

# THE FUTURE OF CLEAN ELECTIONS

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## ABSTRACT

Arizona was an early pioneer in public campaign financing at the state level with the adoption of its clean elections system. Over the past decade, Arizona's approach has generated broad participation among candidates for office and catalyzed more competitive elections for the state legislature. However, in the wake of the Supreme Court's decision in *Arizona Free Enterprise v. Bennett*, the future of clean elections in Arizona and elsewhere is uncertain. Although the decision upheld the constitutionality of public financing, the Supreme Court's rejection of Arizona's matching provision, which ensures that publicly financed candidates can compete financially against those with substantial private resources, is leading many legislative candidates to abandon the system. After *Arizona Free Enterprise*, what are the options for Arizona and other states that seek an effective public campaign financing system that fosters both participation and competition in state elections?

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## I. INTRODUCTION

Arizona's clean elections system is a pioneering effort to alter the role that money plays in shaping the democratic process at the state level. Over the past decade, clean elections encouraged non-incumbent candidates to run for office and catalyzed more competitive elections in Arizona. However, in the wake of the Supreme Court's decision in *Arizona Free Enterprise v. Bennett*,<sup>1</sup> the future of clean elections in Arizona and elsewhere is uncertain. Although the decision upheld the constitutionality of public financing, the Supreme Court's rejection of Arizona's matching provision, which ensures that publicly financed candidates can compete against those with substantial private resources, is leading many legislative candidates to abandon the system.

After *Arizona Free Enterprise*, what are the options for Arizona and other states for maintaining an effective approach to public campaign financing that encourages future candidates to participate in the system? What is the best approach to balancing the objectives of greater participation and more competitive elections in a landscape in which public financing is constrained from responding to a new wave of outside expenditures in state legislative elections? If the clean elections system is to be successful going forward, it will need to introduce reforms which can advance these broader goals while complying with *Arizona Free Enterprise*.

The next section briefly examines the adoption of clean elections in Arizona and contrasts Arizona's clean elections system with models of public financing adopted by other states. Section III analyzes the impact of clean elections on participation and electoral competition in Arizona as well as the way in which public financing has influenced overall levels of campaign spending. Section IV analyzes the recent Supreme Court decision on Arizona's clean elections system in *Arizona Free Enterprise v. Bennett* and its implications for public campaign financing. Section V examines the consequences of the Supreme Court's ruling by contrasting the experience of Arizona and other states in 2010, before the full impact of the *Arizona Free Enterprise* decision, and in 2012, in a new campaign finance environment. Finally, Section VI analyzes possible reform options for public financing in Arizona and elsewhere, and the conclusion highlights some of the enduring challenges of campaign finance regulation at the state level.

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1. *Ariz. Free Enter. v. Bennett*, 131 S. Ct. 2806 (2011).

## II. EMERGENCE OF CLEAN ELECTIONS

Since 2000, an innovative experiment in campaign finance regulation has taken place in Arizona. In that year, both Arizona and Maine became the first states to implement a clean elections model of campaign finance reform. In fact, these initiatives represented the first time in the history of the United States that candidates seeking state legislative seats and other statewide offices could fully fund campaigns with public financing.<sup>2</sup> By 2010, 25 states had some form of public financing for legislative or executive elections, but Arizona's approach nonetheless remained one of the most comprehensive.<sup>3</sup>

Arizona adopted the clean elections model in response to major scandals in which nearly 10% of the state legislature was videotaped accepting cash bribes.<sup>4</sup> In the wake of these corruption scandals, a majority of Arizona voters supported a citizen initiative in 1998 creating an innovative system of public campaign financing that was first implemented in 2000.<sup>5</sup> The Arizona Clean Elections Proposition received the support of nearly half a million voters and, as in Maine, reflected the important role of state initiative laws in enabling comprehensive campaign finance reform.<sup>6</sup>

In contrast with other states, Arizona's law covers all legislative and most statewide offices and uses an innovative approach to funding the system.<sup>7</sup> Vermont provides public financing only for candidates for governor and lieutenant governor.<sup>8</sup> North Carolina provides public financing only for judicial appellate candidates, and New Mexico offers such funding only for candidates for its public regulation commission and appellate judgeships.<sup>9</sup> The Arizona law is broader than Maine's because it covers not just the governor and the legislature but also other statewide candidates for secretary of state, attorney general, treasurer, superintendent

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2. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-390, CAMPAIGN FINANCE REFORM: EXPERIENCES OF TWO STATES THAT OFFERED FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 1 (2010), available at <http://www.gao.gov/new.items/d10390.pdf> [hereinafter GAO].

