



2002

Judicial Elections and Campaign Finance Reform

Roy A. Schotland

Georgetown University Law Center, schotland@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/354>

33 U. Tol. L. Rev. 335-351 (2002)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Judges Commons](#), and the [Law and Politics Commons](#)

GEORGETOWN LAW

Faculty Publications



April 2010

Judicial Elections and Campaign Finance Reform

33 U. Tol. L. Rev. 335-351 (2002)

Roy A. Schotland
Professor of Law
Georgetown University Law Center
schotlan@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/354/>

Posted with permission of the author

JUDICIAL ELECTIONS AND CAMPAIGN FINANCE REFORM

PROFESSOR DEBOW: The topic for the fourth and final panel today is judicial elections and campaign finance reform. My name is Mike DeBow. I teach at the Cumberland Law School at Samford University, which is in Birmingham, Alabama.

If I say the name of my university quickly enough, people think I live in California. That is not the case. I live in Alabama, and that is why I am interested in judicial selection. It is really impossible to live in Alabama without forming some sort of opinion about judicial selection, and I have one.

I have been teaching for fifteen years. I have never tried to teach a class at 2:30 on a Friday afternoon, and I hope I am never asked to do such a thing. So for those of you still with us, I salute you. I appreciate your presence here, particularly the students who are still with us. That shows a level of self-discipline that will stand you in good stead when you get into practice.

It is perhaps inevitable that the question of judicial campaign speech is followed by the question of judicial campaign finance and the possible reform of that practice. It certainly is a timely issue for us to take up since the country seems to be interested, to one degree or another anyway, in the current debate over McCain-Feingold¹ and the alternatives to it at the federal level.

The general issue of money in politics is a vexing one for many people. It raises a number of very intriguing constitutional questions, and questions for various social scientists. In particular, the question of causation, I think, is interesting here. Are conservative candidates conservative so that they can raise money from conservative donors, or does the causation run the other way around, with liberal donors seeking out liberal candidates and conservative donors seeking out conservative candidates? Is it just that simple?

In the judicial realm, the issue of campaign finance cuts across all states that use any form of election as part of their selection or retention system, whether the elections are partisan or non-partisan.

The raising of money for campaigns is a task that has to be performed in all states that use any form of election. Like many other things that we have discussed today it seems to involve a sort of balancing act. The state certainly has a strong interest in protecting the integrity of its judiciary and encouraging the public perception of the judiciary as an institution of integrity and honor. On the other hand, there are obviously First Amendment interests of the candidates and their contributors to be taken into account.

There seem to be three questions that we should take up today, to one degree or another. First of all, what is the range of current practice in campaign fundraising—on behalf of judicial candidates? Secondly, what, if anything, would be preferable to current practice? And thirdly, what reforms, if any, would be constitutionally permissible?

1. Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

We have a very distinguished panel to help us address these questions. I will introduce them in the order in which they will speak. First to speak will be, to my far left, Professor Roy Schotland of the Georgetown Law School faculty, who is a nationally recognized expert on judicial selection.

Most recently, he was the co-convenor, with Texas Chief Justice Thomas Phillips, and the Texas Senate President, Rodney Ellis, of a Chief Justices summit, which met last December, with seventeen Chief Justices working on the problems of state judicial elections and producing some twenty recommendations.

Professor Schotland has been working on judicial elections for almost twenty years. He is a graduate of Columbia University, Oxford University, and Harvard Law School. Following law school, he clerked for Justice Brennan, worked for a time in the New York firm of Paul Weiss. He has worked on Capitol Hill and in several executive agencies, and in five campaigns, all Democratic he tells me. He has taught also, in addition to Georgetown, at the University of Virginia Law School and the University of Pennsylvania Law School. He teaches Administrative Law, Election Law, and Constitutional Law at Georgetown. We are very privileged to have him with us today.

Our second speaker is Jan Baran, who is a partner with the Washington D.C. firm of Wiley, Rein & Fielding. He is the head of the firm's election law and government ethics practice and has been with the firm since 1985. He is a graduate of Ohio Wesleyan University and Vanderbilt University Law School.

Among other activities, Mr. Baran has served as the General Counsel of the Republican National Committee from 1989 to 1992, and the 1988 Bush for President campaign. He has been the Chairman of the ABA Standing Committee on Election Law and a member of the ABA Commission on Public Financing of Judicial Campaigns. He is the author of a book titled *The Election Law Primer for Corporations*.²

Finally, I wanted to note that *Washingtonian Magazine* included him in their 1997 issue in an article entitled, "Heavy Hitters,"³ which list the top fifty lawyers in Washington D.C. That is quite a recommendation.

To give us a view from the Bench, we are pleased to have Justice Craig Enoch from the Texas Supreme Court. Justice Enoch has undergraduate and law degrees from Southern Methodist University, and an LL.M. from the University of Virginia Law School.

He has been a judge for twenty years, believe it or not. You could not tell that to look at him, I do not think. He began his judicial career on the 101st District Court in Dallas County, Texas in 1981, where he served from 1981 to 1987. He was then Chief Justice of the Fifth District Court of Appeals at Dallas from 1987 through 1992. He was then elected to his first term on the Texas Supreme Court; the term began January 1st, 1993. He was reelected in 1998 to a second term.

