

## Beyond BCRA: Cutting-Edge Campaign Finance Reform at the Local Government Level

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Congressional passage and Federal Election Commission implementation of the Bipartisan Campaign Reform Act (BCRA) (aka the McCain-Feingold bill) has commanded the attention of media, political pundits, and elected officials throughout the nation. With so much attention being paid to federal campaign finance law, few realize that local governments around the country have for many years enforced and refined the most progressive campaign finance laws in the United States. Twelve local government jurisdictions, including the cities of New York and Los Angeles, currently administer public campaign financing laws.<sup>1</sup>

Although BCRA is the strongest federal effort since the 1970s to control the undue influence of money in the electoral process, some local jurisdictions are steps ahead of Congress. A number of local jurisdictions not only limit campaign contributions to political committees—the most notable feature of BCRA—but also control campaign spending by candidates who voluntarily agree to limits in exchange for public campaign financing.<sup>2</sup> The presidential public financing program created by Congress in 1974 is in dire need of repair. Overhaul of the presidential public financing program and expansion of public financing to Congressional elections, however, was never seriously considered for inclusion in BCRA.

Public financing not only serves as an incentive for candidates to comply with spending limits but also enables qualified individuals—often women and people of color—who lack personal wealth or access to wealthy donors to run a competitive campaign and win public office. Public financing reduces candidate dependence on special interest donors, making elected officials more accountable to the constituents they represent.

Under these local government programs, a candidate wishing to receive public campaign financing must sign a statement agreeing to abide by a variety of campaign finance regulations. The candidate must then raise a specified amount of money in small contributions to meet a fundraising threshold.

Fundraising thresholds are designed to ensure that only candidates with broad public support qualify for public funding. Campaign fundraising and spending activities of participating candidates are closely monitored by a government administrative agency to ensure compliance with the law. Public financing programs of some jurisdictions include electronic campaign finance reporting and disclosure systems, giving the public timely access to candidate campaign finance records on Websites.

Local government public financing programs vary dramatically from one jurisdiction to another. This article presents a general overview of these programs, with specific reference to unique provisions of individual jurisdictions. Part one gives a brief history of local government public campaign financing in the United States. Part two describes the major elements of local government public financing programs. Part three explores the most notable achievements of local government public financing programs, and Part four examines some of the challenges that lie ahead for existing programs.

## **History of Public Campaign Financing at the Local Government Level**

Seattle became the first local jurisdiction to adopt public campaign financing in 1978. Public financing has since been adopted by a total of sixteen local jurisdictions throughout the United States. Twelve of these programs are currently operating, while four have been terminated by ballot measures. Here is a complete chronological list (with the year of adoption noted in parentheses):

- Seattle, Wash. (1978, terminated in 1992)
- Tucson, Ariz. (1985)
- Sacramento County, Calif. (1986, terminated in 1988)
- New York City (1988)
- King County, Wash. (1989, terminated in 1992)
- Los Angeles (1990)
- Austin, Tex. (1994)
- Long Beach, Calif. (1994)
- Suffolk County, N.Y. (1998)
- Boulder, Colo. (1999)
- Oakland, Calif. (1999)
- Cary, N.C. (2000)
- Petaluma, Calif. (2000)
- San Francisco (2000)
- Miami-Dade County, Fla. (2001)
- Cincinnati, Ohio (2001, terminated in 2002)

Tucson is home to the oldest local government public financing program currently in operation. The programs in New York City and Los Angeles have been

in operation for more than a decade. Public financing has exploded in popularity in recent years, with seven of the twelve currently active programs having been adopted since 1998.

Three of the four invalidated programs were ended by statewide ballot measures; they are discussed in detail later. Cincinnati is the jurisdiction most recently acting on public financing, adopting a program by ballot measure in 2001 and repealing the program by ballot referendum in 2002.<sup>3</sup>

**Public Financing and the U.S. Constitution.** Public campaign financing was born in the aftermath of the Watergate scandal in the early 1970s. Iowa, Maine, Rhode Island, and Utah passed laws in 1973 providing public financing to political parties. Congress amended the Federal Election Campaign Act (FECA) in 1974 to create a system of partial public financing for presidential election campaigns. The 1974 FECA amendments also included contribution and spending limits for all federal candidates and political committees influencing federal elections.