3. Stephen Ansolabehere, *Arizona Free Enterprise v. Bennett and the Problem of Campaign Finance*, 2011 SUP. CT. REV. 39, 54–55 (2011).

4. *Ariz. Free Enter.*, 131 S. Ct. at 2832.

5. *Id.*

6. See Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POL. & POL'Y Q. 263, 264 (2008).

7. ARIZ. REV. STAT. ANN. §§ 16-940, -951 (2006).

8. VT. STAT. ANN. tit. 17, §§ 2851–2855 (1998).

9. N.C. GEN. STAT. §§ 163-278.61 to -278.70 (2012); N.M. STAT. ANN. §§ 1-19a-1 to -19a-17 (2012).

of public instruction, corporation commissioner and mine inspector.<sup>10</sup> Finally, Arizona's system is also unique in the way that it is financed. While Maine, like the federal government, employs a tax check off as the central source of revenue, in Arizona most of the funding comes from a surcharge on civil penalties and criminal fines and fees charged to lobbyists.<sup>11</sup>

### III. IMPACT OF CLEAN ELECTIONS

The impact of Arizona's clean elections system over the last decade has been significant in terms of expanding the pool of candidates who participate and opt into the system of public campaign financing. Participation in Arizona's clean elections system grew dramatically between 2000 and 2008. In 2000, the first year of the initiative, 53% of all races included at least one candidate that participated in the system, but by 2008, participation extended to 82% of all legislative races in Arizona.<sup>12</sup> The overall level of participation by candidates in the system more than doubled in both primary elections and in general elections over this period. While less than one quarter of all candidates in the primaries participated in clean elections in 2000, 59% did so by 2008. At the general election stage, just over one quarter of all candidates participated in clean elections in 2000, but 64% participated by 2008.<sup>13</sup>

Public financing can contribute to electoral competitiveness through a variety of mechanisms. The power of incumbency is often a reliable predictor of electoral outcomes, and across the country, the advantages of incumbency grew for nearly every office over the past half century.<sup>14</sup> Research by political scientists has found that campaign spending by challengers to incumbents is one of the few variables that significantly impacts electoral competition.<sup>15</sup> Public financing can help challengers overcome financial barriers to entering the campaign in the first place and expand the pool of potential candidates for state office. It can also reduce the financial advantage of incumbents and thereby increase the likelihood of

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10. See ARIZ. REV. STAT. ANN. §§ 16-940, -951 (2006); Maine Clean Election Act, ME. REV. STAT. tit. 21-A, §§ 1121-1128.

11. Jason Franco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 CORNELL L. REV. 733, 757 (2007).

12. GAO, *supra* note 2, at 32.

13. *Id.* at 25.

14. Stephen Ansolabehere and James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L.J. 315, 316 (2002).

15. Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. POL. SCI. REV. 334, 334 (1990).

a competitive election. However, public funding is unlikely to have these effects if the grant sizes and spending limits are not meaningfully connected to the level of funding candidates actually need to compete against privately funded competitors.<sup>16</sup>

The system of public financing in Arizona effectively eliminated the fundraising gap between incumbents and challengers in its early years. Instead of many legislative seats remaining uncontested, the introduction of clean elections led to far more incumbents being challenged. In Arizona, the number of incumbents who ran unopposed for the Arizona House declined from over 40% in the 1990s to under 15% by 2006, after the introduction of clean elections.<sup>17</sup> With a much greater number of contested elections at the state level, lower barriers to entry for challengers contributed to more competition for incumbents in Arizona.

