

# VILLAGE SOUP

## Cowardly Lion meets the First Amendment

By Brenda Wright | May 03, 2011

On March 28, the United States Supreme Court heard arguments in an Arizona lawsuit that could determine the future of Maine's Clean Elections program, and with it the continued integrity of elections in Maine.

McComish v. Bennett calls to mind the Cowardly Lion in "The Wizard of Oz" – the fearsome, unrestrained animal who is reduced to a puddle of tears when the diminutive Dorothy dares to stand up to him. But more on that in a moment.

Arizona's Clean Elections law now before the Court provides public funding for candidates who agree to spending caps along with stringent limits on fundraising from private donors. Arizona modeled its law on Maine's, passed two years earlier.

During the past decade, Maine's Clean Elections program has been a model for many states, liberating legislators from dependence on special interest funding, increasing voter participation in elections, and spurring real electoral competition — an indispensable foundation for government accountability.

Yet opponents of these programs have asked the court to invalidate a key provision that ensures that Clean Elections candidates have sufficient funding to respond to campaign messages against them – whether from another candidate or from an independent source. These "trigger provisions" permit a publicly financed candidate to receive matching funds when the candidate's opposition spends more than the initial public funding grant.

A system that promotes more debate and discussion of the issues from all sources is a strange target for a First Amendment challenge. Indeed, the McComish case seeks to invent what can only be called the Cowardly Lion First Amendment.

When the Cowardly Lion first appears in "The Wizard of Oz," he tries to attack Toto, a tenth of his size; but then is reduced to tears when little Dorothy stands up to him and slaps his nose. Similarly, the privately financed challengers to Clean Elections are the "Lions" of campaign finance: They spend as much as they want, without any limit, yet claim that the publicly funded "Totos" inflict debilitating harm through their "hostile" campaign messages.

All this despite the fact that the Totos – the publicly financed opponents – are strictly limited in what they can spend on their campaigns.

The court is being asked to declare that the First Amendment exists to ensure the right of privately financed candidates to speak without being responded to by their publicly financed opponents.

Let's put this "fear of speech" in context.

In recent weeks we've been vividly reminded that persons seeking public office must be prepared to face harsh criticism, threats and worse. Yet the Arizona case argues that these same aspiring public servants are so fragile that they will be afraid to spend money on their campaigns merely because it could trigger additional funds to their opponents to use on responsive campaign ads – and that the First Amendment must protect them from such a terrible fear.

Embracing this argument requires an extraordinary distortion of the First Amendment, a core purpose of which is to encourage a robust debate of the issues in electoral campaigns, with differing views competing in the marketplace of ideas. Clean Election programs serve this goal, while also promoting citizens' confidence in the integrity of government and encouraging electoral competition.

These programs deserve a First Amendment medal, not a First Amendment challenge.

The "fear of speech" theory being argued is not supported by the facts, either. In Maine, where a similar First Amendment challenge was filed last August, the plaintiff claimed to be "chilled" by the trigger provisions allowing matching funds for his opponent. He argued that he would stop spending his own campaign funds for fear of triggering additional funds to his opponent, unless the courts enjoined the matching funds. The courts rejected this argument. Miraculously, he recovered his courage and continued raising money – ultimately spending more than any other House candidate.

In Frank Baum's masterpiece, the Cowardly Lion also found his courage without magical intervention. The challenges to Clean Elections in Arizona and Maine should have a similar ending. Candidates who face no restrictions whatsoever on their spending, yet claim to be "chilled" by the possibility that a publicly financed opponent might be able to respond to their spending, do not need the intervention of the court. They simply need – and no doubt have – the fortitude to realize that responsive speech is not to be feared.

Here's hoping the court will realize there is no need to use any magic First Amendment powers to bestow courage in the electoral arena.

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