2. JAN WITOLD BARAN, *THE ELECTION LAW PRIMER FOR CORPORATIONS* (2d ed. 2000).

3. Kim Isaac Eisler, *Heavy Hitters: Suddenly Hit with a Subpoena? Served with Divorce Papers? Facing an IRS Audit? Here Are the 50 Washington Lawyers Who Really Get Results*, WASHINGTONIAN, Feb. 1997, at 70.

In addition, Justice Enoch fulfills many civic and professional roles. He is, among other things, currently the Vice-Chairman of the ABA Judicial Division's Appellate Judges' Conference, and a member of the American Law Institute.

Professor Schotland will begin, followed by Mr. Baran and then Justice Enoch. Each speaker will speak for fifteen to twenty minutes. We will follow it up with a question and answer period.

PROFESSOR SCHOTLAND: Thanks, Mike. It is a privilege and pleasure to be here with you. I never thought of the Federalist Society as meek, but I am authoritatively told, "The meek shall inherit the earth." And you all sure are inheriting the earth.

(Laughter.)

The last panel is a very hard act to follow. Not in the normal sense of they were good, but I was struck, and maybe you were, that each one was not only persuasive, but really very appealing. They were appealing guys.

I think Lubet was on to something when he noticed that they had not given him a name card, because I noticed that I had been put at the far left.

(Laughter.)

By the way, I do not know how many of you noticed that they were all guys, as we are all guys. I counted it up today and it is sixteen to three. And maybe you think that is better than I think that is.

Let me start with Sergeant Friday's approach, which is, if you remember: Just the Facts. That is an important step toward meeting our problems. I think the first thing we need to do is clear away two myths that cloud this scene.

The two myths compete. There is the denial myth, which tries to deny how hugely election systems dominate our election of state judges. That competes against the distortion myth, which tries to paint the candidates in these elections as panderers who care more about campaign contributions than about justice or integrity.

The denial myth surfaces all in the time in the media coverage of judicial elections. We had several last fall. I remember from the October 1999 Federalist annual meeting when you had some very impressive white papers on "should there be judicial elections or should not there be judicial elections?"

And they evidently had not really exchanged the papers before they distributed, and they could not agree on how many states did or did not have elections, and what kinds of elections. We get this all the time.

USA Today this fall said there were twenty-one states that elect judges and State Supreme Court Justices.⁴ That did not include a couple of easily overlooked states: California, Florida, Indiana, and a number of others. That is not *USA Today's* fault, but the fault of the source from which they get the data.

And *The Washington Post* said eight states had partisan Supreme Court elections,⁵ which is the same myth-making source—the American Judicature Society is in denial. There are not eight. There are eleven with partisan Supreme Court elections, unless you really believe that Ohio is non-partisan. And if so, I do not know what newspapers you read or what you listen to. Or you really believe that

4. See *Campaign Contributions Corrupt Judicial Races*, USA TODAY, Sept. 1, 2000, at A16.

5. See George Lardner Jr., *Speech Rights and Ethics Disputed in Judicial Races*, WASH. POST, Oct. 8, 2000, at A13.

Michigan is non-partisan. Actually, another one is Idaho, which was genuinely non-partisan until 1998; and in 1998 and 2000, became partisan.

The denial myth aims at making us feel better about judicial elections by pretending, counter-factually, that there is not that much of them. The competing myth makes us feel worse about judicial elections by pretending that a great many of the people who run for the Bench, and therefore have to raise campaign funds, are involved in what is labeled by a Texas so-called study as "Payola Justice" or in an Ohio so-called study, "Justice for Sale."

Of all of these studies, I know of only one by my colleague, Steve Ware, which has the simple integrity to put it correctly: Correlation is not causation.

Let me give just one example of the distortion myth. The attack on the Ohio Supreme Court by the American Friends Service Committee of Northern Ohio. They brought this out about fourteen months ago. It got a great deal of ink in the Ohio press, but not an atom of analysis. I was actually very disappointed in some of the Justices who spoke on it. It seems they spoke, without anything in the way of digging into it.

The study reported what it called the "compliance ratings" of the Ohio Justices; that is, how often they would vote for the side represented by a lawyer who had made a contribution.

For example, Chief Justice Tom Moyer had a compliance rating of 74.8%. That is three-quarters of the time, he voted with the side represented by a large contributor.

And the media seemed to take for granted that if that kind of analysis came from that kind of source, about people who raise campaign contributions, it must be sound.

Let me give you just two facts about the study. The method gives, for example Moyer, a 50% rating if, for example, he decided a case, and in that case, on one side, the lawyer gave him 50 bucks, and he decides for that side. And on the other side is a lawyer who gave him 5,000 bucks; he decides against that side, he has got a 50% compliance rating. "The house cannot lose."

Is this honest muckraking, or is this sheer mudslinging? One other fact about the study: they list law firms. And the one that contributed most, that is, was involved in the largest number of cases in which they made contributions, was a law firm called Atty Gen, A-T-T-Y G-E-N.

(Laughter.)

Now, I tried to clear up just exactly what the firm is. And let me say very simply, to keep things polite, that I was rebuffed, "We can't be bothered with these questions."

It appears, going by the cases in which Atty Gen was on one side, that these are the members of the elected Attorney General's Office of Ohio. Now, they do have substantial docket business in the high court, and they might even win some cases. And since it is an elected office, it is not surprising that some of them contribute. The study did not give just how much they had contributed.

