

# THE FUTURE OF PUBLIC FUNDING

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## I. INTRODUCTION

The title of my talk today is the “the future of public funding,” and I am tempted to say “there’s not much future” for public funding. The 2012 presidential election marked the first time since the presidential public funding law was enacted in 1974 that neither major party presidential candidate accepted public funding in the general election and the first time that no significant contender for a major party nomination accepted public funding in the primary phase. Congressional public funding appears dead in the water. In the last Congress, public funding proposals were referred to House and Senate committees, where they promptly died. In the current

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nonelectoral committees not subject to disclosure laws as major campaign players undermines the effectiveness of existing disclosure requirements. Even if those laws can be strengthened, it is unclear whether and to what extent disclosure constrains the powerful influence of large donors on elections and governance, which has long been a driving concern behind campaign finance reform.

honest, and disobeyed by the unscrupulous, so as to act only as a penalty upon honest men.” “Moreover,” he continued, “no such law would hamper an unscrupulous man of unlimited means from buying his own way into office.” Public financing would solve the problem of evasion of contribution limits and directly address the power of the wealthy. “The need for collecting large campaign funds would vanish,” Roosevelt urged, “if Congress provided an appropriation for the proper and legitimate expenses” of political campaigns. Roosevelt was not seeking to cut back on campaign spending. Indeed, he urged that the appropriation be “ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money.” But if an “ample” ae fn-4( )10.4(l)-3.1e.4( f0(g. ))TJi)-3.3(fn-4( )1

### III. WHAT EXACTLY IS PUBLIC FUNDING?

Public funding is a capacious concept. It could mean any use of public resources to provide funds to, or to reduce the campaign costs of, candidates or political parties. This could include tax credits or tax deductions for campaign contributions; public assumption of some of the costs of campaigning, such as voter registration; governmental publication and dissemination of voter pamphlets in which candidates or parties can insert campaign messages; and in-kind assistance, such as free postage for campaign mailings, free use of public rooms or schools for campaign meetings, free billboards for the display of campaign messages, and, most importantly, free or reduced cost access to radio and television for campaign advertisements. But in American campaign finance parlance, “public funding” refers to the direct provision of public funds—or as public funding opponents like to emphasize, tax dollars—to candidates or political parties to be used for campaign purposes. In all existing American public funding programs, payment is made by the government directly to qualifying candidates or political parties. Several academics have proposed plans in which the government would give the voters campaign vouchers—like food stamps—which they could send to the candidates of their choosing, who would redeem them at the Treasury for money.<sup>9</sup> No jurisdiction in the United States has adopted such a voucher plan.

Even when limited to cash payments to candidates or parties, public funding programs exhibit considerable variation. Indeed, every public funding program requires the resolution of multiple basic questions, including: Is the money paid to candidates or parties? Which elections are covered? Which candidates (or parties) are eligible to receive public funds? How much do they get, and how is that calculated? What conditions apply? Where does the money come from? With no two programs answering these questions in exactly the same way, the permutations are substantial. But a few generalizations can be made.

*A. Candidates or Parties?*

Most public funding programs in the United States involve payments to candidates, not parties. This distinguishes American programs from public funding around the world, which generally focuses on political parties. The American approach reflects the candidate-centered nature of our contemporary election campaigns. It is also consistent with the major role played by internal party elections—that is, party primaries—in selecting party nominees. It would be difficult for a party-centered public funding system to finance cano227



candidate's campaign funds. Under *Buckley v. Valeo*,<sup>11</sup> there cannot be mandatory full public funding of an entire election campaign, nor can the decision of one candidate to take public funding affect the freedom of other campaign participants to use private funds. Individual candidates are always free to choose not to take public funding and instead rely on private contributions, or their own personal wealth. So, too, political parties and politically active



taxpayer checkoff. Other states, and nearly all the local governments that



*Action Committee (NCPAC)*,<sup>23</sup> the Court invalidated the provision of the presidential public funding law limiting independent expenditures in support of or in opposition to a publicly-funded presidential candidate to \$1,000. *Buckley* had held unconstitutional the general limit on independent spending, but had not specifically addressed the independent spending limit in the presidential public funding law. Taking *Buckley*, *RNC*, and *NCPAC* together, a candidate's receipt of public funding can be conditioned on his acceptance of a spending limit and his party limiting its coordinated expenditures, but the provision of public funding—and a candidate's acceptance of public funding—has no impact on the rights of independent spenders.

