# Professional Responsibility & Legal Education

## Judicial Speech, Judicial Elections, and the Coming Fallout from *Caperton v. Massey Coal Company*

*By W. William Hodes**

### Note from the Editor:

The following two articles present differing views on state judicial elections as well as the scope and implications of the U.S. Supreme Court case *Caperton v. Massey Coal Company*. We hope that publishing these articles helps contribute to the debate over the issues involved in this case and in judicial elections generally. The Federalist Society welcomes your responses to these materials. To join the conversation, you can e-mail us at info@fed-soc.org.

The Federalist Society

As befits a constitutional democracy dedicated to the primacy of the rule of law, the American system of government assigns to the judiciary a more active role in society than in any other county in the history of the world. The legalization of political and policy disputes, both public and private, is a permanent and essential feature of our system.

Paradoxically, the judiciary plays its active role only when called into action by others; it is like a fire engine company that stands by passively until the alarm bell rings, but then has no choice other than to take decisive action (even if that "action" is to refuse to alter the status quo). Thus, quite unlike members of the executive and legislative branches of government, members of the judiciary do not control their own agendas and timetables, and cannot promise to address certain issues, let alone promise what results will obtain.

Nonetheless, when the judiciary is pulled into the thicket of issues that have been the subject of long public debate, critics often accuse it of defying the will of the people and supplanting the rest of government, rather than enforcing the law as laid down by the political branches and performing its historical constitutional function of providing needed checks and balances. In these situations, the critics assert, judges are giving free rein to their mere personal preferences, ideologies, and individual prejudices, and imposing those values on the rest of us, under the pretense that that is what "the law" requires.

Spirited attacks on "excessive" judicial activism have been launched from both the left and the right—in recent years more from the right than from the left. Those attacks can have merit, but they can also be overblown, and they tend to ignore the point that there are powerful arguments to be made against an *insufficiently* engaged judiciary. If the fire alarm is not answered—because of a justiciability bar set "too high," for example—then someone is going to get burned. Indeed, calibrating the "right" level of involvement of the judiciary is itself one of the deepest constitutional and jurisprudential questions in American law.

** President, The William Hodes Professional Corporation; Professor Emeritus of Law, Indiana University; Co-Reporter (with Charles Gardner Geyh), American Bar Association, The Model Code of Judicial Conduct (2007). The views expressed herein are those only of the author.*

Rare excesses aside—and concededly what counts as an "excess" is hotly contested, as is what frequency counts as "rare"—the American judiciary by and large plays an appropriate and indeed indispensable role, not only with respect to checks and balances at the national level, not only with respect to federalism, not only with respect to vindication of individual federal and state constitutional rights, but with respect to the ordering of private party disputes and transactions as well, according to both common law and statutory norms.

Because of its special place in our scheme of government, the judiciary must be staffed by a cadre of independent and impartial judges.[1] Yet, those traits are not critical—and may even be antithetical—to successful service as a representative of a constituency in the legislature or in an executive branch position.

All legislation discriminates between those who are benefitted and those who are burdened, and it would be passing strange to find, for example, that an elected representative from a farming area was "impartial" during consideration of a bill to raise taxes on farm products. And while creativity and sound policy analysis may be admirable qualities in an officeholder, an elected representative who demonstrates too much "independence"—namely taking action independently of the wishes of his constituency—cannot long avoid punishment at the polls.

The distinctive mode of operation of the judicial branch has, accordingly, led to the development of an impressive array of statutes, rules, and ethical precepts that attempt to shield individual judges from threats to their independence and impartiality. In particular, almost all forms of *ex parte* importuning are banned, as are pernicious outside influences on the judicial function—including not only bribes and intimidation (of course), but also public or political pressure. Ironically, however, the most onerous form of political pressure, the threat of retaliation at the polls, is not only *not* forbidden, but is stoutly defended in the majority of states that elect some or all of their judges.[2]

At the same time, judges are government officials wielding an enormous amount of discretionary power that is capable of being abused. Thus, one of the defining issues of governance is to find an acceptable point on a spectrum running between judicial independence and judicial accountability, and to keep judges

within shouting distance of that point. Concededly again, that formulation conveniently evades the question of whether the needle needs to be moved more toward independence or more toward accountability, and how far.