Many provisions of the 1974 FECA amendments, including contribution and spending limits, were immediately challenged on constitutional grounds in the federal court lawsuit known as *Buckley v. Valeo*. The U.S. Supreme Court issued its landmark *Buckley* ruling on the FECA amendments early in 1976. The court struck down FECA's mandatory spending limits as an unconstitutional violation of First Amendment rights,<sup>4</sup> but it held that public campaign financing may be used as an incentive to induce voluntary acceptance of spending limits by candidates.<sup>5</sup>

As a result of the *Buckley* decision, campaign finance reformers seeking to limit the skyrocketing costs of campaigns have relied on public financing as an incentive to make voluntary spending limits appealing to candidates. Though voluntary spending limits linked to public financing have not been challenged at the local government level on federal constitutional grounds, constitutional challenges have been brought against similar programs at the state level. In the typical legal challenge to voluntary spending limits, a plaintiff claims that the spending limits are coercive—rather than truly voluntary—and therefore unconstitutional. No court has struck down voluntary spending limits linked to public financing on the basis of such a claim.<sup>6</sup>

Given the legal precedent, local government public financing provisions linked to voluntary spending limits are probably not susceptible to federal constitutional challenge. Local government public financing programs have, however, been thwarted in some instances by state laws regarding local government “home rule” authority.

**State Law and Local Government Home Rule Authority.** *Home rule* refers to the legal authority of local governments to enact and enforce local laws. The amount of home rule afforded to local governments is established by state law. Campaign finance activity is also typically regulated by state law. The viability of a local government public financing program depends on the degree to which the local jurisdiction may adopt laws that supplement, or in some instances

conflict with, state campaign finance laws. Numerous local government public financing programs have been challenged on the basis of home rule laws.

At least forty-one states have some form of home rule for local governments today. Under some states' laws, local governments possess full police power with respect to municipal affairs and immunity from state interference with respect to municipal affairs. Most states grant local governments more modest home rule, allowing them to exercise all legislative authority except what is expressly prohibited by state law.<sup>7</sup> Ambiguity in state laws often leads to legal disputes between state and local governments regarding the extent of local home rule authority. Such was the case in California and Washington, where state laws conflicted with local public financing laws.

**Local Public Financing and Home Rule in California.** California voters passed a statewide ballot measure, Proposition 73, purporting to ban the use of public money to fund political campaigns in 1988. The County of Sacramento's public financing program, adopted in 1986, became the subject of a lawsuit between the county and the state. In *County of Sacramento v. Fair Political Practices Commission*, a California state court of appeals held that the county's public financing program was invalidated by Proposition 73.<sup>8</sup>

The city of Los Angeles enacted a public financing program in 1990. The California state assemblyman who drafted Proposition 73 brought a lawsuit against the city.<sup>9</sup> The city defended on the ground that the California constitution's home rule provision gives charter cities the authority over all "municipal affairs."<sup>10</sup> The State Supreme Court ruled that "nothing . . . is of greater municipal concern than how a city's tax dollars will be spent; nor anything which could be of less interest to the taxpayers of other jurisdictions."<sup>11</sup> The court upheld Los Angeles's public financing program as a fully legitimate exercise of charter city home rule authority.<sup>12</sup> In doing so, the court also called into doubt the earlier state appellate court decision invalidating the County of Sacramento's program.<sup>13</sup>

The California State Supreme Court's interpretation of the state constitution in *Johnson v. Bradley* recognizes strong home rule authority in cities that adopt a charter. California's charter cities are able to implement public financing programs despite the ban in Proposition 73. The Los Angeles public financing program upheld by *Johnson v. Bradley* has served as a model for programs in the California cities of Long Beach, Petaluma, Oakland, and San Francisco.

**Local Public Financing and Home Rule in Washington.** Washington voters passed Initiative 134 in 1992, creating contribution limits and strengthening campaign finance disclosure requirements. Initiative 134 also explicitly prohibited use of public funds for state or local election campaigns, leaving no room for interpretation.<sup>14</sup> Passage of Initiative 134 resulted in immediate termination of Seattle's public financing program, the oldest local government public financing program in the nation, as well as King County's public financing program.

**Local Public Financing and Home Rule in New York.** New York City officials have taken a conservative approach to the question of whether local

governments may apply contribution limits to all local candidates and committees. Whereas the campaign contribution limits of local governments in California and many other states apply to all candidates running for local office, the contribution limits enacted by New York City and Suffolk County apply only to candidates who voluntarily agree to abide by the laws in exchange for public funding. Some candidates forgo public funding and consequently are subject only to the much more lenient New York State contribution limits and disclosure laws.

Though spending limits must be voluntary,<sup>15</sup> a strong argument can be made that New York State's home rule law does in fact empower local governments in the state to impose other regulations, specifically contribution limits and disclosure requirements, uniformly upon *all* candidates and committees participating in local elections.

During the past thirty years, New York's high court has moved from a constitutional interpretation severely limiting the home rule authority of local governments to an interpretation that allows local governments much more latitude in legislating.<sup>16</sup> When faced with the question of whether a local law is in conflict with, and thus preempted by, state law, a New York State court today would likely consider whether the local law furthers the legislative purpose of the state law. To the extent that the local law furthers the legislative purpose of the state law, a court would likely find the local law to be a permissible exercise of home rule authority.