The third major case—decided in 2011—is *Arizona Free Enterprise*,<sup>24</sup> which dealt with the so-called “trigger” provision of Arizona's public funding law. Although not part of the presidential public funding law, trigger provisions—also known as “fair fight” or “rescue” funds—became a common part of many state and local public funding laws, starting in the 1990s. Under a trigger law, spending by privately-funded candidates who have declined public funding or by independent committees concerning a publicly-funded candidate can “trigger” a change in the rules governing a publicly-funded candidate. If the (d)4(s)]e

disarmament. The trigger funds—or even simply release from the spending limit with permission to raise additional private contributions—alleviate that concern and make public funding more attractive to candidates. Second, “it is exceedingly difficult to get the level of public subsidy right.”<sup>25</sup> Although the standard public funding grant or match level may be adequate for most races in a jurisdiction, in any given year the election in a particular race or district may be especially hotly contested. It would be impossible to determine in advance which specific elections in a particular election year will be more competitive than others, and it would be wasteful to pump more public funds into all elections just to ensure that more money is available in those elections where it is most needed. On the other hand, too small a grant would discourage participation in the program. High levels of spending by other campaign actors—nonparticipating candidates and independent committees—are an excellent marker of which elections are especially competitive. Triggers provide desirable flexibility by allowing the level of public funding, or the mix of public and private funds, to respond to the cond15.635 -1.135 publ .9( 9( )0.167 T





finance restrictions is the prevention of corruption and the appearance of corrup





funding program or state clean money systems, the spending limit is built into the idea of full public funding, as the candidate can only spend as much as the state provides him. Full public funding plus a spending limit is also intended to eliminate (iii) the burden of fundraising on candidates and (iv) the special influence that large donors can obtain over elections and the behavior of elected officials grateful for or dependent on their donations. Without a spending limit, and with, after *Arizona Free Enterprise*, the additional sums necessarily raised by private contributions, these goals are arguably unattainable.

But the first of these goals—reduction of total spending—should not be a campaign finance reform objective at all, and the second goal—equalization of resources for candidates—is unattainable under current constitutional doctrine. The third and fourth goals—reduction of special interest influence and amelioration of the burdens of fundraising—are both desirable and constitutionally attainable, but they can be advanced without spending limits.

Although commentators regularly decry the cost of election campaigns, arguing for a reduction in total spending is a fundamentally mistaken objection to our current campaign finance system. Election expenditures consist of communications and voter mobilization activities—efforts to present facts, arguments, other information to the voters, and to facilitate their participation in elections. These efforts advance our democratic system. The problems with our campaign finance system relate to the uneven resources across candidates and the influence of large donors on elections and governance, not the level of spending per se.

With respect to the unequal resources of candidates, current constitutional doctrine makes equalization impossible. So long as spending limits on candidates and independent groups, limits on the use of candidate personal wealth, and trigger funds are unconstitutional, candidate equalization is unattainable. To be sure, public funding can promote some equalization by leveling up, that is, by providing public funds to qualifying candidates who have only limited access to private resources (particularly, challengers and political newcomers). The public grant can, thus, provide a measure of equality by enabling underfunded candidates to get their campaigns off the ground. In many elections, providing such public funding functions as a kind of seed money that may enable a candidate to run a competitive campaign against a better-funded opponent. But under current constitutional doctrine true equalization of campaign funding



systems in which candidates get a base amount in a flat grant but can participate in competitive races by raising additional, matchable, small donations. Pure flat grant systems are simply unable to respond to competitive elections without very large initial grants, and small donor matching programs have the additional appeal of providing an incentive to candidates to seek the participation of small donors. Still, as long as these programs include spending limits, there is the possibility that they will be inadequate to competitive races and disadvantage public-funding participants.

My suggestion would be to scrap spending limits completely. Public funding would still enable candidates without personal wealth, wealthy backers, or access to special interest financial support to mount campaigns. With small donor matches, the candidates who are better at raising small donations, which presumably reflects some popular appeal, would be able to mount increasingly well-funded campaigns. In theory, the state or city could keep on matching—presumably at a decreased ratio—as long as the candidate keeps raising funds. More likely, at some point, the jurisdiction could decide the public has helped the candidate enough, and stop providing the candidate with more money, but let him continue to raise (subject to standard contribution limits) and spend private money if he deems that necessary. Such a system of public funding without limits would lower barriers to entry and boost challengers, political outsiders, and candidates without personal wealth or wealthy backers—and reduce the role of large donors in the system—without curbing the ability of publicly supported candidates to respond to unlimited spending by other candidates or independent groups. Public funding under this system would also be available to incumbents and candidates with access to larger donors. But if they want to participate in this system—and be less dependent on large donors—so much the better.

Given our campaign finance jurisprudence, our system will inevitably be at least to some degree privately-funded. Public funding laws can supplement and complement private funds—by making it easier for candidates without personal wealth or support from large donors to run, and by encouraging candidates to pursue small donations—and in so doing these laws can promote fair competition among candidates, increase political speech and participation, and reduce the role of large private wealth. But public funding cannot replace private funds. That being the case, we need to think about the rules that promote the best combination of public and private funding. Spending limits handicap publicly-funded candidates without

