LAST RITES FOR CLEAN ELECTIONS

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In Arizona Citizens Clean Elections Commission v. Brain, *the Arizona Supreme Court ruled that voters who passed a 1998 voter initiative did not intend to cap contribution limits at the 1998 levels. The Court held that the Arizona State Legislature could adjust the campaign contribution limits through a simple majority vote. This Note will cover the history behind Arizona campaign finance law, explore the ramifications of the* Brain *decision, and predict the slow demise of the Arizona Clean Elections scheme.*

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INTRODUCTION

In war, the side with the most soldiers usually wins.[1] In politics, the side that spends the most money usually wins.[2] Despite new forms of communication, increased voter outreach, and a broader selection of candidates, the old adage rings

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1. *See generally* Robert E. Lee's Farewell Address (Apr. 9, 1865) (stating that the Army of Northern Virginia yields to "overwhelming forces"), *available at* http://www.civilwar.si.edu/appomattox_lee_farewell.html.

2. *See* Daniel Smith, *Campaign Financing of Ballot Initiatives in the American States*, *in* DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 76 (Larry J. Sabato et al. eds., 2001).

true—candidates who spend more, win more.[3] While some politicians deride the influence of money in elections, claiming that special interests groups can simply purchase favorable legislation,[4] many states allow voters to bypass special interests and enact their own legislation directly.[5]

Although state voters can enact legislation and constitutional amendments, the Arizona Supreme Court has recently interpreted campaign finance reform legislation narrowly with an eye toward preserving political free speech, even where voters have enacted such legislation directly.[6] Arizona is no stranger to judicial repudiation of voter-initiated campaign finance reforms.[7] After the Arizona Supreme Court's decision in *Arizona Citizens Clean Elections Commission v. Brain*,[8] voters face an uphill battle to curb the influence of special interest money in state elections.

This Note proceeds in three Parts. In Part I, we establish the historical background that led to the enactment of the Voter Protection Act and the Arizona Citizens Clean Elections Act in 1998. In Part II, we explore the Court's rationale in *Brain*. Part III contends that the *Brain* decision validated a fatal loophole in Arizona campaign finance law. In addition, we predict that the Court's decision in *Brain*, coupled with the U.S. Supreme Court's recent campaign finance jurisprudence, is the last rites of publicly financed campaigns in Arizona.

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3. *See generally* Walter Hickey, *House Candidates Who Spent More Money Won Their Elections 95% of The Time*, BUS. INSIDER (Nov. 9, 2012, 8:41 AM), http://www.businessinsider.com/congress-election-money-2012-11; Sheila Krumholz, *Will Money Buy the White House?*, CNN NEWS (Aug. 23, 2012, 4:48 PM), http://www.cnn.com/2012/08/23/opinion/krumholz-money-elections/ (finding that Congressional House candidates who outspent their opponents won 97.8% of the time in 2004). *But see* Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, *in* J. POL. ECON. 777 (1994), *available at* http://pricetheory.uchicago.edu/levitt/Papers/LevittUsingRepeatChallengers1994.pdf (finding that doubling spending only increased votes by 1% and cutting spending in half reduced votes by .5%).

4. Barack Obama, President of the United States of America, 2010 State of the Union Address (Jan. 27, 2010), *transcript available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address ("With all due deference to separation of powers, last week the Supreme Court [in Citizens United] reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections . . . . I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities.").

5. *See* Howard R. Ernst, *The Historical Role of Narrow-Material Interests, in The American States*, *in* DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 3 fig. 1.1–1.2 (Larry J. Sabato et al. eds., 2001).

6. *See, e.g.*, Ariz. Citizens Clean Elections Comm'n v. Brain, 322 P.3d 139, 140 (Ariz. 2014).

7. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806, 2829 (2011).

8. 322 P.3d at 139.

I. HISTORICAL BACKGROUND

The Arizona State Constitution reserves the right of the People to propose, amend, and institute laws independent of the legislature.[9] Arizonans utilized the voter initiative process in an attempt to curb the influence of money in statewide elections after several embarrassing political scandals.[10]

In 1988, Arizona Governor Evan Meachem became the first governor in roughly 60 years to be impeached from office.[11] The Arizona State Senate preemptively removed Governor Meachem from office after a special investigator discovered that he had concealed a $350,000 campaign loan from a real estate developer, and had misused $80,000 of public monies by loaning the funds to his car dealership.[12] Based on the findings, a grand jury indicted the Governor on two counts of fraud and one count of filing a false report regarding his campaign loan.[13]

