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## Breakstone v. MacKenzie: In a Case Where Fear of Bias is Raised by Judicial Election Campaign Contributions, There are no Clear Winners

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# Breakstone v. MacKenzie: In a Case Where Fear of Bias is Raised by Judicial Election Campaign Contributions, There are no Clear Winners

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## **Abstract**

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**KEYWORDS:** bias, winners, fear

## Breakstone v. MacKenzie: In a Case Where Fear of Bias is Raised by Judicial Election Campaign Contributions, There are no Clear Winners

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“[W]ould not a lawyer coming before a recently elected judge be concerned if opposing counsel had contributed to the judge’s campaign . . . particularly if the concerned lawyer had not contributed to that campaign?”<sup>1</sup> That question, posed by Florida Supreme Court Justice Ben F. Overton in an address delivered in April 1989,<sup>2</sup> was prophetic. The following September, Florida’s Third District Court of Appeal responded, holding in *Breakstone v. MacKenzie*<sup>3</sup> that a lawful campaign contribution to a judge or even to the judicial campaign of a judge’s spouse is legally sufficient grounds for disqualification of a judge upon a motion by the non-contributing party.<sup>4</sup> In January 1990, however, Florida’s Fourth District Court of Appeal aligned itself with the dissent in *Breakstone*, holding in *Keane v. Andrews*,<sup>5</sup> that a legal campaign contribution by a lawyer to a judge is not legally sufficient grounds for disqualification when the contributing lawyer appears before the recipient judge.<sup>6</sup>

Justice Overton had the opportunity to answer his own question when the Florida Supreme Court recently decided the issue.<sup>7</sup> In *Breakstone*,<sup>8</sup> the court could either eviscerate the state’s system of choosing its trial court judges through competitive nonpartisan elections<sup>9</sup> or

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1. Overton, *Trial Judges and Political Elections: A Time for Re-examination*, 2 U. FLA. J.L. & PUB. POL’Y 9, 10 (1988-89).

2. *Id.*

3. *Breakstone v. MacKenzie*, 561 So. 2d 1164 (Fla. 3d Dist. Ct. App. 1989) (en banc); consolidated with *Super Kids Bargain Store, Inc. v. MacKenzie*.

4. *Id.* at 1166.

5. *Keane v. Andrews*, 555 So. 2d 940 (Fla. 4th Dist. Ct. App. 1990). *Keane*, and a subsequent case, also styled *Keane v. Andrews*, 561 So. 2d 30 (Fla. 4th Dist. Ct. App. 1990) and involving the same parties as well as the same issue is currently pending before the Florida Supreme Court. In both cases Dr. Moulton Keane moved for the disqualification of Broward County Circuit Court Judge Robert L. Andrews on grounds that opposing counsel had contributed to the judge’s campaign.

6. *Keane*, 555 So. 2d 940.

7. *MacKenzie v. Breakstone*, 15 Fla.L. Weekly 397 (1990).

8. *Id.*

9. FLA. CONST. art. V, § 10(b). Section 10(a) was amended to provide for merit

spare the system that no one really wants, a system that draws breath directly from the yawn of public apathy.<sup>10</sup> With the exception of Justice Overton, the court chose the status quo,<sup>11</sup> but not without reservations. "I concur in the majority's opinion because I believe it endorses the lesser of the evils from which we must choose," Justice Kogan said in his concurring opinion.<sup>12</sup> "And in so concluding, I have many regrets," he added.<sup>13</sup>

The majority held that a lawful contribution to the election campaign of a judge or the judge's spouse is not legally sufficient grounds for disqualification.<sup>14</sup> However, the court upheld the third district's grant of writs of prohibition to disqualify Judge MacKenzie on other grounds.<sup>15</sup> Justice Overton concurred in the result, but set forth in a separate opinion his view that a \$500 contribution to a judicial election campaign may be legally sufficient grounds for disqualification of a judge.<sup>16</sup>

retention of supreme court justices and district court judges. Section 10(b) provides for the election of circuit and county court judges as follows:

Circuit judges and judges of county courts shall be elected by vote of the qualified electors within the territorial jurisdiction of their respective courts. The terms of circuit judges shall be for six years. The terms of judges of county courts shall be for four years.

FLA. CONST. art. V, § 10(b).

10. See Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57 (1985).

Voter apathy and unawareness in the area of judicial elections has been documented by several studies. Examples offered by the author include a 1976 Texas election exit poll in which just 15.4% of the voters were able to name a supreme court candidate, 4.9% could name a district court candidate, and only 2.4% were able to name a county court candidate. Not so suprisingly, 69 percent of those asked said they preferred the election of judges over appointment. *Id.* at 86-88.

Even those closest to the existing system of picking trial court judges, lawyers and the judges themselves, dislike the system. See Overton, *supra* note 1, at 21-22.

11. *Breakstone*, 15 Fla. L. Weekly 397.

12. *Id.* at 400.

13. *Id.*

14. *Id.* at 397-98.

15. The supreme court upheld the third district's ruling in *Breakstone* that Judge MacKenzie impermissibly passed on the facts contained in the motion for disqualification and should be disqualified on that basis. *Breakstone*, 15 Fla. L. Weekly at 399-400. The supreme court also upheld the district court's ruling in *Super Kids* that Judge MacKenzie should have granted a motion for disqualification rather than granting an *ore tenus* motion for withdrawal of the counsel who had contributed to the judicial campaign of Judge MacKenzie's husband. *Id.*

16. *Breakstone*, 15 Fla. L. Weekly at 401.