Suffolk County recently moved to the cutting edge of campaign finance reform in the state. In November 2002, County Executive Robert Gaffney signed into law a requirement that all candidates for county office—even those not participating in the county's public financing program—file campaign finance reports electronically with the Suffolk Campaign Finance Board. Suffolk County is the first local jurisdiction in the state to adopt a campaign finance law that applies to all candidates for local office.

## Major Elements of Public Financing Systems

Local government public finance programs share many of the same general features: contribution limits, spending limits, qualification thresholds, high-spending-opponent trigger provisions, limits on a candidate's use of personal funds, and debate requirements. Wide variation exists, however, in specific program details such as the dollar amount of limits and qualification thresholds, the public funds matching rate, and the total amount of public funds available to candidates. This section describes the major elements of local government public financing programs and gives specific examples of the variation among programs.<sup>17</sup>

**Eligible Offices.** Most local government public financing programs apply to all or nearly all of the jurisdiction's elected officials. In the City of Los Angeles, for example, candidates for all elected city offices—city council, controller, city attorney, and mayor—may participate in the public financing

program. New York City offers public financing to candidates for each of the city's fifty-one city council seats, as well as the offices of borough president, comptroller, public advocate, and mayor. New York City does not, however, offer public financing to candidates for district attorney in each of the five boroughs. In Tucson, candidates for city council and mayor, the city's only elective offices, are eligible for public financing.

Though many local governments have elected school boards, Oakland is the only city that offers public financing to school board candidates. San Francisco voters elect a board of supervisors, mayor, city attorney, district attorney, and sheriff, yet public financing is available only to candidates for the board of supervisors.

***Distribution of Public Funds.*** Public funds are distributed to qualified candidates either as a match to private contributions raised by a candidate, or as a block grant, or a combination of the two. The total amount of public funds available to candidates is specified by law and detailed here.

New York City has the most generous matching funds rate among the twelve local government programs. Qualified candidates receive four dollars in public funds for each dollar in contributions of \$250 or less from natural persons (as opposed to political committees or business entities).

In Los Angeles, each dollar in contributions up to \$250 for city council candidates and \$500 for citywide office candidates is matched with a dollar in public funds in a primary election. General election candidates receive a block grant in the amount of one-sixth of the total public funds available to the candidate in the general election, plus continued matching funds at the dollar-to-dollar rate.

Eligible primary election candidates in Long Beach and Petaluma receive fifty cents in public funds for each dollar in private contributions. Candidates in Boulder, Oakland, and Tucson receive matching funds dollar-to-dollar.

Qualified candidates in Miami-Dade County and Suffolk County receive a block grant of public funds in both the primary election and the general election. Austin and the Town of Cary use block grants to qualified candidates who reach a runoff election. Cary does not distribute public funds until *after* the runoff election.

San Francisco has the most complex scheme for distributing public funds. A general election candidate receives \$5,000 on certification of eligibility, then four dollars in public funds for each of the first \$5,000 raised in contributions, then one dollar in public funds for each dollar in contributions raised, up to a maximum of \$43,750. A runoff election candidate receives \$5,000 on qualification for runoff, then four dollars in public funds for each dollar in contributions raised, up to a maximum of \$17,000.

***Total Public Funds Available.*** Every jurisdiction but Austin limits the total amount of public funding available to a candidate. As a percentage of the spending limit, public funding allocations range from 15 percent in all Oakland elections to 85 percent in a San Francisco runoff election. Under



normal circumstances, New York City candidates may receive up to 55 percent of the spending limit in public funds. If faced by a high-spending opponent, however, New York City candidates may receive up to 67 percent of the spending limit in public funding. Most jurisdictions offer candidates approximately 50 percent of the spending limit in public funds.

In New York City, for example, a 2001 mayoral candidate could receive a maximum of \$3.4 million (67 percent of the spending limit) in public funds per election, while a city council candidate could receive a maximum of \$91,333 (67 percent of the spending limit) in public funds per election. In San Francisco, a candidate for the board of supervisors could receive up to \$43,750 (58 percent of the spending limit) in public funds for the 2002 general election and another \$17,000 (85 percent of the spending limit) in public funds if the candidate advanced to a runoff. A 2001 candidate for the Boulder city council could receive up to \$5,871 (50 percent of the spending limit) in public financing.

**Qualification Fundraising Thresholds.** Public financing programs require participants to raise a specified number of small contributions to ensure that recipients of public funds have substantial popular support. Los Angeles city council candidates, for example, must raise at least one hundred contributions of \$250 or less totaling at least \$25,000 to be eligible for public funding. Los Angeles mayoral candidates must raise at least three hundred contributions of \$500 or less totaling at least \$150,000 to be eligible for public funding.

New York City has a unique provision requiring city council candidates to raise at least fifty contributions between \$10 and \$1,000 totaling at least \$5,000 *from residents of the council district*.