Just one year after Governor Meachem was impeached, Arizona Senators John McCain and Evan DeConcini were involved in the "Keating Five" scandal.[14] Senator McCain, Senator DeConcini, and three others received $1.3 million in campaign contributions from Charles H. Keating Jr., owner of a savings and loan bank.[15] After the collapse of the savings and loan market, taxpayers bailed out failed banks, including Keating's, at a cost of billions of dollars.[16] After the market's collapse, the "Keating Five" Senators met with the Federal Home Loan Bank Board.[17] In the meeting, the Senators urged the Board to overlook federal banking violations committed by Keating and his bank.[18] Their advocacy spurred a Senate ethics investigation resulting in Senator DeConcini choosing not to seek reelection and Senator McCain calling the situation the "worst mistake of [his] life."[19] Although Senator McCain was only issued a warning, he later observed that "the American people and the people of Arizona feel that the system has been corrupted."[20]

Two years later, in 1991, Arizonans were struck with another political scandal. An undercover agent and ex-convict, Joseph C. Stedino, posed as a casino developer and offered bribes to Arizona state legislators in exchange for legalizing

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9. ARIZ. CONST. art. IV, part I, § 1.

10. *See infra* notes 12–36 and accompanying text.

11. GEORGE CHILDS KOHN, THE NEW ENCYCLOPEDIA OF AMERICAN SCANDAL 265 (rev. ed. 2000).

12. *Id.*

13. *Id.*

14. Alyssa Fetini, *A Brief History of The Keating Five*, TIME (Oct. 8, 2008), http://content.time.com/time/business/article/0,8599,1848150,00.html.

15. *Id.*

16. *Id.* (reporting that Keating's bank collapsed at a cost of $3 billion to taxpayers).

17. *Id.*

18. *Id.*

19. *Id.*; EJ Montini, *How Sen. John McCain Picked Charles Keating's Pocket*, ARIZ. REPUBLIC (Apr. 2, 2014, 4:48 PM), *available at* http://www.azcentral.com/story/ejmontini/2014/04/02/mccain-keating-lincoln-keating-5-politics-arizona/7215855/.

20. MATT WELCH, MCCAIN: THE MYTH OF A MAVERICK 91 (1st ed. 2007).

gambling in the state.[21] Legislators accepted hundreds of thousands of dollars in bribes, and even offered Stedino tactics on how to blackmail other legislators.[22] The meetings between Stedino and the state legislators were filmed and broadcast to the public, causing voter outrage.[23] The so-called "AzScam" scandal resulted in the indictment of seven state legislators.[24]

This tumultuous four-year period led Arizona citizens to elect Fife Symington as governor in 1991.[25] Governor Symington made it his top priority to "turn[] the image of Arizona around."[26] But, Symington failed in his goal—he resigned in 1997 after being convicted of seven felony counts of filing false financial statements.[27]

As demonstrated, Arizona is no stranger to corruption in politics, and combating corruption remains salient in the current political landscape.[28] In the context of this scandal-riddled legacy, voters exercised their right under the Arizona State Constitution to enact three key provisions of law.

In 1998, voters passed the Arizona Citizens Clean Elections Act. Hinting at the political scandals of the 1980s and 1990s, the initiative observed that the then-current election financing system "[a]llow[ed] Arizona elected officials to accept large campaign contributions from private interests."[29] Those contributions "undermin[ed] public confidence in the integrity of public officials" and "[c]ost[] average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors."[30] Therefore, the Act declared that Arizona voters had:

> [The] intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of

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21. Deborah Laake, *AzScam's Bombshell*, PHX. NEW TIMES (Mar. 17, 1993), http://www.phoenixnewtimes.com/1993-03-17/news/azscam-s-bombshell/.

22. *Id.*

23. DAVID L. ALTHEIDE, TERRORISM AND THE POLITICS OF FEAR 67 (2006).

24. Associated Press, 7 Arizona Lawmakers Charged With Corruption, N.Y. Times, (Feb. 7, 1991), *available at* hhtp://www.nytimes.com/1991/02/07/us/7-arizona-lawmakers-charged-with-corruption.html.

25. *State of Arizona Official Canvas – General Election – November 6, 1990*, ARIZ. SEC. OF STATE 2 (Nov. 26, 1990), *available at* http://www.azsos.gov/election/1990/General/Canvass1990GE.pdf.

