A COMMENTARY ON PUBLIC FUNDS OR PUBLICLY FUNDED BENEFITS AND THE REGULATION OF JUDICIAL CAMPAIGNS

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Professor Briffault's paper[1] is an elegant and virtually unassailable analysis of the question of whether receipt of public campaign funds by candidates for judicial office may, consistently with modern First Amendment doctrine, be conditioned upon the candidates' agreement to certain constraints on the content of their campaign speech. In particular, Professor Briffault considers the constitutionality of conditioning receipt of public funds on judicial candidates' agreeing to avoid deceptive and misleading communications,[2] to participate in debates,[3] to abide by viewpoint neutral restrictions on the content of their statements in voter pamphlets,[4] and to refrain from announcing their positions on legal and political issues generally.[5] Professor Briffault understandably finesses the question of whether these judicial candidate speech codes would violate the First Amendment if adopted without the carrot of public funding; he assumes that they would. Concluding that they pass *Buckley's* voluntariness test,[6] he proceeds to analyze them pursuant to the notoriously indeterminate unconstitutional conditions doctrine and, not surprisingly, his analysis leads him to an indeterminate conclusion.[7]

I agree with Professor Briffault that, on the basis of present First Amendment doctrine, the central question he poses in his paper cannot be answered with confidence, at least not if one takes everything the Supreme Court has said about elections and candidates' speech in other election contexts and assumes that its underlying rationale applies with equal vigor to the speech of judicial candidates.[8] It is on this point that this Commentary will take issue with him, though not so much with the accuracy of his analysis of the state of the law as with its normative thrust—or lack thereof. In other words, I think he is correct that courts in the future are as likely as courts have been in the past to begin their

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1. Richard Briffault, *Public Funds or Publicly Funded Benefits and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819 (2002).
2. *Id.* at 820.
3. *Id.* at 839-40.
4. *Id.* at 840-43.
5. *Id.* at 819-20.
6. *See* Buckley v. Valeo, 424 U.S. 1, 57 n.65 (1976).
7. Briffault, *supra* note 1, at 828-36.
8. *Id.* at 822.

analysis of judicial election speech regulations by reasoning from First Amendment premises that were developed in other election contexts.[9] However, I have considerable qualms—more so, apparently, than does Professor Briffault—about whether this is the correct First Amendment starting point. In addition, the indeterminacy of Professor Briffault's conclusion with respect to his central inquiry invites speculation about why this uncertainty exists and how such a muddle came about. This Commentary will offer some thoughts along those lines—thoughts which will no doubt resonate with and represent variations on themes that will have permeated the discussions that have already taken place at this Symposium on Judicial Campaign Conduct and the First Amendment.

The thoroughness and transparency of Professor Briffault's analysis and his apparent familiarity of the First Amendment terrain of candidate speech generates an impression somewhat akin to that which Chief Justice Shepard expressed in his 1996 essay:[10] that standard First Amendment analysis "obscures and undervalues the relationship between litigants' interests in the neutral adjudication of their claims and judicial campaigning."[11] Conventional approaches to the question of judicial candidate campaign speech have forced Professor Briffault (and courts that have ruled on First Amendment challenges to judicial speech codes) to try to fit a square peg—namely, speech of candidates for *judicial* office—into a round hole—namely, First Amendment doctrine concerning speech of *ordinary citizens* and of candidates for *legislative* or *executive* office. This is particularly apparent in Professor Briffault's analysis of whether judicial speech codes would "distort" or "reform" a medium of expression,[12] for the arguments he puts forward pass each other like ships in the night instead of taking issue with one another. This suggests that neither First Amendment doctrine in general, nor the particular doctrines that have emerged from *Buckley* and its progeny, nor the doctrinal chaos of the "unconstitutional conditions" cases that Professor Briffault so ably recounts[13] are adequate for the task of identifying, much less of sorting out, the interests that conflict when the subject is regulation of the speech of candidates for judicial office.

One reason for this inadequacy, to be sure, is a function of the fact that First Amendment doctrine itself has become so formulaic. It pretends to invite analysts to play a sort of paint-by-numbers game and seems to suggest that if one touches all the familiar bases ("is the regulation viewpoint or content based?" "does it achieve a compelling state interest by the least restrictive means?") the one true answer will readily emerge. In fact, however, far from eliminating the First Amendment's indeterminacy, the formulas merely disguise it. The doctrine, in other words, is like the emperor who has no clothes. This aspect of First Amendment doctrine is of course not unique to our problem of public funding

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9. *Id.* at 827.

10. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).

11. *Id.* at 1083.

12. Briffault, *supra* note 1, at 833-36.

13. *Id.* at 828-36.

conditioned on adherence to speech codes by candidates for judicial office, but it is exacerbated in the context we are considering. This is so simply because the interests at stake on both the First Amendment side and the governmental interest side of the balance are not interests that the Court has spent much time or effort considering. Thus what at first glance seem to be the most obviously relevant precedents offer much less guidance than First Amendment precedents usually do—and that is precious little.

