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Cover Page Footnote
This Note is dedicated to my parents, to my sister, Caroline, and to Jenn.
THE MAINE CLEAN ELECTION ACT: THE FUTURE OF CAMPAIGN FINANCE REFORM

Michael E. Campion*

INTRODUCTION

One need only open a newspaper to discover the prevalence of campaign finance abuses. Campaign finance abuses, however, do much more than provide notable headlines. Indeed, the current campaign financing system undermines our system of representative democracy. In particular, it encourages legislators to ignore their constituents and their duties, gives “special interests” disproportional influence, and discourages qualified candidates from running.

Politicians ignore their constituents and their public duties because they must spend an inordinate amount of time chasing campaign money. Indeed, as campaigns have become increasingly expensive, candidates spend more and more time fund-raising. When elected, legislators immediately begin raising money for their next campaign because they must raise thousands of dollars a week to remain competitive. As a result, they devote less time and energy to the duties of public office and to their constituents.

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3. Clean Money Campaign Reform (visited Mar. 8, 1998) <http://www.publicampaign.org/cleanmoney.html> [hereinafter Clean Money Campaign Reform]. This web site was created by Public Campaign which is a “non-profit, non-partisan organization dedicated to taking special-interest money out of America’s elections.” Public Campaign: Organizational Profile (visited Mar. 8, 1998) <http://www.publicampaign.org/who.html>. Public Campaign is working to “build a network of state-based efforts into a powerful national force for federal reform.” Id.


6. Clean Money Campaign Reform, supra note 3.


8. See Kenneth J. Levit, Campaign Finance Reform and the Return of Buckley v. Valeo, 103 Yale L.J. 469, 475 (1993) (noting that the spiraling costs of campaigns requires candidates to raise thousands of dollars a week).

9. Clean Money Campaign Reform, supra note 3.

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Many candidates rely heavily on special interest money as a source of campaign funds.\textsuperscript{10} Hoping to gain influence, special interests, usually wealthy organizations and individuals, gladly supply legislators and prospective legislators with money.\textsuperscript{11} Legislators often respond by tailoring their politics to please the special interests.\textsuperscript{12} Indeed, when special interests funnel large sums of money into campaigns, many candidates feel bound to represent the contributors’ interests lest they lose their source of special interest money in the future.\textsuperscript{13} This “influence-peddling” disrupts our representative system, as many candidates inevitably place their wealthy contributors’ interests above their constituents’ interests.\textsuperscript{14} Indeed, monied interests play a greater role in forming legislators’ agenda because their constituents have less access to and influence with the candidates than do special interests.\textsuperscript{15}

Reformers point to scores of examples of trading money for legislative favors,\textsuperscript{16} and even legislators note that special interest money leads to political quid pro quo\textsuperscript{17} and a distortion of representative democracy.\textsuperscript{18} One former legislator complained that “[i]t is not ‘we the people,’ but . . . monied interests who are setting the nation’s agenda and are influencing the position of candidates on the important issues.”\textsuperscript{19} Another legislator acknowledged that “[w]e are the only human beings in the world who are expected to take thousands of dollars from perfect strangers and not be affected by it.”\textsuperscript{20} Yet another legislator admitted that “[f]or campaign funds, you must endear

\textsuperscript{10} See Jezer & Miller, supra note 2, at 470.
\textsuperscript{11} See id. at 470-72; see also Jill Abramson, Tobacco Industry Steps Up Flow of Campaign Money, N.Y. Times, Mar. 8, 1998, § 1, at 1 (noting that the tobacco industry, which seeks favorable legislation, donated millions of dollars to candidates in a non-election year).
\textsuperscript{12} See Jezer & Miller, supra note 2, at 479-80 (noting that legislators who supported subsidies to sugar growers received substantial contributions from the Sugar PAC).
\textsuperscript{13} See id. at 470-72.
\textsuperscript{14} See Larry J. Sabato & Glenn Simpson, Dirty Little Secrets: The Persistence of Corruption in American Politics 7 (1996) (noting that influence-peddling has become worse over time); Jezer & Miller, supra note 2, at 467-85 (documenting that monied interests disrupt American democracy).
\textsuperscript{15} See Sabato & Simpson, supra note 14, at 7-10. Moreover, because many special interest contributors come from outside the candidate’s district, many legislators end up representing the interests of those thousands of miles away from the legislator’s constituents. See Note, “Foreign” Campaign Contributions and the First Amendment, 110 Harv. L. Rev. 1886 (1997).
\textsuperscript{16} See Sabato & Simpson, supra note 14, at 49-82 (discussing examples of trading influence for campaign contributions).
\textsuperscript{17} Political quid pro quo consists of trading legislative favors for campaign contributions. See Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).
\textsuperscript{18} See Jezer & Miller, supra note 2, at 474-75 (citing legislators’ viewpoints regarding the distortion of representation by the current system of campaign financing).
yourself to the appropriate monied groups. Almost always, that means voting . . . to aid those groups." 21

The prevalence of money in campaigns further undermines our democratic system by limiting electoral choices. 22 Because only those who can quickly accumulate sufficient resources can run an effective campaign, many candidates choose not to run. 23 Indeed, many highly qualified potential candidates abstain from running because they have little access to lucrative funding and do not wish to get entangled in the special interest "money chase." 24

Despite a loud call for change in this system, Congress has failed to pass meaningful campaign finance reform 25 and continually spurns bills that would restructure the system. Most recently, several influential law makers effectively defeated this year's version of campaign finance reform: the McCain-Feingold bill. 26

Cynics claim that few should be surprised that Congress refuses to pass meaningful reform. After all, why should politicians abolish a system which keeps them in power? 27 To maintain their interests, politicians merely embrace "business as usual."

The people of Maine, however, have disrupted politicians' usual business. In response to campaign abuses and legislative inaction, the citizens of Maine passed "The Maine Clean Election Act" (the "Act") a comprehensive campaign finance reform initiative. 28 This Act provides candidates with full public financing if they voluntarily limit their spending and reject all contributions. 29 With this Act, the citizens of Maine seek to quash campaign abuses and restore equality to the electoral process. 30

Maine's successful ballot initiative energized and focused similar reform efforts in over a dozen states. 31 Vermont was the first to follow Maine with a similar "Clean Money" statute. 32 Other similar bills are moving though the legislatures of North Carolina, Illinois, Wisconsin,

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22. See Magleby & Nelson, supra note 7, at 44; Berke, supra note 5.
23. Berke, supra note 5.
24. Id.
27. Jezer & Miller, supra note 2, at 495.
29. Id.
30. Id.
31. Clean Money Campaign Reform, supra note 3. Such states include Vermont and Massachusetts.
Meanwhile, pending referenda in New York City, Massachusetts, Arizona, and Missouri have strong support. In dozens of other states, several grass-roots organizations have begun to lobby for reform similar to the Maine Act.

This Note discusses the First Amendment issues surrounding the Maine Clean Election Act. Part I examines the Act's provisions and its underlying policies. Part II discusses First Amendment issues and case law concerning campaign finance reform, specifically focusing on voluntary expenditure limitations, public financing, and contribution limitations. Lastly, Part III analyzes the Act's constitutionality. In particular, Part III examines opponents' First Amendment challenges to the Act and concludes that the Act does not violate the First Amendment. In fact, Part III finds that the Maine Act promotes rather than inhibits First Amendment principles.

I. THE MAINE CLEAN ELECTION ACT

Part I provides an overview of the Maine Clean Election Act. It examines both the background of the Act and specific provisions within the Act, as well as the policies underlying those provisions.

A. Background of the Act

In November 1996, the citizens of Maine passed an initiative which enacted the most comprehensive and far reaching campaign finance reform act in the nation. These citizens were wiser than many politicians. While many previous reforms across the nation were struck down as violating First Amendment rights, the drafters of this act, the Maine Clean Election Act, designed it to fit within constitutional limits. Indeed, they wrote this act with an eye on the constitutional limits outlined by the U.S. Supreme Court in Buckley v. Valeo.

33. Ireland, supra note 25.
34. Id.
35. Id.
40. 424 U.S. 1 (1976); see Bleifuss, supra note 39, at 12.
By passage of the Maine Clean Election Act, the citizens of Maine hope to diminish the "evils" that plague current campaign financing practices. In particular, they seek to reduce corruption, prevent wealthy individuals and organizations from "buying influence" with legislators, remove the enormous time constraints placed on candidates to fund-raise, and level the financial playing field among candidates. The following section examines the Act's provisions which address these concerns.

B. Specific Provisions

Beginning in 2000, the Act permits qualified candidates to voluntarily participate in the nation’s first fully-funded public financing of state election campaigns. As discussed below, the Act: 1) supplies full funding for primary and general elections conditioned upon the participant's agreement to limit expenditures and accept no contributions; 2) provides additional public funding if non-participating candidates or their supporters spend above the participating candidates' spending limits; and 3) limits the amount a contributor may give to privately financed candidates.

1. Voluntary Public Financing Conditioned Upon Expenditure Limitations

The Act establishes a system of public financing for state legislative and gubernatorial elections. Candidates are not required to participate in the public financing program; it is merely an "alternative campaign financing option" in which candidates may voluntarily enlist. Participating candidates receive full funding for both primary and general elections. In exchange for the public funding of their campaigns, participating candidates agree not to accept any campaign

41. See Campbell, supra note 36.
46. Id. § 1125(6).
47. Id. § 1125(9).
48. Id. § 1015.
49. Id. § 1123.
50. See id.
51. Id.
52. Id. § 1125(7)-(9).
contributions. Moreover, those candidates must comply with a strict ceiling on campaign expenditures.\textsuperscript{53}

If candidates choose to participate, they must meet certain qualifying criteria.\textsuperscript{54} To qualify, participating candidates must first file a declaration of intent.\textsuperscript{55} Next, they must solicit a set number of five dollar “qualifying” donations from registered voters.\textsuperscript{56} Gubernatorial candidates must solicit more “qualifying” donations than candidates running in non-statewide races.\textsuperscript{57}

While attempting to raise the “qualifying” contributions, participating candidates may accept “seed” contributions.\textsuperscript{58} Seed contributions, which are limited to $100 per contributor,\textsuperscript{59} enable a candidate to gather enough resources to effectively solicit the “qualifying” contributions.\textsuperscript{60} For instance, candidates may use the seed money to advertise their bids or implement a drive to garner qualifying contributions. A candidate may not collect or spend seed contributions after qualifying, and these seed contributions are subject to strict limitations.\textsuperscript{61}

After candidates receive enough “qualifying” donations, they give those donations to a state fund.\textsuperscript{52} Once they submit the requisite amount of donations, candidates become certified “Clean Election

\textsuperscript{53} Id. § 1125(6).
\textsuperscript{54} Id. § 1125(1), (3)-(4).
\textsuperscript{55} Id. § 1125(1). The statute provides:
  Declaration of intent. A participating candidate must file a declaration of intent to seek certification as a Maine Clean Election Act candidate and to comply with the requirements of this chapter. . . . A participating candidate must submit a declaration of intent prior to collecting qualifying contributions under this chapter.
\textsuperscript{56} Id.
\textsuperscript{57} See id.
\textsuperscript{58} Id. § 1122(9).
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. §§ 1122(9), 1125(2). Including the candidates themselves, contributors may donate up to $100 per person. Id. § 1122(9). Gubernatorial candidates may receive up to $50,000 in seed money; State Senate candidates may receive up to $1,500, and State House of Representatives may receive up to $500. Id. § 1125(2).
\textsuperscript{62} Id. § 1125(4). This fund provides money to all certified candidates. See id. § 1125(7)-(9). The fund receives most of its finances from taxes, including a “check-off” on state income taxes. Id. § 1124(2).
Candidates.™63 Once certified, candidates receive full public financ-
ing™64 may not accept any contributions, and must abide by expendi-
ture limitations set by the state.™65 Candidates may spend only the
revenues they receive from the state.