The impact of clean elections on electoral competition can also be seen in the shrinking margins of victory of state legislative candidates after 2000. In both Arizona and Maine, the winning candidate's margin of victory decreased significantly as compared to comparable states after the introduction of public financing. In Arizona, the average margin of victory declined from 31.1% to 26.9%, and the percentage of close races with less than a ten point margin grew from 29.2% to 36.6%.<sup>18</sup> Most of the studies of campaign competitiveness in Arizona found that the clean elections system increased competition, and incumbents were more likely to face major party challenges and achieve lower margins of victory after the introduction of public financing.<sup>19</sup>

The clean elections model did not have consistent effects on the overall level of campaign spending across states. While overall campaign spending declined in Maine after the introduction of clean elections, it consistently increased in Arizona over the subsequent five elections.<sup>20</sup> Although one of the concerns about public financing is that it reduces the speech of privately funded candidates, the initial evidence in Arizona does not seem to support

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16. Kenneth Mayer, et. al., *Do Public Funding Programs Enhance Electoral Competition?*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 245, 249 (Michael P. McDonald & John Samples, eds., 2006); see also Malhotra, *supra* note 6.

17. Michael Miller, *After the GAO Report: What Do We Know about Public Election Funding?*, 10 *ELECTION L.J.* 273, 284 (2011).

18. GAO, *supra* note 2, at 38.

19. Amnon Cavari & Kenneth Mayer, *Why Didn't Public Funding Generate More Competition in State Elections? Evidence from the 2008 and 2010 Connecticut Elections 2* (paper presented at American Politics Workshop, Wisconsin University, April 18, 2011), available at [users.polisci.wisc.edu/apw/archives/CavariMayer1%200\\_APW.doc](http://users.polisci.wisc.edu/apw/archives/CavariMayer1%200_APW.doc).

20. See GAO, *supra* note 2, at 59.

this view. Instead, private spending actually increased over the decades since the adoption of clean elections.<sup>21</sup> During the first decade of clean elections in Arizona, total campaign expenditures in midterm elections grew from \$1 million to over \$12 million.<sup>22</sup>

There is some evidence that public financing increased intra-party challenges and expanded the ideological diversity of state legislative candidates. Those funded under the clean elections system were initially found to be more ideologically extreme relative to their districts than privately funded legislators, but this difference diminished over time once candidates entered the legislature.<sup>23</sup> Clean elections significantly weakened the dominance of party elites in the process of candidate selection and strongly encouraged non-incumbent candidates to run in primaries. As a result, it contributed to significant swings in intra-party voting within both Republican and Democratic leaning districts and a decrease in intra-party cohesion.<sup>24</sup>

#### IV. SUPREME COURT AND CLEAN ELECTIONS

Arizona generated the key test case for the constitutionality of clean elections before the United States Supreme Court. The constitutionality of Arizona's campaign finance system was challenged in *Arizona Free Enterprise v. Bennett* on the grounds that its matching provision violated the First Amendment.<sup>25</sup> The case, which reached the Supreme Court in 2010, reshaped the landscape for public financing at the state level and overturned a critical feature of the clean elections model. Under Arizona's approach, candidates who met threshold eligibility requirements to receive public funds could be granted additional "equalizing" or matching funds under certain conditions.<sup>26</sup> The logic of this provision, sometimes called a triggering mechanism, was to ensure that publicly funded candidates would

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21. Tilman Klumpp, Hugo Mialon & Michael Williams, *Matching Funds in Public Campaign Finance* 18 (Univ. of Alberta, Dep't of Econ., Working Paper No. 2012-20), available at <http://www.ualberta.ca/~klumpp/docs/trigger.pdf>.

22. Ansolabehere, *supra* note 3, at 58.

23. Seth Masket & Michael Miller, *Buying Extremists? Public Funding, Parties, and Polarization in Maine and Arizona* 16 (April 14, 2012) (working paper), available at <http://polisci2.ucsd.edu/hhassell/Readings/Masket,%20Miller,%202012.pdf>.

24. Michael Brogan & Jonathan Mendilow, *Public Party Funding and Intraparty Competition: Clean Elections in Maine and Arizona*, 2 INT'L J. HUMAN. & SOC. SCI. 120, 126 (2012), available at [http://www.ijhssnet.com/journals/Vol\\_2\\_No\\_6\\_Special\\_Issue\\_March\\_2012/10.pdf](http://www.ijhssnet.com/journals/Vol_2_No_6_Special_Issue_March_2012/10.pdf).