That was about thirty-plus percent of the cases that had Atty Gen on one side. You can see what that does to the so-called compliance ratings. These awful people are voting for the state.

May I suggest that attackers producing studies like this, and always claiming the moral high ground, lack integrity far more clearly than their targets.

Now, I am not saying there are not campaign finance problems in Ohio. A leading recent example, again your Supreme Court—a suit for damages against Conrail. I do not know how many of you know about the Wightman suit.⁶ A girl was killed by a train when she drove onto a grade crossing despite the flashing lights and the gates all but barring her.

The extensive proceedings involved three trials: first, a jury trial, then a bench trial for punitive damages, and then after an appeal, a jury trial for punitives.

Then, there followed another appeal, followed by taking it to your Supreme Court. The effort to get your Supreme Court to review the case was sought by both sides because the jury had awarded “punis” of \$25 mil, and the trial judge had reduced that to \$15 mil.

I assume you would all like to be the plaintiff’s lawyer on this case. The share is better than ten dollars an hour. The plaintiff was represented by a firm that include nine members of the Murray family, Murray and Murray⁷

Before the Court agreed three years ago to hear the appeal, two of the Justices (not including Moyer) got contributions from nine of the Murrays, every Murray in the firm, and seven Murray spouses.

On February 28th, 1998, the high court decided to take the appeal. The contributions had come to one Justice on February 9, 1998, for the other Justice between January 19 and January 21

Every contribution complied with the relative legal limits, as did the aggregation of contributions to each Justice. The Justices ran in November of 1998. And according to their post-campaign, post-election reports, the contributions from this one firm and spouses turned out to be 4.4% of the total pot for one Justice, 4.7% of the other’s. For each Justice, they were the largest source of support. Both Justices participated in the oral argument on November 10, 1998. Their reports were filed one month later.

In January 1999, Conrail filed a motion seeking their recusal before a decision. In October 1999, without the Court or either Justice addressing that motion at that time, or earlier, or later, the Court decided in favor of the plaintiffs.

Conrail sought certiorari, making the contribution pattern one of their major bases. Cert was denied.⁸

We had a similar concentrated source of support in Michigan in 1998 from one firm that gave \$225,000 to three Democratic candidates. That totaled 29% of one candidate’s total pot; 19% for another. And of the three, the one who got the least, 18%, was a former partner of the firm—sort of ironic.

Now, Ohio has a \$5,000 individual contribution cap, but no caps on the aggregates from a firm. Texas is the only state in the country that does put a cap on the aggregate from a firm. By “aggregate from a firm,” I mean, partners, employees, associates, and any political action committee if affiliated, and so forth.

6. *Wightman v. Consol. Rail Corp. (Conrail)*, 86 Ohio St. 3d 431 (1999).

7. Murray & Murray is located in Sandusky, Ohio.

8. *Consol. Rail Corp. (Conrail) v. Wightman*, 529 U.S. 1012 (2000).

Texas, like Ohio, has a \$5,000 individual cap. But unlike Ohio, Texas says, "No firm can give more than \$30,000." Now, you might quibble over whether thirty is too high or too low. What they are trying to do is to accommodate a fair balance between essentially the two sides of so many of those controversies, the plaintiff's bar and the defense bar

And the plaintiff's bar is by and large very small firms. And if you have nothing but an individual cap, you are giving an enormous advantage to big firms and the big firms' candidates.

So, I applaud Texas for leading what should be done, and I would be interested in any reactions any of you would have to whether it is completely artificial to put on, or too close to artificial to put on, an individual cap without putting on also an aggregate cap.

In the summer of 1999, the American Bar House of Delegates amended the Model Code of Judicial Conduct to add various recommendations with respect to campaign finance, that there should be, of course, full and effective disclosure, that there should be contribution limits. They did not include the recommendation that there should be an aggregate for firms, and that is a gap.

But a good way of making sure the limits will be adhered to is to say that if any lawyer gives more than the limit, it is automatic recusal if the other side says, "Our adversaries gave more than the limit. Sorry, Your Honor, good-bye." The Judge would have to go.

And that, too, is now in the Model Code of Judicial Conduct. The Model Code has been essentially adopted in somewhere between thirty-two and thirty-nine of the thirty-nine states with judicial elections, I do not know whether it will take ten years or 100 years before these amendments are adopted in various states.

But this is clearly a way that we are moving. And obviously, the sooner, the better.

Another one of those provisions is that no judge can appoint a lawyer as a special master, guardian, etcetera, if that lawyer has given more than the contribution cap, unless there are extraordinary circumstances or, of course, if it is pro bono.

We are not going to get rid of judicial elections. There has been an absolutely major effort by the Bar and so much more than the Bar at least since 1906, and we have brought the proportion of state judges who face election for some type all the way down to 87%.

If you take out retention elections, you have got 53% of state appellate judges facing contestable elections; 77% of trial judges in general jurisdiction courts facing contestable elections.

At the rate of this 100-year effort, we will end judicial elections to the appellate bench in about 160 years, and for the trial bench in 770 years.

Now, the great Arthur T. Vanderbilt said, as you have probably all heard a thousand times, "Judicial reform is not for the short-winded." But I think 160 years, let alone 770, is a little long. And we have got to focus in on campaign finance and the campaign conduct.