Smaller jurisdictions tend to have lower fundraising thresholds. A candidate for Tucson's city council must raise two hundred contributions of \$10 or more, while mayoral candidates must raise three hundred contributions of \$10 or more. Boulder city council candidates running in 2001 were required to raise 10 percent of the spending limit, or \$1,174 in contributions of \$25 or less, to be eligible for public funding.

**Program Funding Mechanisms.** The element most critical to the success of a public financing program is its funding mechanism. Candidates will not participate in a program that is underfunded, making the program useless.

The public financing program of Los Angeles relies on a charter provision that guarantees \$2 million per year to the program, adjusted for changes in the cost of living. The \$2 million allocation is not subject to the legislative budgeting process and cannot be reduced without voter approval of a charter amendment. This charter-protected funding source has effectively funded the city's program and serves as a model for other jurisdictions. One drawback to this funding mechanism is the difficulty of *increasing* the annual allocation; voter approval of a charter amendment is necessary. The availability of public funding, combined with term limits, has encouraged more candidates to run for office. More funding will soon be needed to meet candidate needs. Without a

charter amendment, the program's budgetary constraints will prevent the program's evolution.

Under New York City's campaign finance law, the city's Campaign Finance Board submits an estimated budget to the mayor for inclusion in the city's executive budget. The city charter contains two provisions protecting program funding. First, the charter requires that the mayor include the Campaign Finance Board's budget estimate in the executive budget *without revision*. Second, the charter gives the Campaign Finance Board authority to draw program funding directly from the city's general fund if the mayor and council fail to appropriate a sufficient amount of program funding. This general fund "draw down" provision is unique to New York City but has never been used because the city's public financing program has been fully funded in every year of its existence.

The funding mechanism of Suffolk County's program, by contrast, is among the worst in the nation. Suffolk County's program relies entirely on voluntary donations from the public. Donations are solicited by the Suffolk County Campaign Finance Board using an insert in annual property tax bills. Many residents are renters and consequently do not receive property tax bills. The property tax bills of many homeowners are received by the homeowner's accountant or a bank that holds a mortgage on the property. The few homeowners who do receive the Campaign Finance Board's solicitation are not likely to be in a generous mood when opening a tax bill. Since the enactment of Suffolk's public financing program in 1998, this funding mechanism has generated approximately \$25,000—only a fraction of the \$200,000 technically available to a single candidate for the office of county executive. Suffolk's public financing program will continue to flounder until a reliable funding mechanism is developed.

Most public financing programs rely on the standard legislative budget process, making funding uncertain from year to year. Program funding often becomes a political hot potato, with opponents of public financing characterizing the program as "welfare for politicians." Some programs have relied on the legislative budget process with success, while others have been underfunded. The charter-protected funding mechanisms of Los Angeles and New York City have proven far more reliable.

**Spending Limits.** Spending limits apply only to candidates voluntarily participating in the public financing program. Spending limits vary dramatically from one jurisdiction to another. Limits range from a low of \$10,000 per election for a council candidate in the Town of Cary to \$5.7 million per election for a New York City mayoral candidate. A mayoral candidate in Los Angeles may spend up to \$2.2 million in a primary election and \$1.76 million in a general election, while a council candidate may spend \$330,000 in a primary and \$275,000 in a general election.

**Contribution Limits.** A local jurisdiction's contribution limits typically apply to all candidates running for office, regardless of whether the candidate



chooses to participate in the public financing program. This is not the case in New York City and Suffolk County, where local contribution limits apply only to candidates who participate in the public financing program.

Contribution limits range from a low of \$100 per election to certain candidates and political committees in Austin, Boulder, and Oakland to \$4,950 per election cycle to candidates running for citywide office in New York City. Most jurisdictions' contributions limits are between \$250 and \$1,000, with the limit applying to candidates varying with the office. Candidates for citywide office are typically able to accept larger contributions than candidates for city council.

Los Angeles, San Francisco, and Oakland limit contributions to political committees that make independent expenditures. The limit in San Francisco and Los Angeles is \$500 per calendar year; Oakland's limit is \$100 per calendar year.

**High-Spending-Opponent Trigger Provisions.** Most local government public financing programs release participants from compliance with the spending limit if a participant's opponent receives contributions or makes expenditures in excess of the spending limit. New York City and Suffolk County eliminate the spending limit for program participants if a nonparticipating opponent receives contributions or makes expenditures that exceed 50 percent of the spending limit. New York City also offers the participating candidate an additional one dollar in public matching funds, increasing the matching funds rate to five-to-one.

**Independent-Expenditure Trigger Provisions.** An "independent expenditure" is an expenditure by a person or organization directly advocating the election or defeat of a candidate that is in no way coordinated with a candidate's campaign.<sup>18</sup> Austin, Los Angeles, Oakland, and San Francisco eliminate the spending limit in a race when independent expenditures to influence the race exceed a specified threshold.