25. *Ariz. Free Enter. v. Bennett*, 131 S. Ct. 2806, 2816 (2011).

26. *Id.* at 2815.

not be uncompetitive against privately funded candidates who exceeded a certain level of campaign spending.<sup>27</sup>

The United States Court of Appeals for the Ninth Circuit held that the triggering mechanism imposed “only a minimal burden on First Amendment rights” because it did not “actually prevent anyone from speaking in the first place or cap campaign expenditures.”<sup>28</sup> However, the Supreme Court previously rejected a different type of triggering provision under the federal campaign finance laws in *Davis v. Federal Election Commission*.<sup>29</sup> In considering Arizona’s law, the Supreme Court ruled that its decision in *Davis v. Federal Election Commission* applied to Arizona’s matching funds provision, despite its significant differences from the federal statute at issue in that case.<sup>30</sup> The majority ruled that Arizona’s system “imposes an unprecedented penalty on any candidate who robustly exercises First Amendment rights.”<sup>31</sup> After finding that Arizona’s matching provision imposed a substantial burden on the speech of privately funded candidates, the Supreme Court held that such a burden was not justified by a compelling state interest.<sup>32</sup> A majority of the Court rejected the argument that the government has a compelling interest in “leveling the playing field” of electoral campaigns.<sup>33</sup> Instead, the majority took the view that when it comes to campaign speech, “the guiding principle is freedom—the unfettered exchange of ideas.”<sup>34</sup> However, the Court did not question the constitutionality of public campaign financing at the state level more generally. Instead, the majority wrote: “We do not today call into question the wisdom of public financing as a means of funding political candidacy. That is not our business.”<sup>35</sup>

Justice Elena Kagan issued a strongly worded dissent on behalf of the four justices in the minority in *Arizona Free Enterprise*. In the view of the dissenters, Arizona’s matching provision did not impose a “substantial burden” on privately funded candidates under the First Amendment.<sup>36</sup> According to Justice Kagan, Arizona’s law “does not impose a restriction or ‘substantial burden’ on expression. The law has quite the opposite effect: It

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27. *Id.* at 2825.

28. *McComish v. Bennett*, 611 F.3d 510, 513, 525 (9th Cir. 2010), *rev’d sub nom.* *Ariz. Free Enter. v. Bennett*, 131 S. Ct. 2806 (2011).

29. *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008).

30. *Ariz. Free Enter.*, 131 S. Ct. at 2821–22.

31. *Id.* at 2818 (quoting *Davis*, 554 U.S. at 739).

32. *Id.* at 2825–26.

33. *Id.*

34. *Id.* at 2826.

35. *Id.* at 2828.

36. *Id.* at 2833 (Kagan, J., dissenting).

subsidizes and so produces more political speech . . . Arizona imposes nothing remotely resembling a coercive penalty on privately funded candidates.”<sup>37</sup> In contrast with the Supreme Court’s earlier ruling in *Davis v. Federal Election Commission*, which rejected a discriminatory speech restriction, Kagan and the other dissenters viewed Arizona’s matching provision as nothing more than a non-discriminatory speech subsidy.<sup>38</sup>

The majority and the dissent in *Arizona Free Enterprise* reflected a long-standing and fundamental difference in how campaign finance is viewed by different wings of the Supreme Court. Since the Court’s decision in *Buckley*, a strong strand on the Court has held that unfettered political discourse is best fostered by unregulated campaign spending.<sup>39</sup> On the other side, dissenters on the Court have consistently argued that there is a compelling interest in ensuring electoral competition based on an adversarial view of the electoral marketplace.<sup>40</sup> For the majority in *Arizona Free Enterprise*, support for unregulated expenditures trumped concerns about corruption and less competitive elections.

Where Arizona’s law sought to efficiently allocate public funding to more competitive races and enhance overall electoral competition, the Supreme Court found an undue burden on privately financed candidates. The majority opinion in *Arizona Free Enterprise* discounted the risk of corruption and the importance of electoral competition in favor of protecting unregulated campaign spending.<sup>41</sup> The Court rejected the argument that the matching funds provided by the state of Arizona could indirectly serve to reduce the level of corruption by fostering more competitive elections within the state.<sup>42</sup> In fact, the majority was skeptical of the idea that high levels of independent expenditures “give rise to corruption or the appearance of corruption.”<sup>43</sup>

Since *Arizona Free Enterprise*, state public financing of campaigns is substantially more constrained. Public financing mechanisms can no longer calibrate funding levels based on the level of private funding by candidates or independent groups in any given race.<sup>44</sup> This presents a major challenge to the system, especially when late investments by privately funded

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37. *Id.* at 2833–36.