This comment examines the rationales on both sides of the *Breakstone* controversy. Part I summarizes the facts of the case as well as the majority and dissenting opinions of the Third District Court of Appeal. Part II focuses on the Florida Supreme Court's decision in *Breakstone*, analyzing what the court said as well as what the court did not say. Policy considerations involved in this controversy are discussed in Part III. Finally, Part IV concludes that the *Breakstone* decision failed to recognize the potential for infringement on litigants' due process right to judicial impartiality in its conclusion that a lawful contribution to a judicial election campaign is not legally sufficient grounds for disqualification.

## Part I

This section separately summarizes the facts of *Breakstone v. MacKenzie*<sup>17</sup> and *Super Kids Bargain Store, Inc. v. MacKenzie*.<sup>18</sup> Part I also summarizes the majority and dissenting opinions of the Third District Court of Appeal.

### A. *Breakstone*

The Florida Supreme Court's consideration of judicial disqualification in cases involving campaign contributors sprang from a chance encounter in the anteroom of Dade County Circuit Court Judge Mary Ann MacKenzie.<sup>19</sup> Arthur Breakstone, the defendant in a postjudgment garnishment proceeding, was in the anteroom with his counsel and plaintiff's counsel awaiting a hearing before Judge MacKenzie when the judge's husband paid a visit to his wife in chambers.<sup>20</sup> The judge's husband was at that time a candidate for circuit court judge.<sup>21</sup> Two days after the anteroom encounter Breakstone's attorney learned that opposing counsel had contributed \$500 to the husband's judicial campaign and promptly filed a motion to disqualify Judge MacKenzie.<sup>22</sup> "The suggestion is that there was a specific opportunity for the

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17. *Breakstone*, 561 So. 2d at 1164.

18. *Id.*

19. *Id.* at 1164 n. 2. The third district stated that its analysis was based on the contribution itself, not the circumstances under which the contribution became a cause of concern to Arthur Breakstone and his counsel.

20. *Id.*

21. *Id.* at 1166.

22. *Id.* at 1164 n. 2.

husband to mention the \$500 contribution by the plaintiff's counsel sitting in the anteroom, and that such information, however innocently imparted, would inevitably create a favorable bias toward the \$500 contributor," the court stated.<sup>23</sup>

Judge MacKenzie denied Breakstone's motion for disqualification.<sup>24</sup> After finding the motion to be legally insufficient, the judge stated:

I cannot address your motion as far as the truth or misinformation that you may have or not have or anything like that. But I will state for the record that I kept absolutely clear of my husband's campaign, had nothing to do with it whatsoever. Couldn't go to a judicial luncheon—went to one and it was followed all over by The Miami Herald, and that's the last time I went to anything. And who donated to his campaign and who did not donate to his campaign, I don't know. I have not looked at his records. So in no way could I be prejudiced.<sup>25</sup>

During the same hearing Judge MacKenzie expressed "frustration for not being in my husband's campaign . . . In fact, if I had been in it, he would have won, and that's for real."<sup>26</sup> On the basis of the judge's comments, Breakstone renewed his motion for disqualification on the grounds that the judge had impermissibly passed on the merits of the original motion for disqualification.<sup>27</sup> Judge MacKenzie also denied the renewed motion.<sup>28</sup>

23. *Id.*

24. *Id.* at 1166. Under Florida law, judicial disqualification in civil cases is governed by Rule 1.432 of the Florida Rules of Civil Procedure. Applicable standards for disqualification are contained in Florida Statutes section 38.10 and Canon 3(C) of the Code of Judicial Conduct. Florida statutes pertaining to judicial disqualification and judicial elections are considered in Part II.

The issue of whether a judge should decide a motion for his or her own disqualification is beyond the scope of this note. For a full discussion of the matter, see D'Agostino, *Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law — Proposal for Reform*, 11 NOVA L. REV. 201 (1986).

25. *Breakstone*, 561 So. 2d 1164.

26. *Id.*

27. *Id.* See Rule 1.432(d), FLA. R. CIV. P.; *Bundy v. Rudd*, 366 So. 2d 440, (Fla. 1978) ("[A] judge who is presented with a motion for disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.'") *Id.* at 442 (quoting FLA. R. CRIM. P. 3.230(d)).

28. *Breakstone*, 561 So. 2d 1164.

## B. *Super Kids*

*Super Kids*<sup>29</sup> was a subsequent, separate case before Judge MacKenzie and the plaintiff's lawyer was the same contributing counsel who had represented the plaintiff in *Breakstone*.<sup>30</sup> Based on the lawyer's same \$500 campaign contribution and the third district's panel holding in *Breakstone* that Judge MacKenzie should have disqualified herself,<sup>31</sup> defendant Super Kids Bargain Store, Inc., moved for disqualification.<sup>32</sup> During a hearing on the motion, plaintiff's counsel offered to withdraw from the case and made a motion for substitution of counsel.<sup>33</sup>

After stating that on the basis of the third district's panel holding in *Breakstone* the motion for disqualification was legally sufficient, Judge MacKenzie granted the *ore tenus* motion for substitution and then denied the motion for disqualification.<sup>34</sup>