In Austin, independent expenditures by one person exceeding \$10,000 result in elimination of the spending limit. In Los Angeles, total independent expenditures supporting or opposing a single candidate exceeding \$200,000 in a mayoral race, \$100,000 in another citywide office race, or \$50,000 in a city council race result in elimination of the spending limit for all candidates in the race. In Oakland, independent expenditures by a single committee exceeding \$15,000 in a district city council or school board race or \$70,000 in a citywide office race result in elimination of the spending limits. San Francisco eliminates the spending limit for all candidates in a race if total independent expenditures supporting or opposing a candidate exceed the applicable candidate spending limit.

**Debate Requirement.** The cities of Austin, Los Angeles, New York, and San Francisco require some or all candidates participating in the public financing program to participate in public debates. In Los Angeles, for example, candidates must agree in writing to participate in at least one debate prior to

the primary election and two debates prior to the general election to be eligible for public funding. New York City requires publicly financed candidates for citywide office to participate in two public debates prior to the primary election and at least one debate prior to the general election.

***Electronic Filing and Disclosure.*** Some jurisdictions, among them Los Angeles, New York City, Suffolk County, and San Francisco, require candidates to submit periodic campaign finance reports in an electronic format. The data are then made available to the public on a Website.

### **Achievements of Local Government Public Financing Programs**

The fundamental goals of public campaign financing programs are to give qualified candidates who have limited access to wealthy donors the necessary resources to wage a competitive campaign and to induce candidate compliance with spending limits and other campaign finance restrictions. These goals have unquestionably been met, at a relatively small cost, in jurisdictions that have adequately funded their programs.

***High Level of Candidate Participation.*** A high level of candidate participation results in widespread compliance with spending limits and other campaign finance restrictions. Candidate participation in the public financing programs of Los Angeles, New York City, and Tucson has increased to nearly 100 percent in recent years.

Public funds were first available to New York City candidates in 1989, when 48 of 139 candidates (35 percent) appearing on the ballot participated in the public financing program and 37 candidates (27 percent) met all program requirements and received public matching funds. The most accurate gauge of a program's popularity is participation among serious candidates, as opposed to candidates who merely run symbolic campaigns. Participation among New York City candidates who raised or spent at least \$5,000 rose from 77 percent in 1991 to 97 percent in 2001. Both the number of candidates receiving public funds and the total amount of public funds distributed to candidates have risen dramatically between 1989 and 2001. In 1989, 37 New York City candidates received \$4.5 million in public funds. In 2001, 199 candidates received a total of more than \$41 million in public funds.

Public funds were first available to candidates in Los Angeles for the 1993 elections. As is the case in New York, candidate participation and receipt of public funds have grown steadily over time. Participation among candidates who raised at least \$5,000 exceeded 96 percent in the 1999 and 2001 elections. The Los Angeles City Ethics Commission distributed more than \$8 million to thirty-nine candidates during the 2001 election cycle.

It takes years to develop a high level of candidate participation in local government public financing programs. High participation occurs only if the benefits of participating outweigh the burdens. Most candidates are not familiar

with public financing programs. High participation depends on the willingness of an administrative agency (campaign finance board, ethics commission, city clerk) to promote the program and educate candidates about the availability of public funds. Only time will tell if the younger programs in San Francisco, Miami-Dade County, and other jurisdictions receive the necessary resources to boost currently low participation rates to a level comparable with more established programs.

***Bringing New Voices into the Political Arena.*** An abundance of anecdotal evidence suggests that public financing enables individuals with limited access to wealthy donors to wage competitive campaigns and win public office. Public financing can increase the political representation of historically underrepresented communities: women, people of color, and lower-income people of every race. When asked what the most notable achievement of public financing has been, Los Angeles City Ethics Commission Executive Director LeeAnn Pelham replied, “I think what works best is people who say to us that they were able to think about running for office because they thought that the public funds help give them a way to be more competitive than they would otherwise. I would describe them as your grassroots candidates, who feel that there’s some way that they have a shot at actually being a legitimate candidate running for city office.”<sup>19</sup>

Many candidates in Los Angeles have echoed these sentiments. First-time officeholder Ed Reyes, elected to the Los Angeles city council in 2001, stated: “My parents are from Mexico. I’m the first generation that has grown up here, I’m born here. I don’t have the traditional ties to the power groups or the power structure. I literally came from the neighborhood. Without public financing, I knew that I wouldn’t have been able to throw a stone like in the David and Goliath story. I probably would have been throwing a pebble. With public financing I knew I had a shot.”<sup>20</sup>

Public financing has had the same impact in New York City. In 1989, one year after adoption of the public financing program, New York City voters adopted a charter amendment increasing the size of the city council from thirty-five to fifty-one seats. The twin reforms of public financing and city council expansion were intended to give greater representation to historically underrepresented communities.<sup>21</sup>