The Act's full funding removes major obstacles to running an effec-
tive campaign. Under private financing systems (and partial public
financing systems), only those who can quickly accumulate large
amounts of money can mount a competent campaign.™66 Private fi-
nancing often limits the pool of candidates to only the wealthy and
those with access to wealth.™67 Unlike some previous campaign finance
efforts, the Act's full funding provision opens the door to all qualified
candidates, not merely to those who can quickly accumulate large
sums of money.™68

The Act's full funding also reduces corruption.™69 The Supreme
Court has noted that contributions may lead to corruption or the ap-
pearance of corruption.™70 Indeed, contributions may lead to a "quid pro quo" situation where a legislator will reward a contributor by vot-
ing for the contributor's positions.™71 The likelihood of this quid pro
quo situation increases when a legislator relies on "special interest" money to run his campaign.™72 Therefore, full public funding signifi-
cantly reduces the possibility of corruption by eliminating the need for
contributions.™73 Additionally, the Act's full funding gives candidates a
choice among campaign financing options™74 which increases their abil-
ity to express their message. Candidates will likely choose the op-
tion—private or public funding—which gives them more money and a
larger voice to communicate their ideas to the electorate.

63. Id. § 1125(5).
64. See id. § 1125(7)-(9).
65. Id. § 1125(6). The revenues allocated to candidates equal the average of the
previous two elections. Id. § 1125(8)(A)-(C). For contested primaries, the allocation
equals the average amount of expenditures made by each candidate during the previ-
tous two contested primary elections. Id. § 1125(8)(A). For uncontested primaries, the
allocation equals the average amount of expenditures made by each candidate during
the previous two uncontested primary elections (or the contested amount, if lower).
Id. § 1125(8)(B). For general election, the allocation equals the average amount of
expenditures made by each candidate during the previous two elections (or nothing if
uncontested). Id. § 1125(8)(C)-(D).
66. Jezer and Miller, supra note 2, at 470-71.
67. Id.; see Clean Money Campaign Reform, supra note 3.
68. See Jezer & Miller, supra note 2, at 489.
69. See Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280,
285 (S.D.N.Y.) (three-judge court) (noting that a similar public financing act reduces
corruption), aff'd, 445 U.S. 955 (1980).
71. Id.
72. See Raskin & Bonifaz, supra note 42, at 275-76.
74. See, e.g., id. (holding that an increased choice in financing options increases
candidates' speech).
Lastly, the Act's conditional spending ceiling helps equalize the playing field among candidates. Because states cannot constitutionally place limits on campaign expenditures, well-financed candidates can grossly outspend their opponents. The Supreme Court, however, has held that candidates may voluntarily agree to limit their expenditures in exchange for public financing of their campaign. Thus, by offering public financing in exchange for conformity to the spending ceilings, Maine can achieve greater equality among the participating candidates by putting them on a level financial playing field.

2. Trigger Provisions

If candidates choose not to participate, Maine cannot satisfy its underlying policy goals. To reduce the likelihood of this possibility, the Act includes a provision which induces candidate participation by mitigating some drawbacks of participation. This provision is commonly known as a "trigger" provision.

a. Candidate-Triggered Matching Funds

If a privately financed candidate spends above a participating candidate's expenditure ceiling, the state will issue more public money to the participating candidate in an amount equivalent to the excess. In effect, the non-participating candidate's spending "triggers" a release of more money to the participating candidate in an amount above the statutory ceiling. The state, however, will not continually match all spending over the expenditure ceiling. Rather, the state will match each dollar spent over the limit until the spending reaches an absolute ceiling of up to two times of the initial allocation to the candidate.

This type of trigger provisions encourages participation with the Act's spending limits. Without the triggered matching funds, candidates would fear being grossly outspent by their privately financed opponent and might forgo public financing, leaving the state unable to satisfy its policy goals. The trigger provision addresses this

75. Weine, supra note 43, at 224 (noting that public financing "triggers" create a level financial playing field).
76. Jezer & Miller, supra note 2, at 489 (noting that full public financing should "create a level playing field").
79. Title 21-A, § 1125(9).
80. Id.
83. Id.
problem by ensuring that participating candidates can keep pace with big spending opponents, at least until the spending reaches the absolute ceiling.

b. Independent Expenditure Triggered Matching Funds

Non-candidates also spend money in campaigns. In addition to direct contributions, non-candidates spend money without giving it directly to a candidate and without coordination with that candidate. For example, non-candidates may spend money on television commercials or newspaper advertisements in support or opposition to one’s candidacy. This type of non-candidate spending is termed “independent expenditures.”

The Maine Act’s trigger provision requires the state to consider “independent expenditures” in determining when, if, and how much matching funds should be allocated to participating candidates. The state must aggregate all funds the non-participating candidate spends with any independent expenditure spent to support that non-participating candidate. When the aggregated spending exceeds the participating candidate’s spending ceiling, the state allocates corresponding matching funds.

Most campaign finance laws contain no provisions limiting independent expenditures because the Supreme Court held that such limitations violate the First Amendment. States may restrict only direct contributions to the candidate. Therefore, many contributors use independent expenditures as a loophole to avoid campaign spend-

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85. See id.
86. Weine, supra note 43, at 227 (noting that the Republican National Committee spent $800,000 “independently” attacking the Democratic nominee for a House seat in New York and that in 1996, the AFL-CIO spent close to $2 million attacking a Republican House incumbent in Arizona).
88. Id.
89. Id.
90. See infra Part II.A.1.
91. Any “coordinated” expenditures by non-candidates are essentially contributions and are subject to restrictions. Federal Election Comm’n v. National Conservative Political Action Comm., 470 U.S. 480, 492 (1985); Buckley v. Valeo, 424 U.S. 1, 46-47 (1976); see also Michael D. Leffel, A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC’s New Express Advocacy Standard, 95 Mich. L. Rev. 686, 686-90 (1996) (noting that reformers face a large hurdle because independent expenditures warrant First Amendment protection). Independent expenditures which “expressly” advocate the support or defeat of a candidate may be subject to reporting requirements to the Federal Election Commission. Buckley, 424 U.S. at 44. Independent expenditures which merely advocate an issue are not subject to reporting and disclosure requirements. Id. at 81-82; Leffel, supra, at 689-90.
Instead of abiding by contribution limitations, wealthy contributors spend enormous sums by way of independent expenditures to support candidates without any restriction. In recent years, non-candidates have capitalized on this loophole by increasing their independent expenditures. The prevalence of independent expenditures, in turn, discourages candidates from participating in the other reform acts that include voluntary expenditure limits because participating candidates fear that their non-participating opponents will grossly outspend them.

By considering non-candidate spending, the independent expenditure provision of the Maine Act prevents participants from being outspent by non-candidate money. Indeed, the participating candidate receives public funds matching dollar-for-dollar any amount spent above the ceiling by the candidate or his supporters in the form of independent expenditures, up to two times the initial disbursement of funds. Thus, the provision provides candidates security and an incentive to participate.

3. Contribution Limitations

The Act prohibits anyone from contributing more than $500 in any election to a gubernatorial candidate. “Any election” refers to either a primary or a general election. Thus, the Act limits contributions to $500 for the primary election and $500 for the general election. Thus, a contributor may give a total of $1000 to a single candidate in an election cycle. The Act provides an even lower contribution limit for non-statewide races. In these races, no one may contribute more than $250 in any election to a candidate for state senator or state representative. Therefore, a contributor may give a total of $500: $250 in the primary and $250 in the general election.

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93. See Weine, supra note 43, at 227.
94. See id. (observing that independent expenditures have increased since Buckley); McMahon, supra note 84, at 366 (noting that independent expenditures play a much greater role in influencing elections today than when the Supreme Court upheld Buckley).
95. See Weine, supra note 43, at 226-27.
97. See Weine, supra note 43, at 227 (noting that triggers function as “insurance policies” so that candidates may respond to independent expenditures).
100. Id.
101. Id.
Like public financing, lower contribution limits are also aimed at eradicating corruption. Because candidates are less likely to grant special favors to individuals who give small contributions, the Act requires that candidates rely on multiple small contributions rather than a few large contributions. This way no single contributor can extract a special favor based on the size of his contribution. Consequently, the problems caused by quid pro quo transactions will be less likely to occur with lower contributions.

In sum, the people of Maine hope that the combination of these provisions will change the face of campaign financing. While previous reform efforts in other states supplied only partial funding or other minor incentives in exchange for expenditure limitations, the Maine Act provides more comprehensive and far-reaching reforms. Because it provides full funding and strong assurances that participating candidates can remain competitive despite spending limits, the Act should achieve high participation rates and successfully diminish problems associated with campaign financing. If proven successful, this Act should lay the foundation necessary to change the structure of campaign financing. The Act, however, must survive First Amendment challenges. The following part examines the pertinent First Amendment case law.

II. THE FIRST AMENDMENT: CAMPAIGN SPENDING AND PUBLIC FINANCING

In its 1976 decision in *Buckley v. Valeo*, the Supreme Court recognized that campaign spending implicates First Amendment rights. Indeed, the *Buckley* Court held that campaign spending is a “fundamental First Amendment activ[y]” because it is a form of political communication.

In *Buckley*, the Court examined amendments to the Federal Election Campaign Act (“FECA”), a stringent campaign finance reform measure which Congress passed in response to the Watergate scandal. In particular, the Court scrutinized provisions that restricted

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106. Moos, *supra* note 36; *Clean Money Campaign Reform, supra* note 3.
109. *Id. at* 14.
candidates’ and contributors’ ability to spend money in political elections.\footnote{111} In its decision, the Court split campaign spending into two components: “contributions” and “expenditures.”\footnote{112} “Contributions” consist of donations to candidates,\footnote{113} while money spent by candidates in furtherance of their campaign constitutes “expenditures.”\footnote{114} Although both forms of spending implicate First Amendment rights, the Court found that expenditures warrant greater protection than contributions.\footnote{115} Indeed, the Court upheld a mandatory $1000 contribution limit as constitutionally valid,\footnote{116} but struck down mandatory expenditure limitations, finding that they violated the First Amendment.\footnote{117} The Court held, however, that candidates may “voluntarily” agree to abide by such limitations in exchange for some benefit, specifically public financing.\footnote{118}

Today, a majority of the Court still upholds the 	extit{Buckley} expenditure/contribution framework.\footnote{119} While this framework remains generally intact, 	extit{Buckley} did not clearly define the acceptable parameters of either expenditure limits or contribution limits. As a result, subsequent lower court decisions more clearly defined permissible and impermissible restrictions on campaign spending.\footnote{120}

This part examines the standards set by 	extit{Buckley} and its progeny. This part first discusses 	extit{Buckley}'s analysis of expenditure limitations and public financing conditioned upon expenditure limitations. Next, this part scrutinizes post-	extit{Buckley} case law regarding these issues. Lastly, this part examines the case law delineating constitutionally permissible contribution limitations.