26. Faye Juliano, *New Governor Rides In to Set Arizona Aright*, CHRISTIAN SCI. MONITOR, Mar. 8, 1991, at 4.

27. *Arizona Governor J. Fife Symington III*, NATIONAL GOVERNOR'S ASSOCIATION, http://www.nga.org/cms/home/governors/past-governors-bios/page_arizona/col2-content/main-content-list/title_symington_j-fife.html (last visited Oct. 2, 2014). President Bill Clinton pardoned Governor Symington in 2001. *See Clinton Defends Pardons, Saying Individuals 'Paid in Full' for Crimes*, CNN NEWS (Jan. 21, 2001), http://edition.cnn.com/2001/ALLPOLITICS/stories/01/21/clinton.pardons/index.html.

28. For instance, 2011 saw yet another scandal. Fiesta Bowl CEO John Junker was convicted of making illegal campaign contributions, such as free bowl tickets to lawmakers. *See* Associated Press, *Ex-CEO of Fiesta Bowl sentenced*, ESPN (Mar. 20, 2014, 5:49 PM), http://espn.go.com/college-football/story/_/id/10639098/john-junker-ex-ceo-fiesta-bowl-gets-2nd-sentence-week.

29. ARIZ. REV. STAT. § 16-940(B)(1) (1998).

30. ARIZ. REV. STAT. § 16-940(B)(1), (5), (6).

> special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.[31]

The Clean Elections Act created a public-financed candidate system to fund candidates who chose to forego large private contributions in favor of public funds.[32] Candidates decide very early in the campaign process whether to run as Clean Elections "participating candidates," eschewing private contributions and limiting their own personal spending on their campaigns.[33] Once a candidate elects to forego private contributions, they must first demonstrate their viability as a candidate by raising a set amount of $5 private contributions; the candidate then receives "two lump sums from the Citizens Clean Elections Commission" ("CCEC").[34] The CCEC pays for candidates through the $5 donations the candidate raised, a voluntary $5 donation to the CCEC on Arizona state income tax, and a 10% surcharge on civil penalties and criminal fines.[35]

There are two key provisions of the Clean Elections Act relevant to this discussion. First, the CCEC provided matching funds, or "rescue funds," for participating candidates who were outspent by their nonparticipating opponents.[36] The CCEC provided a participating candidate one dollar for every dollar the nonparticipating opponent raised or spent, and one dollar for every dollar spent by independent groups supporting the nonparticipating candidate.[37] But, the matching funds provision was later deemed an unconstitutional burden on free speech by the U.S. Supreme Court.[38]

Second, and more notably, the Clean Elections Act limited the amount a nonparticipating candidate could fundraise. It achieved this feat by specifically referencing a previous voter initiative, codified at Arizona Revised Statutes § 16-905, which restricted contribution limits to certain amounts. The Clean Elections Act mandated that nonparticipating candidates could fundraise only 80% of the contribution limits set forth in § 16-905.[39] In other words, a nonparticipating candidate was subject to a 20% gap between the amount she was allowed to fundraise under § 16-905 relative to a participating candidate. For example, at the inception of the Clean Elections Act, an individual donor could contribute up to $750 to a participating candidate running for statewide office.[40] Thus, a nonparticipating statewide candidate could only accept 80% of $750, or $600, from

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31. *Id.* § 16-940(A).
32. ARIZ. REV. STAT. § 16-951(A) (1998).
33. Andrew Spencer, *Cleaning Elections*, 54 ARIZ. L. REV. 277, 288 (2011).
34. *Id*.
35. *About*, CITIZENS CLEAN ELECTIONS COMM'N, http://www.azcleanelections.gov/about-us (last visited Oct. 29, 2014).
36. ARIZ. REV. STAT. § 16-952(A), (B), (C)(4)–(5) (amended 2012).
37. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S.Ct. 2806, 2808–09 (2011).
38. *Id.* at 2829.
39. ARIZ. REV. STAT. § 16-941(B) (1998).
40. *See* ARIZ. REV. STAT. § 16-905 (1997).

an individual donor. Because the Clean Elections Act specifically and textually uses § 16-905 to limit campaign contributions, any change in § 16-905 directly impacts the effect, and efficacy, of the Clean Elections Act and its stated goal of reducing the influence of special interest money.

Changing the Clean Elections Act is very difficult after voters passed the Voter Protection Act ("VPA") in 1998.[41] The VPA was a constitutional amendment in Arizona designed to prevent the state legislature from amending voter initiatives and interfering with their stated purposes.[42] Under the VPA, the legislature cannot amend any voter initiative passed during or after the 1998 election unless three-quarters of both houses vote to do so.[43] Therefore, the VPA in effect makes the Clean Elections Act virtually unamendable by the legislature.

