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JUDICIAL ELECTIONS IN THE AFTERMATH OF WHITE, CAPERTON, AND CITIZENS UNITED
BY CHARLES GARDNER GEYH

Those who support judicial elections pledge allegiance to judicial accountability.1 For proponents, elections hold judges answerable to the people they serve: they are democracy-enhancing; and they curb the excesses of "activist" judges predisposed to disregard the law and implement their ideological preferences. From this perspective, the alternative of a commission-based appointive system (a.k.a. "merit selection") deprives citizens of their right to vote, delegates the task of judicial selection to an elitist cabal of experts, and moves the politics of judicial selection from the ballot box to the backroom.

Opponents of judicial elections, in contrast, salute the star spangled banner of judicial independence.2 Judicial elections undermine judicial independence, opponents argue, when: they lead judicial candidates to commit themselves to deciding future cases in particular ways; candidates receive campaign support so substantial as to appear beholden to their supporters; and incumbents are put at risk of losing their tenure for being affiliated with an unpopular political party, for invalidating unconstitutional but popular laws, or for upholding the rights of unpopular litigants. Merit selection is preferable, they argue, because judicial tenure should not turn on the outcome of popularity contests and because commission-based appointive systems diminish the corrosive influence of money in the selection process.

Between ardent proponents and opponents is a third group that can be characterized as incrementalists.3 It includes judicial election proponents who acknowledge that hotly contested elections can threaten judicial independence in ways that concern election opponents. It likewise includes thoughtful election skeptics who concede the political inevitability of judicial elections in jurisdictions where the judiciary’s legitimacy with the public turns on judges being selected in a democratic process. Incrementalists would retain judicial elections in jurisdictions that have them, but look for ways to minimize their adverse affects on judicial independence by regulating judicial campaigns. And so, incrementalists have advocated such reforms as longer terms between election cycles, public financing of judicial campaigns, disclosure requirements for campaign contributions, contribution limits, restrictions on campaign speech and conduct, judicial performance evaluations, moving from partisan to non-partisan races, and judicial disqualification of judges whose campaign speech and conduct calls their impartiality into question.

In the past decade, the Supreme Court of the United States has decided three cases of particular relevance to elected judiciaries. In Republican Party of Minnesota v. White, decided in 2002, the Supreme Court declared that judicial candidates had a First Amendment right to announce their views on disputed legal issues that may come before them as judges.4 In Caperton v. Massey Coal Company, decided in 2009, the Court decided that when a person with a personal stake in a case pending before a judge lends independent support to the judge’s election campaign so substantial as to create a likelihood of judicial bias, due process demands disqualification of the judge.5 Finally, in Citizen’s United v. Federal Election Commission, the Supreme Court ruled that corporations have a first amendment right to undertake independent campaigns on behalf of candidates for elected office.6 For the reasons elaborated upon below, all three cases can be used to bolster arguments against judicial elections—arguments that are unlikely to move election proponents. For incrementalists, White and Citizen’s United complicate their lives by restricting the permissible reach of governmental regulation of campaign conduct, while Caperton creates a limited opportunity for more incremental reform.

Republican Party of Minnesota v. White
Broadly construed, White implies that every Code of Conduct restriction on judicial speech must survive the exacting test of strict scrutiny, which bodes ill for a host of rules limiting campaign speech and association. Narrowly construed, White simply invalidated the “announce clause,” which few states employed and which the Model Code of Judicial Conduct jettisoned twelve years before White was decided because it imposed unwarranted restrictions on the rights of judicial candidates to express their views on issues of the day.

In the years since White, the lower courts have been called
upon to apply White to other rules and in different settings, with inconsistent results. Some courts have invalidated rules barring judges from making pledges, promises or commitments; others have upheld them. Some courts have struck down rules prohibiting judges from engaging in electioneering of various kinds; others have upheld them.

At a minimum, however, White enables judicial candidates to make campaign issues of the questions they are likely to decide as judges. Candidates who worry that taking public positions on matters they will decide later could compromise their impartiality may decline to discuss their views, but do so at their peril in hotly contested races when voters may punish their silence. It is unsurprising, then, that issue-based judicial campaigns have become more prevalent post-White, in jurisdictions that have relaxed their restrictions on judicial speech the most.

White troubles many election opponents, because it portends to turn judicial races into referenda both on future rulings, to the detriment of judicial impartiality (insofar as judges appear to pre-commit themselves to a result before the case is heard), and on past rulings, to the detriment of judicial independence (insofar as judges risk loss of tenure for making unpopular decisions). For them, White presents another good reason to replace judicial elections with merit selection.

Election proponents, however, often applaud White, because it entitles candidates to provide voters with information that the electorate regards as important to its decision. For incrementalists, White has complicated their reform agenda, by creating a cloud of uncertainty over how far regulators may restrict campaign speech and conduct without running afoul of the first amendment.

Insofar as White forbids regulators from putting a fence at the top of the cliff to stop independence and impartiality-threatening campaign speech and conduct, incrementalists have proposed judicial disqualification as an ambulance at the cliff base to ensure that unpreventable speech and conduct does not impair the fairness of subsequent judicial proceedings. Such a remedy was suggested by Justice Kennedy in his concurrence in White, and in 2003, the American Bar Association followed suit with a rule requiring that judges disqualify themselves from proceedings in which the judge made a prior extrajudicial statement "that commits or appears to commit the judge to... rule in a particular way." While some election proponents have argued that disqualifying judges who exercise their first amendment rights is itself a first amendment violation, lower courts have—with isolated exceptions—rejected that view.