\footnote{111} See 	extit{Buckley}, 424 U.S. at 6-7.
\footnote{112} Id. at 19-21.
\footnote{113} See id. at 21.
\footnote{114} See id. at 19-20.
\footnote{115} “[A]lthough [FECA]'s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.” Id. at 23.
\footnote{116} Id. at 58-59.
\footnote{117} Id. at 53-54.
\footnote{118} Id. at 57 n.65, 85-109.
\footnote{119} See Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996). Some justices, however, favor eliminating 	extit{Buckley}'s framework by removing the expenditure/contribution distinction. Justice Stevens and Justice Ginsburg favor constitutional restrictions on expenditures as well as contributions. See id. at 2332 (Stevens, J., dissenting). Justice Thomas, on the other hand, believes there should be no limitations whatsoever on contributions or expenditures. See id. at 2325-28 (Thomas, J., concurring in the judgment and dissenting in part).
\footnote{120} See, e.g., Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996) (holding that a “trigger” provision did not implicate First Amendment rights), cert. denied, 117 S. Ct. 1820; Russell v. Burris, 978 F. Supp. 1211 (E.D. Ark. 1997) (considering the factual context surrounding the election campaign in determining whether a contribution limit is narrowly tailored).
A. The Constitutionality of Public Financing and Expenditure Limitations

Because Buckley provided a framework for all campaign finance reform measures, this section first discusses Buckley's analysis of expenditure limits and public financing. This section then discusses subsequent lower court decisions which further defined the constitutional parameters regarding public financing and expenditure limits. Much of these decisions examined whether the public financing statutes unconstitutionally "coerce" candidates to participate and accept expenditure limitations or permissibly encourage candidates to participate. This section then focuses on the constitutionality of specific provisions within public financing statutes. After examining the specific provisions, this section looks at Day v. Holahan,121 the one case that deviates from the rest of the case law in this area. Instead of analyzing whether statutes unconstitutionally coerce candidates to accept expenditure limitations, this case examines whether public financing statutes cause "self-censorship" among those involved in campaigns.

1. Buckley v. Valeo

Expenditure limitations violate First Amendment free speech rights because they pose substantial restraints on the quantity of political speech.122 Because effective political communication in modern society requires the expenditure of money, the Court equated a candidate's spending of money in political campaigns to a candidate's political speech.123 Consequently, any expenditure limitation imposed on a candidate violates the First Amendment because it "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."124

In addition to restrictions on candidate spending, the Court also held that restrictions on "independent expenditure[s]" by non-candidates violate the First Amendment.125 Indeed, because the First Amendment ensures non-candidates a right to "speak [their] mind[s]" and engage in "vigorous advocacy,"126 any restriction of their expenditures "heavily burdens core First Amendment expression."127

121. 34 F.3d 1356 (8th Cir. 1994).
122. See Buckley, 424 U.S. at 19.
123. Id. The Court analogized that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." Id. at 19 n.18.
124. Id. at 19.
125. Id. at 47-48.
127. Id.
Nonetheless, campaign spending restrictions may be upheld if: 1) the restrictions address a compelling state interest; and 2) the restrictions are narrowly tailored to meet that state interest.128 The Court found, however, that limiting expenditures addressed no compelling interest.129

*Buckley*, however, did not eliminate the possibility of expenditure limitations in elections. The Court held that candidates may “voluntarily” abide by expenditure limitations in exchange for public financing of their elections.130 Indeed, in *Buckley*, a FECA provision which implemented this type of public financing for presidential elections passed constitutional muster.131 The Court reasoned that as long as candidates may “voluntarily” choose to participate,132 nothing prevents candidates from privately funding and freely spending. Moreover, the Court reasoned that public financing promotes more speech by presenting candidates with additional financing options.133 In this system, candidates select the option that gives them a larger voice.


Four years after *Buckley*, in *Republican National Committee v. Federal Election Commission*,134 a three-judge district court examined another challenge to the FECA public financing provision. The plaintiffs claimed that the statute violated candidates’ rights because “practical matter[s]” forced them to accept public financing and to restrict their spending, in violation of their First Amendment right to communicate.135

Like the *Buckley* Court, the Southern District of New York rejected this contention136 and reasoned that public financing was merely an...
additional funding alternative." The court concluded that the public financing statute increased a candidate's ability to speak, rather than restricting it.

The plaintiffs also argued that the statute compelled candidate participation in violation of the First Amendment because privately financed candidates could not raise as much money as the public financing statute provided to the program's participants. The court dismissed the plaintiffs' argument by reasoning that because participating grants more money "its effect would be to facilitate and enlarge their exercise of free speech over what it would otherwise be rather than to inhibit or reduce their speaking power." Accordingly, the court held that the statute burdened no First Amendment rights.

Even assuming the statute burdened First Amendment rights, the court held that Congress narrowly tailored the statute to meet a compelling state interest. The court identified: 1) the reduction of the "deleterious influence of large contributions" on the political process; 2) the facilitation of candidate communication with the electorate; and 3) freedom of candidates from the rigors of fund-raising as "significant" state interests behind the public financing program. Although its analysis was limited, the court explained that the expenditure limitations were narrowly tailored because they "further[ ] an important or substantial governmental interest"; that interest is "unrelated to the suppression of free expression"; and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." In short, Republican National Committee reapplied the rationale of Buckley and upheld expenditure restrictions conditioned upon public financing. The Supreme Court affirmed this decision without an opinion.

137. Id. at 285.
138. Id. Candidates have a "legitimate choice whether to accept public funding and forego private contributions." Id. at 286.
139. Id. at 285 (emphasis omitted).
140. Id.
141. Id.
142. Id.
143. Id. at 285-86.
144. Id. at 285 (citing Buckley v. Valeo, 424 U.S. 1, 91 (1976)).
145. Id. at 286-87 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). Indeed, without the spending limit, the court reasoned candidates would have to engage in the hardships of fund-raising by soliciting "deleterious contributions" to keep pace with their opponents. See id. at 285-86.
146. Id. at 283-87.
3. Subsequent Developments

After Buckley and Republican National Committee, public financing programs appeared to qualify as the only constitutionally permissible restriction of campaign expenditures. As a result, some reform-minded legislatures passed voluntary public financing statutes that conditioned public funds upon acceptance of expenditure ceilings. Many of these statutes included “incentive” provisions designed to induce candidate participation in the public financing/expenditure limitation schemes. This section first examines the case law regarding the constitutionality of incentive provisions. It then discusses the courts’ analyses of two specific incentive provisions: 1) “trigger” provisions; and 2) “cap gap” provisions.

a. Incentive Provisions: Inducement or Unconstitutional Coercion

Opponents of recent public financing statutes alleged that incentive provisions “chill” their speech. In particular, they claimed that these provisions “coerce” candidates to participate and accept expenditure limitations in violation of the First Amendment. Despite these legal challenges, courts generally upheld these incentive provisions. While courts recognized that a public financing statute could unconstitutionally “coerce,” they rarely found such coercion.

To find coercion, courts examine whether a statute’s provisions present candidates with a truly voluntary choice between private and public funding. When candidates have a legitimate choice between funding alternatives, no coercion occurs and the statute violates no

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150. See Rosenstiel v. Rodriguez, 101 F.3d 1544, 1546 (8th Cir. 1996), cert. denied, 117 S. Ct. 1820 (1997); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38 (1st Cir. 1993); Weine, supra note 43, at 229; see also Wilkinson v. Jones, 876 F. Supp. 916, 928 (W.D. Ky. 1995) (rejecting the contention that the incentive provision “chills the speech of privately financed candidates”).
151. See, e.g., Rosenstiel, 101 F.3d at 1546 (dismissing appellant’s claim that the statute “coerce[d]” participation).
152. See, e.g., id. at 1549-55 (upholding the constitutionality of incentive provisions).
153. See, e.g., Vote Choice, 4 F.3d at 38 (“Coerced compliance with fundraising caps and other eligibility requirements would raise serious, perhaps fatal, objections to a system like Rhode Island’s [public financing scheme].”).
154. See Rosenstiel, 101 F.3d at 1551; Vote Choice, 4 F.3d at 38-39.
155. See, e.g, Vote Choice, 4 F.3d at 38 (holding that “voluntariness” is an important factor in examining campaign financing schemes).
First Amendment rights.\textsuperscript{156} Coercive statutes, on the other hand, leave candidates with no real choice but to use public funding.\textsuperscript{157} Thus, if a provision prevents a candidate from choosing private funding, the provision effectively "coerces" a candidate in violation of the First Amendment.\textsuperscript{158}

Under this analysis, courts have held that incentive provisions do not amount to unconstitutional coercion where they merely encourage or induce candidates to restrict their spending.\textsuperscript{159} Indeed, nothing in the First Amendment prevents states from encouraging candidates to choose public funding and spending limits because such inducements do not penalize, censure, or proscribe speech.\textsuperscript{160} So long as the statutory scheme achieves a "rough proportionality" between the benefits provided to candidates—such as incentive provisions—and restrictions imposed on candidates—spending caps—such inducements to participate do not coerce.\textsuperscript{161}

Statutes unconstitutionally coerce, however, when incentive provisions upset this "rough proportionality" by "creating... a large disparity between the benefits provided to publicly financed candidates and... restrictions imposed on those candidates."\textsuperscript{162} For instance, coercion may occur where incentive provisions provide publicly-funded candidates with unusually rich benefits and few restrictions.\textsuperscript{163} Ultimately, the courts have found that only "large disparities" between these benefits and restrictions constitute coercion.\textsuperscript{164}

Provisions which fall short of this "large disparity" between benefits and restrictions are necessarily constitutional.\textsuperscript{165} Incentive provisions may even favor publicly financed candidates without upsetting this

\textsuperscript{156} To sum up, the implication of the public funding cases is that the government may legitimately provide candidates with a choice among different packages of benefits and regulatory requirements." \textit{Id.} at 39; \textit{see also} \textit{Rosenstiel}, 101 F.3d at 1550 (finding that participation in this program was truly voluntary, and thus the plaintiff-candidate's claim of coerced participation had no merit).

\textsuperscript{157} \textit{See Vote Choice}, 4 F.3d at 38 (noting that coerced compliance destroys the voluntariness of campaign financing statutes).

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{See, e.g., Rosenstiel}, 101 F.3d at 1549-50 (holding that an incentive provision was merely an inducement to encourage maximum candidate participation in public financing).


\textsuperscript{161} \textit{See, e.g., Rosenstiel}, 101 F.3d at 1550-51 (holding that a public financing statute achieved a relative balance between benefits and restrictions and therefore, did not coerce participation); \textit{Vote Choice}, 4 F.3d at 38-39 (same).

\textsuperscript{162} \textit{Rosenstiel}, 101 F.3d at 1549; \textit{see also Vote Choice}, 4 F.3d at 38 ("There is a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.").

\textsuperscript{163} "Stated otherwise, the Appellants contend that these provisions make the public financing option so attractive that they effectively compel candidates to enroll in the State's financing plan." \textit{Rosenstiel}, 101 F.3d at 1549.

\textsuperscript{164} \textit{Id.} at 1549-50.

\textsuperscript{165} \textit{See Vote Choice}, 4 F.3d at 38-39.
"rough proportionality," as states may legitimately encourage participation. Indeed, the courts have found that requiring states to make private financing equally attractive defeats the purpose of public financing schemes without inducements, no candidates would participate, and states could not satisfy their compelling and substantial interests. In short, the courts concluded that this permissible favoritism does not make the public financing program so coercive as to prevent candidates from voluntarily choosing private funding.

b. Specific Incentive Provisions: "Triggers" and "Cap Gaps"

Opponents have mounted First Amendment challenges to some specific incentive provisions. The courts have engaged in a coercion analysis when examining these provisions. This section examines the courts' First Amendment analyses of two such provisions—"trigger" provisions and "cap gap" provisions.

The most common type of trigger provision permits participating candidates to spend above the expenditure ceiling if non-participating candidates spend over some threshold amount. Another type of trigger provision releases participants from their spending ceiling if a non-participant's supporters spend above the spending ceiling. A third type of trigger provision aggregates the spending of a non-participating candidate and his supporters in determining when the participant is released from the spending ceiling. In effect, under each type of trigger, opposition spending—by either the opposing candidate or his supporters—triggers the participants' ability to spend above the statutory ceiling. Some "triggers" provide additional public funding


167. States may induce candidate participation to forward the state interests that the public financing statutes address. Wilkinson v. Jones, 876 F. Supp. 916, 928 (W.D. Ky. 1995). Moreover, "inducements . . . do not per se render the State's scheme coercive because they are not inherently penal." Rosenstiel, 101 F.3d at 1550.