38. *See id.* at 2835.

39. Ansolabehere, *supra* note 3, at 41.

40. *Id.* at 66.

41. *Ariz. Free Enter.*, 131 S. Ct. at 2826–27.

42. J. Alexandra Gonzales, *Repercussions of Losing the Right to Respond: Why Matching Funds Should be Constitutional for Judicial Elections even After Arizona Free Enterprise v. Bennett*, 10 FIRST AMEND. L. REV. 509, 529 (2012).

43. *Ariz. Free Enter.*, 131 S. Ct. at 2826.

44. *Id.* at 2827.

candidates or outside groups can overwhelm the spending limits which publicly financed candidates must abide by under the clean elections system.<sup>45</sup>

#### V. CLEAN ELECTIONS AFTER *ARIZONA FREE ENTERPRISE*

In the wake of the Supreme Court's decision in *Arizona Free Enterprise*, the landscape of campaigns in Arizona, and other states that have adopted public financing, has shifted dramatically. Although the decision was issued too late to significantly affect candidate participation in the clean elections program in 2010, it had a marked effect on participation and spending in subsequent elections. The shift between the 2010 and 2012 elections in Arizona and other states with public campaign financing offers a useful lens on the potential significance of the *Arizona Free Enterprise* decision.<sup>46</sup>

The level of participation in Arizona's clean elections system declined significantly between 2010 and 2012. A total of eighteen candidates who were previously elected using public financing switched to private funding for 2012.<sup>47</sup> While 110 legislative candidates participated in the clean elections system in 2010, only sixty-four participated in 2012.<sup>48</sup> This represented the lowest participation rate since the first year of the program in 2000.<sup>49</sup> The threat of privately funded challengers led many longtime clean elections legislators to abandon the system in 2012.<sup>50</sup> In 2010, twenty-four of the sixty members of the Arizona House were elected using public financing; by 2012, this figure dropped to just fourteen members.<sup>51</sup>

In 2010, the level of funding provided by the clean elections system was close to the average expenditures for legislative races in Arizona. In that year, publicly funded candidates received an average of \$14,355 for the primary election and \$21,533 for the general election, or a total of \$35,888

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45. See generally, Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, 41 PS POL. SCI. & POL. 527 (2008).

46. Of course, the *Arizona Free Enterprise* decision was not the only important development in campaign finance law over this period and the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 588 U.S. 310 (2010), may be another important factor in the rise of independent expenditures at the state level and the decline in candidate participation in the clean elections system after the 2010 election.

47. James Dura, *Legislative Candidates Find Success Switching from 'Clean' to Traditional*, ARIZ. CAP. TIMES, Dec. 21, 2012.

48. *Id.*

49. *Id.*

50. *Id.*

51. Author's calculation based on publicly available data from the Arizona Secretary of State.

for the election cycle.<sup>52</sup> These allocations were enough for a challenger to create a competitive race, with the average amount of money raised by the winner in House races totaling \$46,070 and in Senate races totaling \$48,124.<sup>53</sup> However, by 2012 very few legislative incumbents were opting for clean elections funding because of a much greater likelihood that outside funders or privately financed opponents would overwhelm these static clean elections funding allocations.