In today's world, moreover, the issue has become more focused and also more deeply embedded in the fabric of our system: *who* will hold the judiciary accountable, and *to what standard*? Finally, as already intimated above, should judicial accountability, to whatever extent it becomes a high order value, be accomplished directly, through the ballot box, as it is in most states? Or should it be accomplished indirectly, through a combination of appointments, confirmations, and impeachments carried out by officials who are themselves elected, as it is in a few states and in the federal system?

The United States Supreme Court has engaged the continuing reality of state court judicial elections on more than a few occasions, usually somewhat awkwardly, always with an undertone of disapproval, and always with a marked unwillingness to address the long-term structural difficulties inherent in using popular elections to select public officials who not only do not "represent" their constituents,[3] but who are sometimes required to take action that is opposed by a significant majority of the voters.[4]

## I. The *Caperton* Case: Campaign Finance and Judicial Impartiality

The Supreme Court's most recent encounter with the elected judiciary was *Caperton v. A.T. Massey Coal Co.*,[5] in which the Court, by a vote of 5-4, held that massive campaign expenditures by a party in a pending case—repeatedly but incorrectly referred to as massive campaign contributions—were so likely to skew the judgment of the favored candidate, that disqualification of that (victorious) candidate, now sitting on the state supreme court, was constitutionally required.

*Caperton* was the latest in a short line of cases dating back over eighty years in which the Supreme Court has intervened to put a constitutional floor under state law systems regulating judicial bias. There can come a point, in other words, in which the pressure on a judicial officer to favor one party or the other is so irresistible that failure to stand down constitutes a denial of the other party's right to due process of law under the Fourteenth Amendment.

The seminal and still most obvious and easiest to understand case was *Tumey v. Ohio*,[6] in which the Court adopted as the constitutional standard an inability "to hold the balance nice, clear and true" between the litigants. In *Tumey*, mayors of small towns were authorized to sit as judges to hear (without a jury) cases involving petty criminal offenses under the Ohio alcoholic beverages laws.

Under the Ohio regime, convicted defendants would pay a small fine, and these fines would be paid in part into the town's treasury, and in part to the Mayor personally as a stipend for assuming the additional duty of sitting as a judge. Of course, as the Supreme Court readily saw, the stipend was actually for assuming the additional duty of sitting as a judge *and convicting defendants*, because absent a conviction there would be no fine and no stipend.[7]

The only other significant case in this line—until *Caperton* was decided in 2009—was *Aetna Life Ins. Co. v. Lavoie*.[8] In that case, Justice T. Eric Embry of the Alabama Supreme Court had voted with the majority of a closely divided court to uphold a punitive damages award against Aetna for bad faith refusal to pay a claim under a health insurance policy. At the same time, the justice was himself the lead plaintiff in a class action pending in the lower courts of Alabama against the health insurance carrier for all state employees (including not only Justice Embry, but all of his colleagues on the Alabama Supreme Court). The class, claiming that the carrier—which was not Aetna—pervasively delayed and refused to pay valid claims, sought punitive as well as compensatory damages.

The United States Supreme Court reversed the Alabama Supreme Court's decision against Aetna because of Justice Embry's refusal to disqualify himself, but, significantly, only after *rejecting* a claim that the justice was biased or prejudiced towards insurance companies generally, as evidenced by statements he had made at his deposition in the class action. Disqualification for bias (as opposed to interestedness) was unknown at common law, the Court reminded, and was a matter for the states to regulate by statute or court rule. It could essentially never rise to the constitutional level.[9]

But it is not hard to see why Justice Embry's participation in the *Lavoie* decision was *Tumey*-like in its self-interestedness: although the justice could not gain directly at *Aetna's* expense, a ruling against Aetna on the availability of punitive damages in Alabama would significantly enhance his leverage against the defending carrier in the case in which he was the lead plaintiff. Thus, Aetna was entitled to have this justice removed from decision-making in *its* case as a matter of fundamental fairness.[10]

