

COMMENT

THOMAS R. PHILLIPS*

I

INTRODUCTION

After surveying past and present attempts to determine the best way of selecting judges, Professor Carrington concludes in *Judicial Independence and Democratic Accountability in Highest State Courts* that, as Chief Justice Traynor observed, “there is no unobjectionable way to decide who shall judge or to judge those who do.”¹ There is broad agreement over how to select legislators and executive officials; that the “least unobjectionable” method of judicial selection remains elusive after more than two centuries is a reflection of our difficulties in defining the proper limits of the judicial role. As Professor Carrington’s discussion of the California Supreme Court suggests, what is illegitimate judicial activism to some may be only courageous constitutional application to others.²

With the proper role of judging so unsettled, it is hardly surprising that Americans also do not agree on what training, experience or temperament will produce the best judge. And even for those with settled views on these questions, it is not clear which method of selection produces what kind of judge. Under any system, we rely on the almost unattainable hope that some facet of the political process will generate a powerful official whose performance will be above and apart from politics.

For these reasons, any discussion about good and bad ways to choose and retain judges must be largely subjective. Within these limitations, however, most people would agree that some state judiciaries perform better than others. And however much the local legal, political or civic culture may explain these differences, it seems inevitable that the structure of the judicial system, including the selection method, must also be in part responsible. In short, while there may not be a “right” way to choose judges, there are probably several “wrong” ways.

One wrong way, I am convinced, is the contested partisan election system used in my home state of Texas. Professor Carrington charitably concludes that the reformers who pushed for elected judiciaries in the second half of the

Copyright © 1998 by Law and Contemporary Problems

This comment is also available at <http://www.law.duke.edu/journals/61LCPPhillips>.

* Chief Justice, Supreme Court of Texas.

1. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 113 (Summer 1998).

2. *See id.* at 81-87.

nineteenth century did not foresee the resulting complications, such as unqualified judges selected by an uninformed electorate, political parties handing out judicial positions as patronage plums, the necessity for raising campaign funds from problematic sources, and the nastiness of sound-bite campaigns.³ I suspect that most of these problems were always with us, with longer ballots and modern campaign techniques merely exacerbating their effects.

What clearly is new, and what has caused so much attention to be focused on how problematic judicial elections are, is the amount of resources that interested persons and groups are willing to expend to influence the results of judicial elections. While Texas may have been a pioneer in high-dollar judicial campaigns, it is no longer alone: On a per-voter basis, many states now have equally or more expensive campaigns, especially for their highest court. Reversing or containing this trend is at the heart of most of Professor Carrington's suggestions.

But I am concerned that any new reforms not merely resurrect old deficiencies or create new ones. Any changes must be scrutinized for unintended consequences. As Justice Astbury quipped: "Reform! Reform! Aren't things bad enough already?"⁴

II

THE MERITS OF MERIT SELECTION

I do not share Professor Carrington's profound skepticism about the viability of retention elections. Clearly it is troubling that special interest groups have poured huge sums of money into negative and sometimes misleading anti-retention campaigns. But since the triple-whammy California Supreme Court rejection in 1986, only three state high court judges were not retained—Walter Urbigkit (Wyoming, 1992), David Lanphier (Nebraska, 1996), and Penny White (Tennessee, 1996). While there have been other occasional challenges in California, Florida, Indiana, Oklahoma, Tennessee, and perhaps elsewhere, the plain fact is that judges are far more likely to lose for far more inscrutable reasons in contested elections rather than retention elections. I suspect that most judges from Alabama, Louisiana, Michigan, Mississippi, Nevada, Texas, or Washington would be quite surprised to see their counterparts in retention election states labeled as "sitting ducks" facing the "potential nightmare" of an election that "may be no longer politically viable . . . and is now possibly . . . the worst kind of election to conduct for judges who have been sitting for long enough to acquire a record that can be mischaracterized."⁵

I agree that the modern trend of politicizing retention elections is most disquieting. But almost all judges are retained, and the mean affirmative vote for retention across the nation for trial and appellate judges has actually increased

3. *See id.* at 91.

4. OXFORD DICTIONARY OF HUMOROUS QUOTATIONS 173 (1995).

5. Carrington, *supra* note 1, at 111, 114.

in the last few cycles.⁶ Moreover, the very nature of the merit selection process suggests that not every judge will be contested—special interests are unlikely to fund a vigorous “no” campaign unless there is at least a fair prospect of a more sympathetic successor being named. Finally, it surely is instructive that no state has ever abandoned retention elections once they have been instituted.