## C. Opinions of the Third District Court of Appeal

The third district's en banc hearing and rehearing of the two consolidated cases produced a sharply divided 5-4 decision in which the majority held that a lawful campaign contribution of \$500 to either a judge or the judge's spouse is legally sufficient grounds for disqualification.<sup>35</sup> Judge Nesbitt's dissenting opinion argued that since the legislature set a \$1,000 limit on contributions to trial court judicial campaigns, a \$500 contribution could not be the basis of a reasonable fear of prejudice.<sup>36</sup> In a separate dissenting opinion, Chief Judge Schwartz emphasized policy considerations, including concern that the majority opinion endorsed an unsubstantiated public cynicism about and distrust of the judiciary.<sup>37</sup>

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29. *Id.*

30. *Id.*

31. *Breakstone v. MacKenzie*, 561 So. 2d 1163 (Fla. 3d Dist. Ct. App. 1988).

32. *Breakstone*, 561 So. 2d 1164, 1166.

33. *Id.*

34. *Id.* at 1172-73.

35. *Id.* at 1166.

36. *Id.* at 1174 (Nesbitt, J., dissenting) (citing FLA. STAT. § 106.08(1)(e) (1987)).

37. *Id.* at 1178.

## 1. The Majority

The third district majority opinion written by Judge Cope stated that both Florida's codified law,<sup>38</sup> and case law<sup>39</sup> require a judge's disqualification when a party reasonably fears bias.<sup>40</sup> Judge Cope further stated that the litigant's fear must be taken as being reasonable so long as the allegations are neither frivolous nor fanciful.<sup>41</sup>

The majority reasoned that because a \$500 campaign contribution is both substantial and beyond the financial means of the ordinary litigant, a reasonable person would fear prejudice on the part of the recipient judge in favor of the contributing party.<sup>42</sup>

The majority went on to argue that the statutory \$1,000 limit on contributions to trial court judicial campaigns<sup>43</sup> is not a legislative statement which implies no reasonable fear of prejudice could stem from contributions of \$1,000 or less.<sup>44</sup> Judge Cope pointed to state election law requiring disclosure of campaign contributions and expenditures<sup>45</sup> as evidence that the legislature recognized the potential for bias in lawful contributions, requiring disclosure so the public can make its own assessments.<sup>46</sup>

## 2. The Dissent

Judge Nesbitt's dissenting opinion argued that a lawful campaign contribution cannot form the basis for a reasonable fear of bias because the amount contributed is within the limits established by the legislature as being permissible.<sup>47</sup> Nesbitt noted that if the legislature's intent in enacting the contribution cap and the disclosure laws was to permit members of the public to "draw their own conclusions," then the purpose would be accomplished by the disclosure laws alone and there would be no need for a limit on campaign contributions.<sup>48</sup>

38. *Id.* at 1167 (citing FLA. R. CIV. P. 1.432; FLA. STAT. § 38.10 (1987)).

39. *See* *Livingston v. State*, 441 So. 2d 1083, 1085-1086 (Fla. 1983); *Dickenson v. Parks*, 104 Fla. 577, 582, 140 So. 459, 462 (1932).

40. *Breakstone*, 561 So. 2d at 1166-73.

41. *Id.* at 1167.

42. *Id.* at 1168.

43. FLA. STAT. § 106.08(1)(e) (1987).

44. *Breakstone*, 561 So. 2d at 1171.

45. *Id.* (referring to FLA. STAT. §§ 105.08, 106.07 (1987)).

46. *Id.*

47. *Id.* at 1175.

48. *Id.* at 1174.



The opinion also stated that electing trial court judges through contested nonpartisan elections reflects the will of the people and that campaigns and campaign funding are "necessary evils."<sup>49</sup> If the public is dissatisfied with the system, Nesbitt said, it is the legislature, not the courts, which must respond to those concerns.<sup>50</sup>

In his separate dissenting opinion, Chief Judge Schwartz opined that the majority replaced a presumption that lawful campaign contributions were proper with a "conclusive presumption of impropriety."<sup>51</sup> Schwartz added that the appearance of impropriety to the uninformed does not amount to legally sufficient grounds for disqualification.<sup>52</sup> "We cannot operate a judicial system, or indeed a society, on the basis of the factually unsubstantiated perceptions of the cynical and distrustful," Schwartz wrote.<sup>53</sup>

The third district certified the following question to the supreme court:

**IS A TRIAL JUDGE REQUIRED TO DISQUALIFY HERSELF ON MOTION WHERE COUNSEL FOR A LITIGANT HAS GIVEN A \$500 CAMPAIGN CONTRIBUTION TO THE POLITICAL CAMPAIGN OF THE TRIAL JUDGE'S SPOUSE?<sup>54</sup>**

## Part II

The Florida Supreme Court answered the certified question in the negative,<sup>55</sup> but affirmed the lower court's writ of prohibition disqualifying Judge MacKenzie on other grounds.<sup>56</sup> The court, speaking through Justice Ehrlich, held that a legal campaign contribution to a judge or to a judge's spouse is not legally sufficient grounds for disqualification of a judge.<sup>57</sup> Justice Overton concurred in the result, but wrote separately, arguing that the majority had reached the wrong conclusion on that a lawful campaign contribution could spawn a reasonable fear of judicial bias.<sup>58</sup> Justice Kogan concurred in the majority opinion but

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49. *Id.* at 1176.