The Supreme Court had a more difficult time, however, putting limits on the *Lavoie* rule, and this may have come back to haunt it in the *Caperton* case in 2009, as will be seen. In *Lavoie*, the question was asked why only Justice Embry was required to be disqualified, and not the other members of the Alabama Supreme Court (who were also members of the class in the suit against the state's health insurance carrier). In response, the United States Supreme Court simply asserted that the other justices had only a "slight" pecuniary interest that was "too remote and insubstantial to violate the constitutional constraints," whereas Embry's was "direct, personal, substantial, [and] pecuniary."[11]

Earlier in the opinion, the Court had conceded that it was impossible to know if Justice Embry had actually been influenced by the pendency of the class action, but said that nothing more than a "possible temptation" was sufficient to require disqualification—again quoting *Tumey*. Ultimately, the Court had to content itself with the hellishly vague proposition that "justice must satisfy the appearance of justice" in order to comport with the Due Process Clause.

If that is the standard, unfortunately, then there is no standard; whatever "appears" to a majority of the Supreme Court to be "not justice," or a "possible temptation" to injustice, will be grounds for constitutionally mandated disqualification, accompanied by reversal of decisions rendered by a possibly tempted state court judge or justice.

In *Caperton v. Massey Coal Co.*, another justice of a state supreme court (West Virginia) was ordered disqualified from a case by the United States Supreme Court on the basis of the due process analysis developed in *Tumey* and *Lavoie*, but not because of anything that the justice did, and not because of anything more substantial, ultimately, than the "appearance" that an injustice might have been done.

The case began in 2002 in the state courts of West Virginia, when Hugh Caperton and his small development and coal sales firms sued Massey Coal, one of the largest coal producers in the world, for business torts, including fraudulent misrepresentation and interference with contractual relationships. A jury found for Caperton, and awarded $50 million in damages, including punitive damages. When the case eventually made its way to the West Virginia Supreme Court of Appeals and was decided in 2007, a 3-2 majority found that Massey had indeed engaged in misconduct and that the jury's verdict was supported by the facts. The majority nonetheless reversed the jury verdict, on the basis of two subtle and perhaps novel procedural and jurisdictional issues.

A lot had happened between the end of the proceedings in the trial court and the decision in the state supreme court, in particular the November 2004 election in which Brent Benjamin unseated (by a comfortable margin) Justice Warren McGraw, who was seeking reelection. As it turned out, Don Blankenship, the CEO of Massey Coal, had donated a small amount to Benjamin's campaign, but had spent over three million dollars on independent expenditures such as anti-McGraw television spots.[12] Indeed, Blankenship spent more than the campaign committees of both candidates combined.

As the case made its way to the West Virginia Supreme Court of Appeals, Caperton picked up the meme that had been developed by the press in and out of the state: Massey and its CEO had purchased (or at least seen to the election of) their own personal justice to sit on their pending $50 million case. Caperton repeatedly moved to disqualify now Justice Benjamin, and Justice Benjamin repeatedly denied the motion, eventually explaining that he had no "direct, personal, substantial, pecuniary interest in this case" (quoting the language from *Lavoie*), and that bowing to a standard based on appearances "seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations."[13]

In its 2009 decision, the United States Supreme Court held, as it had in *Tumey* and in *Lavoie*, that disqualification was constitutionally required. But Justice Anthony Kennedy's opinion for the 5-4 majority did not clearly explain what combination of facts and circumstances led to that conclusion.

Certainly Justice Benjamin would not be tempted to skew toward Massey Coal in the hope that a win for Massey would bring him direct pecuniary gain (as had been the case in *Tumey*). Nor—absent a criminal quid-pro-quo arrangement that the Supreme Court specifically assumed did *not* exist—was there a way in which skewing towards Massey would bring future collateral benefits (as had been the case in *Lavoie*).

Thus, in order to find that disqualification of Justice Benjamin was constitutionally required, the Supreme Court had to extend the rationale of the previous cases and accept Caperton's claim that Benjamin would be unable to resist the temptation to repay the "debt of gratitude" that he owed to Blankenship, a temptation that is "inherent in human nature." Justice Kennedy did not cite any scientific literature for that decisive-sounding proposition, however, and there is no indication that the parties presented expert testimony on that issue to any court.