Furthermore, I do not share Professor Carrington’s disdain for the efficacy of the retention election process. How can it be a “masquerade to put political power in the hands of . . . [an] elite,” a view he regards as not without reason, when the voters are allowed to pass on the tenure of every judge in their jurisdiction?⁷ In reality, contested judicial elections are less democratic in operation. Even in Texas, where judicial races have been highly politicized for two decades, far more judges are unopposed than opposed each election cycle.⁸ And due to the vagaries of political fortune, bad judges are sometimes unopposed while good judges are challenged, or bad judges are opposed by bad candidates, or good judges are opposed by other good candidates. Far too often there is so little information and so many candidates that voters are powerless to exercise any meaningful choice. A simple yes or no on each individual judge, far from “diminish[ing] the role of the electorate in controlling” the judiciary,⁹ should permit a more meaningful public role. If judges of unsuitable temperament, insufficient industry, or unacceptable philosophy are defeated often enough, the appointing authority will take note in selecting their replacements.

Finally, I do not share Professor Carrington’s apparent view that “it is only the highest state courts that wield substantial political power” such that they “are on that account arguably legitimate objects of partisan political concern.”¹⁰ It is true that high courts frequently promulgate rules of procedure and evidence, but sometimes lower courts do so as well. High courts often wield administrative power, but lower court judges sometimes have equal or greater authority within their own districts. As with all courts, high court judicial decisions are informed by the text of the applicable provision, statute, treaty, rule or contract in issue, or by ancient and powerful traditions of respect for precedent. While high courts may theoretically have the final say, practical constraints usually preclude them from hearing more than a fraction of cases where review is sought. And even where they do exercise review, high courts are generally bound by the factual determinations made below. Like other judges, high court judges should not have platforms, agendas, or constituencies; I would not devise a selection system that suggests otherwise.

6. See Larry Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, SOC. SCI. J. (forthcoming).

7. Carrington, *supra* note 1, at 106.

8. See *infra* note 30.

9. Carrington, *supra* note 1, at 106.

10. *Id.* at 87.

III

THE FALLACY OF MONEY-FREE CAMPAIGNS

My second principal area of disagreement with Professor Carrington is his apparent belief that the genie can be put back into the bottle, so that judicial quality and confidence would be enhanced if only campaigns were once again conducted without money, or at least without media campaigns. Even if such quiet campaigns did at one time produce a good judiciary, I am not at all sure they would do so now. First, the organized bar no longer wields the power to encourage good candidates and discourage bad ones. Even more importantly, as Professor Carrington concedes, independent expenditures by those who think they have something to gain cannot meaningfully be controlled. A better system is to have most contributions given directly to a candidate or committee, where the records are more transparent, the content of campaign statements are subject to the state judicial conduct codes, and the conduct of the candidates can be fairly assessed by the voters.

I share Professor Carrington's concern about the harmful effects, both real and perceived, of abnormally large donations. But he considers "contributions of sufficient size to confirm the widely shared suspicion that the donor expects something in return"¹¹ to include any that, in the aggregate, produce enough funds for a candidate to purchase "spot advertising on commercial television prepared by highly paid craftsmen skilled in the art of disparaging public persons."¹² I respectfully disagree.

Few judicial campaigns approach the cost of campaigns for governor, senator, or even mayor. Furthermore, the total amount of money raised matters less than whether the funds are raised from sources reflecting diverse backgrounds and views. I would be more concerned about a candidate who raises \$250,000 in twenty-five \$10,000 increments than one who raises several times that amount from thousands of small donors. Similarly, I would be more concerned about a candidate who raises \$250,000 from one segment of the legal profession than about one who raises several times that amount from those with widely varying occupations, interests, and philosophies. The "outlier" contributions that cause the most concern can be met by realistic contribution limits, set either by legislation or by judicial and professional conduct rules.

But for Professor Carrington, this may not be enough. He would encourage states to "limit the corrupting effects of expensive media campaigns" by promulgating rules to "disqualify a judge from sitting on a case in which any large contributor is a party or has a significant economic stake in an issue coming before the court."¹³ Although Carrington recognizes that "[t]here is very little harm to the integrity of the courts caused by extravagant expenditures on handbills, billboards, mail, and newspaper advertising," he recognizes that can-

11. *Id.* at 112.

