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Matching funds are "fundamental matter of fairness"

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By John Brautigan
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A number of legal challenges filed during this campaign season have focused renewed attention on the interplay between First Amendment expression and the public's interest in free and fair election campaigns.

In Maine, not only has the revival of a 1996 lawsuit challenging the Maine Clean Election Act spurred a bevy of attorneys into action, the threat of a sudden change in the rules has alarmed candidates now in the middle of their legislative and gubernatorial campaigns.

The spate of legal challenges can be traced to the United States Supreme Court, which has shown it is increasingly eager to remake the constitutional landscape in an area so critical to our democratic process.

At the center of that landscape is the First Amendment and the fundamental principle that a robust exchange of ideas is essential for our democracy.

If the First Amendment could be reduced to a slogan, it would be "more speech is better." Any middle school civics student could describe the concept of the "marketplace of ideas" — where people speak out publicly, others respond and we all benefit from the give-and-take of political debate.

But new legal challenges to public funding systems in Arizona and Maine threaten that fundamental idea. In both states, opponents are challenging "matching funds" provisions, which ensure that publicly funded candidates who are outspent have an opportunity to respond with additional campaign communications of their own.

Most people recognize that such a system of matching funds is a fundamental matter of fairness, keeping a level playing field so the marketplace of ideas can function as intended. The matching funds are carefully calibrated never to exceed the amount of money being spent against the participating candidate.

But a small handful of die-hard opponents of campaign finance reform have a very different view. They believe that privately funded candidates will refrain from spending their campaign funds if they know that an opponent would receive matching funds. Their legal briefs argue the First Amendment should protect them from ever having to make that strategic choice in their campaigns.

This is a badly warped view of the First Amendment. The First Amendment prohibits censorship by the government. It does not say anything about self-censorship by a candidate for strategic campaign purposes.

More fundamental to the First Amendment, it would also reduce the amount of speech. In our system political speech is always valuable. The claim that political speech is a private harm rather than a public good simply cannot be reconciled with the First Amendment.

Imagine how that concept would apply in a contest between a wealthy candidate and one of modest means. It is difficult to imagine any judge ruling that a person of modest means is harmed by the campaign speech of the wealthy opponent.

If (as the Supreme Court recently ruled) a campaign ad purchased by a corporation is the epitome of free speech, how can the same ad purchased by a candidate in a voluntary public funding program be an intolerable burden on free speech? If more speech is better, then surely matching funds enhance constitutional values and do not infringe anyone's rights.

It is also important to remember how campaign finance reform efforts have developed over time. People concerned about the corrupting influence of money in politics did not conjure up public funding programs and their matching funds system in a vacuum.

They were following the evolution of the law under the Supreme Court. Early campaign finance reforms focused on simply capping campaign spending as the best way to reduce undue influence by special interests.

Opponents argued that a less restrictive approach based on effective public disclosure of contributor names and a public funding option could accomplish the same objectives without restricting political spending.

For many years, this combination of disclosure for privately funded candidates and a viable public funding option was the accepted approach to reform. The Maine Clean Election Act is based on this approach, which courts and legal scholars said was constitutionally preferred.

It provides resources to qualified candidates, reasonable limits on the size of private contributions and complete transparency. The package as a whole reduces the opportunity for corruption and undue influence, ensures that political debate occurs on a level playing field and provides important information to voters.

Now, even this compromise approach is in jeopardy. Indeed, there is no campaign finance system — contribution limits, matching funds, public funding — that is not under attack by a small group of opponents determined to roll back the clock to the sordid days of Watergate. In these days of increasing public skepticism of elected officials, much is at stake.

Will the Supreme Court again move the goal line? The Arizona and Maine cases will provide the answer.

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