After noting Justice Benjamin's conscientious efforts to examine his own motives, and without making any finding that actual bias existed, the Supreme Court adopted what it said was an objective standard: whether, "under a realistic appraisal of psychological tendencies and human weakness, [Benjamin's irresistible desire to reward Blankenship's company] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[14] Of course, as the dissenting justices complained, that standard is "objective" only in the sense that it does not require examining the inner workings of Justice Benjamin's mind; in every other sense it depends wholly on the subjective and often uninformed views of a majority of the Supreme Court on "psychological tendencies and human weakness."

Turning to the facts of the Caperton versus Massey Coal case itself, Justice Kennedy several times referred to Blankenship's extraordinary "contributions" to Benjamin's campaign (which in fact were no more than anyone else's), and even suggested that Blankenship had helped "direct" the campaign (when in fact merely *coordinating* efforts with a campaign is strictly forbidden to people making independent expenditures).

Finally, brushing aside abundant evidence that Warren McGraw would have lost badly to Brent Benjamin even without any independent action by Don Blankenship, Justice Kennedy concluded, "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man *chooses the judge in his own cause*."[15]

Justice Kennedy's fear of the corrupting effects of independent expenditures is especially odd, in light of his opinion for himself and the four *Caperton* dissenters in *Citizens United v. Federal Election Commission*[16] less than eight months later. In *Citizens United*, the Court permitted a long-standing federal ban on corporate and labor union *contributions* to electoral campaigns to stand, but invalidated restrictions on *independent expenditures* as violative of the First Amendment.

The burden of the *Caperton* and *Citizens United* decisions, read together, seems to be that Don Blankenship not only did nothing wrong in the West Virginia elections of 2004, but that he had a First Amendment right to spend as much as he wished of his own or even Massey Coal's money to defeat McGraw and to elect Benjamin (so long as he did not coordinate his efforts with the Benjamin campaign).

Yet Justice Benjamin, who did not know Blankenship and was in any event powerless to interfere with his constitutionally protected activities, was required to disqualify himself from hearing any case involving Massey Coal[17]—not only by the Constitution, but presumably also by the dictates of the West Virginia Code of Judicial Conduct. Moreover, the damage

to his reputation will never be fully repaired; in the popular culture he will always be known as "the West Virginia justice that Massey Coal purchased for $3 million in order to win a $50 million case."

## II. The Short-Term Consequences of *Caperton*

During a panel discussion at the 2010 Federalist Society National Lawyers Convention, a sitting justice and two former chief justices of three state supreme courts tried to predict the extent to which *Caperton* would impact the functioning of court systems in which judges are elected or subject to retention elections. They were joined by Indiana attorney James Bopp, who had successfully litigated *Republican Party of Minnesota v. White*,[18] the other case that was the subject of the panel discussion.[19] (In *White*, the Supreme Court established, also by a 5-4 vote, the First Amendment right of candidates for elective judicial office to "announce their views" on disputed legal and political issues, *even if those issues might later come before a successful candidate sitting on the bench*.)

The participants disagreed to some extent about how readily *Caperton* would be limited to its "extreme" facts, as the Supreme Court was at great pains to promise it would be. They generally agreed, however, that given the huge increase in independent expenditures that the country has seen in the last few election cycles, the threat of promiscuous judge-shopping through constitutionally-based disqualification motions was significant, even if such motions continued to be denied at a high rate.

Moreover, the dislocation and costs visited upon the court system would be severe, especially if more multimember courts adopted rules that allowed a movant to appeal to the rest of the court to review an initial negative decision of the targeted judge. Most ominously, judges faced with the prospect of being judged by their colleagues, or tagged as "the next Justice Benjamin" would begin to disqualify themselves at the first hint of a challenge. That would put the weighty matter of impartial judges into the hands of the popular press and the whims of the community (just as Justice Benjamin predicted).

Winding the process back one step further, it is even possible that the availability of *Caperton* motions, or the threat of the unwanted publicity of a *Caperton* motion, would lead to manipulation of the financing of judicial campaigns. Suppose, for example, that Massy Coal's Don Blankenship, hoping for a Brent Benjamin victory, made his independent expenditures designed to defeat the incumbent Warren McGraw, but that McGraw prevailed in the election nonetheless.