50. *Id.* at 1177.

51. *Breakstone*, 561 So. 2d at 1178.

52. *Id.*

53. *Id.*

54. *Id.* at 1173.

55. *Breakstone*, 15 Fla. L. Weekly at 399.

56. *Id.* at 399-400.

57. *Id.* at 397-98.

58. *Id.* at 401.

wrote separately to express his concerns over the troubling policy considerations which he would anticipate stemming from the adoption of Overton's view.<sup>59</sup>

This part of the article is divided into two sections. The first deals with what the majority opinion said. The second deals with what the majority chose to ignore. Justice Kogan's concerns are addressed in Part III under the heading of public policy considerations.

### A. What the Majority Said

The court arrived at its conclusion in *Breakstone* by applying first amendment freedom of association principles which were enunciated by the U.S. Supreme Court in *Buckley v. Valeo*,<sup>60</sup> and adopted by the Florida Supreme Court in *Richman v. Shevin*.<sup>61</sup> In determining the constitutionality of the Federal Election Campaign Act (FECA) of 1971,<sup>62</sup> the *Buckley* Court stated that congressional limits on campaign contributions did implicate freedom of association,<sup>63</sup> but upheld the \$1,000 limitation on contributions as a means of checking the two evils which the Court saw as being associated with campaign contributions: 1) The creation of a *quid pro quo* between contributor and recipient, and, 2) the appearance of a *quid pro quo*.<sup>64</sup>

Justice Ehrlich concluded in *Breakstone* that the twin evils of campaign contributions (corruption and the appearance of corruption) are adequately managed by Florida election laws and Florida's Code of Judicial Conduct.<sup>65</sup> The court cited the statutory provisions limiting contributions to candidates for circuit and county court judgeships to \$1,000,<sup>66</sup> and requiring public disclosure of campaign contributions in

59. *Id.* at 400-01.

60. 424 U.S. 1 (1976).

61. 354 So. 2d 1200 (Fla. 1977). The court held *inter alia* that the Dade County Judicial Trust Fund was a political committee within the definition of Florida Statutes section 106.011(2). *Id.* at 1205. The ruling effectively ended the attempt by the Dade County Bar Association to fund judicial election campaigns through a trust fund rather than through direct contribution from lawyers to judicial candidates.

62. Federal Election Campaign Act of 1971, 2 U.S.C. § 431 (1988).

63. *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976).

64. *Id.* at 26-27.

65. *Breakstone*, 15 Fla. L. Weekly at 398.

66. FLA. STAT. § 106.08(1)(e) (1989) states in part:

(1) No person, political committee, or committee of continuous existence shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:

excess of \$100.<sup>67</sup>

The court also pointed to Canon 7(B) of Florida's Code of Judicial Conduct as providing an additional safeguard against corruption or the appearance of corruption which might stem from judicial campaign contributions.<sup>68</sup> Canon 7(B)(2) provides as follows:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, or solicit attorneys for publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law. A candidate's committees may solicit funds for his campaign only within the time limitation provided by law. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.<sup>69</sup>

Canon 7(B)(2) is designed to insulate judicial candidates from the financial aspects of their campaigns through the use of campaign committees to solicit and accept contributions. However, the *Breakstone*<sup>70</sup> court failed to account for the contradiction of purpose between Canon 7(B)(2), which tries to isolate the judicial candidate from knowledge of

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(e) To a candidate for county court judge or circuit judge, \$1,000.

*Id.*

67. Florida Statutes section 106.07(1)(4)(a) states in part:

(1) Each campaign treasurer designated by a candidate . . . shall file regular reports of all contributions received . . . by or on behalf of such candidate . . .

...

(4)(a) Each report required by this section shall contain:

1. The full name, address, and occupation, if any, of each person who has made one or more contributions to or for such committee or candidate within the reporting period, together with the amount and date of such contributions. However, if the contribution is \$100 or less or is from a relative, as defined in section 112.3135(1)(c), provided that the relationship is reported, the occupation of the contributor need not be listed, and only the name and address are necessary.

FLA. STAT. § 106.07(1)(4)(a) (1989).

68. *Breakstone*, 15 Fla. L. Weekly at 398.

69. FLA. CODE JUD. CONDUCT Canon 7(B)(2) (1988).

70. *Breakstone*, 15 Fla. L. Weekly 397.

campaign contributions, and Florida Statutes section 106.07, which requires that contributions be made public for all, including the candidate, to inspect.<sup>71</sup>

Even without the public disclosure of campaign contributions mandated by statute, elected judges can not help but know who their supporters are because those supporters attend campaign functions such as fundraisers.<sup>72</sup> Consequently, despite the existence of Canon 7(B)(2), judges are not insulated from knowledge of who backs their campaigns and, therefore, the *Breakstone* court's reliance on Canon 7(B)(2) was misplaced. The majority stated that not all suspicions of judicial bias are legally sufficient grounds for disqualification.<sup>73</sup> "There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers," the court explained.<sup>74</sup>

However, courts have held that circumstances which give the appearance of bias may rise to the level of legally sufficient grounds for disqualification. In *Potashnick v. Port City Construction Co.*,<sup>75</sup> for example, the court held that where the father of a judge is a partner in a law firm which represents a litigant before the judge, disqualification is required.<sup>76</sup>

In the context of judicial election campaigns, it was held in *Caleffe v. Vitale*<sup>77</sup> that disqualification was warranted where the counsel for one of the litigants in a divorce action was running the judge's ongoing campaign for re-election.<sup>78</sup>

71. Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 385 (1987).