169. Id. at 1549 (challenging Minnesota's expenditure limitation waiver and the contribution refund provision).

170. Id. at 1547 (noting that non-participant spending triggers a waiver of an expenditure ceiling); see also Weine, supra note 43, at 227-28 (discussing different forms of trigger provisions). See generally Fred Wertheimer & Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 Colum. L. Rev. 1126, 1150-51 (1994) (endorsing "trigger provisions" as necessary to ensure that public funding remains a "viable option").

171. See id. at 1547 (noting that non-participant spending triggers a waiver of an expenditure ceiling); see also Weine, supra note 43, at 227-28 (discussing different forms of trigger provisions). See generally Fred Wertheimer & Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 Colum. L. Rev. 1126, 1150-51 (1994) (endorsing "trigger provisions" as necessary to ensure that public funding remains a "viable option").
to participants, while others simply release the participant from any spending ceiling.

The Eighth Circuit examined the constitutionality of trigger provisions in *Rosenstiel v. Rodriguez.* In *Rosenstiel,* plaintiffs challenged a Minnesota public financing statute that contained a trigger provision. This trigger removed the spending ceiling and provided participants additional public funds when a non-participant spent an amount as low as twenty percent of the participant’s ceiling.

The plaintiffs alleged that this statute’s trigger “coerced” participation because the benefits provided by the statute, namely the triggered waiver of the expenditure ceiling, made participation so attractive that the statute compelled their enrollment. This compelled participation, plaintiffs concluded, violated candidates’ First Amendment right to spend without limits.

The Eighth Circuit disagreed. The court held that the statute did not create such a profound disparity between benefits and restrictions that candidates were coerced to accept expenditure limitations. The

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> A candidate who has agreed to be bound by the expenditure limits imposed by this section as a condition of receiving a public subsidy for the candidate’s campaign is released from the expenditure limits . . . if the candidate has an opponent who does not agree to be bound by the limits and receives contributions or makes or becomes obligated to make expenditures during that election cycle in [specified amounts].

*Id.* (emphasis added). Some triggers provide both additional funds and a release from the expenditure ceiling. See Weine, *supra* note 43, at 227-28. Weine notes three trigger responses to two political scenarios:

In general, there are two scenarios for which triggers may be designed and three types of responses that can be provided for these two scenarios. The two scenarios are: (1) spending by a [non-participating] candidate . . . and (2) independent spending [by a non-participant’s supporters]. The three general types of responses that triggers may provide are: (1) allowing opt-in candidates to spend additional funds and to raise these funds privately; (2) allowing opt-in candidates to spend additional funds and to raise these funds privately with the help of government matching funds for each contribution raised; and (3) providing candidates with government funds outright.

*Id.*

176. The court called the trigger an “expenditure limitation waiver.” *Id.* at 1547. The statute included other challenged inducements, including a provision which gave tax deductions to those who contributed to participating candidates. *Id.* at 1546. The court also held that this provision did not violate the First Amendment. See *id.* at 1550-51.
177. *Id.* at 1547.
178. *Id.* at 1549.
179. *Id.*
180. *Id.* at 1550.
181. *Id.*
provision was merely another incentive.\textsuperscript{182} In its analysis, the court noted that the trigger simply encourages candidate participation by eliminating a powerful disincentive—a privately-funded opponent vastly outspending a participating candidate.\textsuperscript{183}

Moreover, the court observed that because there was nothing “inherently penal” about this provision\textsuperscript{184} and “participation [was] truly voluntary,”\textsuperscript{185} nothing prevented non-participants from raising and spending as much as possible.\textsuperscript{186} Indeed, non-participants could still express themselves, and even outspend participating candidates.\textsuperscript{187} The trigger merely compensated for some of the drawbacks of participation.\textsuperscript{188} The court concluded that because candidates may voluntarily choose the most advantageous financing option, “the State’s scheme promotes, rather than detracts from, cherished First Amendment values.”\textsuperscript{189}

Another provision that faced First Amendment challenges is a “cap gap.”\textsuperscript{190} A “cap gap” is a provision which allows participating candidates to accept larger contributions than non-participating candidates.\textsuperscript{191} The First Circuit examined cap gaps in \textit{Vote Choice, Inc. v. DiStefano}.\textsuperscript{192} In \textit{Vote Choice}, the plaintiffs challenged a Rhode Island public financing statute which contained a cap gap provision.\textsuperscript{193} The Rhode Island cap gap allowed participating candidates to raise up to $2000 per contributor while non-participating candidates could only raise up to a $1000 limit per contributor.\textsuperscript{194} These plaintiffs alleged that the statute coerced participation because its combination of pen-

\begin{itemize}
\item \textsuperscript{182} \textit{Id.} at 1550-51. Indeed, the “trigger” eliminated a strong fear among candidates of being grossly outspent by a privately-financed opponent. \textit{Id.} at 1551. Without this “trigger,” the court reasoned, candidates might forgo participation. \textit{See id.}
\item \textsuperscript{183} \textit{Id.} at 1551.
\item \textsuperscript{184} \textit{Id.} at 1550.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.} at 1549-50.
\item \textsuperscript{187} \textit{Id.} at 1551 n.6 (observing that non-participants may strategically use the trigger provision to outspend participants). The Court also noted that because a non-participating candidate controlled the triggering event, he or she controls when and if his or her participating opponent will be freed from the ceiling. \textit{Id.} at 1551. Hence, the non-participating candidate can use the provision to his or her strategic advantage. \textit{See id.}
\item \textsuperscript{188} \textit{See id.} at 1550-51.
\item \textsuperscript{189} \textit{Id.} at 1552 (citations omitted). Another post-\textit{Buckley} decision, \textit{Wilkinson v. Jones}, 876 F. Supp. 916 (W.D. Ky. 1995), also ruled that triggers do not unconstitutionally coerce candidate participation. \textit{See id.} at 928. This court echoed much of Rosenstiel’s rationale, and concluded that triggers promote more speech, not less. \textit{Id.} at 928. Indeed, more speech results where a participating candidate is given an opportunity to respond to his or her adversary’s lucrative spending. \textit{See id.} at 928.
\item \textsuperscript{190} \textit{See, e.g., Vote Choice, Inc. v. DiStefano,} 4 F.3d 26, 37-40 (1st Cir. 1993) (rejecting a First Amendment challenge to a “cap gap”).
\item \textsuperscript{191} \textit{See id.} at 30.
\item \textsuperscript{192} \textit{Id.} at 37-40.
\item \textsuperscript{194} \textit{See id.} at 30.
\end{itemize}
alties on non-participants and enticing incentives given to participants destroyed the voluntariness of the public financing statute.

The First Circuit rejected these arguments with an analysis similar to that in Rosenstiel. The court pointed out that because "there is nothing inherently penal about a $1000 contribution cap[,] logic suggests that the higher cap is . . . not a penalty imposed on [non-participants]." Instead, the $2000 limit is merely a benefit conferred upon the participant.

The court reasoned that while the cap gap may be an attractive incentive, such an incentive does not eliminate a candidate's true voluntary choice and, therefore, does not run afoul of the non-participant's First Amendment rights. The state merely tried to persuade candidates to participate, not to punish non-participants. The court reasoned that such persuasion is not coercion because, with the cap gap, the state achieved a "rough proportionality" between the statute's advantages—public financing and the cap gap—and restrictions—expenditure limits. In the end, the state provided candidates with "an authentic choice" where they could voluntarily choose whether public or private funding best suited their needs. Consequently, the court concluded that the cap gap provision neither penalizes candidates nor coerces them into surrendering their First Amendment rights.

4. Narrowly Tailored to a Compelling State Interest

Even if a public financing statute burdens First Amendment rights, the statute may still be valid if it: 1) furthers a compelling govern-

195. See id. at 38.
196. Id.
197. See id. at 38-39. The First Circuit decided Vote Choice before the Eighth Circuit decided Rosenstiel; the decisions are very similar. Compare Rosenstiel v. Rodriguez, 101 F.3d 1544, 1555 (8th Cir. 1996) (holding that Minnesota's trigger provision did not violate First Amendment rights), cert. denied, 117 S. Ct 1820 (1997), with Vote Choice, 4 F.3d at 26, 39 (holding that Rhode Island's cap gap provision did not violate First Amendment rights). In fact, the Rosenstiel court frequently cited Vote Choice in its decision. See Rosenstiel, 101 F.3d at 1550-51.
198. Vote Choice, 4 F.3d at 38. Indeed, Buckley found $1000 contribution limits to be constitutionally valid. See Buckley v. Valeo, 424 U.S. 1, 23-35 (1976).
199. See Vote Choice, 4 F.3d at 38.
200. Id. at 38-39.
201. See id. at 39.
202. Id.
203. Id. at 40 n.17.
204. See id. at 39-40.
ment; and 2) is narrowly drawn to serve that interest.\footnote{Rosenstiel v. Rodriguez, 101 F.3d 1544, 1553 (8th Cir. 1996), cert. denied, 117 S. Ct. 1820 (1997); Shrink, 71 F.3d at 1426; see Republican Nat'l Comm., 487 F. Supp. at 285.}

Although most post-Buckley courts found that these statutes burdened no First Amendment rights,\footnote{Rosenstiel, 101 F.3d at 1553-54; Vote Choice, 4 F.3d at 39; see Wilkinson, 876 F. Supp. at 928.} they engaged in this type of scrutiny \emph{arguendo}.\footnote{Rosenstiel, 101 F.3d at 1553-54; Vote Choice, 4 F.3d at 39; Wilkinson, 876 F. Supp. at 928. Some courts hold that "strict scrutiny" applies in campaign financing cases while others rule that a less exacting scrutiny applies. \emph{Compare} Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1322 (9th Cir. 1992) (holding that an intermediate level of scrutiny applies in campaign financing cases), \emph{with} Carver v. Nixon, 72 F.3d 633, 637-38 (8th Cir. 1995), cert. denied, 116 S. Ct. 2579 (1996) (holding that strict scrutiny applies in campaign financing cases). Nonetheless, both examine whether the statute is drawn to meet a compelling or significant state interest. Carver, 72 F.3d at 637-38; Service Employees Int'l Union, 955 F.2d at 1322.}

Post-Buckley courts identified three "compelling" state interests that public financing statutes address. First, public financing statutes reduce the possibility of corruption that may arise from large campaign contributions.\footnote{Rosenstiel, 101 F.3d at 1553-54; Vote Choice, 4 F.3d at 39; see Wilkinson, 876 F. Supp. at 928.} Second, public financing statutes free candidates from the pressure of raising campaign contributions.\footnote{Rosenstiel, 101 F.3d at 1553; Vote Choice, 4 F.3d at 39. Buckley also recognized the fight against corruption as a compelling state interest. See Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).} Lastly, these statutes facilitate communication with the electorate.\footnote{Rosenstiel, 101 F.3d at 1553; Vote Choice, 4 F.3d at 39. See Rosenstiel, 101 F.3d at 1553; Republican Nat'l Comm., 487 F. Supp. at 285. Rosenstiel calls this a related concern to corruption and a "well settled" compelling interest. Rosenstiel, 101 F.3d at 1553.}

The post-Buckley courts found that most legislatures narrowly drew incentive provisions to serve these interests.\footnote{Rosenstiel, 101 F.3d at 1553; Vote Choice, 4 F.3d at 39; Republican Nat'l Comm., 487 F. Supp. at 285.} While not thoroughly analyzing whether the restrictions were narrowly tailored, the courts noted that a "state need not be completely neutral on the matter of public financing of elections" because narrowly tailored public financing statutes must necessarily bestow benefits upon participating candidates.\footnote{Rosenstiel, 101 F.3d at 1553; Vote Choice, 4 F.3d at 39; see also Wilkinson, 876 F. Supp. at 928 (reasoning that a trigger provision prevents publicly-funded candidates from being outspent by privately-financed candidates). Thus, the provision is narrowly tailored because it "avoid[s] a circumstance in which the publicly-financed candidates may be unfairly disadvantaged." Id.} Without the benefits that favor participants, the courts found that candidates have "no incentive to participate, and the State's goals..."
of decreasing the chances of corruption and freeing up more of the candidates' time for campaigning would be frustrated.\(^{215}\)