Before the VPA, the legislature could and did amend voter initiatives; a voter initiative was unamendable only if more than half of all registered voters enacted the law.[44] Because virtually all voter initiatives were passed by smaller numbers of voters, the state legislature effectively had the ability to amend nearly all voter initiatives. This is the case with § 16-905, the law that limits campaign contributions, which passed in 1986.[45] Originally, § 16-905 limited contributions by the type of donor and the office the candidate was running for, and allowed for biennial adjustments to account for inflation.[46] But, because less than half of all registered voters enacted § 16-905, the legislature increased § 16-905's contribution limits through simple majority vote three times in the 12 years prior to 1998.[47]

In 2013, the legislature once again amended § 16-905 with a simple majority vote, more than doubling the amount of campaign contributions a candidate may receive.[48] This raised the very serious issue of whether a pre-VPA voter initiative could be amended by a simple legislative majority, even when the amendment would change the substantive nature of a post-VPA voter initiative.[49] These amendments to campaign contribution limits are the subject of *Arizona Citizens Clean Elections Commission v. Brain*,[50] which the Arizona Supreme Court decided in 2014.

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41. *State of Arizona Official Canvas – General Election – November 3, 1998*, compiled and issued by ARIZ. SEC. OF STATE 14–15 (Nov. 23, 1998), *available at* https://docs.google.com/a/email.arizona.edu/viewer?url=http://www.azsos.gov/election/1998/General/Canvass1998GE.pdf.

42. *See generally* Richard Mahoney, *Yes on Proposition 105*, PROPOSITION 105 (1998) (enacted), *available at* https://www.azsos.gov/election/1998/info/pubpamphlet/Prop105.html.

43. ARIZ. CONST. art. IV, part I, § 1(6)(C).

44. Cave Creek Unified Sch. Dist. v. Ducey, 308 P.3d 1152, 1155 (Ariz. 2013).

45. ARIZ. REV. STAT. § 16-905 (1986).

46. ARIZ. REV. STAT. § 16-905(H) (2013).

47. Ariz. Citizens Clean Elections Comm'n v. Brain, 322 P.3d 139, 143 (Ariz. 2014).

48. *See generally* H.B. 2593, 51st Leg., 1st Sess. (Ariz. 2013).

49. *See* ARIZ. REV. STAT. § 16-905 (2013).

50. 322 P.3d 139 (Ariz. 2014).

II. *ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION V. BRAIN*

The *Brain* case began when the CCEC sought a preliminary injunction to prevent the legislature's increase in contribution limits under § 16-905.[51] The CCEC argued that the legislature's amendment to § 16-905 was unconstitutional because it directly increases the campaign contributions limits prescribed by the Clean Elections Act.[52] This direct impact exists because the Clean Elections Act bases its reduced contribution limits for nonparticipating candidates on § 16-905.[53] The CCEC contended that a legislative amendment to § 16-905 required a supermajority to be in compliance with the VPA.[54] But, because § 16-905 is a pre-VPA voter-approved initiative, it could be amended by the legislature with a simple majority.[55]

This reliance on contribution limits raised a new question—how should the Clean Elections Act be interpreted? Specifically, the Arizona Supreme Court sought to determine whether the Clean Elections Act "fixes contribution limits [contained in § 16-905] at eighty percent of the amounts that existed in 1998 or instead provides a formula for calculating limits."[56]

In determining whether the Clean Elections Act was intended to operate as a strict limitation or as a formula, the Court first considered the Act's language, which states in relevant part:

> Notwithstanding any law to the contrary, a nonparticipating candidate shall not accept contributions in excess of an amount that is twenty per cent less than the limits specified in § 16-905, subsections A through E, as adjusted by the secretary of state pursuant to § 16-905, subsection H . . . .[57]

The Court's analysis of the statute entertained two reasonable interpretations: the Clean Elections Act either was intended to be a formula that would adjust whenever § 16-905 increased, or was intended to be a fixed amount by referring to § 16-905 as it was in 1998 when the law was enacted.[58] Because the statutory language was ambiguous,[59] the Court considered "the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose."[60]