A special off-year election was held in 1991 to elect representatives for the fifty-one newly drawn council districts. Twelve new people of color were elected to the city council, ten of whom had participated in the public financing program.<sup>22</sup> The availability of public financing dovetailed with term limits in 2001 to produce an unprecedented number of candidates running for public office in New York City. More than 350 candidates joined the public financing program in 2001, nearly 100 more candidates than the 1991 record of 256.<sup>23</sup>

Following the 2001 elections, approximately half of the city’s fifty-one council seats, three of five borough president seats, and one citywide office are

held by people of color. Virginia Fields, the African American Manhattan borough president, testified at a 2001 New York City Campaign Finance Board public hearing, saying “the underlying purpose . . . of the Campaign Finance Program is to make our elective process more democratic and encourage people of limited resources to run for office. . . . Candidates from communities of color should not be constrained from seeking higher office because of not having access to the financial resources required.”<sup>24</sup>

Given sufficient time and resources, local government public financing programs throughout the United States hold the potential to increase the political representation of traditionally underrepresented groups.

**Low Program Costs.** The achievements of local government public financing programs have come at a surprisingly low cost to taxpayers. The public financing program of the City of Los Angeles cost city taxpayers approximately \$1.29 per registered voter per year, or \$0.54 per resident per year, between 1992 and 2001—less than 0.05 percent of the total city budget. Los Angeles spends four times this amount maintaining the city zoo.<sup>25</sup>

The New York City Campaign Finance Board has distributed a total of \$63.8 million to candidates since the program was adopted. This amounts to an annual average cost of \$1.13 per registered voter, or \$0.57 per city resident—0.001 percent of the total city budget.<sup>26</sup>

Public financing programs in smaller jurisdictions with a lower level of candidate participation cost taxpayers even less than the programs in Los Angeles and New York City, the nation’s two most populous cities. Public financing program costs are a tiny fraction of local budgets.

## Challenges Ahead

Campaign finance practices are constantly evolving. As voters, elected officials, and administrative agencies adopt policies to limit the undue influence of money in politics, candidates, political committees, and wealthy special interests find new ways to exert influence within the political process. Local government public financing programs have evolved and must continue to evolve in order to address new problems as they arise.

**Wealthy, Self-Financed Candidates.** The U.S. Supreme Court has interpreted the Constitution’s First Amendment to protect, as a legal right, a wealthy individual’s ability to spend an unlimited amount of personal wealth through his or her political campaign.<sup>27</sup> Self-financed, high-spending candidates frustrate the goals of public financing programs. Candidates with limited access to wealthy donors are often overwhelmed by high-spending wealthy opponents.

Public financing’s proponents and critics alike have cited self-financed, high-spending candidates as cause for concern. Supporters of public financing programs argue that more resources must be made available to candidates facing wealthy opponents. Critics of public financing programs argue that

wealthy candidates enjoy an insurmountable advantage and that public money distributed to the opponent of a wealthy candidate is wasted.

In New York City's 2001 mayoral election, for example, publicly financed Democrat Mark Green faced self-financed billionaire Republican Michael Bloomberg in the general election. Green received more than \$4.5 million in public funds and spent a total of \$16.2 million. Bloomberg spent \$73 million from his personal fortune and won the election, outspending Green by more than four to one.

Under New York City's high-spending-opponent trigger provision, which increased Green's matching funds rate to five to one (from a \$4-to-\$1 rate), Green received less than \$800,000 in additional funding—a sum many considered paltry given the magnitude of Bloomberg's spending. Consequently, there are calls for an increase in the amount of public funds available to publicly financed candidates who face a wealthy opponent.

Wealthy candidates are becoming increasingly active throughout the United States. Local government public financing programs must grapple with whether and how much additional public funding candidates who face a high-spending opponent should receive. Without adequate provisions to address such an opponent, candidates may forgo participating in a jurisdiction's public financing program and instead fundraise as much as possible from every available source.

**Independent Expenditures.** Independent expenditures are likewise playing an increasingly significant role in elections throughout the United States. To date, the U.S. Supreme Court has protected independent expenditures as a form of free speech.<sup>28</sup> Yet such large independent expenditures do in fact pose a risk of corruption, or the appearance of corruption—a risk recognized by the Court when justifying limits on campaign contributions.

Independent expenditures undermine the spirit of contribution limits by enabling wealthy special interests to exert a level of influence exceeding what is possible through campaign contributions. Prohibited from giving a \$50,000 contribution to a candidate by a local campaign finance law, a special interest group may instead choose to spend \$50,000 on a campaign mailer independently of the candidate's campaign.

Independent expenditures are of particular concern in jurisdictions with public financing programs, because those candidates who agree to limit their spending are faced by independent expenditure committees without limits. Furthermore, independent expenditures are typically made only in competitive races, where the impact is surely felt. Independent expenditures totaling millions of dollars have been made in recent Los Angeles and San Francisco elections.<sup>29</sup> Evidence suggests that significant independent spending activity occurred in New York City's 2001 elections as well.<sup>30</sup>

Currently, no local jurisdiction offers additional public financing to candidates facing opponents who benefit from large independent expenditures.