Not all incentive provisions survived First Amendment scrutiny. Two years before Rosenstiel, the Eighth Circuit considered another trigger provision in Day v. Holahan.\(^{216}\) In Day, the plaintiff challenged an amendment to Minnesota’s public financing provision,\(^{217}\) that provided that any “independent expenditures” by non-candidates would trigger benefits to participating candidates.\(^{218}\) The Day court struck down the trigger as violating the First Amendment rights of those wishing to make expenditures.\(^{219}\) The court’s reasoning, however, deviated from all other public financing cases.\(^{220}\) Unlike Rosenstiel and Vote Choice, the Day court did not engage in a “coercion” analysis. Instead, it ruled that the provision burdened the First Amendment because it created “self-censorship” among those who make “independent expenditures.”\(^{221}\) It explained that the independent spender’s knowledge that his spending will increase a public subsidy to an opposing candidate “chills the free exercise of ... protected speech.”\(^{222}\)

Day further held that the provision failed to adequately address a compelling state interest.\(^{223}\) Although the state professed that its compelling interest was to enhance public confidence in the political process by encouraging more candidate participation, Day rejected this reasoning.\(^{224}\) The court refused to hold that this provision was narrowly tailored to the professed interest because the state already achieved nearly 100 percent participation in the public financing program.\(^{225}\)

Day’s precedential value seems limited. While not explicitly overruling Day, the Eighth Circuit limited it to its narrow set of facts where participation was nearly 100 percent.\(^{226}\) Indeed, in Rosenstiel,

\(^{215}\) Rosenstiel, 101 F.3d at 1555.

\(^{216}\) 34 F.3d 1356 (8th Cir. 1994).

\(^{217}\) Id. at 1359-60.

\(^{218}\) Id. The amendment provided that non-candidate independent expenditures spent in support of a participating candidates' opponent triggered an increase in participants' spending ceiling in an amount equal to the independent expenditures. Id. at 1359.

\(^{219}\) Id. at 1362.

\(^{220}\) See Weine, supra note 43, at 233.

\(^{221}\) Day, 34 F.3d at 1360.

\(^{222}\) Id.

\(^{223}\) Id. at 1361.

\(^{224}\) Id.

\(^{225}\) Id.

the Eighth Circuit refused to apply *Day*, noting that the confined factual circumstances "make *Day* inapposite." 227

As demonstrated above, much of the case law reveals that public financing statutes that are conditioned upon acceptance of expenditure limitations are constitutional. Part II.B explores the constitutionality of contribution limits.

**B. Contribution Limitations**

Campaign contribution limits are constitutionally permissible. At some point, however, contribution limitations become unconstitutionally low. This section first explores *Buckley*'s First Amendment analysis of contribution limits. This section then explores post-*Buckley* cases that attempt to answer the following question: How low of a contribution limit is too low?

1. *Buckley v. Valeo*

Like expenditures, contribution limits impact the First Amendment and any limitation must survive First Amendment scrutiny.228 Unlike in the expenditures context, the Court recognized that involuntary limits on contributions could be constitutional.229

Contribution limits implicate the First Amendment rights of both candidates and contributors:230 contribution limits impact associational and expressive rights of contributors231 and communication rights of candidates.232 Despite the foray into a protected area, the Supreme Court has upheld contribution restrictions.233 While limiting the associational quality of a contributor's donation is the "primary First Amendment problem" of contribution restriction,234 the *Buckley* Court found that contributors have other equally effective associational avenues235 that "mitigate[] the impact of contribution limits."236 Similarly, the Court found that restrictions on contributions only marginally inhibit contributors' political expression because contributions are merely a general expression of support for candidates

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227. *Id.*
229. *See id.* at 23-35
230. *See id.* at 1, 15, 20-23.
231. *See id.* at 15, 21-22. "A limit on contributions . . . need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981).
233. *Id.* at 23-30.
234. *Id.* at 24.
235. *Id.* at 22. One such avenue would be volunteering their service to a candidate.
and their views. Actual transformation of contributions into political debate involves someone other than the contributor.237

Contribution limits threaten candidates’ rights even less than contributors’ rights. The Court pointed out that such limits only minimally restrict a candidates’ free speech communications, as they do not severely disrupt the potential for “robust and effective discussion” of candidates’ campaign issues.238

Contribution restrictions are constitutional if a compelling state interest is served, and the limitations imposed are narrowly tailored to serve that interest.239 The Court recognized the reduction of corruption or the appearance of corruption associated with large campaign contributions as a compelling state interest.240 The Court deemed this interest compelling because large contributions undermine representative government when “given to secure a political *quid pro quo* from current and potential office holders.”241 In *Buckley*, the Court found that Congress narrowly tailored a FECA provision that banned contributions over $1000 to presidential candidates.242 Indeed, the Court pointed out that the $1000 limit focused on the “*quid pro quo*” associated with “large” contributions and did not significantly interfere with protected First Amendment rights.243

Even though Congress could have implemented a less restrictive limitation, the Court still upheld FECA’s contribution limits as narrowly tailored.244 Indeed, the Court implemented a kind/degree analysis that substantially defers to legislative determinations regarding

238. Id. at 28-29.
239. See id. at 25-29.
240. Id. at 26-28. The *Buckley* Court did not hold that this was the only compelling state interest. The Court merely stated that it need not “look beyond [this] purpose.” Id. at 26. In a subsequent case, *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652, 659-60 (1990), the Court recognized a compelling state interest in limiting the impact of a large aggregation of wealth by a corporation. The Court held that [r]egardless of whether [the] danger of “financial *quid pro quo*” corruption may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas. Id. (citations omitted).


242. Id. at 28-29.
243. Id. at 27-29.
244. See id. at 30.
limits.\textsuperscript{245} Under this analysis, courts may conclude that a limit is unconstitutionally low only if it is a difference "in kind" from the \textit{Buckley} limit.\textsuperscript{246} Differences "in degree" are presumptively narrowly tailored.\textsuperscript{247}

A difference becomes a "difference in kind" when the limit is excessively different from the \textit{Buckley} approved limit.\textsuperscript{248} Only then may a court strike down legislatively drawn contribution limits.\textsuperscript{249} The Court forbid any judicial interference with differences "in degree," however. As to "in degree" differences, a court may "not invalidate the legislation... [if] it is satisfied that some limit on contributions is necessary." Moreover, once a limit is established that differs "in degree," "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000."\textsuperscript{250} The legislatively drawn limit which differs "in degree" is, therefore, necessarily narrowly tailored.

2. Post-\textit{Buckley} Developments—How Low is Too Low?

Because \textit{Buckley} drew no bright line regarding a minimum contribution limit, lower courts were left to determine: how low is too low?\textsuperscript{251} While all courts held that the $1000 limit in \textit{Buckley} was not a constitutional minimum,\textsuperscript{252} different courts have applied differing


\textsuperscript{246} \textit{Buckley}, 424 U.S. at 30.

\textsuperscript{247} Id.; California Prolife Council Political Action Comm., 1998 WL 7173, at *7 (citing \textit{Buckley}, 424 U.S. at 30).

\textsuperscript{248} The \textit{Buckley} Court compared two cases to illustrate when a discrepancy "amount[s] to differences in kind." \textit{Buckley}, 424 U.S. at 30. In one case, \textit{Rosario v. Rockefeller}, 410 U.S. 752 (1973), the Court upheld a voting requirement that prevented individuals from voting in a party primary where individuals had not registered with their party of choice at least thirty days before the previous general election. In a subsequent case, \textit{Kusper v. Pontikes}, 414 U.S. 51 (1973), however, the Court struck down another voting requirement that prevented individuals from voting in a primary election if they had voted in the primary of another party in the previous twenty-three months. As the Eighth Circuit later observed, the \textit{Kusper} requirement was a "difference in kind" from \textit{Rosario}; hence, the Supreme Court could strike it down. Carver v. Nixon, 72 F.3d 633, 641 (8th Cir. 1995), cert. denied, 116 S. Ct. 2579 (1996) (examining \textit{Kusper} and \textit{Rosario}); see also Connolly, supra note 104, at 518 (noting that an "in kind" difference refers to a "nature or character as determining likeness or difference between things" while differences "in degree" refer only to "a stage in the scale of intensity or amount" (quoting Random House Dictionary of the English Language 525, 1056 (2d ed. 1987)). In \textit{Buckley}, the Court could not engage in an in kind/degree analysis because it had no baseline against which it could compare the $1000 limit.

\textsuperscript{249} See \textit{Buckley}, 424 U.S. at 30.

\textsuperscript{250} \textit{Buckley}, 424 U.S. at 30 (quoting from \textit{Buckley v. Valeo}, 519 F.2d 821, 842 (8th Cir. 1975)).

\textsuperscript{251} See Connolly, supra note 104, at 497-500.

\textsuperscript{252} See, e.g., \textit{Carver}, 72 F.3d at 641 ("recognizing that the $1,000 limit in \textit{Buckley} was not a 'constitutional minimum'"); Arkansas Right to Life State Political Action Comm. v. Butler, 983 F. Supp. 1209, 1222 (W.D. Ark. 1997) (noting that a $1000 limit is not a constitutional minimum).
analyses to determine whether a limit was narrowly tailored. Nevertheless, some consistent guidelines have emerged.

a. Carver v. Nixon

Only two appellate circuits examined whether a contribution limit was too low to be narrowly tailored. First, the Eighth Circuit conducted an analysis of limits lower than Buckley in Carver v. Nixon. In this case, Thomas Carver, a former state legislator, sued to enjoin the enforcement of a new Missouri measure that limited contributions to $100-$300 per election cycle. The Eighth Circuit held that this limit was not closely drawn to a compelling state interest. Integral to its decision was a kind/degree analysis. First, the court acknowledged that unless the contribution limitation was a difference "in kind," it could not "fine tune" the limit. In this case, however, mostly quantitative considerations justified the court's belief that the limit amounted to a difference in kind.

First, the court pointed out that the statute limited contributions on a "per election cycle" basis, not on a "per election" basis. Significantly, the court noted that a "per election cycle" limit constituted a much smaller number than a "per election" limit. For instance, under a $300 "per election cycle" limit, a contributor may donate only $300, but under a $300 "per election" limit, a contributor may donate $300 for the primary election and $300 for the general election.

253. Compare National Black Police Ass'n v. District of Columbia Bd. of Elections and Ethics, 924 F. Supp. 270, 275, 281-82 (D.D.C. 1996) (determining whether contribution limits severely impact First Amendment Rights and, if so, whether the limits are tailored to a sufficient governmental interest), with Carver, 72 F.3d at 641 (determining whether the limit is narrowly tailored by examining whether the contribution limit differs "in degree" or "in kind" from the Buckley limit (citation omitted)).


255. See Connolly, supra note 104, at 500.

256. Carver, 72 F.3d at 641-42. In doing so, the court struck down a district court decision which held that the state has a compelling interest in restricting "all" contributions. The court asserted that states have a compelling interest only in reducing "large" contributions. Id. at 638-39.

257. Id. at 641-44.

258. Id. at 641. The court reiterated Buckley's familiar command that courts have no "'scalpel to probe' whether a different ceiling might not serve as well." Id. (quoting Buckley v. Valeo, 424 U.S. 1, 30 (1976)).