12. *Id.*

13. *Id.* at 114.

didates prefer television and radio advertising for their “artificial means of capturing the attention” of voters.¹⁴ While he opposes expenditure limits to achieve this means, he finds disqualification a more “saleable response” that would “eliminate serious fundraising, and thus force judicial candidates to return to the humble practices of the past when low-cost campaigns featured handbills, posters, and calling cards as the primary media of communication.”¹⁵

Carrington’s principal criticism of disqualification rules is that the Supreme Court’s First Amendment jurisprudence would make their enforcement against third party “issues advocates” impossible to achieve. While he notes without comment the “administrative difficulties and costs to parties” of such a scheme,¹⁶ he seems to have no doubt that money-free pseudo-campaigns would produce a better judiciary.

This would be so, however, only if one believes that a good electorate need not be an informed electorate. However much voters may want in the abstract to elect their judges, these are low salience elections that are almost never covered in any meaningful way by the free media.¹⁷ And absent free media, as the Supreme Court in *Buckley v. Valeo* observed, “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”¹⁸

As any election consultant, professional psephologist, political reporter or interested voter will confirm, current voters are not moved at all by Carrington’s humble “handbills, posters and calling cards,” and only somewhat more by his “billboards, mail and newspaper advertising.” Politics today is less a participatory than a spectator event to most Americans; such information as they receive about candidates, particularly those for lower offices, is far more likely to come from paid television or radio advertisements than from anywhere else. As the *Buckley* Court went on to observe: “The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.”¹⁹

When the Supreme Court of Texas considered promulgating a rule to prohibit judges from sitting in cases where parties or their lawyers were substantial, albeit legal, contributors, we encountered these problems, among others:

14. *Id.* at 117.

15. *Id.* at 114-15.

16. *Id.* at 115; see also Roy A. Schotland, *Judicial Campaign Finance Could Work*, NAT’L L.J., Nov. 23, 1998, at A21.

17. A 1999 statewide poll of 600 registered Texas voters showed that only two Supreme Court justices could be named by more than 1% of respondents. I was named by 2%, and the junior justice, Alberto Gonzales, who is the immediate past Secretary of State of Texas, was named by 1%. See Bruce Davidson, *Poll another argument for appointed judges*, SAN ANTONIO EXPRESS NEWS, Feb. 13, 1999, at 7B (noting that the results of this poll were consistent with similar surveys conducted during the last twenty years).

18. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

19. *Id.* at 19.

What degree of lawyer involvement should be required? Should the ban extend just to lawyers who appear in court or sign pleadings, or to all lawyers who work in a firm with a case?

How should business entities be treated? Should the ban extend to corporate litigants? Should just the chief executive officer be prohibited from giving, or should all officers, all directors, or all employees also be included? What about their spouses? Should any or all stockholders be included in the ban?

What is a case before a court? Should the ban extend to lawyers and litigants whose case is about to be filed in a court, or whose case has just concluded? What if a pending case may later be appealed to a court, or may later be remanded to that court? What about cases that are pending in another court, but will be won or lost based on the precedent to be established in a case pending in the court for which an election is being held? What if a district has a central docket? Should lawyers and litigants who have any pending cases in that district be prohibited from contributing to all judges?

Should the rules apply to challengers? Should the ban apply only to sitting judges, or should it extend to their challengers? If the challenger is also a judge, should the ban apply to the dockets of both judges?

A committee of the Alabama Supreme Court found similar difficulties in implementing a state statute that required recusal of judges who took more than nominal contributions from lawyers or litigants appearing in their courts.²⁰

In most states with contested judicial elections, campaigns have run the gamut from amply financed to literally penniless; only a handful could be called "lavishly financed" by comparison to campaigns for executive or legislative offices of similar dignity and prestige. For most Texas judicial elections, voters have no idea for whom they are voting.²¹ While many candidates for the Texas Supreme Court and those trial courts that hear civil cases are quite well funded, most other candidates, particularly those for courts specializing in criminal, family, or juvenile matters, have quite sparse campaign treasuries.