One of the best steps we could take would be to lengthen terms. Here in Ohio, you have six-year terms. I implore your Chief Justice, and others who agree with him, to not put all your energy into going for merit selection, which is not going to

happen, and to put real energy into getting that six-year term up to, I would hope, even ten years, maybe even more than ten.

All by itself, just think of lengthening terms, what that does in the way of reducing campaign finance problems, reducing campaign conduct problems. And does not it make the job of being a judge more attractive? And if the job is more attractive, are you not likely to get better people seeking it and staying in it?

And isn't the whole venture about getting the best people we can onto the bench? Thank you.

PROFESSOR DEBOW: Thank you, Professor Schotland. We will hear next from Jan Baran.

MR. BARAN: Thank you very much. It is a pleasure to be here. I grew up in Ohio for a stretch of my life. I lived in Northeast Ohio, and went to school in Central Ohio. My mother taught at a university campus in Southeastern Ohio. However, I had never been to this quadrant of Ohio. Now I have been here twice in four weeks to exactly the same place and the same podium. So, I do not know if this is a sign that my destiny is somehow linked to Toledo, Ohio and this particular law school.

I am pleased to be here to address the issue of campaign finance in the context of judicial elections. Campaign finance is a subject to which I have devoted almost thirty years of my life, both professionally and politically. I ran a campaign for governor of Maine in 1973 and 1974 that was subject to Maine's campaign finance laws. I went to see the arguments in *Buckley v. Valeo*⁹ in 1975. I spent two years at the Federal Election Commission, and I have been in continuous private practice representing clients on these types of issues all over the country since 1979.

This past week, you may have read, we had the second week of debate in the United States Senate regarding the McCain-Feingold Bill.¹⁰ A couple of reporters called me to discuss the legislation and asked me how I felt about it? I said, "I feel like a tow-truck operator who has just learned that there is a hundred car pile-up on the interstate."

(Laughter.)

Campaign finance is such a difficult topic with which to come to grips because of the inherent constitutional considerations that present themselves when attempting to regulate campaigns. I want to just summarize some of the issues with which I, along with the other members of the American Bar Association's Commission on Public Financing of Judicial Campaigns, have been grappling. We have struggled with these issues because we have been reluctant to propose any regulation of judicial campaign funding unless and until we are comfortable with the constitutional parameters in doing so.

The constitutional discussion to date stems essentially from the 1976 decision in *Buckley v. Valeo*.¹¹ The subject of the case was the Federal Election Campaign Act of 1971, as amended in 1974, which was the most comprehensive federal campaign

9. 424 U.S. 1 (1976).

10. See Bipartisan Campaign Reform Act of 2001, S. 27 107th Cong. (2001).

11. 424 U.S. at 1.

finance reform to have been enacted.¹² The four main principles of regulation that were in the Act seem fairly common to us today, but were quite new at that time.

The first principle was disclosure. Can the government mandate the disclosure of how campaign money is received and spent? The Supreme Court said "yes." Specifically the Court concluded that the government could require both campaign contributors to be identified by name and amount contributed, and campaign expenditures to be itemized by recipient and amount.

The second principle of regulation was based on whether political contributions can be limited in amount. The Supreme Court again said "yes" and upheld the reasonable limit of \$1,000 for contributions to candidates for the House, Senate, or President. The Senate, just this past week, you may have read, increased that limit in the McCain-Feingold Bill to \$2,000.

This raises the interesting question of exactly how much money will George W. Bush raise in 2004 as a sitting president? Of course, last year, he raised a mere \$105 million under a \$1,000 contribution limit, and not as a sitting President of the United States. And I fear or expect the possibility that in 2004, he might, at the very least, double the amount that he raised in the last election.

The third principle addressed by the Supreme Court was the regulation of expenditures of money for political purposes. The Act had a spending limit of \$70,000 on the amount a candidate for the House of Representatives could spend in a primary, and an equal limitation on the amount that could be spent in the general election. The Supreme Court struck down the limit saying that although limits on contributions are simply marginal interferences with the speech and associational rights of campaign contributors, a spending limit is a direct, substantial, and unconstitutional interference with the ability of a candidate's campaign to communicate with the public and to convey the candidate's message. This led the Supreme Court to conclude that limiting the amount of money that an individual can put into his or her own campaign is also unconstitutional.

On the other hand, the Court stated that the public funding system that Congress had devised for presidential campaigns survived constitutional scrutiny because it was voluntary. The Court determined that if the government decides to provide public funds to a candidate, the government can condition the receipt of public funds on a candidate's agreement not to spend over a certain amount.

Finally, the *Buckley* Court addressed the principle of independent speech. Can the government regulate speech of individuals who decide to go out and buy newspaper ads, publish leaflets, put advertisement on television or radio? The Act had a limit of \$1,000 that people could spend, independent of a candidate, for a political message that the Supreme Court defined as a message that expressly advocated either the election or defeat of a clearly identified candidate. The Court struck down this limitation, but upheld disclosure requirements for independent speech that contained the above described express advocacy.