Implicit in what I have just said is the controversial proposition that the First Amendment interests at stake in judicial elections are in fact different, not only in kind, but also in degree, from those that the Court has considered in prior cases dealing with candidate speech or unconstitutional conditions. The proposition amounts to a claim that candidates for judicial office are not the legal or constitutional equivalents of either ordinary citizens or candidates for other elective offices; the scope and extent of their First Amendment rights, therefore, ought not in the first instance to be measured by the same yardstick that applies to candidates for legislative or executive office. Chief Justice Shepard and others have made this point, and Professor Briffault summarizes it in his discussion of whether judicial candidate speech codes would "reform" or "distort" judicial election campaigns.[14] My quibble with Professor Briffault's paper is that it does not give the argument quite the credence or attention it deserves, nor does he fully develop its implications. Indeed, consistently with his otherwise admirable fair-mindedness, he presents—as if it were equally persuasive and normatively equivalent—the counter-argument, which is to the effect that candidates for judicial office "no less than any other person, [have] . . . First Amendment right[s] to engage in the discussion of public issues and vigorously and tirelessly to advocate [their] own election. . . ."[15] But I would like to put on the table (or, perhaps, back on the table) the proposition that, although it is constitutional and indeed has become quite common to select state judges by popular election, judicial elections are not all the same as elections of legislators, presidents, or governors. Indeed, judicial elections are an anomaly when considered both in the full context of our legal and our political traditions and in terms of separation of powers principles and the function of judges within a separated powers regime. Because judicial elections put both rule of law norms and commands of the due process clause at substantial risk, and because they invite judges to become embroiled in explicitly political disputes, neither the First Amendment rules of the democratic political game nor its solicitude for individual speakers are necessarily the appropriate starting point of analysis when it comes to regulating the speech of candidates for judicial office.

I take up the former point first. Consider what our rule of law tradition requires:

> The rule of law signifies the constraint of arbitrariness in the exercise of government power. . . . [I]t means that the agencies of official coercion

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14. *Id.* at 833-36.

15. Brown v. Hartlage, 456 U.S. 45, 53 (1982), *quoting Buckley*, 424 U.S. at 52.

> should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct. The evils to be retarded are caprice and whim, the misuse of governmental power for private ends, and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and even-handedness in the administration of justice and accountability in the use of government power. In short, the "rule of law" designates the cluster of values associated with conformity to law by government.[16]

Consider too the due process clause, which gives litigants the right to an impartial judge, to a decision based on facts presented by the litigants, evidence constrained by rules of relevance, and arguments of counsel based on the commands of existing law. Fidelity to these norms is central to our desire to remain a nation governed by laws, not by men, where clear, impersonal, universally applicable general laws constrain the conduct of both individual citizens and those who govern them. Abiding by these norms also secures to all citizens the promise that law itself—and those entrusted to apply it—will exhibit qualities of regularity, certainty, transparency, predictability, evenhandedness, and equal, impersonal, disinterested and impartial treatment according to known general rules and without regard to status, rank, or political persuasion. For all its platitudinous quality, the boast that we are—and relentlessly aspire to be—a nation of laws, not men, is the bedrock of our entire legal system.

What rule of law norms and commands of due process imply for judges is that they are not *supposed* to be "accountable" for their decisions to public opinion about whether they are "correct" or not—no matter how well- or ill-informed public opinion may be. Rather, they are accountable to the legal system itself, to the precedents and rules that guide their decisions, and to the litigants whose cases come before them.[17] With all due respect to legal realists, it is implicit in the nature of the judicial duty impartially to *apply* the law (rather than to make it, as do politically accountable legislators, or to enforce it, as does the politically accountable executive) and not to attend to the policy whims of the political majority at any particular moment. Our system of representative democracy permits the majority's policy whims to be enacted into law by legislators, and provides for judges to apply the law that the majority has passed. The majority may prefer at any given time simply to ignore existing law rather than to expend the political effort to change it, and they may thus reward the judicial candidate who promises (however implicitly) to ignore rather than to

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16. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212-13 (1985).

17. I acknowledge here that I am finessing a very difficult question about judicial accountability and what mechanisms exist to enforce it. The point in text is *not* necessarily that "accountability to the legal system itself" is an *adequate* means for constraining judicial abuse of power, for that is a question that must be left to another day. The point simply is that the idea of direct judicial accountability to the electorate is anomalous.

abide by it. But these realities ought to be irrelevant to the question whether the First Amendment permits candidates for judicial office to speak qua candidate without restraint about political and legal issues. The judicial process is already unfortunately highly politicized, and unrestrained campaigning by candidates for judicial office threatens even greater politicization. This in turn threatens to undermine the rule of law and deprive citizens of due process.

The next question, though, is whether we can inhibit the politicization of the judicial process with rule of law and due process constraints. It is not merely First Amendment doctrine, nor an indiscriminate insistence that judicial elections—because they are elections—"operate free of government distortion or control,"[18] that stand in our way. Forces other than the First Amendment have brought us to the point where judicial election campaigns seem to pose a threat to the promise of judicial impartiality. In recent decades, law has become ubiquitous, with legal rules and regulations governing seemingly every facet of American life. American citizens are notoriously litigious. Courts have placed themselves at the center of most of the major social controversies of the day, from abortion to affirmative action, from school prayers to school vouchers. Thus the stakes in judicial elections are increasingly high for those individuals and groups who believe their interests are potentially at risk if the "wrong" candidate prevails. With the stakes becoming ever more significant, the prospect of inducing more restraint on the part of judicial candidates or their advocates and opponents does not seem to be a bright one.[19] Finally, since legal realists have stripped us of our innocence about the extent to which the "rule of law" ever was, could be, or even should be a reality, it is not as easy as it once might have been to make the case that restraints on speech during judicial elections is warranted by the need to preserve the rule of law.

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18. Briffault, *supra* note 1, at 834.

19. On this point, I offer a note of additional skepticism about whether, even if public funding conditioned on candidate adherence to speech codes, debate requirements, and voter pamphlet restrictions were to pass both political and judicial muster, it would help much. So long as independent advocacy were permitted—and the case for and practicality of restraining it are both highly questionable in my view—judicial elections would continue to be politicized especially in high profile, high stakes races.