Caperton v. Massey Coal Company
Caperton concerned a different kind of judicial campaign-related disqualification problem that arises when a campaign supporter has an interest in a case pending before the judge. In 1999, the ABA amended the Model Code to require disqualification when parties or lawyers appeared before a judge to whose election campaign they had directly contributed amounts in excess of a dollar threshold. Virtually no state had adopted that rule, however, which in any event did not address the problem in Caperton, because Caperton concerned an independent campaign (not a direct contribution) by the CEO of a party (not the party itself).

To ensure a fair tribunal that satisfied due process requirements, the Court (quoting Withrow v. Larkin) declared that disqualification is necessary when “the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.” Applying a probability of bias standard to the facts of the case, the majority found that the “campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome.” In addition, it found that this “significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—offer a possible temptation to the average... judge to... [l]ead him not to hold the balance nice, clear and true.” The Court therefore concluded that “[i]n these extreme facts, the probability of actual bias rises to an unconstitutional level.”

Like White, Caperton may raise more questions than it answers. Other than to say that non-disqualification will pose due process problems only in exceptional cases, the majority offered little guidance for future application of its probability of bias test. In his dissent, Chief Justice Roberts posed forty questions that, in his view, the majority’s opinion left unanswered.
Election opponents can argue that to avoid the perils Caperton sought to address and the uncertainties Caperton left to linger, the simple solution is to end judicial elections altogether, and with them the need for campaign related spending that gave rise to Caperton in the first place. On the other hand, Caperton is unlikely to move election proponents, who may regard Caperton as wrongheaded or irrelevant to the judicial selection debate, and who could conceivably use the case to support an argument that the crisis rhetoric of election opponents is overblown because the due process clause operates as a check on elections run amok.

Incrementalists, in turn, may see Caperton as an opportunity. The Caperton majority took pains to emphasize that the due process remedy was a rare one, and that states were free to—and typically did—impose disqualification requirements that were more stringent than the due process clause required. That could be viewed as an invitation for the states to avoid the uncertainties Caperton created by enforcing their disqualification rules more rigorously. If problematic cases (in which litigants and lawyers create the perception that their campaign support is buying influence from judges before whom they appear) can be addressed by disqualification under state law, then the need for Supreme Court intervention is obviated.

**Citizens United v. FEC**

Citizens United raises the stakes for election opponents and proponents alike. Gone are prohibitions on corporate contributions to independent campaigns in support of candidates for elective office, and likely gone are prohibitions on corporate contributions to the candidates themselves. For election opponents, the door that Citizens United opened for corporations to exert greater (and arguably disproportionate) influence over the outcomes of judicial elections, is another good reason to end judicial elections. For election proponents, Citizens United is a positive development both for the first amendment and judicial elections, which—like White—encourages more speech rather than less and will lead to a better informed electorate. For their part, incrementalists may find Citizens United frustrating, insofar as it deprives them of regulatory authority to limit corporate influence on judicial races, and the baleful effects of such influence on judicial independence and impartiality.

**Conclusion**

In short, White, Caperton and Citizens United each can be impressed into the service of arguments for and against judicial elections. Which way one is moved by these arguments will turn in large part on how one envisions the role of judges in American government. For those who see judges as politicians in robes, akin to legislators or governors, White and Citizens United should be received as welcome developments because they portend to make judicial races more competitive, issue driven affairs—like political branch races. Judicial elections can hold judges more fully accountable for their conduct in office if they are high-profile events that scrutinize the candidates’ records closely. For those who see judges as “different” from other politicians, on the other hand, White and Citizens United will be more troubling. Those who think that judges are more likely to rule fairly and on the basis of facts and law if they are insulated from electoral pressure and the blandishments of corporate support will flinch at the prospect of further politicizing judicial selection and may look more favorably upon a move toward an appointive system.

Caperton, in contrast, offers incrementalists an opportunity to insulate the judicial process from some of the more corrosive effects of the electoral process. It bears emphasis, however, that disqualification is a reactive remedy—one that comes into play after a judge has already made statements or accepted support that call her impartiality into question. It may protect future litigants from being caught in the crossfire of hotly contested judicial campaigns, but is an incomplete restorative for those committed to preserving the appearance of impartial justice to the public a large.

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See, e.g., Call to Action: Statement of the National Summit on Improving Judicial Selection, 34 Loy. L.A. L. Rev. 1353, 1354 (2001) (“Many observers have concluded that moving to a wholly appointed judiciary is the best answer to these problems. But movement away from systems providing for contested elections of judges has not occurred in most states. Too little attention has been given to incremental changes in the election process to address some of the most serious threats to judicial independence and impartiality”); see also, American Bar Association, Justice in Jeopardy 74 (2003) (“the Commission acknowledges that support for judicial elections remains entrenched in many states,” and that “[i]t is to those states that the Commission now directs its attention, with recommendations aimed at ameliorating some of the deleterious effects of elections”); see also James Sample, Caperton: Correct Today, Compelling Tomorrow, 60 Syr. L. Rev. 293, 302 (2010) (arguing that more attention be paid to incremental judicial selection reforms because “repeated calls for fundamental changes prove to be of scant pragmatic value”).


In re Kinsey, 842 So. 2d 77 (Fla. 2003), cert. denied, 540 U.S. 825 (2003); In re Watson, 794 N.E.2d 1 (N.Y. 2003).


White, 536 U.S. 765, 794 (Kennedy concurring).


For a good summary of Post-White cases, including those concerning recusal of judges who make prior commitments, see http://www.brennancenter.org/content/resource/summaries_of_relevant_cases_decided_since_republican_party_of_minnesota_v_w


129 S.Ct. at 2264.