72. *Id.*

73. *Breakstone*, 15 Fla. L. Weekly at 399.

74. *Id.*

75. 609 F.2d 1101 (5th Cir. 1980).

76. *Id.* at 1113.

77. 488 So. 2d 627 (Fla. 4th Dist. Ct. App. 1986). The majority opinion in *Breakstone* does mention *Caleffe* in a footnote. "Although a motion for disqualification based solely upon a legal campaign contribution is not legally sufficient, it may well be that such a contribution, in conjunction with some additional factor, would constitute legally sufficient grounds for disqualification upon motion." 15 Fla. L. Weekly at 400 n.5 (emphasis in original).

78. *Caleffe*, 488 So. 2d at 629. *But see* *Raybon v. Burnette*, 135 So. 2d 228, 230 (Fla. 2d Dist Ct. App. 1961) (Plaintiff and plaintiff's attorneys campaigned for unsuccessful

The *Breakstone* majority found support in other jurisdictions for its position that a lawful campaign contribution by an attorney to a judge is not legally sufficient grounds for disqualification.<sup>79</sup> In *Ainsworth v. Combined Insurance Co. of America*,<sup>80</sup> the Nevada Supreme Court held that involvement of plaintiff's lawyer in the re-election campaign of the court's former chief justice some years earlier did not constitute legally sufficient grounds for disqualification.<sup>81</sup> The *Breakstone* court quoted *Ainsworth* for the proposition that:

[L]eading members of the state bar play important and active roles in guiding the public's selection of qualified jurists. Under these circumstances, it would be highly anomalous if an attorney's prior participation in a justice's campaign could create a disqualifying interest, an appearance of impropriety or a violation of due process sufficient to require the justice's recusal from all cases in which that attorney might be involved.<sup>82</sup>

The *Breakstone* court also found support for its position in *Frade v. Costa*,<sup>83</sup> and quoted the Supreme Judicial Court of Massachusetts as saying a lawful, ordinary campaign contribution " 'does not tend to indicate any closer relation between the contributor and the recipient than would ordinarily exist between members of the same local bar.' " <sup>84</sup>

However, the *Breakstone* majority did not consider several Texas cases on point, perhaps due to that jurisdiction's well known willingness to see no evil when it comes to judicial campaign contributions.<sup>85</sup> In *Rocha v. Ahmad*,<sup>86</sup> the Texas court held that disqualification was not

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cessful judicial candidate who was one of plaintiff's lawyers, and defense attorneys endorsed and contributed financially to campaign of the judge. Held, insufficient grounds for disqualification.).

79. *Breakstone*, 15 Fla. L. Weekly at 399.

80. 774 P.2d 1003 (Nev. 1989), cert. denied, 110 S.Ct. 376 (1989).

81. *Id.* at 1020.

82. *Breakstone*, 15 Fla. L. Weekly at 399 (quoting *Ainsworth*, 774 P.2d at 1020).

83. 171 N.E.2d 863 (Mass. 1961).

84. *Breakstone*, 15 Fla. L. Weekly at 399 (quoting *Frade*, 171 N.E.2d at 865).

85. Texas precedent on the issue dates back to *Coker v. Harris*, 281 S.W.2d 100 (Tex. Civ. App. 1955) (plaintiff's attorney active in judge's reelection campaign was insufficient grounds for disqualification, especially in light of participation in same campaign by one of defendant's attorneys).

86. 662 S.W.2d 77 (Tex. Ct. App. 1983).

warranted where counsel for a litigant had contributed “many thousands of dollars” to two justices’ election campaigns and held victory celebrations for those justices in his law offices.<sup>87</sup> The court dismissed the matter, saying:

It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge’s opponent.<sup>88</sup>

Similarly, in *River Road Neighborhood Association v. South Texas Sports, Inc.*,<sup>89</sup> the same court ruled, in a case involving the same contributing counsel and the same recipient justices, that disqualification was not required even though the attorney had contributed 21.7% of one justice’s total reported contributions, and 17.1% of the other justice’s total campaign war chest.<sup>90</sup>

The most widely known example of the Texan approach to this issue came in *Texaco, Inc. v. Pennzoil, Co.*,<sup>91</sup> in which the appellate court dismissed Texaco’s contention that a \$10,000 contribution from Pennzoil’s lead attorney to the election campaign of the presiding judge two days after the suit was filed did not warrant disqualification.<sup>92</sup>

## B. What the Majority Did Not Say

The court’s opinion in *Breakstone*<sup>93</sup> is based on the right of free

87. *Id.* at 77-78.

88. *Id.* at 78.

89. 673 S.W.2d 952 (Tex. Ct. App. 1984).

90. *Id.* at 952-953. In *River Road* the contributing attorney was a party, not counsel.

91. 729 S.W.2d 768 (Tex. Ct. App. 1987).

92. *Id.* at 842-843.