The *Buckley* Court's circumscription of the Act provides the current constitutional construct with respect to regulating campaign finance. Now the McCain-Feingold Bill is attempting to stretch, and perhaps test, some of those twenty-five year old constructs. For example, there is a provision in the bill that

12. Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified as amended at 2 U.S.C. §§ 431-456 (1994)).

makes it a crime for a corporation, union, incorporated trade association, or any incorporated group to pay for advertising that either contains the name of a candidate, or the image of a candidate, during a specific period of time, namely sixty days before a general election or thirty days before a primary election.

There is not a whole lot of case law on this type of speech regulation. The only case that comes to my mind is *Mills v. Alabama*.¹³ In the early 1960s, the State of Alabama had passed a statute that prohibited political speech on election day. No one, including a newspaper, was permitted to endorse candidates or subsidize or pay for speech on that one day of the year. The Supreme Court said that this prohibition was unconstitutional under the First Amendment and struck down the statute.

Since then, the Supreme Court has not addressed anything approaching that type of regulation. There was an attempt in Michigan to prohibit certain types of speech during a specified time period. I believe it was forty-five days. The restriction was promulgated as a regulation, and was struck down by two federal district courts in Michigan.¹⁴ Within the last couple of years, there was a similar restriction on the dissemination of voting records during the sixty-day time period preceding an election in West Virginia. That prohibition was also struck down by the district court in that state.¹⁵

In contrast with the approach taken by the McCain-Feingold bill, if we are going to somehow contend with the Supreme Court and the original *Buckley* paradigm, how is this going to potentially transfer to judicial campaigns? The first question that arises is, are judicial campaigns constitutionally different from campaigns for the House, the Senate, or President? Is there something unique, or at least distinguishable, about a judicial campaign that would allow a type of regulation that, otherwise, would not be permitted in a race for the legislature?

The most recent evidence or case law that we have on this question arose here in Ohio. The Ohio Supreme Court implemented a rule to place a limit on how much a candidate for the Supreme Court may spend. Unlike the public financing scheme that was addressed in *Buckley*, this was a unilateral spending limit, the same as that which was imposed by Congress in the Federal Election Campaign Act and subsequently struck down by the Supreme Court in *Buckley*. The Sixth Circuit similarly struck down the Ohio Supreme Court limitation as unconstitutional, saying that there was no constitutional difference between a limit on judicial candidate spending and the spending that was struck down in *Buckley*. So, the initial indication from the courts, though not the U.S. Supreme Court, is that there is nothing significantly different about running for state Supreme Court than for Senator in the State of Ohio that would justify a unilateral spending limit.

The second question that arises is whether contributions to judicial candidates can be limited. We have a \$5,000 limit on contributions to judicial candidates here in Ohio. That is very typical of other types of limits that are imposed on legislative races. However, there is a very major practical consideration here, which is that the judges are not really in the same position as individuals running for Senate. Their

13. 384 U.S. 214 (1966).

14. See *Planned Parenthood Affiliates of Mich. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998); *Right to Life of Mich. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998).

15. See *West Virginians for Life, Inc. v. Smith*, 960 F. Supp. 1036 (S.D. W. Va. 1996).

constituency is much smaller. If you are a United States Senator or candidate for Senate, you presumably will have many many more Ohioans who are interested in your race. Therefore, your pool of contributions will be larger. On the other hand, we know from experience that the likely contributors to a judicial race are, according to Roy, going to be lawyers. I mean, your other options are litigants, jurors, and people who work at the courthouse. But otherwise, you are dealing with a much smaller pool of potential contributors.

Third, what about independent speech? And this is a hot issue. We have an increasing number of examples of independent groups that are paying for advertising. There have been no allegations that these groups are a part of a candidate's campaign. In fact, candidates have been growing frustrated that they have no control over these groups which are spending more and more money on this type of independent speech.

With these issues illuminated in the context of judicial races we must then search for a possible solution. One that we are constantly pointed to is public funding. Perhaps public funding will help address many of the constitutional considerations, as well as help maintain judicial independence.

On its face, public financing has a great deal of appeal. Most would agree that it would be nice to provide funding for judicial candidates so they do not have to raise money, so they do not have to go and seek private support from a relatively small pool of potential contributors who are likely to be interested in the judicial system and perhaps the outcome of cases that have to be decided by these individuals.

There is one state that has public funding of judicial races, Wisconsin, which has had publicly funded judicial races since 1977. They have encountered some problems with it, not the least of which is that it is very difficult to convince the politicians to fund such a system. Additionally, you heard the Justice this morning say that she participated in the public funding system last time and received less than \$15,000 in public funding for her campaign. This is not unusual. The history at least for the last decade, is that the candidates generally do not participate in the public funding system. The good news for the Justices is that there has not been an incumbent justice who has lost in Wisconsin since 1966. So, it does not seem that Wisconsin's public funding system presents them with a great risk of compromise.

Maybe there is a lot more to be said about Wisconsin and why public funding works. Perhaps it is because of their culture. Maybe they have not had any big controversies regarding tort reform, abortion, or whatever issue seems to be stirring up constituencies elsewhere.

So, we are looking at public funding to see if it is an option. I think there is a big question as to whether or not it will work, even if we can convince legislatures to provide the funding, even if the limits are large enough. The questions remain, well, what happens if wealthy candidates wish to run for Justice, and what effect will this have on independent spending by groups who insist on having something to say and pay for large amounts of advertising?

Under the *Buckley* paradigm, a wealthy individual cannot be limited in the amount of money he or she puts into a campaign, even a campaign for Supreme Court Justice.