Outside of Arizona, publicly financed candidates were often overwhelmed by unprecedented levels of outside expenditures in 2012. For example, in North Carolina, one outside group outspent two candidates for a seat on the North Carolina Supreme Court with over a million dollars in advertising.<sup>54</sup> In Maine, outside political action committees spent a record \$3.6 million to support or defeat legislative candidates in 2012.<sup>55</sup> For the first time in that state's history, these outside funders spent more than all of the legislative candidates combined.<sup>56</sup>

The risks of such overwhelming outside expenditures led many candidates to opt out of the clean elections system altogether by 2012. As in Arizona, far fewer candidates in Maine utilized the clean elections system with candidate participation in 2012 dropping to 62% from historic levels of closer to 80%.<sup>57</sup> States with robust public financing fostered higher levels of electoral competitiveness in 2010,<sup>58</sup> but this link became much more attenuated by 2012. Although the Supreme Court's decision in *Arizona Free Enterprise* did not challenge the underlying constitutionality of public financing for state elections, it eliminated a key feature of the clean elections system, which proved critical to its success over the previous decade. In the wake of the decision, the clean elections approach is unlikely

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52. Kevin McNellis & Robin Parkinson, *Independent Spending's Role in State Elections, 2006–2010*, FOLLOW THE MONEY: NATIONAL INSTITUTE ON MONEY IN STATE POLITICS (Mar. 15, 2012), <http://www.followthemoney.org/press/PrintReportView.phtml?r=481>.

53. *Id.*

54. *Outside Spending Makes Big Difference in State-Level Races: Citizens United Decision Impact Goes Beyond D.C.*, CENTER FOR PUB. INTEGRITY (Nov. 7, 2012, 11:45 AM), <http://www.publicintegrity.org/2012/11/07/11791/outside-spending-makes-big-difference-state-level-races>.

55. Steve Mistler, *In Maine, Outsiders Outspent Candidates for First-Time Ever*, PORTLAND PRESS HERALD, Dec. 20, 2012.

56. Steve Mistler, *Maine Campaign Spending by Outside Groups Shatters Record*, PORTLAND PRESS HERALD, Dec. 20, 2012.

57. Peter Quist, *Monetary Competitiveness in 2009-2010 State Legislative Races*, FOLLOW THE MONEY: NATIONAL INSTITUTE ON MONEY IN STATE POLITICS (July 3, 2012), <http://www.followthemoney.org/press/PrintReportView.phtml?r=490>.

58. *Id.*

to succeed in maintaining broad candidate participation or fostering competitive elections without significant reforms to the existing model.

## VI. REFORMING CLEAN ELECTIONS

Shortly after the Supreme Court decision in *Arizona Free Enterprise*, the Arizona legislature eliminated the matching provision which had been a central feature of the clean elections initiative.<sup>59</sup> In addition, the legislature ended the tax credit which had supplemented the funding for clean elections and eliminated the use of voter education funds to “promote the benefits of clean elections.”<sup>60</sup> Although these changes reduced the total amount of funding in Arizona for public financing, the system continues to have adequate funding for the time being because most of the resources continue to come from a surcharge on civil, criminal, and traffic fines.<sup>61</sup> Nonetheless, these changes mean that a smaller pool of resources must now respond to an escalating level of outside campaign expenditures in order to convince candidates to participate in the public financing system.

Among the options that remain open to Arizona and other states which have public financing systems are to substantially increase the fixed amount allocated to candidates or to allow for some matching funds for small donations.<sup>62</sup> The challenge with increasing the fixed allocation to clean elections candidates is two-fold. First, the resources needed to enable competitive elections at the state level would likely require much greater public investments than are plausible in an era of shrinking public budgets. Second, any system that allocates such a large amount to all publicly financed candidates would likely be very inefficient. It would not be capable of differentiating between those candidates facing only modest competition and those who would be at a serious competitive disadvantage without a much larger allocation.

An alternative approach would be to create some form of matching system through which publicly funded candidates could requalify for additional funding or be encouraged to raise funds from small donors through a public match of private contributions below a certain dollar threshold. Such an approach could be much more efficient because many candidates would not seek additional funding unless they faced really competitive election environments. In Maine, the Government Ethics

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59. Howard Fischer, *CofC Ends its Fight vs. Clean Elections*, ARIZ. BUS. GAZETTE, Apr. 26, 2012.

60. *Id.*

61. ARIZ. REV. STAT. ANN. § 16-940 (2006).

62. See Ansolabehere, *supra* note 3.

Commission estimated that only one quarter of candidates would seek higher funding levels under this model.<sup>63</sup> A version of the public match for privately raised funds from small donors already exists in New York City<sup>64</sup> and could potentially become a model for Arizona and other states.