93. *Breakstone*, 15 Fla. L. Weekly 397.

association guaranteed by the first amendment, but the court did not directly deal with the competing constitutional principle of due process which requires judicial impartiality.<sup>94</sup> The due process approach to the issue is at the heart of the Third District Court of Appeal's majority opinion in *Breakstone*,<sup>95</sup> and is the argument advanced by Justice Overton in his separate opinion.<sup>96</sup>

State law regarding the disqualification of judges is rooted in the principle of due process.<sup>97</sup> The U.S. Supreme Court stated in *Tumey v. Ohio*,<sup>98</sup> that:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.<sup>99</sup>

In *In re Murchison*,<sup>100</sup> the Court added that "a fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."<sup>101</sup> The Court went on to say that, "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"<sup>102</sup>

The theme that due process requires not only impartiality, but the appearance of impartiality, is present in Canon 3(C)(1) of Florida's Code of Judicial Conduct,<sup>103</sup> in state statutes on the disqualification of judges in civil cases,<sup>104</sup> and case law interpreting disqualification stat-

94. U.S. CONST. amend. XIV, § 1. ("nor shall any state deprive any person of life, liberty, or property, without due process of law . . .").

95. 561 So. 2d at 1166-73.

96. 15 Fla. L. Weekly at 401.

97. See Note, *supra* note 71, at 391.

98. 273 U.S. 510 (1927).

99. *Id.* at 532.

100. 349 U.S. 133 (1955).

101. *Id.* at 136.

102. *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

103. FLA. CODE JUD. CONDUCT, Canon 3(c)(1) (1988).

104. FLA. R. CIV. P. 1.432.

(a) Grounds. Any party may move to disqualify the judge assigned to the action on the grounds provided by statute.

(b) Contents. A motion to disqualify shall allege the facts relied on to show the grounds for disqualification and shall be verified by the party.

(c) Time. A motion to disqualify shall be made within a reasonable time

utes.<sup>105</sup> As explained by Overton in his opinion in *Breakstone*: "The Code of Judicial Conduct, in Canon 3(C)(1), states that, '[a] judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned.'"<sup>106</sup> Overton went on to cite case law in which the court has construed Canon 3(C)(1) as being consistent with precedent holding that in a motion for disqualification, a judge need only consider whether the fear of bias exists in the mind of the moving party and whether that fear is well grounded.<sup>107</sup> Overton also quoted *Dickenson v. Parks*,<sup>108</sup> for the proposition that public confidence in the integrity of its judiciary is crucial:

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after discovery of the facts constituting grounds for disqualification.

(d) Determination. The judge against whom the motion is directed shall determine only the legal sufficiency of the motion. The judge shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall enter an order of disqualification and proceed no further in the action.

(e) Judge's Initiative. Nothing in this rule limits a judge's authority to enter an order of disqualification on the judge's own initiative.

*Id.*

Florida Statutes section 38.10 provides in part:

Whenever a party to any action or proceeding makes and files an affidavit stating that he fears he will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

FLA. STAT. § 38.10 (1989).

105. See, e.g., *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983); *Dickenson v. Parks*, 104 Fla. 577, 582-584, 140 So. 459, 462 (1932).

106. *Breakstone*, 15 Fla. L. Weekly at 401 (emphasis in original). For a critical look at Canon 3C(1), see Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. A.B. CITY N.Y. 694 (1973). Then-Justice Rehnquist stated that, "though the Canons of Ethics are extraordinarily detailed and specific about what constitutes a 'financial interest,' they have virtually nothing to say about what constitutes 'bias.'" Rehnquist suggested that the use of the word "favoritism" would be clearer than "bias." *Id.* at 708-711.

107. *Breakstone*, 15 Fla. L. Weekly at 401 (citing *State ex rel. Brown v. Dewell*, 131 Fla. 566, 573, 179 So. 695, 697-698 (1938)); *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983); *Hayslip v. Douglas*, 400 So. 2d 553 (Fla. 4th Dist. Ct. App. 1981).

108. 104 Fla. 577, 140 So. 459 (1932).



Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.<sup>109</sup>

In weighing the effects on impartiality and the appearance of impartiality created by lawyer contributions to judicial election campaigns, courts should consider the amount of the contribution, the timing of the contribution, and whether there is a pattern of support between the contributor and recipient. Consideration of these factors is useful in determining whether the recipient has an interest in the outcome of a particular case involving the contributor, and therefore is useful in determining the potential due process infringement.<sup>110</sup> In Florida, the maximum dollar amount of a contribution to a trial court judicial campaign is limited to no more than \$1,000.<sup>111</sup> However, the amount of a contribution may have particular significance to the recipient because of its size in comparison to other contributions received. As Overton noted in *Breakstone*, the \$500 contribution in question was the second largest received by the candidate.<sup>112</sup> Considering the timing factor, Overton noted that the judicial election campaign of Judge MacKenzie's husband was ongoing at the time the disqualification motion was made.<sup>113</sup> Although Florida limits contributions to trial court judicial campaigns to \$1,000,<sup>114</sup> and requires public disclosure of contributions,<sup>115</sup> the potential exists for an infringement on due process. Depending on the proportionate size of the campaign contribution, the timing of the contribution and the existence of a pattern of support, the lawful contribution could affect the judge's impartiality as well as the public perception of impartiality. The court's holding in *Breakstone*<sup>116</sup> that an attorney's lawful campaign contribution to a judicial candidate is not legally sufficient grounds for disqualification ignores the potential

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109. *Breakstone*, 15 Fla. L. Weekly at 401 (quoting *Dickenson*, 104 Fla. at 582-584, 104 So. at 462).