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51. *Id.* at 141.
52. *Id.*
53. *Id.*
54. *Id.*
55. Prior to the VPA, a voter initiative needed approval from a majority of *registered voters* before it would be protected from legislative amendments. Adams v. Bolin, 247 P.2d 617, 628 (Ariz. 1952) ("[T]he Legislature has constitutional power to repeal or amend an initiated measure approved by less than a majority of the qualified electors . . . . ").
56. *Brain*, 322 P.3d at 140.
57. ARIZ. REV. STAT. ANN. § 16-941(B) (2013).
58. *Brain*, 322 P.3d at 140.
59. Both the majority and dissenting opinions agreed that § 16-941(b) was ambiguous. *Id.* at 142, 146.
60. *Brain*, 322 P.3d at 142 (quoting Wyatt v. Wehmueller, 806 P.2d 870, 873 (Ariz. 1991) (citing Martin v. Martin, 752 P.2d 1038, 1043 (Ariz. 1988))).

The majority's analysis of these principles shored up the formula interpretation of the Clean Elections Act while undermining the fixed-limits interpretation.[61] First, the Court looked to the language used in the statute and found that "voters used a percentage for calculating contribution limits for nonparticipating candidates," which by definition is a formula.[62] In addition, other sections of the Clean Elections Act used specific dollar amounts instead of percentages.[63] In viewing the Act as whole, the Court reasoned that if voters intended to enforce a strict contribution limit, they would have stated as much.[64] Considered cumulatively, the Court found "no sound reason . . . to conclude that voters intended to establish fixed contribution limits."[65]

Second, the Clean Elections Act contains an inflation adjustment process for fixed amounts, but the contribution limits are not included in this adjustment process.[66] The contribution limits in § 16-905 are adjusted for inflation through a subsection of § 16-905 itself.[67] But, fixed amounts of the Clean Elections Act used an inflation adjustment process found within the Act itself.[68] Therefore, the Court reasoned that if voters intended to enact fixed contribution limits they would have based the inflation adjustment process on the Clean Elections Act, § 16-905.

Third, the Court turned to an analysis of the effects and consequences of the statute and expressed concerns with the increased gap that would be created over time. The Court specifically considered the impact of "fixing contribution limits for nonparticipating candidates at eighty percent of 1998 levels."[69] Because the legislature had amended the § 16-905 contribution limits on several occasions, including the year prior to the enactment of the Clean Elections Act, the Court reasoned that voters knew that the legislature was likely to amend the limits again in the future.[70] Combining the legislature's recent § 16-905 contribution limits increases with a fixed-limits interpretation—"a sixty-seven percent gap [would be] created between contribution limits for nonparticipating candidates and those for candidates not subject to the [Clean Elections Act]."[71] At the same time, "nothing indicate[d] that voters wanted to widen this gap."[72] The Court reasoned that applying

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61. *Id.* at 142–44,
62. *Id.* at 142.
63. *Id.* at 143.
64. *Id.*
65. *Id.*
66. *Id.*
67. ARIZ. REV. STAT. ANN. § 16-905(H) (1998)).
68. *Compare* ARIZ. REV. STAT. ANN. § 16-959 (1998) (directing the secretary of state is to modify the amounts of specified statues for inflation), *with* ARIZ. REV. STAT. ANN. § 16-941(B) (1998) (indicating that inflation adjustments would be made according to ARIZ. REV. STAT. ANN. § 16-905(H) (1998)).
69. *Brain*, 322 P.3d at 143.
70. *Id.*
71. *Id.* at 143–44 (analyzing the new limits and finding that city council candidates would have higher individual contribution limits than nonparticipating gubernatorial candidates even though statewide campaigns are more expensive).
72. *Id.* at 143.

the formula interpretation "prevents such anomalies and maintains the voter-approved twenty-percent gap."[73]

Next, the Court turned its attention to the effects and consequences of fixed contribution limits and the difficulties in tracking inflation adjustments for two different sets of limits.[74] Once the legislature amended § 16-905, the fixed interpretation would require a confusing system of tracking two different limits: the fixed 1998 limits and the current § 16-905 limits.[75] Inflation adjustments would further complicate the fixed interpretation, "[b]ecause nothing requires the Secretary to adjust 1998-established limits for nonparticipating candidates."[76] Without statutory direction, it would be uncertain if the Secretary of State would make the necessary inflation adjustments to the fixed amounts.[77] In contrast, the uncertainty about how inflation adjustments would be made is moot if the Clean Election Act relied on a formula based on the current and inflation-adjusted § 16-905 limits.[78]