The Los Angeles City Ethics Commission, however, recently recommended a groundbreaking proposal to the city council.

Under the Ethics Commission's recommendation, publicly financed candidates facing an opponent who benefits from large independent expenditures would receive public financing at the increased matching rate of three dollars to one, instead of the standard rate of one to one. Other local jurisdictions throughout the country will likely consider similar proposals to address the deleterious effects of independent expenditures in the coming years.

## Conclusion

Local governments throughout the United States have experimented with public campaign financing for more than two decades. Public financing has increased electoral competitiveness by enabling qualified candidates with limited access to wealthy donors to win public office. Public financing has reduced candidate dependence on special interest donors and placed a premium on small contributions from individuals. Public financing has also leveled campaign spending by serving as an effective incentive for candidates to abide by spending limits and other campaign finance restrictions. This has been accomplished at a surprisingly low cost to taxpayers. Local government public financing serves as a model for campaign finance reform beyond BCRA.

## Notes

1. In addition to twelve local government jurisdictions, fourteen states and the federal government provide some form of public financing to candidates. The Clean Money programs of Maine, Massachusetts, Vermont, and Arizona give participating candidates full public financing, while the other programs offer participating candidates partial public funds to supplement private contributions raised by candidates.

2. The U.S. Supreme Court has interpreted the First Amendment of the federal Constitution to prohibit mandatory spending limits; see *Buckley v. Valeo*, 424 U.S.1, 49 (1976, per curiam). The *Buckley* Court did rule, however, that Congress may "condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" (*Buckley v. Valeo*, at 57 n. 65).

3. Cincinnati voters approved a city charter amendment creating a public financing program in November 2001 (Issue 6) by a margin of less than 1 percent of the total votes cast. Cincinnati voters then repealed the program in November 2002 (Issue 8) by a 10 percent margin.

4. *Buckley v. Valeo*, 424 U.S., at 54–58.

5. *Buckley v. Valeo*, at 57 n. 65.

6. The Supreme Court gave no guidance in *Buckley* regarding how to determine whether a particular public financing program is voluntary or coercive. Lower federal courts have ruled that it is lawful to offer incentives to encourage acceptance of spending limits, even if such incentives create pressure for candidates to abide by the limits.

In *Gable v. Patton*, the federal Sixth Circuit Court of Appeals considered a First Amendment challenge to a provision of Kentucky's public financing program, which removed spending limits for program participants if their nonparticipating opponents exceeded the applicable spending limit. In addition to removing spending limits, the provision allowed the participating candidate to continue receiving unlimited public matching funds at the rate of two dollars in public funds



for every dollar in private contributions raised by the publicly financed candidate. The plaintiff argued that the effect of the provision was to unconstitutionally coerce him into abiding by the spending limit, so as to avoid triggering unlimited matching funds for his opponent. The court recognized that candidates are under financial pressure to participate but also admitted that “voluntary campaign finance schemes must rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice.” The court upheld the statute, ruling that the incentive chosen by the Kentucky legislature simply did not reach the point of unconstitutional coercion. See *Gable v. Patton*, 142 F.3d 940, 947–49 (6th Cir. 1998), cert. denied, 525 U.S. 1177 (1999).

In a more recent case, *Daggett v. Commission on Governmental Ethics and Election Practices*, the federal First Circuit Court of Appeals upheld the Maine Clean Elections Act against multiple First Amendment challenges. Unlike the municipal public matching funds programs analyzed in this paper and the matching funds program at issue in *Gable*, the Maine Clean Elections Act uses full public financing for candidates who are willing to abide by spending limits and who meet the other program requirements. In *Daggett*, the plaintiffs made an overarching claim that the public funding scheme embodied in the Maine Clean Elections Act is unconstitutionally coercive, while also making multiple claims attacking specific provisions of the program. The court reasoned that “as long as the candidate remains free to engage in unlimited private funding and spending instead of limited public funding, the law does not violate the First Amendment rights of the candidate or supporters.” The court upheld the act, holding its various provisions to be “hardly overwhelming.” See *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 466–72 (1st Cir. 2000); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1550 (8th Cir. 1996), cert. denied, 520 U.S. 1229 (1997); and *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993).

7. According to traditional legal theory, local government exists only as a result of state action. During the first century of this nation’s existence, local governments were empowered to do only that which states authorized them to do.

The relationship between state and local governments began changing in the second half of the nineteenth century. Missouri was the first state to grant significant legislative authority to a local government in 1875, when it adopted a constitutional amendment granting the city of St. Louis the power of home rule. California followed suit, granting San Francisco home rule authority in 1879 and then extending home rule to cities throughout the state eight years later. The home rule movement spread throughout the country during the Progressive Era, giving local governments broad lawmaking authority. For a comprehensive review of both the theory and the application of local government home rule law, see Briffault, R., “Our Localism: Part I—The Structure of Local Government Law,” *Columbia Law Review*, 1990, 90 (1), 72–85.