In New York City, public funds match private contributions up to \$175 with a 6:1 match.<sup>65</sup> Legislation introduced in the Congress, entitled the Fair Elections Now Act, builds on this model with a 5:1 match for small contributions.<sup>66</sup> Connecticut currently provides a 3:1 match under its campaign finance system.<sup>67</sup> Under this approach to public financing, citizen participation in financing campaigns is encouraged and the pool of available resources for candidates is expanded. In New York City, the matching program has increased the importance of small donors and significantly expanded the demographic diversity of those contributing to campaigns. Matching systems have been important in catalyzing the involvement of small donors even in jurisdictions with traditionally low rates of voter participation.<sup>68</sup> The U.S. Court of Appeals for the Second Circuit recently upheld this approach in an opinion that was issued after *Arizona Free Enterprise* and the Supreme Court declined to review the Second Circuit's decision.<sup>69</sup>

Alternatively, one could simply give candidates a fixed amount of public funding but allow them to pursue further private fundraising rather than face limits on private fundraising.<sup>70</sup> While this seems to address the competitive disadvantage of publicly funded candidates, it also undercuts one of the central goals of clean elections: reducing the dependence of political candidates on private contributors. One formulation of this approach would be to only allow clean elections candidates to raise additional private contributions once spending by a challenger or outside expenditures reached

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63. ME. GOV'T ETHICS COMM'N, 2011 REPORT ON IMPROVING THE MCEA, at 2 (Sept. 26, 2011), available at [http://www.maine.gov/ethics/pdf/2011ReportonImprovingMCEA\\_000.pdf](http://www.maine.gov/ethics/pdf/2011ReportonImprovingMCEA_000.pdf).

64. Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3, 4 (2012), available at [http://www.cfinst.org/pdf/state/NYC-as-a-Model\\_ELJ\\_As-Published\\_March2012.pdf](http://www.cfinst.org/pdf/state/NYC-as-a-Model_ELJ_As-Published_March2012.pdf).

65. *Id.*

66. Fair Elections Now Act, S. 1285, 110th Cong. (2007), available at <http://www.opencongress.org/bill/110-s1285/text>.

67. CONN. GEN. STAT. §§ 9-700 to -759 (2006), available at <http://search.cga.state.ct.us/surs/sur/htm/chap157.htm>.

68. See Malbin, Brusoe & Glavin, *supra* note 64, at 9.

69. See *Ognibene v. Parkes*, 671 F.3d 174, 193–94 (2nd Cir. 2012), *cert. denied*, 133 S. Ct. 28 (2012).

70. Nicholas Bamman, *Campaign Finance: Public Funding After Bennett*, 27 J.L. & POL. 323, 337 (2012).

a certain threshold. While this might be an efficient mechanism for keeping potential candidates within the system, it could raise similar constitutional issues as the trigger for the matching provision that the Supreme Court struck down. Raising private fundraising limits for clean elections candidates, rather than increasing public subsidies, seems to be different in kind from the facts of *Arizona Free Enterprise*. Nonetheless, it is quite possible that the Court's logic in *Arizona Free Enterprise* could be extended to the view that any such triggering provision would violate the First Amendment.

A different model for empowering small donors is to provide every citizen with a certain amount of campaign finance to allocate themselves. Lawrence Lessig, for example, advocates a campaign voucher system in which every voter would have a certain amount of money to distribute.<sup>71</sup> This proposal is similar to the idea of patriot dollars put forward by Bruce Ackerman and Ian Ayres.<sup>72</sup> Yet it is possible even such a voluntary voucher scheme could run afoul of the Supreme Court's ruling in *Arizona Free Enterprise* if it links the level of public financing to the level of independent or private expenditures against publicly financed candidates.<sup>73</sup> Although such a system might require substantial resources beyond most current models of campaign financing at the state level, it would have the advantage of decentralizing public campaign finance in a way that could foster expanded citizen participation.

Finally, a more modest but still potentially important response to the rise of independent expenditures at the state level is to expand disclosure requirements for such expenditures. The best practice for campaign finance disclosure generally includes clearly identifying the source of independent expenditures, the target of such expenditures, and the positions being advocated through such expenditures.<sup>74</sup> In Arizona, there are not currently robust requirements that electioneering communications be disclosed in many circumstances. Since only express advocacy must be disclosed in Arizona, most forms of electioneering communications which name candidates without explicitly calling for their election or defeat are

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71. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 266 (2011).

72. BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 4 (2004).

73. Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 575 (2012) (book review).

74. Kevin McNellis, *Scorecard: Essential Disclosure Requirements for Independent Spending*, FOLLOW THE MONEY: NATIONAL INSTITUTE ON MONEY IN STATE POLITICS (Mar. 15, 2012), <http://www.followthemoney.org/press/PrintReportView.phtml?r=482>.

generally not covered.<sup>75</sup> Increased public disclosure requirements introduces transparency as a potential accountability mechanism for large outside expenditures but would be unlikely to significantly alter the incentives for candidates deciding whether to participate in public financing systems.

## VII. CONCLUSION

Compared to other countries, the United States is somewhat unique in its balance between public and private expenditures for financing elections. Of the \$4 billion spent on elections in 2008, approximately nine of every ten dollars came from individual, private donors.<sup>76</sup> By contrast, most Western democracies provide extensive public subsidies to support the costs of campaigning.<sup>77</sup> The experiment by Arizona and Maine with clean elections represented an unprecedented shift from a model of purely private financing to significant public financing of state level elections. There is substantial evidence that this model catalyzed wide participation by candidates for office in both states and enhanced the competitiveness of state level elections. However, the elimination of the matching provision in the clean elections system significantly undercuts the likely impact of this approach in the future. The most recent election supports the conclusion that what remains of the model of clean elections will attract much less participation and create much less competition without substantial reform.

While the impulse to prevent and control corruption lies at the heart of the clean elections initiative in Arizona, other goals have also played an important role in shaping the system. Expanding candidate participation by lowering the barriers to entry for challengers remains a central feature of clean elections. Fostering political competition which involves challenges to incumbents and closer margins of victory is another important objective of this approach. More controversially, efficiently allocating public money to those candidates who face real competition and high levels of private spending by their opponents is the goal which is most clearly undermined by the *Arizona Free Enterprise* decision.

While corruption has been the rationale for campaign finance regulation for decades, expanding citizen participation may prove to be a firmer basis for such efforts in the future. Recent Supreme Court decisions undercut the anti-corruption rationale and reject this reasoning even in states with a clear

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75. *Independent Spending in Arizona 2006-2010*, FOLLOW THE MONEY: NATIONAL INSTITUTE ON MONEY IN STATE POLITICS (Aug. 12, 2011), <http://www.followthemoney.org/press/PrintReportView.phtml?r=456>.

76. Asolabehere, *supra* note 3, at 45.

77. *Id.* at 46.

history of overwhelming corruption.<sup>78</sup> Participation not just of candidates but also of citizens through mechanisms beyond voting ought to be an important feature of state campaign finance regulation. While larger grants to candidates might serve the objective of fostering greater competitiveness, they are not as likely to enhance democratic participation by citizens as other approaches. Matching small donations, providing tax credits for small donors, and offering citizens the opportunity to allocate public finance dollars each could serve to more directly expand citizen participation. Since there is now a proven track record for public matches for small donations, this model could be promising in the near term. Ultimately, if campaign finance systems cannot foster robust electoral competition, even approaches that expand citizen participation are unlikely to survive in a difficult fiscal environment. Any system that cannot ensure some balance between independent expenditures and the efforts of candidates themselves is unlikely to attract enough participation from candidates or to meaningfully foster citizen participation in the long-run.

The clean elections model faces an underlying challenge in the wake of *Arizona Free Enterprise*. The moments which foster public commitment to comprehensive campaign reform are fleeting while the forces which seek to evade campaign finance regulation seem to be ever present. Some scholars have referred to this dynamic as the hydraulic nature of campaign finance.<sup>79</sup> Even a less pessimistic account must take seriously the reality that clean elections systems at the state level now offer static incentives to candidates while outside contributors are much better placed to respond to dynamic electoral environments. Responding to this key challenge will be central to the future of clean elections and to other experiments in public campaign financing.

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78. See *American Tradition Partnership, Inc. v. Bullock*, 132 S.Ct. 2490, 2491 (2012) (Breyer, J., dissenting).

79. Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).