Finally, the Court considered the historical background of the Clean Elections Act by looking to the publicity pamphlets related to the Clean Elections Act.[79] While the dissent also considered prior political scandals and political corruption,[80] the majority focused on the ballot and publicity pamphlets language related to whether the contribution limits would be fixed at the 1998 levels.[81] The Court found nothing in the material "alert[ing] voters that the percentage reduction in [the Clean Elections Act] would apply only to then-existing limits in § 16-905, or that any future increases in contribution limits under § 16-905 would not apply to nonparticipating candidates."[82] The materials did state that the Clean Elections Act would reduce nonparticipating candidates' contribution limits by twenty percent.[83] The Court expected a clear explanation to have been included if voters had intended a fixed-limits interpretation because of the significant impact it would have on campaign financing.[84]

Ultimately, the Court determined that "the most reasonable interpretation remains that [the Clean Elections Act] prescribe[d] a formula that allowed adjustments by the legislature."[85]

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73. *Id.* at 144.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 147 (Bales, J., dissenting) (explaining that voters' intent in enacting the Clean Elections Act was influenced by the AzScam and "misconduct and outright corruption in connection with campaign contributions").
81. *Id.* at 144 (majority opinion).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*

III. THE ARIZONA SUPREME COURT VALIDATED A LOOPHOLE IN CAMPAIGN CONTRIBUTIONS

By deciding that the Clean Elections Act was intended to be a formula that could be adjusted by the state legislature, the Arizona Supreme Court validated an existing loophole in Arizona's campaign finance laws. The loophole will spell the end of the efficacy of the Clean Elections Act.

Because an incumbent candidate's objective is to be reelected,[86] the legislature can directly curtail the efficacy of the Clean Elections Act by indirectly amending the law. By amending the contribution limits in § 16-905, the legislature, in effect, can render the Clean Elections Act toothless.

This is exactly what the legislature did, giving rise to the *Brain* case. The 2013 amendment to § 16-905 more than doubled previous contribution limits, permitting individuals to donate up to $2,500 to a candidate for a legislative office (up from $488) and $5,000 to a single political committee (up from $2,000).[87] This loophole is compounded in the Arizona Clean Elections Act as it stands today.

For example, under the current law, a candidate can solicit up to $2,500 from an individual donor without consequence. If the candidate is facing a Clean Elections opponent, he can only fundraise 80% of $2,500, or $2,000. Theoretically, the legislature can increase the contribution limits an individual may make to $10,000. While the nonparticipating candidate would only be able to raise $8,000 from an individual, the effect of big money would certainly be felt. A nonparticipating candidate will have a significant financial advantage even if he is subject to the limitations imposed by the Clean Elections Act. At a certain dollar figure, candidates will abandon Clean Elections in favor of private campaign contributions because the CCEC would be unable to financially support a competitive candidate, especially in light of the prohibition against matching funds.

By allowing the legislature to amend the contribution limitations in § 16-905, the Court held open the door for the legislature substantially to negate advantages of the Clean Elections Act, such as competitive elections, voter-centered campaigns, and diversity in candidates.[88] The loophole allows self-interested incumbent legislators to increase the limitations in § 16-905 for their own benefit. The limitations can be increased to such an extent that they are not actual limits. The *Brain* decision, in effect, sanctions this end run around the Clean Elections Act. A self-interested legislature can ring the death knell of the Clean Elections Act by amending the contribution limits through simple majority vote. After the U.S. Supreme Court struck down the matching-funds provision of the Clean Elections

86. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 17 (2d ed. 2004); DENNIS C. MUELLER, PUBLIC CHOICE III 223 (2003).

87. H.B. 5293, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (increasing contribution limits found in ARIZ. REV. STAT. ANN. § 16-905 from $488 to $2,500, $390 to $2,500, $2,000 to $5,000, and $1,010 to $2,500).

88. Mimi Marziani et al., *More than Combating Corruption: The Other Benefits of Public Financing*, BRENNAN CTR. FOR JUSTICE 1–2.

Act,[89] incumbent candidates can now increase the contribution limits in § 16-905 through simple majority and outraise their participating opponents without fear of matching funds leveling the playing field. As the dissent in *Brain* noted, participation in the Clean Elections scheme becomes "less appealing as it becomes easier for candidates to receive large private contributions."[90]

For example, a Clean Elections candidate running for the Attorney General receives $195,180 for the primary election. While this is no paltry amount, it pales in comparison to the funds raised and spent by all three 2014 Attorney General candidates. Although Clean Elections candidates can still receive public funds, there is no longer an incentive to participate because Clean Elections candidates will be heavily outspent as the legislature amends contribution limits to maintain their competitive edge.