When Caperton's case came before the West Virginia Supreme Court, would not *Massey Coal* now have a constitutional claim "in reverse"—that it would be unfair to permit Justice McGraw to sit, because it would be "inherent in human nature" for him to exact a "debt of hostility" by ruling against Massey?[20] If that is just as plausible as Justice Kennedy's insistence that Justice Benjamin would be unable to resist ruling in favor of Massey in the actual case, then how long will it be before some wealthy individual will heavily back a challenger who has no chance at all of unseating the incumbent, *so that at least the returning incumbent can be removed from an important case*?

## III. The Longer-Term Consequences of *Caperton*: Undoing the Free Speech Principles of *Republican Party of Minnesota v. White* Through Disqualification Motions and Judicial Discipline

The renewed interest in a constitutional due process standard for judicial disqualification that *Caperton v. Massey Coal Co.* has brought is likely to put pressure on the Supreme Court's other recent major decision involving judicial elections, *Republican Party of Minnesota v. White*.[21] As noted above, in *White* the Supreme Court invalidated a disciplinary rule that prohibited candidates for elective judicial office from "announcing their views" on disputed legal and political issues. In a nutshell, Justice Antonin Scalia's opinion for a 5-4 majority held that while no one requires a state to hold elections for judicial office, if such elections are to be held, the First Amendment perforce must apply to them. If elections are to be more than frivolous popularity contests, the candidates must be allowed to speak, and the voters must be allowed to learn something substantive about the candidates.[22]

But because of the special nature of the office, the analogy to true representative elections can only be taken so far. The *White* opinion hinted broadly that states may continue to prohibit judicial candidates from making "a pledge or promise" about how they would rule in specific cases or on specific issues if elected. This distinction between permitted statements of personal views and prohibited campaign promises in the context of campaign for judicial office is eminently sensible, but ultimately unworkable, because of the necessary disconnect between the campaign and later performance in office.

If a judicial candidate "announces," for example, that he is personally opposed to same-sex marriage, the vast majority of voters will imagine that if that candidate is elected and is presented with a case testing the validity of a state statute banning same-sex marriage, that he will be a reliable vote on the court to uphold the ban. That is because the vast majority of voters has not even the most minimal understanding of the judicial function, and literally cannot understand, let alone appreciate, the difference between political and judicial offices.

Thus, an "announcement of views" on the subject of same-sex marriage that scrupulously avoids any "pledge or promise" about how the judge will *actually* rule, will be treated as if it was a campaign promise anyway. That difficulty became exacerbated, moreover, when, the year after the *White* decision and in response to it, the prohibition in the Code of Judicial Conduct against making improper pledges and promises was amended so that it required judges to disqualify themselves if they had made a campaign or other public speech that "commits *or appears to commit* the judge to reach a particular result or rule in a particular way in the proceeding or controversy" (emphasis supplied).[23]

That vague standard will put judges in such an awkward position that they may be able to launch a constitutional attack on the entire self-disqualification regime. It should not be forgotten, after all, that although the current iteration of the above standard, Rule 2.11(A)(5) of the Model Code of Judicial Conduct, speaks of "disqualification," it is a rule of

discipline—the discipline to be meted out by an arm of the state government in any state that has adopted the CJC without significant amendment.

The difficulty is made worse when Rule 2.11 is considered together with Rule 2.7(A), which commands that "A judge *shall* hear and decide matters assigned to the judge, *except* when disqualification is *required* by Rule 2.11 or other law" (emphasis supplied).

Thus, if a judge fails to disqualify himself when disqualification is "required," he is subject to discipline under Rule 2.11. But if a judge disqualifies himself when disqualification was not "required" by Rule 2.11, then he violates the "duty to sit" provision of Rule 2.7. But when *is* self-disqualification required? If the vague and overbroad "appears to commit" language of Rule 2.11 (A)(5) is factored in, judges have been placed squarely between Scylla and Charybdis.