Again, under the current Supreme Court restrictions, there is nothing that can be done to curtail or limit independent speech, although there are some devices that are being proposed in some states, which would trigger more public funding for candidates faced with these circumstances.

Finally, one of the issues that has to be addressed in any campaign finance system is who is going to regulate all of this, and how will this apply to judicial campaigns? In *Buckley*, one of the things the Court eventually upheld was an independent agency to regulate federal elections. That is the Federal Election Commission. Each state, I believe, now has an Election Commission to regulate campaign financing of general elections. Most often, they will also have a role in regulating the funding of judicial elections. However, I think this regulatory issue is more complex in the judicial election context.

We have the organized Bar, which may have a role on occasion. We have the court itself, and we have disciplinary committees. In that regard, it is starting to look increasingly like the system we have in Washington, where if you are a Congressman, you are not only subject to the Federal Election Commission, you also have the House Ethics Committee that you have to worry about, and you might even have to deal with the Justice Department and the Office of Government Ethics.

That is an outline of the constitutional considerations. As you can tell, I did not come here with any answers. In the year I have spent on the ABA Commission, what we have developed is great expertise in identifying all of the questions. If you have any apparent solutions to any of these questions, we would all like to hear them. Thank you.

PROFESSOR DEBOW: Thank you, Jan. Our final speaker today is Justice Enoch, and that will be followed by your questions.

JUSTICE ENOCH: Thank you, Mike, and good afternoon. Thanks for the opportunity to be here. I guess I am uniquely qualified to be talking about campaign finance reform since in my two races in Texas I raised, for just my race, over \$3.6 million. And so, now, let us talk about limiting that campaign fundraising that I have.

(Laughter.)

I think it is fair to say that the public is conflicted over its relationship with its judges. At once the public wants its judges to be independent, but also accountable. And I call that a conflict because I suggest independence and accountability are necessarily concepts in tension. And we have heard that earlier today

In fact, I would suggest they are polar opposites. James Madison, one of the founders of the Federalist movement, insisted that a system of independent courts would be an impenetrable bulwark of liberty

And Justice Clarence Thomas argues that it is judicial unaccountability that fosters impartiality and adherence to the rule of law, even when doing so, stands in opposition to the popular wishes.

Now, assume with me, if you will, that our discussions today simply recognize the reality of this conflict of these ideals, that what we are implicitly acknowledging is that we want our judges to be independent, but just not too independent. And we want our judges to be accountable, but just not too accountable.

Perhaps I could be a little bit more pointed. Are we not really saying, "I want my judge to be independent to them, but I want my judge to be accountable to me?"

In the mid-1970s, Texas tried to rewrite its constitution. And the judicial section established merit selection retention election for the judges. The State's party platform for the Republican Party of Texas called for that proposal. And that provision has disappeared from the platform.

Now I cannot say, for a fact, why that happened. But my educated guess is because shortly thereafter, Republican judges started getting elected to the Bench. Their judges started losing, and our judges started winning.

So, let us look at the Texas experience. We have been electing judges on a partisan ballot for over 100 years. To say that these elections, because Texas was a one-party state for most of that time, were non-partisan is really not correct.

There were tremendous battles within the Democratic Party the conservative populist and liberal Democrats.

Also, it is misleading to say that the judges in Texas are elected. Upwards of 80% of judges came to the bench by gubernatorial appointment. And I have heard that 80% of those, if they had a primary opponent in their very first election, never had another election until their retirement.

Now, because of the evolving two-party state we have, we have a few more contests. But the percentage of the retained judges still holds at about 60%, maybe a little bit above it.

In short, Texas has an appointment retention system. It is just that the appointment is ad hoc, and a retention election is open to influences that have nothing to do with the merits of the judge.

Let us talk about reform. The quality of the judge's decision is very hard to measure. In fact, I suggest to you it cannot be measured. It may be an oversimplification, but it seems to me that only lawyers care why a court ruled the way it did. The public only cares about what the court's ruling is.

Now, it was interesting, the last session that was here, I kind of enjoyed it. You know, the First Amendment, tell it like it is. More information is better.

We have a little bit of a debate going on. What is the role of the judges and what should they say? If you are going to elect them, then let them say everything.

But then, the speakers all sort of agreed there are some things judges should not say, right? Well, these views are legal niceties. I am telling you, the public does not care about your reasons for your decision; they only care what you decided.

And I suggest in the election of judges, why wouldn't the public be entitled to demand of the judge how they are going to rule in a particular case because what else are you electing the judges for? What else do you elect judges for except to be your representative on the Bench; to elect our judges, as opposed to their judges?

I think it is a legal nicety to say that an issue may come before me, and therefore, I cannot comment on it. But if a voter cannot get your commitment, what else are you asking for their vote for?

Now, I'm giving you the extreme because of my campaign in 1992. That was the position of my opponent. My opponent said that he had a constituency and he had been elected to represent his constituency on the Court. I challenged him in that election, and I won, though Republicans were not winning statewide in Texas.

The question was asked earlier today, why do we see all this money getting in these state judicial races? I suggest to you an answer New federalism. This is not New Federalism of Justice Brennan who encouraged state supreme courts to look

at their state constitutions for guidance on personal liberties. I am talking about the fact that the United States Supreme Court is now saying that “Not every issue deserves a national solution. We want to see what the states are going to decide.” Let’s look at tort reform both in Congress and state legislatures, major battles over tort reform are occurring. Because state legislatures have been more active, the state supreme courts are where the action is.