110. See Note, *supra* note 71 at 403.

111. FLA. STAT. § 106.08(1)(e) (1987).

112. *Breakstone*, 15 Fla. L. Weekly at 401.

113. *Id.*

114. FLA. STAT. § 106.08(1)(e) (1987).

115. FLA. STAT. § 106.07(4)(a) (1987).

116. 15 Fla. L. Weekly 397.

for due process infringement.

### Part III

Justice Kogan, in his concurring opinion in *Breakstone*, calls the majority's position on judicial disqualification "the lesser of evils from which we must choose."<sup>117</sup> Kogan goes on to describe what evil lurks on the side of the issue chosen by Overton.<sup>118</sup> According to Kogan's view, the dangers include the possibility that contributions to judicial campaigns would be made by lawyers or litigants solely for the purpose of avoiding particular judges who would be required to grant a motion for disqualification.<sup>119</sup> This, Kogan notes, would have the double negative impact of securing contributions for those inferior candidates that contributing lawyers and litigants would seek to avoid through disqualification, and would promote "judge-shopping."<sup>120</sup> The combined effect would be "an administrative nightmare" in the judicial system.<sup>121</sup> Finally, Kogan suggests that well-motivated lawyer contributions to the best qualified judicial candidates would dry up, and as a result, only the wealthy or those supported by special interests could afford the cost of a judicial election campaign.<sup>122</sup> An answer to the dilemma presented by *Breakstone* rests in the hands of Florida voters and their legislators, Kogan said, suggesting a merit retention system for trial court judges along with public financing of judicial election campaigns.<sup>123</sup> "So long as judicial seats can be filled by elections financed by private campaign contributions, we in Florida must live with a system that opens the door to some type of abuse," Justice Kogan wrote.<sup>124</sup>

Florida is not alone in its struggle to solve the problems inherent in electing judges.<sup>125</sup> As one author noted, "[i]t may well be that no subject in American law has provoked more articles, more speeches and meetings, more hearings and struggles in legislatures and for constitu-

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117. *Id.* at 400 (Kogan, J., concurring).

118. *Id.*

119. *Id.*

120. *Id.* at 400-01.

121. *Breakstone*, 15 Fla. L. Weekly at 401.

122. *Id.*

123. *Id.*

124. *Id.*

125. See, e.g., Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 452-66 (1988).

tional revision, than judicial selection."<sup>126</sup>

The practice of electing judges by popular vote was not instituted by the founding fathers of our nation,<sup>127</sup> but rather emerged after 1832 as part of the Jacksonian era's wave of democratization of the American political scene.<sup>128</sup>

Today, forty-two states elect some portion of their judiciary.<sup>129</sup> Twenty states, including Florida hold nonpartisan judicial elections.<sup>130</sup> Florida, thirty-three other states, and the District of Columbia use the "Missouri Plan" process of merit selection and retention for at least some of their judiciary.<sup>131</sup> Florida employs merit selection and retention for its supreme court justices and district court judges.<sup>132</sup> While twenty-four states now use some form of merit selection and retention for trial court judges,<sup>133</sup> Florida continues to elect its circuit and county court judges in competitive elections.<sup>134</sup>

#### A. The Nature of the Judicial Election Problem

Voter apathy and unawareness in the area of judicial elections have been well documented in a number of studies.<sup>135</sup> As a result of public apathy, judicial elections are decided not on the issues or the candidates' records, but on name recognition.<sup>136</sup> The 1982 primary race of incumbent Alabama Supreme Court Justice Oscar Adams provides an example of how the name game operates in judicial politics.<sup>137</sup> Although Adams' challenger was a three-year practitioner from an unaccredited law school, the challenger had the same name as a popular bakery and Adams only won the primary by a narrow margin.<sup>138</sup> "Our survey showed a substantial number voted for him because they

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126. Schotland, *supra* note 10 at 72.

127. Overton, *supra* note 1, at 11.

128. Atkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. B.J. 152 (Mar. 1976).

129. Note, *supra* note 125 at 452.

130. *Id.*

131. Overton, *supra* note 1 at 12, 14.

132. *Id.* at 12-13.

133. *Id.* at 14.

134. FLA. CONST. art. V, § 10(b).

135. Schotland, *supra* note 10, at 86-88.

136. Overton, *supra* note 1, at 18-19.

137. Schotland, *supra* note 10 at 89.

138. *Id.*

thought he was the bakery man," Justice Adams said.<sup>139</sup>

Buying name recognition in a contested election is an expensive proposition. The price tag for an average campaign for a Dade County circuit court judgeship is \$150,000, but, in one race a judicial candidate spent \$600,000, while his opponent spent \$350,000.<sup>140</sup> In jurisdictions in which competitive judicial elections are held, the national trend is toward more contested elections at a steadily escalating cost.<sup>141</sup>

These increasingly expensive judicial elections will require more campaign contributions to pay the bills and a high percentage of the contributions to judicial campaigns come from lawyers.<sup>142</sup> A 1982 study showed that in Florida, 50% of the contributors to judicial campaigns were lawyers and that lawyers gave 50% of the money raised by judicial candidates from outside sources.<sup>143</sup>