The real differences in outcome between well-funded campaigns and those run on Carrington's shoe-leather method can be demonstrated by comparing results for Texas Supreme Court races with those for its jurisprudential equivalent in criminal cases, the Texas Court of Criminal Appeals. During this decade, there have been seventeen elections for the Texas Supreme Court²² and

20. See *Report to the Supreme Court of Alabama by the Alabama Supreme Court Standing Committee on Rules of Conduct and Canons of Judicial Ethics* (Dec. 2, 1996).

21. See, e.g., Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 86-87 (1985).

22. Of those 17 races, 15 were contested by both major parties in the general election, while two were contested by one major party and a Libertarian. Nine Republican and six Democratic nomina-

seventeen elections for the Court of Criminal Appeals.²³ All thirty-four races have been contested, with fifty-four candidates on the primary or general election ballot for the Supreme Court and seventy-nine for the Court of Criminal Appeals. In every Supreme Court election, at least one candidate has been well-funded, while only a single candidate for the criminal court ran a television campaign, and that campaign was quite modest. Thus, the Supreme Court races are a paradigmatic example of the sound-bite campaigns deplored by Carrington, while the Court of Criminal Appeals races are an example of the grassroots efforts he extols.

Which system has produced better results? Any measure of good judicial performance is undoubtedly subjective.²⁴ As one of the subjects to be rated, I should not suggest a comprehensive test. But the objective data demonstrate that money increases the likelihood that incumbent judges and judicial candidates favored by the legal profession will win. Money also increases the chance that general election voters will distinguish between candidates on some basis other than party affiliation.

For example, the winners of the State Bar of Texas's judicial bar poll have also won twelve of the seventeen Supreme Court races since 1990, but only nine of the seventeen Court of Criminal Appeals races. Incumbents have won twelve Supreme Court justices races while losing only three, but incumbents have won only six Court of Criminal Appeals races while losing the same number. In Supreme Court races, every successful challenger was well funded, with substantial support from the legal community and various organized groups. In contrast, five of the six losing criminal court incumbents won the State Bar of Texas Bar Poll as well as most or all newspaper endorsements.²⁵

tions were contested in primaries, and two of the six Democratic nominations required runoffs because no candidate won a majority of the votes.

23. Of those 17 races, 14 were contested by both major parties in the general election, while two were contested by one major party and a Libertarian. The sole candidate unopposed in a general election won a contested primary. In all, 11 Republican and 9 Democratic nominations were contested in primaries, and six Republican and three Democratic nominations required runoffs because no candidate won a majority of the votes. In 1990, the candidates for one position were chosen by the state party executive committees when a vacancy on the court occurred after the primaries.

24. See, e.g., Justice Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L. J. 313, 322 (1998).

25. The bar poll and electoral results for the six incumbent Court of Criminal Appeals judges defeated since 1990 are as follows:

Year	Winning Challenger	Vote	Bar Poll	Losing Incumbent	Vote	Bar Poll
1990	Baird (D)	51.4%	32.1%	Berchermann (R)	48.6%	48.8%
1990	Overstreet (D)	51.3	52.0	Sturns (R)	48.7	48.0
1992	Meyers (R)	50.5	27.8	Benavides (D)	49.5	51.0
1994	Mansfield (R)	54.0	14.9	Campbell (D)	46.0	71.8
1996	Price (R)	53.8	11.1	Maloney (D)	46.2	53.3
1998	Keasler (R)	54.0	16.7	Baird (D)	46.0	55.3

Source: Secretary of State of Texas, Official Election Returns; State Bar of Texas, Judicial Preference Polls.

Furthermore, in each of the five election cycles since 1990, the candidate who led his or her ticket for the Texas Supreme Court has finished with an average of 7.9% more of the total vote than the candidate who trailed that ticket. By contrast, the average difference for high and low candidates for the Court of Criminal Appeals on the same ticket was only 2.9%.²⁶ In simple terms, this means that more voters have looked to something other than party labels in choosing justices of the Supreme Court than they have when choosing judges of the Court of Criminal Appeals.