For example, punitive damages is a big issue both in the business community and the plaintiff’s bar. And legislative limits on punitive damages are being interpreted in the state courts. Also class actions, that started out as a federal rule, are now recognized in all state rules.

Many state cases that used to be tried as individual cases now are being brought as class actions in the state courts. That means there is a lot of money on the line. I served on a Texas Intermediate appellate court in Dallas. It dealt with both civil and criminal appeals. I came to that court from a civil trial bench. But a good friend and colleague of mine came to that court from a criminal district bench. One of the very first arguments he handled was in a civil case. And the lawyers almost came to blows during their argument. My colleague said, “Wait, wait, wait, where’s the dead body? I mean, there s no dead body in this case. There were no firearms used. What’s the big deal?” But I explained later to my colleague, “you just don’t understand; it’s always money”

I suggest that the reason there is more money going into the state races is because these courts deal, day in and day out, with big issues involving both the plaintiff’s bar and the defense bar. And how the state supreme court rules means real dollars to them and their clients.

And to Mr. Hantler—he was here earlier, I may have missed him now—he said he was all in favor of the election of judges and he works with Daimler Chrysler. And I was tempted to say, “Show me the money”

That is really the truth. The truth is that, if you are going to have an election of judges, then the judges are going to have to get their message out. And to get their message out, they are going to have to be able to have access to resources necessary to pay for their messages’ dissemination.

In Texas, there are more population centers of 100,000 in various parts of the state than any other place in the country. There are sixteen major media markets. Dallas, Ft. Worth, and Houston only have 60% of the vote. If I am going to campaign statewide, it will take me \$600,000 to \$800,000 just for two weeks of TV publicity

And assuming it takes a dollar to earn a dollar, then it costs \$1.6 million to run just a two-week campaign in Texas if you want to have an effect on the voter.

So then, let me talk about campaign contributions. I became a judge and subject to election at a time when Texas had no limits on campaign contributions. By the time I got to the court of appeals, the notion that judges might set voluntary limits on contributions as a judicial reform was gaining steam. It resonated with a community that wanted you to be accountable, but not too accountable, that wanted you to be independent, but not too independent.

Campaign contribution limits sent a middle of the road message. Essentially we recognized that we had to raise campaign contributions, but we agreed to not let any

one individual give us so much money that it would raise the specter that we might be influenced in our judicial decisions.

I set mine at a pretty low limit. Ironically, I then raised more money than I had ever raised before. It turned out that by setting a limit, people actually started giving more money to my campaign. That was not too bad!

Also, one of the very effective things about a campaign contribution limit is it requires you to have a much broader base of support. One goal of mine was to have less than half of my money come from the lawyers, more than half from other sources than lawyers. By having a campaign contribution limit, you almost assure that you could not raise the money necessary in Texas to run an effective campaign without having to reach out to other members of the community for contributions.

But here is a rub. When I first started running as a judge, campaign contributions from lawyers did not bother me. I reasoned that I saw these lawyers day in and day out, and they won some and lost some. So I did not sense any particular concern about any one case. On the other hand, one day, I got a contribution in the mail, and then a second contribution. I did not recognize the names. Because I did not know who these people were, it sent off warning bells. Even my court administrator, who knew all the lawyers in town, didn't recognize the names so I just held the checks. About two days later, I was preparing for a hearing and whoa, the contributors were parties in the hearing. I sent the money back.

The irony of all of this is that in Texas today, if you quiz the public, they will tell you that they think the worst thing a judge can do is take contributions from lawyers. The best thing a judge can do is take contributions from individuals. Well, okay. So, half of my contributions are from lawyers, half are from individuals. So, now I bother both myself and the public. I guess that is just the way the system works. There is another thing about voluntary contribution limits that I would suggest to you. By making them you have to reach out for a broader base of support, I find that people get a lot more interested in your campaign.

If you can get somebody to put that two dollar bet down on the horse race, they have a much stronger interest in seeing the race through. There are those who say, "the rich can buy the elections if you have campaign contribution limits, because only they will have the funds necessary to win." And sometimes, that happens. But more often than not, it seems to me that you can create a tremendously broad base of support by smaller contributions. During the early part of George Bush's campaign, as he was gearing up, there was a lot of the national media giving him very little credit for what he was able to do.

But there was a little statistic out there that I thought was very telling. At one point in his campaign, \$60 million or something was the mark he had reached, his average contribution was \$500.

There was a lot of press given to his raising huge amounts of money. But if his average contribution was \$500, just think how many people bet on that horse race. And it seems to me that is what pulled him through.

Are judges different than other politicians? Another question I heard. The answer is yes, I think judges are different. If I am running for the legislature, if I am running for governor, I can tell you, "This is my agenda. I am for strong education. I am going to pay the teachers more. I am going to reduce your taxes. I am going

to reduce the property tax. Now, if you agree with me, contribute to my campaign so I can go sell my name to all these people, get my message out, and I can win.”