259. Id. at 644 ("We hold that the [contribution] limits amount to a difference in kind from the limits in Buckley."); Connolly, supra note 104, at 530-31.

260. Carver, 72 F.3d at 643. Indeed, an "election cycle" (sometimes called an "election year") includes both the primary and general election. See Russell v. Burris, 978 F. Supp. 1211, 1218 (E.D. Ark. 1997). Quite differently, "per election" includes only one election, either the primary or general election. See id.

261. Carver, 72 F.3d at 641-42.

262. See id.
In *Carver*, the $100-$300 limits applied "per election cycle." Conversely, the *Buckley* $1000 limit was "per election." Thus, the court held that the $100-$300 per election cycle limits were dramatically lower than the $1000 per election approved in *Buckley*. The Missouri limits actually allow only $50-$150 in contributions "per election" when compared with the $1000 *Buckley* "per election" limit.

After examining other quantitative factors, the court examined one non-quantitative, non-money consideration in its "kind/degree" analysis. The court pointed out that because so many Missourians contribute in the $50-$100 range, the challenged Missouri limits affect a much higher percentage of potential contributors than were affected by the *Buckley*-approved FECA limits. *Carver* observed that the limits in *Buckley* affected only about five percent of contributors. Quite differently, the limits examined in *Carver* affected about twenty to thirty-five percent of all contributors.

The court concluded that this great difference in quantity and its effects on a large percentage of contributors amounted to a difference "in kind." As a result, it brandished its scalpel and held that Missouri did not narrowly draw the contribution limits. Thus, it refused to "adopt the lowest contribution limits in the nation and restrict the First Amendment rights of so many."

b. Kentucky Right to Life v. Terry

The Sixth Circuit also examined a contribution limit lower than *Buckley*. In *Kentucky Right to Life, Inc. v. Terry*, the Sixth Circuit upheld a Kentucky statute that, in the court's reading, limited contributions to $1000 "in any one election year"—in other words, per election cycle.

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263. *Id.* at 641.
264. *Carver* adjusts *Buckley*’s $1000 per election limit to $2000 per election cycle limit. *Id.*
265. *Id.*
266. Similarly, viewed on a "per election cycle" basis, the Missouri limit of $100-$300 per election cycle is "dramatically lower" than *Buckley*’s $2000 "per election cycle" limit. See *id.* at 641-42.
267. For instance, the court considered inflationary factors. See *id.* at 641.
268. *Id.* at 643-44.
269. *Id.* at 643.
270. *Id.* at 643-44.
271. *Id.* at 644.
272. *Id.*
273. *Id.* at 644.
Even though this limit amounts to $500 when compared with the Buckley per election limit,\(^{276}\) the court noted that it was not “different in kind from the $1000 limitation on direct contributions . . . upheld in Buckley.”\(^{277}\) Hence, the court refused to “take out a scalpel to probe dollar limitations.”\(^{278}\) Although its examination was limited, the court alluded to “context” as a consideration in determining whether a contribution limit differs in kind and is narrowly tailored.\(^{279}\) As discussed below, many district court decisions place substantial weight on the context of the election.

c. District Courts: Context

While the district courts’ reasoning varies, most emphasize that considering quantity alone is insufficient to determine whether legislatures narrowly tailored contribution limits.\(^{280}\) Indeed, most evaluate the factual context surrounding elections.\(^{281}\) “[E]very campaign contribution limitation must be judged on its own circumstances,” noted one court.\(^{282}\) Another observed that any decision regarding the constitutionality of contribution limits is “fact-dependent, drawn from all of the record evidence.”\(^{283}\) To illuminate how factual context may be dispositive, this court explained that a $100 limit may be invalid in one jurisdiction but perfectly valid in another depending on the factual

\(^{276}\) One thousand dollars per election year (or per election cycle) allows only one contribution of $1000. In Buckley, however, contributors may donate $1000 for the primary and again for the general election. See Buckley v. Valeo, 424 U.S. 1, 23-24 (1976) (noting the $1000 limit in any election). Hence, $1000 per election year is half of Buckley’s limits or $500 per election.

\(^{277}\) Kentucky Right to Life, 108 F.3d at 648.

\(^{278}\) Id.

\(^{279}\) See id. (noting the “context” of federal elections in Buckley).


\(^{283}\) National Black Police Ass’n, 924 F. Supp. at 281. Note that this court completely ignored Carver’s call for a “kind/degree” analysis. Instead, it first examined whether the limit “severely limit[ed]” political dialogue. Id. Whether a contribution restriction severely limited the political dialogue was “fact-dependent.” Id. If the restriction severely limited political dialogue, it looked to see if the state narrowly drew the limit to a sufficiently important interest. Id.
context. Relevant facts include "the size of the district, the cost of media, printing, staff support, [and] news media coverage." Significantly, the court upheld this limit even though Carver rejected similar limits as unconstitutionally low. The court opined that "[a]pplied in this case, the factors on which the Carver court relied do not alone provide a clear answer as to the degree-versus-kind question." The answer rests in the factual context.

Although the court reiterated much of Carver's reasoning, its emphasis on context explains the different outcomes. Specifically, the court looked at the cost of running a campaign and the size of the electoral districts. Under this expanded analysis, the court ruled that a $100 limit for non-statewide elections was merely a difference "in degree," in large part due to the low cost of elections. Thus, the court refused to use its "scalpel" and held that the $100 contribution limit was narrowly drawn.

In short, in determining the constitutionality of limits lower than Buckley, courts must engage in a kind/degree analysis that depends heavily on the factual context. The next part examines Maine's limits under this analysis. Before this, the following part first analyzes the constitutionality of public financing provisions.

III. Constitutional Analysis

In March 1997, an assortment of candidates, contributors, and political action committees ("PACs") challenged the constitutionality of

284. See id.
286. Russell, 978 F. Supp. at 1222-23. The court also examined a $100-$300 limit for statewide races. Id.
289. See id. at 1223-24.
290. Indeed, the court heeded the "degree-versus-kind" test. Id. at 1222-23.
291. "This interpretation is, of necessity, fact-specific." Id. at 1221.
292. Id. at 1223-24.
293. Id. at 1223 (noting that under the limits, candidates can still mount effective campaigns).
294. Id. at 1222-23.
the Maine Act in the Federal District Court of Maine. These opponents of the Act, including such unlikely allies as the National Right to Life PAC and the American Civil Liberties Union, claimed that the Act "chills" speech in violation of the First Amendment. In particular, they challenged the Act's public financing provisions and contribution limits. This part analyzes both challenges and conclude that the Act does not violate the First Amendment.

A. Constitutional Challenges to Expenditure Restrictions and Public Financing

The Act's opponents challenged the provisions delineating the public financing/expenditure limits as violating their First Amendment rights. They contended that these provisions penalize speech and coerce candidates into participating and accepting expenditure limitations. Specifically, they targeted the trigger provision, which grants matching funds to participants.

First, opponents claimed that the Act's trigger penalizes or "chills" their speech by effectively imposing a spending ceiling on non-participants. Because the state matches every dollar spent over the ceiling, opponents reasoned that non-participants will not spend above the ceiling for fear of "subsidizing" their adversaries. Similarly, because the trigger also considers independent expenditures in support of candidates, opponents argued that the trigger forces independent spenders to cap their spending to avoid aiding participants' speech.


Because the Act is not effective until 2000, however, the court dismissed the claims due to lack of ripeness and standing. Daggett, 973 F. Supp. at 205-06. The court ruled that the claims should be ripe after the 1998 elections. Id. at 205.


300. Plaintiff's Am. Compl. at 15-17, National Right to Life Political Action Comm. (No. 97-56-P-H); Plaintiff's Am. Compl. at 26-29, Daggett (No. 97-56-B-H).

301. Plaintiff's Am. Compl. at 15-17, National Right to Life Political Action Comm. (No. 96-359-P-H); Plaintiff's Am. Compl. at 26-29, Daggett (No. 97-56-B-H).


other words, the trigger created the unconstitutional “self-censorship” found in Day v. Holahan.306

Next, opponents claimed that as a “practical matter,” the trigger coerces participation.307 Because non-participants feel they must spend below the cap,308 opponents reasoned that candidates would be foolish to turn down free public funding.309 As a result, candidates “feel[ ] compelled to participate in the public financing mechanism.”310 Thus, opponents concluded that the Act “indirectly . . . impose[s] spending limits on candidates” in violation of the First Amendment.311

Opponents further claimed that the trigger’s inclusion of independent expenditures in calculating matching funds gave participants a spending advantage.312 They explained that when independent spending plus candidate spending exceeds the ceiling, any dollar spent by a non-participant will trigger more money to participants.313 Under this scenario, even if the non-participant does not spend money above the ceiling, the spending of his or her supporters results in additional funding to participants, leaving participants with a spending advantage.314 Thus, opponents contended that this spending differential penalizes candidates and created another “disparity” which further coerces a candidate into accepting public financing.315

In sum, opponents concluded that the combined effect of the Act’s “inducements” and “penalties” gave participants a “substantial advantage” over non-participants.316 Hence, the “practical effects” of the Act diminished the voluntariness of a candidate’s choice by coercing participation in violation of the First and Fourteenth Amendments.317

Despite opponents’ arguments, the Act does not restrict First Amendment rights.318 As discussed below, any claim of “chilling speech” and “coercion” is inconsistent with recent precedent and First Amendment principles. Indeed, the trigger implicates no First

306. Id.; see supra Part II.A.5.
308. See id. at 23-24.
309. “To spurn public financing and to attempt to outspend [participating candidates] . . . is, in most cases, both unrealistic and exceeding [sic] unlikely.” Id.
310. Id. at 24.
311. Id. at 5.
312. Id. at 21.
313. Id. at 21-22.
314. Id. at 21-23. For example, a participant can outspend a non-participant under a specific hypothetical. First, assume a $5000 spending cap. Next assume that a non-participant’s supporters independently spend $3000 in support of his candidacy. Next, assume the non-participant spends $3000 in his campaign. His spending of $3000 will trigger an extra $1000 over the participants’ spending cap. Thus, the participant can spend $6000, while the non-participant has only spent $3000.
315. Id. at 24.
316. Id.
317. See id.
Amendment rights because it remains voluntary, does not coerce participation or penalize speech, and even promotes more speech. Consequently, the Act deserves to be upheld just as the public financing systems were upheld in *Buckley* and its progeny.319

1. Participation with the Act is Voluntary, Not Coercive

Participation with the Act’s “alternative campaign financing option” and its expenditure cap remains voluntary. The Act merely provides candidates with a choice between campaign financing options.320 Nothing in the Act prevents candidates from privately funding their campaigns or from spending limitless amounts. Indeed, opponents point to nothing in the Act that stops non-participants from soliciting funds, spending their own money, or spending well above the Act’s absolute ceiling. In short, “each candidate . . . [remains free to] spend any amount of funds raised by private funding, without any ceiling.”321

The Act’s trigger provision is merely a legitimate inducement by the state, not a penalty that unconstitutionally coerces or chills speech.322 With the exception of the *Day* court, every court that has examined triggers has held that they do not violate the First Amendment because they do not penalize, inhibit, or censure non-participating candidates’ speech.323 Indeed, as *Rosenstiel* explains, triggers “do not *per se* render the State’s scheme coercive because they are not inherently penal.”324 Instead, triggers operate as an incentive to participate.

Public financing statutes that include such incentives do not violate the First Amendment when the statute achieves a proportionality “between advantages afforded to, and restrictions placed on, publicly financed candidates.”325 Statutory programs maintain this proportionality by balancing the restrictions placed on candidates with incentive provisions that benefit candidates.326 The Act’s trigger helps maintain this constitutionally permitted proportionality between advantages and restrictions.