The results of primary races for nomination to the Supreme Court races show even more dramatically the importance of campaign funding. On three occasions during this decade, broadly supported candidates with extensive media campaigns have been challenged by insurgents with no organized support and only minimal funding.²⁷ In each instance, the established candidate has won a substantial statewide victory while actually *losing* in those areas of the state where no television advertisements were aired.²⁸

26. The differences each year between the high and low polling candidates for Republican Party candidates in contests with Democratic opponents were as follows:

	Supreme Court			Court of Criminal Appeals		
	High GOP	Low GOP	Difference	High GOP	Low GOP	Difference
1990	59.2%	43.6%	15.6%	48.9%	43.9%	5.0%
1992	53.3	43.2	10.1	50.5	47.2	3.3
1994	56.8	56.2	0.6	54.5	54.0	0.5
1996	56.3	52.0	4.3	55.5	53.5	2.0
1998	60.1	53.5	6.6	57.8	54.0	3.8

The difference between high-polling and low-polling Democratic Party candidates with Republican opponents is the same for all years except 1992 and 1996, when the presence of Libertarian candidates in the Supreme Court races led to these results: 1992, High Dem 56.8%, Low Dem 43.1%, Diff 13.7%; 1996, High Dem 45.5%, Low Dem 40.6%, Diff 4.9%.

Thus the average difference between high and low-polling Republican candidates for the Supreme Court is 7.4%, while the average Democratic difference is 8.3%.

27. The challengers were former Justice Charles Ben Howell, a perennial and occasionally successful judicial candidate, against both Dallas Court of Appeals Chief Justice Craig T. Enoch in 1992 and incumbent Justice Nathan L. Hecht in 1994, and Austin attorney Steve Smith against incumbent Justice Deborah G. Hankinson in 1998. Neither Howell nor Smith won the endorsements of any newspapers, the support of any major elected official or public figure, or the support of any bar group. The results of the State Bar of Texas Judicial Polls were as follows: 1992, Enoch 50.7%, Howell 10.0%; 1994, Hecht 58.2%, Howell 5.5%; 1998, Hankinson 49.3%, Smith 19.6%. Source: Secretary of State of Texas, Official Election Results.

28. This summary chart shows the impact of television advertising:

Year	Winning Candidate	% of Vote in TV Markets with Ads	% of Vote in TV Markets without Ads	Overall % of Vote
1992	Enoch	61.1%	42.6%	59.9%
1994	Hecht	64.6	47.7	61.0
1998	Hankinson	60.8	48.7	59.4

Source: Karl Rove & Co., Austin, Texas; Secretary of State of Texas, Official Election Results.

Thus, while roundly deplored, “the ritualized scandals of political spending”²⁹ in Texas judicial elections have given many voters enough information to cast something more than a random vote.³⁰ Republicans also lost slightly more positions than Democrats in 1996, when most of Governor George W. Bush’s judicial appointees in East and South Texas were defeated. Furthermore, in many races, there are profound differences between the qualifications of candidates. For most if not all states, the formal qualifications for judicial office are so minimal that almost any lawyer who has reached a certain age and is not currently disbarred is eligible to serve. In states like Texas that are under Section 5 of the Voting Rights Act, preclearance of enhanced qualifications is not likely to be obtained.

Professor Carrington does provide an answer for those who would press for an informed electorate. He says, “The key to any comprehensively effective solution to the problem of judicial elections is to provide *modest* public funding.”³¹ He urges the institution of publicly funded and distributed voter’s guides, with inclusion perhaps conditioned on a candidate’s forgoing additional funding or forswearing negative television spot advertising. I support the creation and distribution of voter’s pamphlets, and I hope that Congress will en-

29. Charles W. Wolfram, *What Will the Tobacco Fees Set in Motion?*, NAT’L L.J., Dec. 28, 1998/Jan. 4, 1999, at A25.

30. The inability to conduct visible campaigns has left down-ballot judicial candidates in Texas especially vulnerable to partisan sweeps. This was particularly true in the 1994 general election, when incumbents in opposed races fared as follows:

Court	Republicans		Democrats	
	Won	Lost	Won	Lost
Supreme Court	1	-	-	-
Court of Criminal Appeals	-	-	-	1
Courts of Appeals	-	-	3	10
District Courts	<u>10</u>	-	<u>5</u>	<u>21</u>
Total	11	-	8	32

Thus, the Texas judiciary suffered almost a seven per cent turnover in a single day, not counting the five Democrats and one Republican who were defeated for renomination in their primaries. The turnover would have been even greater had not 115 Democratic incumbents (as compared to 71 Republicans) been unopposed in general election.