On the other hand, can a judge address school finance because it is an important issue for his or her constituency? With a school finance case pending, can a voter ask how are you going to rule? What can a judge say but “I’m sorry I can’t answer that question. That’s a case that might come pending before me, and I’ve got to obey the law. Now, how about contributing to my campaign so I can be elected to the bench?”

That is the difference, it seems to me, between judges and people who are elected to the legislative or executive branches.

For all of the First Amendment discussion about election versus appointment, I think all of this today really focuses on just a central notion. The public wants the judges to be accountable, but just not too accountable. And they want the judges to be independent, but just not too independent.

QUESTION & ANSWER

PROFESSOR DEBOW: Thanks, Justice Enoch. Time for questions. I will paraphrase your questions from this microphone. So, the more succinct you are, the more accurate I will be in repeating your question.

Okay, a two-part question: What about these specific forms of judicial candidates’ approach to a potential contributor? And secondly, what sort of enforcement action would be appropriate in cases where the rules are not followed?

PROFESSOR SCHOTLAND: There are only four states in which judges are completely free to directly solicit, including Texas and California. And I do not remember the other two states. Everywhere else, it must be done by a committee.

And maybe I am just a formalist, but I think there is a significant case for trying to build that bit of insulation between the judge and the fundraising.

I think it is also very important to be very realistic. I know, in fact, that often the fundraiser sits right there, and the fundraising judge sits right there. And the only question is, who happens to get to the person first?

And the judge is saying, “Do I now say thank you for your support, or do I say I sure hope you can support.” And the fundraiser is saying, “We really would like if you could send it.”

I remember an Arkansas Intermediate Appellate woman judge who was just the exemplary, splendid judge, who said, “You know, I really never looked at anything about who gave. It doesn’t come to my desk. I don’t look at the reports. I go out of my way to make sure I don’t know who gave. They come up to me at Bar picnics and they tell me.”

PROFESSOR DEBOW: A question about the McCain-Feingold proposal—

MR. BARAN: McCain-Feingold takes a multifaceted approach. In addition to banning certain types of advertising by certain groups prior to an election, it also requires disclosure by individuals, or groups of individuals, who are not incorporated and who run advertising during certain periods of time. So, if a wealthy individual wanted to pay for an ad that did not expressly name or expressly advocate the election or the defeat of a clearly identified candidate, but discussed a particular candidate by name, then he or she would have to file a report with the

Federal Election Commission. All of us in Washington are trying to figure out how this is going to work.

Furthermore, if McCain-Feingold passes, the first thing we all know is going to happen is that groups are going to try and figure out what kind of advertising they can finance without being subject to McCain-Feingold's prohibitions and disclosure requirements.

But I think I have come up with an ad that might be okay if this regime became law. It would be something along the lines of a picture of an individual's profile, like one of those old eighteenth century silhouettes, with a question mark on it. The message would be: "There is a Congressman who supports public funding of abortions. Now, we can't tell you the name of that Congressman, or show you the Congressman's picture, because this Congressman also voted for a bill that would make it a crime for us to do so. But we think we can give you his phone number."

(Laughter.)

MR. BARAN: "So, why don't you call that person, who we are by law not allowed to identify, and ask him why he is doing that." That is, I think, what we are going to be reduced to.

PROFESSOR SCHOTLAND: May I just pick up on Chief Justice Keith's using the words of how McCain-Feingold will work, and make a not bold prediction?

If you could buy stock in state parties, I would buy a lot right now because a lot of money will flow to the state parties if we keep it from flowing to the national.

PROFESSOR DEBOW: Other questions? The question is about sort of a transparency, I guess, of candidates who are supposedly non-partisan raising funds.

PROFESSOR SCHOTLAND: This is the first thing that the Justice has said that I could take any issue with. The leading troublemaking campaign pitch by judicial candidates is "Tough on crime." And we have it in all forms. We have it in not all states, but an awful lot.

One of the reasons he and his colleagues look so good is they do not have any criminal cases. They sent that over to another court, so they can be real judicial statesmen, and they are, in fact, real judicial statesmen. It speaks very well of President Bush, the appointments, the kind of appointments he made to that Court when he was Governor.

We had somebody running down in Houston, Marion Bloss. She ran an ad, "You do the crime, you do the time." Tough Marion.

And by the way, she put the picture of her opponent in the bottom of the ad. Why would anybody put a picture of an opponent in their own campaign ad? Well, if you want to get blunt about it, it is racism. They put in pictures of black opponents. And some put pictures of Latino opponents.

We had a fellow in Nevada, an incumbent Supreme Court Justice, who campaigned through the state arm and arm with the Attorney General. And they were on a tough on crime platform. Later, there was an effort to have that Justice recuse himself. All of his colleagues, except one, the Chief, agreed he did not have to recuse himself.

The Chief wrote an absolutely beautiful, blistering dissent. So, I am afraid I cannot go along with the proposition that judicial candidates do not go out and say "tough on crime." That is the leading, single bad problem.

Let me try to turn this to a happy event. There was a wonderful episode in Cook County, which has either a weekly or biweekly Cook County Irish newspaper. In Cook, as in many other places, the best thing is an Irish name, as mentioned earlier.

But a fellow named O'Riley was running. And he ran a half-page ad, "O'Riley" for whatever it is. And he, in fact, gets elected. And after the election, he runs another ad, except this is a full-page one.

And he has a great big picture of his very happy smiling black face saying, "Thank you, brothers and sisters."