8. *County of Sacramento v. Fair Political Practices Commission*, 222 Cal. App. 3d 687 (1990).

9. See *Johnson v. Bradley*, 4 Cal. 4th 389, 392 (1992).

10. *Johnson v. Bradley*, at 401.

11. *Johnson v. Bradley*, at 407.

12. *Johnson v. Bradley*, at 410.

13. *Johnson v. Bradley*, at 405–406. See also *County of Sacramento v. Fair Political Practices Commission*.

14. “Public funds, whether derived through taxes, fees, penalties, or any other sources, shall not be used to finance political campaigns for state or local office.” *Washington Revised Code* § 42.17.128 (2002).

15. See *Buckley v. Valeo*, at 49.

16. A thorough treatment of this subject is beyond the scope of this article. A complete argument is set out, however, in the forthcoming report by the Center for Governmental Studies titled “A Statute of Liberty: How New York City’s Campaign Finance Law Is Changing the Face of Local Elections,” available on the center’s Website ([www.cgs.org](http://www.cgs.org)).

Local laws found to be “inconsistent” with state law are preempted by state law. New York courts recognize two distinct types of inconsistency as grounds for preemption of local law by

state law: “conflict” preemption and “field” preemption. The approach taken by New York courts to determine the presence of conflict preemption has changed over time. Older decisions, best exemplified by the state high court’s upholding of the appellate court’s decision in *Wholesale Laundry Board of Trade, Inc. v. City of New York*, 234 N.Y.S.2d 862, 864–65 (1st Dept. 1962), affirmed, 239 N.Y.S.2d 128 (1963), tended to find preemption and restrict the ability of local governments to legislate in substantive areas where the state had adopted laws. More recent decisions, including *People v. Cook*, 34 N.Y.S.2d 100 (1974); *Town of Clifton Park v. C.P. Enterprises*, 356 N.Y.S.2d 122, 124 (1974); and *Mayor of the City of New York v. Council of the City of New York*, 696 N.Y.S.2d 761, 765 (1999), have tended to grant greater home rule authority to local governments.

Field preemption seems a possible (but unlikely) barrier to stronger local government campaign finance laws in New York. Field preemption may be either express or implied. Both varieties of field preemption, as well as related public policy considerations, are discussed in full detail in the forthcoming report from CGS mentioned earlier in this note.

17. For more specific detail regarding the public financing laws of all twelve jurisdictions, including contribution limits, spending limits, and legal citations, visit the Center for Governmental Studies Website ([www.cgs.org](http://www.cgs.org)) to view the chart, “Public Financing Laws in Local Jurisdictions,” which is updated regularly to reflect changes in the laws.

18. An example of an independent expenditure might be a glossy 5 × 8.5-inch mail piece sent by a labor union urging voters to elect a particular candidate or group of candidates endorsed by the union. In some jurisdictions, expenditures by an organization to communicate with its members fall into a “member communication expenditure” exception and are not subject to the same fundraising limitations and disclosure requirements as independent expenditures. See California Government Code § 85312, which removes member communication expenditures from California’s definition of independent expenditure. See also Center for Governmental Studies, “On the Brink of Clean: Launching San Francisco’s New Campaign Finance Reforms,” no. 16 (2002; at [www.cgs.org](http://www.cgs.org)).

19. Interview with LeeAnn Pelham, executive director of the Los Angeles City Ethics Commission, Sept. 4, 2001.

20. Interview with Eduardo Reyes, Los Angeles city council member from the first council district, June 14, 2001.

21. New York City Campaign Finance Board, “Windows of Opportunity,” no. 23 (1992).

22. New York City Campaign Finance Board, “Windows of Opportunity,” no. 31 (1992).

23. See Campaign Finance Board press release “Record Number of Candidates Join the Campaign Finance Program,” June 20, 2001.

24. New York City Campaign Finance Board, “Public Hearings on Performance of Campaign Finance Program,” Dec. 11, 2001 (statement of Virginia Fields, Manhattan borough president).

25. See Center for Governmental Studies, “Eleven Years of Reform: Campaign Financing in the City of Los Angeles,” nos. 20–21 (2001; at [www.cgs.org](http://www.cgs.org)).

26. See “A Statute of Liberty” (forthcoming).

27. See *Buckley v. Valeo*, at 52–53.

28. *Buckley v. Valeo*, at 45.

29. “Eleven Years of Reform” (2001). See also Center for Governmental Studies, “On the Brink of Clean: Launching San Francisco’s New Campaign Finance Reforms,” no. 16 (2002; at [www.cgs.org](http://www.cgs.org)).

30. See “A Statute of Liberty” (forthcoming; at [www.cgs.org](http://www.cgs.org)).

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