Democrats also lost a number of seats in 1984, when Ronald Reagan’s coattails swept nearly every Republican candidate in the state’s four largest counties to victory.

In contrast, many able incumbent judges running as Republicans were defeated in 1982, when Governor William P. Clements was defeated for re-election in a statewide Democratic sweep. The results for that year were as follows:

Supreme Court	-	-	-	-
Court of Criminal Appeals	-	-	-	-
Courts of Appeals	2	10	-	-
District Courts	<u>15</u>	<u>15</u>	<u>14</u>	-
Total	17	25	14	-

Source: Secretary of State of Texas, Official Election Results.

31. Carrington, *supra* note 1, at 119 (emphasis added).

courage their use by providing a free franking privilege for state or local governments who distribute them. However, I question whether such initiatives will provide enough information and generate enough interest to displace the candidates' own advertising.³²

If public funding is to be a "comprehensive solution," it must be substantial, not modest. It must completely displace private donations, because public funding that merely supplements existing systems will do almost nothing to enhance the appearance of fairness and integrity that judicial elections can erode. It must be generous enough to permit voters to make the right choices among the candidates offered to them, not leave them choosing blindly between names or political parties. Lawyers' occupation taxes or court fees could be tapped to fund most of this regime.

Although more than twenty states have some form of public funding, only Wisconsin provides any meaningful assistance to judicial candidates, and no state has displaced the private system in the way either Professor Carrington or I have suggested. But it seems axiomatic to me that if any public funding regime is established, the judiciary should be included first.

Absent public funding, Carrington might respond that even if money makes a difference and even if it matters who wins, campaign contributions should be prohibited because their appearance is so damaging to the judicial process. The most that Carrington concedes is that "most lawyers and litigants who contribute to campaign funds are, in their own minds, not trying to bribe judges, but only want a judiciary who is not hostile to their interests."³³ This seems to me far too cynical. Most active trial lawyers want judges to move cases efficiently with few reversible errors, not to be a "friend" on the bench. Even in appellate court races, many lawyers and lay people contribute primarily out of a perceived professional or civic obligation to support able public servants, not out of a hope to buy a philosophical predilection.

Others cannot believe that a judge who accepts campaign contributions will be impartial. While Carrington does not buy this line, the "Payola Justice" tract he references queries: "Could Texas Supreme Court justices be schizophrenic enough to rake in \$1 million in campaign contributions with one hand while impartially swinging the gavel with the other?"³⁴

The answer, of course, is Yes.³⁵ If judges are so weak as to be influenced by a contribution that goes only to their campaign coffers to pay election expenses,

32. The State Bar of Texas placed basic candidate information for all state appellate and trial court candidates on its website in 1998, but received only about 500 "hits." And in Texas, major newspapers and the League of Women Voters have long printed comprehensive Voters' Guides. Nevertheless, official voters' guides do seem to have received much greater attention in those jurisdictions where they are in use.

33. Carrington, *supra* note 1, at 112.

34. TEXANS FOR PUBLIC JUSTICE, PAYOLA JUSTICE 3 (1998).

35. See William Powers, Jr., *60 Minutes' Report Unfair to High Court*, DALLAS MORNING NEWS, Nov. 15, 1998, at 6J. The authors of "Payola Justice" provided no specific correlation between contributions and votes, probably because such evidence was lacking. As Professor William Powers, Jr., of the University of Texas Law School has concluded:

how could they possibly resist the pressures common to all judges of personal friendships and professional associations among those who appear before them? They can and do resist because judges make their rulings within the numerous formal and informal constraints that surround the process of the rule of law.³⁶

Nevertheless, several public opinion polls across the nation have shown nearly universal public skepticism about whether judges are in fact impartial in cases involving contributors. In Texas, for example, a recently completed survey reported that forty-three percent of respondents felt that contributions to judges have a “very significant” influence on decisions made by judges in the courtroom, forty percent felt they had a “somewhat significant” influence, and only seven percent felt they influenced decisions “not at all.”³⁷ Do such results justify banning contributions?