319. See id. at 236.


324. *Rosenstiel*, 101 F.3d at 1550; see also Wilkinson v. Jones, 876 F. Supp. 916, 928 (W.D. Ky. 1995) (“This court is not convinced that [the trigger] impermissibly chills the speech of privately-financed candidates simply because it enables the speakers’ adversaries to respond.”).


326. Courts note that achieving this proportionality is fundamental to public financing schemes and is necessary to encourage participation. *Rosenstiel*, 101 F.3d at 1549-50, 1555; *Vote Choice*, 4 F.3d at 38-39.
The Act imposes significant restrictions on candidates when they participate in the Act: 1) candidates relinquish their First Amendment right to spend without limits; 327 2) candidates surrender their right to receive contributions; 328 and 3) candidates subject themselves to civil and criminal penalties for violating the terms of voluntary participation. 329 Absent any benefits, the net effect of these restrictions, particularly the spending cap, would burden candidates so much that some would view participation as "foolhardy." 330

To achieve a proportional balance, Maine compensates these burdensome restrictions with the trigger's benefits. 331 As Rosenstiel explains, a state's trigger achieves this "balancing act" 332 by "avert[ing] a powerful disincentive for participation in its public financing scheme: namely, a concern of being grossly outspent by a privately financed opponent with no expenditure limit." 333 As spending by independent supporters and candidates has grown in recent years, 334 the Act's trigger confronts this powerful disincentive and encourages all to participate by reducing the possibility of a participating candidate being outspent by non-participants and independent spenders. 335

Even if Maine's trigger does not achieve a perfect balance between the benefits and the restrictions, the "proportionality," nevertheless, remains intact. 336 As public financing statutes need not achieve "perfect equipoise," a balance in favor of benefits is permissible, 337 in fact, only profound disparities between benefits and restrictions may amount to unconstitutional coercion. 338 Indeed, because "'state[s] need not be completely neutral on the matter of public financing'... any favoritism enjoyed by the publicly funded candidate... is simply a permissible byproduct of the campaign financing process." 339 For example, such permissible "favoritism" in recent public financing stat-

328. Id.
329. Id. § 1127.
331. Cf. Rosenstiel, 101 F.3d at 1549-50 (finding that a Minnesota trigger provides a relative balance in terms of benefits provided to participating candidates and the restrictions imposed on those candidates); Vote Choice, 4 F.3d at 38-39 (finding that a "cap gap" achieves a relative balance between advantages afforded to and restrictions placed on participating candidates).
332. See Weine, supra note 43, at 232.
333. Rosenstiel, 101 F.3d at 1551.
335. See Rosenstiel, 101 F.3d at 1549-50; Weine, supra note 43, at 226-27.
336. Cf. Rosenstiel, 101 F.3d at 1551 (noting that the examined public financing scheme achieves a "rough proportionality necessary to entice, but not coerce," even if it is not perfectly balanced); Vote Choice, 4 F.3d at 39 (same).
337. See Rosenstiel, 101 F.3d at 1551; Vote Choice, 4 F.3d at 39.
338. Rosenstiel, 101 F.3d at 1549-50; Vote Choice, 4 F.3d at 38.
339. Rosenstiel, 101 F.3d at 1555 (quoting Vote Choice, 4 F.3d at 39).
utes includes fund raising advantages,\textsuperscript{340} tax breaks,\textsuperscript{341} and the ability to outspend.\textsuperscript{342} For this reason, even if the Act's independent expenditure trigger creates a possible spending advantage and tilts the scale of benefits in favor of participants, as opponents contend, the provision still does not coerce participation.\textsuperscript{343} The alleged spending advantage is merely the permissible "favoritism" which participants may enjoy.\textsuperscript{344} Consequently, the rough proportionality remains intact, and no cognizable First Amendment claim arises, as the Act neither coerces participation, penalizes speech, nor inhibits a candidate's true choice.\textsuperscript{345}

\textsuperscript{340} See Vote Choice, 4 F.3d at 38-40 (upholding a "cap gap" even though it favors participants).
\textsuperscript{341} See Rosenstiel, 101 F.3d at 1554-55 (upholding a contribution tax deduction to contributors who donated to participants' campaigns even though non-participating candidates were not provided the same benefit).
\textsuperscript{342} See Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280, 289 (S.D.N.Y.) (three-judge court) (upholding a public financing statute even though it may provide participants with more funding than privately funded candidates can raise), aff'd, 445 U.S. 955 (1980).
\textsuperscript{343} See Vote Choice, 4 F.3d at 39; Republican Nat'l Comm., 487 F. Supp. at 285-85.
\textsuperscript{344} See Rosenstiel, 101 F.3d at 1555.
\textsuperscript{345} In fact, other constitutionally approved statutes gave participants a spending advantage. For instance, the Rosenstiel-approved Minnesota statute allowed participants a spending advantage; when non-participants spend as low as 20% of the ceiling (an amount they would surely reach), the state continues to subsidize participants and allows them to spend without a limit. \textit{Id.} at 1547 (citing Minn. Stat. Ann § 10A.25(10)). Clearly, participants in the Minnesota statute have a spending advantage as they are subsidized without a cap. Nevertheless, the court upheld the statute. \textit{Id.} at 1557.


Moreover, under the FECA plan affirmed by the Supreme Court, the Republican National Committee court viewed spending advantages as inconsequential. See Republican National Committee, 487 F. Supp. at 285. Under the FECA framework, opponents argued that FECA provided more public money than a non-participant could likely raise. Nonetheless, the Republican National Committee court rejected an argument that this public financing scheme was coercive because more money "facilitate[s] and enlarge[s]" the exercise of free speech "rather than . . . inhibit[s] or reduce[s] . . . speaking power[s]." \textit{Id.}

Opponents may contend that the constitutionally approved FECA scheme is not a valid comparison because it contains no trigger provision. On the contrary, the Maine Act bears considerable resemblance to FECA. Both acts contain an absolute ceiling. They differ merely in how the state determines the amount of the subsidy (or the ceiling). FECA calculates its subsidy by past election, while the Act provides that spending in current elections will trigger its ceiling. Whether the state sets the ceiling at a level that could be easily reached or not reached at all, under FECA or the Act, is of no relevance. As stated above, providing more money "facilitate[s] and enlarge[s] [participants'] exercise of free speech . . . rather than . . . inhibit[s] or reduce[s] their speaking power." \textit{Id.} Accordingly, the ability to outspend burdens no First Amendment rights as it merely induces participation and balances benefits with restrictions.

Not only does Maine's trigger not "coerce" participation and "chill" speech, it actually promotes First Amendment interests. Where non-participants speak by spending, participants respond. By enabling participating candidates to respond to their high spending opponents, the Act fosters the vibrant exchange of ideas and adds to the political debate by allowing the electorate to hear more viewpoints. In other words, it promotes the core principles that underlie the First Amendment.

Additionally, the Act promotes speech by permitting candidates a choice among "alternative campaign financing option[s]." With an additional choice, candidates have an opportunity to select which option most enhances their "powers of communication and association." Accordingly, Maine's trigger does not burden the First Amendment. Instead, it enhances First Amendment interests and injects a substantial dose of equity into election campaigns. Maine's citizens demanded this result; a court should affirm this democratic choice by following the weight of judicial precedents in this area of First Amendment law.


Any reliance on Day to prove that the Maine trigger "chills" speech ultimately fails. Not only is Day inconsistent with all other cases that have examined public financing statutes, it also contradicts established First Amendment jurisprudence and ignores the purpose behind the First Amendment.

Day's holding states that an individual's speech is chilled when the individual knows that his or her spending will trigger money for an


347. See Rosenstiel, 101 F.3d at 1552; Wilkinson, 876 F. Supp. at 928; see also Weine, supra note 43, at 235 (noting that triggers promote First Amendment interests). "To the extent the statute provides for increased debate about issues of public concern raised by an independent expenditure, it promotes the free and open debate the First Amendment seeks to foster and protect." Day, 863 F. Supp. at 947.

348. See Weine, supra note 43, at 235.


350. Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993). Moreover, the dollar for dollar response even resembles some existing privately funded races. Indeed, in privately funded elections, candidates try to keep pace with their opponents' spending. Because it resembles privately funded races, the matching fund provisions can hardly be construed as a profound disparity that stifles a true choice.

351. See Weine, supra, at 232-36.

352. Id. at 233.

353. Id. at 232-35.
opponent’s response.\textsuperscript{354} This notion is antithetical to the First Amendment. The First Amendment is supposed to encourage a healthy exchange of ideas,\textsuperscript{355} not inhibit individuals from responding to speech.\textsuperscript{356}

The First Amendment is concerned with persecution, not reprisal. That is, it protects individuals from being persecuted—or chilled—from speaking. Its purpose is not to inhibit individuals from responding to speech. Otherwise, the First Amendment would be used not to foster the type of vibrant exchange of ideas necessary for democracy to flourish, but instead would serve to give one or more speakers hegemony of the market of speech.\textsuperscript{357}

In short, promoting responsive speech never amounts to an unconstitutional “chill” of speech.

The “chilling” of speech occurs when the state penalizes, restricts, censures, or proscribes an individual’s speech.\textsuperscript{358} Promoting speech does not amount to an unconstitutional “chill,”\textsuperscript{359} because it does not proscribe or censure one’s speech. Even the government’s vigorous criticism of an individual’s speech does not “chill” First Amendment rights.\textsuperscript{360} Moreover, Buckley points out that the government should provide financial assistance to enhance speech.\textsuperscript{361} Therefore, because the Act does not penalize or censure any speech, the Act’s promotion of candidates’ responsive speech, in fact promotes, rather than unconstitutionally “chills” speech.

\textit{Day} ignored these principles.\textsuperscript{362} Under the statutory scheme overruled by Day, the plaintiffs were not silenced by the government’s trigger in any way.\textsuperscript{363} The trigger was merely an inducement to en-

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\textsuperscript{354} Day v. Holahan, 34 F.3d 1356, 1360 (8th Cir. 1994).
\textsuperscript{356} Weine, \textit{supra} note 43, at 233.
\textsuperscript{357} \textit{Id.}
\textsuperscript{358} See, e.g., Laird v. Tatum, 408 U.S. 1, 12-16 (1972) (holding that a cognizable First Amendment violation requires finding a present objective injury or a threat of direct injury to plaintiffs).
\textsuperscript{359} Weine, \textit{supra} note 43, at 233.
\textsuperscript{360} See, e.g., Meese v. Keene, 481 U.S. 465, 480-82 (1987) (labeling speech “political propaganda” does not chill speech because it does not prohibit, edit, or censure the speech); Penthouse Int’l, Ltd. v. Meese, 939 F.2d 1011, 1015 (D.C. Cir. 1991) (holding that government officials may vigorously criticize speech).
\textsuperscript{361} Buckley v. Valeo, 424 U.S. 1, 93 n.127. According to Buckley, Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers.
\textsuperscript{362} Weine, \textit{supra} note 43, at 233.
\textsuperscript{363} \textit{Id.}
courage participation. Plaintiffs were still "free to make as many independent expenditures as they desire[d] without restraint, censure, or penalty by the Government." 

An analogy elucidates these principles and demonstrates the frail reasoning of Day and the tenuous position supported by opponents of the Maine Act. Imagine that an organization forms to oppose a municipality's proposed school budget. This organization exercises its free speech rights by distributing hundreds of pamphlets denouncing the budget due to its new tax provisions. It vows to distribute the pamphlets every day until voters reject the budget. In response, the municipality announces that for every day the organization distributes its pamphlets, it will distribute copies of an essay in support of the proposal, so that the electorate may make an informed choice. This essay explains that higher taxes are necessary to support a school lunch program. According to Day's reasoning, the municipality's response "chills" the organization's speech in violation of the First Amendment because the organization knows that its speech will trigger a response.