Lawyer contributions to judicial campaigns raise concerns about the integrity and independence of the judiciary.<sup>144</sup> Concerning the ethical dilemma, one judge said, "I very much appreciated the contributions I received from others. However, it makes me feel uncomfortable dealing with them in court."<sup>145</sup>

## B. The Merit Selection and Retention Solution

Extending merit selection and retention to trial court judges is the most frequently mentioned solution to the problems posed by *Breakstone*.<sup>146</sup> The move has been endorsed by The Florida Bar, the League of Women Voters, and the Circuit Judges Conference.<sup>147</sup> The 1978 report of the Constitutional Revision Commission recommended the

139. *Id.*

140. *Report of the Florida Bar Commission on Merit Selection and Retention of Trial Judges*, 11 app. (Jan. 1990). (Comments of Miami political consultant Gerald Schwartz before the Commission in a public hearing in Miami) [hereinafter *Report*].

141. Schotland, *supra* note 10, at 77.

142. *Id.* at 136.

143. *Id.*

144. *Id.* at 120. (Schotland writes, "I reject the proposition that practices . . . inherent in judicial elections can be called corrupt. Present campaign financing practices put undue strain on actual judicial integrity and independence, on the judiciary's and the bar's appearance of integrity and independence . . . .")

145. Note, *The Ethical Dilemma of Campaigning for Judicial Office: A Proposed Solution*, 14 FORDHAM URB. L.J. 353, 402 (1986).

146. *Breakstone*, 15 Fla. L. Weekly 397.

147. Overton, *supra* note 1, at 21-22.

change, as did the 1984 report of the Article V Review Commission.<sup>148</sup>

The Florida Bar Commission on Merit Selection and Retention recommended extending the process to trial court judges as a means of upgrading the quality of judges and eliminating the public perception of impropriety spawned by judicial election campaigns.<sup>149</sup>

The predominant contributors to judicial elections are attorneys. The collection of large sums of money from those who will be representing clients before the judges creates the appearance [of] impropriety in the eyes of the general public. Although the commission did not find that this, in fact, does create widespread problems of favoritism; the perception of favoritism by the public is a very real and serious problem which poisons the public's attitude toward our justice system generally.<sup>150</sup>

However, even supporters of the move to extend merit selection and retention to Florida's trial judges admit that problems would remain,<sup>151</sup> because those judges would still face election to retain their positions. But the major problem with the view that merit retention will ease the present dilemma is that extending merit retention to trial court judges requires a constitutional amendment, which requires legislative action. The most recent attempt to pass legislation placing such a constitutional amendment on the ballot was House Joint Resolution 9, which was referred to the House Judiciary Committee,<sup>152</sup> where it died in June 1990. Therefore, for the present and foreseeable future, the courts should not look to the legislature for solutions to the problems *Breakstone*<sup>153</sup> represents.

#### Part IV

Justice Kogan's lesser evil approach to this issue is only necessitated by the court's all-or-nothing answer to the *Breakstone* dilemma. A more sensible alternative is a case-by-case approach which balances

148. *Id.*

149. *Report, supra* note 140, at 18-19.

150. *Id.*

151. *Breakstone*, 15 Fla. L. Weekly at 400. Justice Barkett, in a brief concurring opinion, stated that, "merit retention elections requiring judges to solicit campaign funds are subject to the same concerns as those presented here. Therefore, although merit retention improves the situation, it is not the answer to the problem." *Id.*

152. Journal of the House of Representatives, No. 1, at 9 (April 3, 1990).

153. 15 Fla. L. Weekly 397.

the freedom of association of campaign contributors against the due process requirement of judicial impartiality.

Such a case-by-case analysis would require consideration of at least three relevant factors relating to the judicial campaign contribution. Those factors are the proportionate size of the contribution in relationship to other contributions received, the timing of the contribution, and whether any pattern of support exists between the contributor and the judge.

While the Court chose not to consider such circumstances in *Breakstone*, the facts of *Keane v. Andrews*<sup>154</sup> offered the court another opportunity to look beyond the mere fact that the contribution was within the legal limit. In *Keane*, Dr. Moulton Keane moved for the disqualification of Broward County Circuit Court Judge Robert L. Andrews on grounds that opposing counsel had contributed to the judge's campaign.<sup>155</sup> But while opposing counsel contributed \$500 to the judge's campaign, contributions by his firm and members of the firm brought the total contribution to \$3,850.<sup>156</sup> These contributions, made during a two-month period of 1988, represented 17.25% of the judge's campaign contributions through the first eight months of that year.<sup>157</sup>

Only by assessing the circumstances surrounding the lawful contribution is it possible to determine the importance of the contribution to the recipient judge. The greater the importance, the greater the potential for due process infringement. By not considering the relevant circumstances surrounding judicial campaign contributions the Court is opening the door to due process violations created by the appearance of judicial bias.

*Peter Cooke*

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154. 555 So. 2d 940 (Fla. 4th Dist. Ct. App. 1990), *review denied*, (1990 Fla. LEXIS 1090).

155. *Id.*

156. Petitioner's Brief on the Merits at 2, *Keane v. Andrews*, 555 So. 2d 940 (Fla. 4th Dist. Ct. App. 1990) (No. 75,378), *review denied*, (1990 Fla. LEXIS 1090).

157. *Id.* at 2-3.