Not necessarily. In the same poll, sixty-nine percent of respondents rated Texas courts as “very” or “somewhat” honest and ethical (the Texas Supreme Court was so rated by seventy-seven percent of respondents).³⁸ About two-thirds of those polled thought Texas judges were highly qualified (sixty-six percent), and three-fourths believed that Texas courts followed the law in performing their duties (seventy-five percent).³⁹ Almost three-quarters (seventy-three percent) felt that they would be treated fairly if they had a pending case in a Texas court, and sixty percent of those with Texas courtroom experience rated the services they received as very or somewhat good, while only thirteen percent rated them very or somewhat poor.⁴⁰

These numbers reflect something profound: Either citizens are so cynical they do not expect any public official to be beyond reproach, or they do not value absolute impartiality as an essential judicial prerequisite, or they treasure a viable election process so highly that they are happy to permit a “little play in the joints” to retain their control at the ballot box. After all, two-thirds of those surveyed thought that Texas judges were accountable to the public for their actions (sixty-seven percent), and an even greater margin said judges should be “elected by the people” rather than “appointed by the Governor

At Chief Justice Phillips’ request, I recently analyzed his votes in the decisions used in the “Payola Justice” study. That analysis demonstrated that there was no positive relationship between contributions by lawyers and his votes. Lawyers he voted against contributed slightly more money than lawyers he voted for. I suspect the other justices have similar voting records, although I haven’t examined other data in detail.

Id.

36. See, e.g., Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in *JUDGES ON JUDGING: VIEWS FROM THE BENCH* 71 (David M. O’Brien ed., 1997); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

37. SUPREME COURT OF TEXAS, OFFICE OF COURT ADMINISTRATION AND STATE BAR OF TEXAS, PUBLIC TRUST AND CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS SUMMARY REPORT 6 (1999).

38. See *id.*

39. See *id.*

40. See *id.*

subject to retention elections where people vote to determine whether the judge should remain in office" (seventy percent to twenty percent).⁴¹

Finally, the poll demonstrates that the effect of campaign contributions is only one of several negative aspects about the administration of justice. Less than half the respondents agreed that Texas courts are effective in informing the public about court procedures and services (forty-six percent), or that court cases are concluded in a timely manner (forty percent), or that the average person can afford court costs and filing fees (twenty-five percent).⁴² Clearly the issues of access to justice, as well as judicial selection, must be more forcefully addressed if public confidence in the courts is to be strengthened.

IV

CONCLUSION

From his survey of past and present difficulties in American judicial selection, Professor Carrington offers some excellent ideas about how to do a better job of choosing judges. As both an observer and a participant in one of our nation's more rambunctious judicial selection systems, I see the strengths and weaknesses of some proposed changes somewhat differently than he does. But my disagreements are almost entirely in emphasis, not overall direction, and they in no way lessen my respect for his scholarly and thoughtful approach to these knotty issues.

Money in a judicial election is a big problem, but a judicial election without money is not the answer. If a state insists on keeping the election system, the state should adopt a comprehensive system of adequate public funding, or else use retention elections where every judge will face the voters but few will have to mount a serious, well-funded campaign.

In states with elections, legislatures and Supreme Courts should make incremental reforms through candidate regulation by imposing reasonable contribution limits, proscribing outrageous campaign tactics, and mandating the full and timely disclosure of all campaign finance activities. The recent recommendations of the American Bar Association Task Force on Lawyers' Political

41. *See id.* Other statewide polls have consistently shown more public support for merit selection. In November 1995, a Baseline & Associates survey for Texans for Lawsuit Reform found that 74% favored merit selection and retention elections for appellate judges, a slight increase over the 71% who favored that method in a March 1995 Tarrance Group Poll. In April 1993, the Harte-Hanks Texas Poll found that 61% of Texans supported merit selection. In January 1990, a Shipley and Associates Poll found that Texans favored merit selection over the current system 48% to 42%. In Winter 1989, the Texas Poll found that voters favored gubernatorial appointment with voter or legislative approval over partisan or nonpartisan elections 50% to 38%. In Fall 1984, a Texas Poll found that voters supported gubernatorial appointment and voter approval of judges 57% to 29% over the current system.

In general, these poll questions have explained the merit selection process in some detail. When the question is worded differently, however, strikingly different results can be obtained. In March 1988, for example, 86% of Texas Democratic Primary voters said "Yes" to this nonbinding referendum question: "Texans shall maintain their right to select judges by direct vote of the people rather than change to an appointment process created by the Legislature."

42. *See* SUPREME COURT OF TEXAS, *supra* note 37.

Contributions, suggesting these and other reforms, deserve serious consideration.