Permitting incumbents to adjust campaign contributions while in office will result in higher reelection rates. Between name recognition, electioneering and governance experience, and community ties, incumbents already have a distinct advantage over their competitors.[91] This advantage allows the incumbent to win reelection even when approval ratings are historically low. For example, even though Congress had a 12% approval rating heading into the 2012 general election cycle, *90% of incumbents were reelected.*[92] While some may point to other reasons for the high reelection rates,[93] it is almost axiomatic that the more money an incumbent spends compared to her opponent, the more often and more easily she wins.[94]

While scholars have already examined and debated whether clean elections schemes have accomplished their stated goals of increasing electoral competition,[95]

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89. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2828 (2011).

90. Ariz. Citizens Clean Elections Comm'n v. Brain, 322 P.3d 139, 148 (Ariz. 2014) (Bales, J., dissenting).

91. Lee Hamilton, *Why Incumbents Keep Getting Reelected*, CTR. ON CONG. AT IND. UNIV. (Jul. 23, 2014), http://congress.indiana.edu/why-incumbents-keep-getting-reelected.

92. Charles Mahtesian, *2012 Reelection Rate: 90 Percent*, POLITICO (Dec. 13, 2012), http://www.politico.com/blogs/charlie-mahtesian/2012/12/reelection-rate-percent-151898.html.

93. Hamilton, *supra* note 91 (citing political skills, previous constituent services, name recognition, and voters as the reason incumbents keep getting reelected).

94. Phillip Bump, *Does More Campaign Money Actually Buy More Votes: An Investigation*, WIRE (Nov. 11, 2013), http://www.thewire.com/politics/2013/11/does-more-campaign-money-actually-buy-more-votes-investigation/71473/ (using data collected by the Center for Responsive Politics to show that the more a candidate outspent his opponents, the wider his margin of victory).

95. *Compare* Neil Malhotra, *The Ipact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POL. & POL'Y Q. 263 (2008) (finding that when adjusting statistics to account for redistricting, the Clean Elections increased competitiveness), *with* U.S. GOV'T ACCOUNTABILITY OFFICE, Rep. No. GAO-03-453, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES (2003) (finding that public funding of candidates had minimal impacts on electoral competitiveness); *see also* Kenneth R. Mayer, et al., *Do Public*

reducing the amount of money in elections,[96] and decreasing the influence of special interest monies,[97] the *Brain* decision renders the Clean Elections Act ineffective. Efforts to close the loophole reinforced in *Brain* through piecemeal reactive measures are unlikely to work,[98] especially in light of recent campaign finance jurisprudence. The U.S. Supreme Court currently views limits on campaign contributions as overly burdensome on free speech. For example, in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court struck down the matching funds provision of the Clean Elections Act, finding that:

> [While it may create] more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups. This sort of "beggar thy neighbor" approach to free speech—"restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others'—is 'wholly foreign to the First Amendment."[99]

Additionally, the U.S. Supreme Court struck down contribution limits as applied to for-profit and nonprofit corporations.[100] In *Citizens United v. FEC*, the

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Funding Programs Enhance Electoral Competition?, *in* THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 245–67 (Michael McDonald & John Samples eds., 2006) (finding that public election funding increases electoral competition only for state legislative elections).

96. *Compare* Peter L. Francia & Paul S. Herrnson, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, 31 AM. POL. RES. 520, 520–39 (2003) (concluding that clean elections allow candidates to spend less time campaigning), *with* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-453, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES (2003) (finding that campaign spending after the Clean Elections Act increased in Arizona). *See also* Allison R. Hayward, *Campaign Promises: A Six-Year Review of Arizona's Experiment with Taxpayer-Financed Campaigns*, GOLDWATER INST. (Mar. 28, 2006), http://goldwaterinstitute.org/sites/default/files/Campaign%20Promises.pdf (finding that the Arizona Clean Elections program has not delivered on its stated goals).

97. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-390, CAMPAIGN FINANCE REFORM: EXPERIENCES OF TWO STATES THAT OFFERED FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES (2010) ("There is no indication the programs decreased perceived interest group influence.").

98. The state legislature or the voters of Arizona could amend § 16-941 of the Clean Elections Act to remove reference to § 16-905 and place strict limitations on campaign contributions. This solution, however, would be difficult to achieve. The Arizona legislature would need 75% of both houses to amend the Clean Elections Act because the Act is subject to the VPA. This substantial threshold is unlikely to be met, not least because state legislators and candidates have challenged various aspects of the Clean Elections Act. A voter initiative to this effect may be more plausible but would still require considerable resources.

99. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2821 (2011).

100. *See* Citizens United v. FEC, 558 U.S. 310 (2010). The Court was initially reluctant to abolish the limitations imposed upon for-profit corporations. In *Austin v. Michigan Chamber of Commerce*, the Court upheld the campaign expenditure limits imposed on for-profit corporations, stating that even though the statute was designed to restrict speech, "a healthy democratic system can survive the legislative power to prescribe how much

Court held that the government may not suppress political speech based solely on the "speaker's corporate identity."[101] Just four years later, in *McCutcheon v. FEC*, the Court held that limiting the number of candidates an individual could contribute toward violated the First Amendment's protection of free speech.[102] The Court further held that unless the government can show that campaign finance restrictions prevent a specific type of corruption—quid pro quo corruption—the restrictions will virtually always fail strict scrutiny.[103]

While the Arizona Clean Elections system has been on shaky ground since the Court declared matching funds unconstitutional in *Arizona Free Enterprise*, the Arizona Supreme Court's holding in *Brain* signals its eventual end. Good or bad, the recent campaign finance jurisprudence will make it more difficult for participating candidates to maintain their financial competitiveness against nonparticipating opponents, and so more candidates will likely forego Clean Elections funds in favor of greener pastures.

The decision in *Brain*, then, will likely have the effect of reversing the major policy goals of the Clean Elections Act: to encourage public candidate financing and to reduce the relative sway of wealthy private donors. Although the publicly financed candidate system is being whittled away, it is unlikely that the system will disappear entirely, as the U.S. Supreme Court upheld such a scheme for Presidential elections.[104] Based on *Arizona Free Enterprise* and *Brain*, it is more likely that the Arizona Clean Elections scheme will lose its appeal to candidates, thus entrenching the role of special interest money in Arizona campaign finance.

CONCLUSION

The *Brain* decision is the last rites of the Clean Elections Act. Because of Arizona's scandalous political past, voters attempted to reduce political corruption through three separate voter initiatives—the Clean Elections Act, the VPA, and § 16-905. But, because the Clean Elections Act referenced § 16-905, a pre-VPA voter initiative, in its text, the legislature was able to amend the Clean Elections Act indirectly without meeting the higher burden imposed by the VPA. And, the *Brain* case ensued. The Arizona Supreme Court held in *Brain* that the Clean Elections Act did not impose strict limits on campaign contributions, but rather, allowed the legislature to increase the contribution limits in § 16-905. This resulted in an indirect

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political speech is too much, who may speak, and who may not." Justices Kennedy and Scalia dissented, stating that upholding the Michigan Campaign Finance Act, which banned corporations from spending money to endorse or oppose a candidate, was equivalent to upholding censorship. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668–69 (1990).

101. 558 U.S. at 365.

102. 134 S. Ct. 1434, 1462 (2014).

103. *Id.*

104. Buckley v. Valeo, 424 U.S. 1, 143 (1976); *see also* Mimi Marziani et al., *More than Combating Corruption: The Other Benefits of Public Financing*, BRENNAN CTR. FOR JUSTICE 1 (claiming that even though the Clean Elections design has been rolled back significantly, the Court has endorsed the publicly financed campaign system by refusing to invalidate it).

amendment of the Clean Elections Act and rendered the Clean Elections scheme ineffective. The Court validated a loophole in campaign finance law.

Consequently, nonparticipating candidates can raise larger amounts from individuals and political action committees, thus placing additional stress on participating candidates and on the CCEC's limited resources. The *Brain* decision, together with the *Arizona Free Enterprise* decision, disincentivizes participation in the Clean Elections program and will likely force candidates to seek outside dollars—private donations and political action committee contributions—to remain competitive in electoral races. Candidates who rely on the Clean Elections funds will likely find themselves at a severe financial disadvantage, which may ultimately lead to their defeat. While the Arizona Clean Elections scheme may continue to survive, it is unlikely to thrive or achieve its stated purposes if lesser-known or less wealthy candidates either choose not to participate or are unable to outspend their nonparticipating opponents. The Court's holding in *Brain*, coupled with recent campaign finance jurisprudence, has the effect of dissolving the Arizona Clean Elections scheme because candidates now have a strong impetus to seek private contributions. It is now certain that the publicly financed election schema in Arizona has been read its last rites.