Such a claim contradicts the very purpose of the First Amendment. While the First Amendment protects an "uninhibited, robust, and wide open" expression of views necessary for a "healthy representative democracy," Day's reasoning results in a less informed citizenry unable to hear opposing viewpoints. Indeed, in the hypothetical, Day's reasoning denies the municipality's citizens an opportunity to fully hear the city's proposal. Similarly, under the Act, application of Day forbids Maine's citizens from fully hearing both sides of a political debate. In the end, the practical effect of forbidding Maine's trigger leads to a monopolization of the speech market by nonparticipating candidates and independent spenders.

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364. See supra Part III.A.1.
366. See Weine, supra note 43, at 234 (describing Day's reasoning under a similar analogy).
367. Id.
370. Id. (noting that application of Day to triggers is contrary to First Amendment principles).
371. See id. at 233 (noting that application of Day to triggers leads to a hegemony of political speech).
In light of Day's misguided reasoning, it comes as no surprise that no court has followed Day. All other courts have held that trigger provisions survive constitutional scrutiny.

4. The Act is Narrowly Tailored

Assuming arguendo that the Act's public financing provisions impact First Amendment rights, the Act would still survive constitutional scrutiny because Maine narrowly drew the Act's provisions to further its compelling interest. Indeed, the provisions address the three compelling interests identified by the public financing cases. First, this program frees candidates from the pressures of fund-raising because they no longer need to raise funds. Second, it facilitates communication with the electorate because candidates can now spend more time communicating instead of soliciting donations. Third, it eliminates reliance on corrupting contributions because candidates receive virtually no contributions.

Moreover, Maine narrowly drew the public financing provisions. Although the public financing cases that have considered similar provisions provide only cursory analysis, they consistently found similar incentive provisions narrowly tailored to further the above

372. Rosenstiel v. Rodriguez, 101 F.3d 1544, 1555 (8th Cir. 1996), cert. denied, 117 S. Ct. 1820 (1997); Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995); see supra Part II; see also Weine, supra note 43, at 233 ("With the exception of the Eighth Circuit decision in Day, each court reviewing a trigger concluded that the trigger did not cause a cognizable First Amendment injury because the government was not actually inhibiting speech.").

373. See, e.g., Rosenstiel, 101 F.3d at 1548-55; Wilkinson, 876 F. Supp. at 928; see also supra Part II.


377. Rosenstiel, 101 F.3d at 1553; Vote Choice, 4 F.3d at 39; Wilkinson, 876 F. Supp. at 928 (citing Buckley, 424 U.S. at 91); Republican Nat'l Comm., 487 F. Supp. at 285-86.


379. These cases analyzed whether the challenged statutes were narrowly tailored arguendo. Rosenstiel, 101 F.3d at 1553; Wilkinson, 876 F. Supp. at 928.
Thus, the precedents of the public financing cases suggest that the Act is also narrowly tailored.480

B. Constitutional Challenge to the Maine Act's Contribution Limits

Opponents alleged that the Act's contribution limits violate their First Amendment rights.482 They claimed that contribution limits inhibit candidates' speech and contributors' right to association much more than the FECA limits in Buckley.483 While opponents recognized that Maine may limit large contributions due to its compelling interest in preventing corruption or the appearance of corruption, they contended that the $250-$500 per election limits are too low to be narrowly tailored.484

380. See, e.g., Rosenstiel, 101 F.3d at 1554 (holding that Minnesota's trigger was narrowly tailored because it encourages participation); Vote Choice, 4 F.3d at 40 ("[W]e find Rhode Island's contribution cap gap narrowly tailored and logically related, in scope, size, and kind, to compelling governmental interests.").

Because these courts did not fully engage in an analysis of whether the provisions were narrowly tailored, further explanation is helpful. Under Buckley's narrowly tailored analysis, courts defer to the state's determination of a campaign finance regulation if the regulation addresses the compelling interest and it does not differ in kind from other campaign finance regulations. See Buckley, 424 U.S. at 29-30. As stated above, the trigger addresses Maine's compelling interests. Moreover, this limit does not differ in kind from other constitutionally approved triggers because it does not differ excessively from these other triggers. Indeed, the Act's trigger may be even less restrictive than the trigger examined in Rosenstiel. While the Act triggers matching funds only when the non-participant exceeds the participant's ceiling, the Rosenstiel approved statute triggers the participant's release from the expenditure ceiling when the non-participant spends as little as 20% of the expenditure ceiling. Minn. Stat. Ann. § 10A.25(10)(a) (West 1997). Thus, as the Act's trigger provision merely differs in degree, it is presumptively narrowly tailored.

Even if the trigger places participants in a better position than non-participants, the Act is still narrowly tailored. Because a state "need not be completely neutral on the matter of public financing of elections," the Act need not benefit both participants and non-participants. Rosenstiel, 101 F.3d at 1555 (quoting Vote Choice, 4 F.3d at 39). Such a contention "misses the point: If the benefits . . . were conferred upon all candidates, participating and nonparticipating, there would be no incentive to participate, and the State's goals of decreasing the chances of corruption and freeing up more of the candidates' time for campaigning would be frustrated." Id.

381. See id. at 1554. As Rosenstiel clearly held, Day is inapposite to a situation where the state has not already secured nearly 100% participation in its public financing program. Id. at 1555.


384. Plaintiff's Am. Compl. at 10, National Right to Life Political Action Comm. (No. 96-359-P-H). Opponents also rely on Justice Thomas's concurrence in Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S. Ct. 2309, 2323 (1996) (Thomas, J., concurring in judgment, dissenting in part). Justice Thomas opined that contribution limits are per se not narrowly tailored because limiting contributions is not the least restrictive means of addressing the governmental interest in reducing corruption. Id. at 2329. No other justice, however, has expounded this viewpoint.
Buckley and its progeny establish that a state may limit large contributions to further its compelling interests in reducing corruption or its appearance. The sole question the courts must consider is whether the contribution limits are narrowly tailored to further Maine’s interests. A “kind/degree” analysis demonstrates that Maine narrowly drew the limits on contributions. An examination of both quantitative factors and the factual context indicate that Maine’s limits differ only “in degree” from Buckley’s limits for presidential campaigns.

Focusing purely on quantity, the Act’s contribution limits amount to only a difference “in degree.” Recognizing that FECA’s $1000 is not a constitutional minimum, past decisions upheld limits comparable to the Maine limits. Indeed, the Sixth Circuit, in Kentucky Right to Life, upheld a limit equal to the Maine gubernatorial limit, even though it is equivalent to one half of the limit approved in Buckley. In fact, no court has ever struck down a statewide limit lower than Maine’s gubernatorial limit. Moreover, an Arkansas limit much smaller than Maine’s local limit also passed constitutional muster despite being less than one quarter of the limit approved in Buckley.

Nonetheless, a “degree/kind” analysis requires more than merely comparing numbers. Even if the challenged limit is merely a fraction of the Buckley limit, the context of the election may nonetheless allow the contribution limit to pass scrutiny as a difference only in degree. As Carver suggests, courts go beyond quantitative comparisons.

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386. See, e.g., Carver, 72 F.3d at 641 (recognizing “that the $1000 limit in Buckley [is] not a ‘constitutional minimum’”).
387. See, e.g., Carver, 72 F.3d at 641 (recognizing “that the $1000 limit in Buckley [is] not a ‘constitutional minimum’”).
388. See, e.g., Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 648 (6th Cir. 1997); Russell v. Burris, 978 F. Supp. 1211, 1223 (E.D. Ark. 1997). In its “in kind/in degree” analysis, Carver mandated that courts consider whether a limit is the larger “per election” or the smaller “per election cycle.” Carver, 72 F.3d at 635, 641-44. Maine’s limit is the larger, “per election” limit.
sons by examining the limit's impact on contributors. Carver notes that if the contribution limits restrict more contributors from donating than the limits in Buckley, this higher restriction may amount to a difference "in kind." While Buckley's limits affected about 5% of all contributors, the limits in Carver affected about 20%. This difference weighed into Carver's ruling that the limits were different "in kind." Maine's limits, however, affect far fewer contributors than the limits approved in Buckley. Indeed, when calculated to a "per election cycle" limit, only 1.8% of all contributors to local races contributed above the limit imposed by the Act. Similarly, only 4% of all contributors to gubernatorial candidates donated above the Act's new limits. Thus, the Act's limit affects fewer contributors than the FECA approved limits in Buckley, suggesting that Maine's limit differs only "in degree."

Another fact-specific comparison reveals that the Act's limit differs only "in degree" from the Buckley-approved presidential limit. The "in degree" difference becomes apparent by comparing the low cost of campaigning in Maine and the Act's limits with the high cost of presidential campaigns and FECA's limits. In 1976, Buckley found that twenty million dollars was a reasonable amount to spend on presidential campaigns and determined that a $1000 limit was constitutional for these types of campaigns. In the context of this federal system, the Buckley approved maximum contribution equals only .01% of a candidate's total expenditure. In contrast, the Act's limits do not restrict candidates nearly as much as the Buckley approved limits. Indeed, campaigning in Maine costs only a fraction of the amount of running a national campaign. In Maine, a state House campaign costs less than $5000, a state Senate campaign costs about $25,000, and narrowly tailored by showing that it is merely one-fifth of the limit upheld in Buckley).
a gubernatorial campaign costs about one million dollars. Under these limits, the maximum contribution to a house candidate equals 10% of the candidate’s spending—an amount 1000 times greater than Buckley. Similarly, the maximum contribution to a Senate candidate ($500 per election cycle) equals 2% of his or her spending—an amount 200 times greater than Buckley. Lastly, the maximum contribution to a gubernatorial candidate equals .1% of his or her spending—an amount 10 times greater than Buckley.

Therefore, in the context of Maine elections, the Act’s contribution limits are less restrictive on candidates than the Buckley approved FECA limit because the Act’s limit represents a much higher proportion of candidates’ spending than the FECA approved limit. Thus, because the limits are less restrictive on candidates, the difference cannot amount to a difference “in kind.”

In sum, a consideration of all of the quantitative and fact-specific factors demonstrates that the Act’s limit differs “in degree.” As the factors do not reveal inordinate differences, and even demonstrate that the FECA approved limits are more restrictive than the Maine limits, the difference cannot reasonably be interpreted to amount to the excessive “in kind” difference that a court can strike down for not meeting the narrowly tailored standard.

As Maine’s limits constitute merely a difference “in degree,” the court must heed the limits prescribed by the drafter's of the Act. Indeed, the court cannot brandish its “scalpel” to “fine tune” the limits. As a result, Maine’s limits are narrowly tailored to its compelling interests, and accordingly, the Act’s limits steer clear of a First Amendment violation.

CONCLUSION

Not only is the Maine Clean Election Act constitutional, but it is also wise policy. The current campaign financing system’s distorting effects on our system of representative democracy persist. While many vow to “clean up the system,” little meaningful reform has been

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406. Five hundred dollars (the per election limit) is 10% of $5000 (500/5000 = 10%).
407. 10% of a candidate’s total spending is one thousand times greater than .01% of a candidate’s total spending (10/.01% = 1000).
408. Five hundred dollars (the per election limit) is 2% of $25,000 (500/25,000 = 2%).
409. 2% of a candidate’s total spending is 200 hundred times greater than .01% of a candidate’s total spending (2/.01% = 200).
410. One thousand dollars (the per election limit) is .1% of $1,000,000 (1000/1,000,000 = .1%).
411. One tenth of a percent of a candidate’s total spending is ten times greater than .01% of a candidate’s total spending (.1/.01% = 10).
implemented. The people of Maine took a significant step with the passage of this Act.

Once the Act passes constitutional muster, and this Note has demonstrated that it should, the end result will be a triumph of democracy over the disproportional representation of special interests. Indeed, through implementation of the Act, the current impure financing practices will no longer distort representative democracy.