These problems have rendered a dead letter the proposal that many commentators have made—starting with Justice Kennedy, concurring in *White*—to harmonize both sides of the judicial speech dilemma. The proposed solution is to permit the speech (as in *White*), but to disqualify the speaker from sitting on implicated cases if elected (as in Rule 2.11). In this view, there is no "punishment" being visited on the judge, only protection of the litigants' rights to a fair adjudicator. Cue the due process clause, now all the more likely, because the *Caperton* decision has suggested that a mere "possible temptation" to be guided by one's personal views rather than fidelity to the law, is sufficient to require constitutionally-based disqualification.

As shown above, however, although it is literally true that a judge will not be punished merely for making a substantive campaign speech (that is not a forbidden pledge or promise of future rulings), the failure of a judge to disqualify himself, when "objectively" he should have, can lead not only to the disqualification solution, but to the imposition of disciplinary sanctions. Thus, one practical effect of *Caperton* may be to help short-circuit the freedoms protected by *White*.[24]

In addition, any encouragement from on high is likely to breed even more disqualification motions from litigants who claim to fear the "psychological tendencies and human weakness" of the judges that they did not support at the last election. The net result of all of these competing pressures is that parties will gin up more and more claims of "issue bias" as a method of judge-shopping, and elected judges, leery of becoming embroiled in controversial cases, will "confess" to a watered down bias in order to duck their responsibility to decide, increasing the workload of their colleagues at the same time.

## IV. The Ultimate Consequences of *Caperton* (Perhaps): The Iowa Debacle and the End of Elections for Judicial Office

The late Steven C. Krane[25] once remarked that perhaps there is some long-range purpose to the Supreme Court's unsatisfactory potpourri of campaign speech and campaign finance law cases, as applied to elections for judicial office. Perhaps the Court hopes that judicial elections will come to be seen as so problematic that states will give up the practice.

Perhaps; but the headwinds are strong. In an article published soon after *Republican Party of Minnesota v. White* was decided,[26] Professor Charles Geyh rounded statistics up or down slightly to achieve symmetry, and developed his "Axiom of 80": 80% of the U.S. population favors judicial elections, 80% of the U.S. population does not vote in judicial elections and does not know who the candidates are, and 80% of the U.S. population believes that those who contribute money to judicial campaigns receive more favorable treatment in court than those who do not.

Moreover, at least for now the headwinds are stiffening in some quarters. In the November 2010 elections, all three justices of the Iowa Supreme Court who were on the retention election ballot were defeated solely—as far as anyone can tell—because they had participated in the unanimous decision of the Court in *Varnum v. Brien*,[27] striking down (under the Equal Protection Clause of the Iowa Constitution) state laws prohibiting same-sex couples from marrying.

The leaders of the campaign to oust the justices were jubilant, and loudly announced that any of the other four justices who did not resign would be targeted for defeat at the next opportunity. Some conservative lawyers and scholars praised the election results too—more soberly—as a needed corrective to a runaway judiciary: judicial independence met judicial accountability, and accountability prevailed. But even if one not only disagrees with the decision, but with its scholarship or analysis, this view of accountability is both shortsighted and antithetical to conservative principles.

It is shortsighted, of course, because once constitutional norms are made the subject of a plebiscite (rather than, say, a campaign for a constitutional amendment), there is no telling which constitutional oxen will next be gored. What will happen if the Iowa Supreme Court upholds some constitutional principle that conservatives hold dear, but is opposed by a majority of the small number of Iowans who come to the polls?

That practical point is reflected in the more important point that a conservative theory of judging requires judges deciding cases to apply only the law (including, of course, constitutional law), quite apart from their own personal or moral views of what is right and just. (Look no further than the writings of Judge Robert Bork, and the confirmation testimony of Chief Justice John Roberts.) If judges not only went beyond the law, but began to base their decisions on the personal or moral views of their neighbors, or the values of the editorial board of this or that newspaper, the violation of the oath of office would be more profound, and the rule of law would be completely undone.

In the recent retention election, the typical Iowa voter voted the justices in or out based strictly on the voter's own views of whether same-sex marriage itself was a good thing or a bad thing, with no thought whatsoever to what the Iowa Constitution did or did not require. Probably not more than one in a thousand even considered the possibility that one or more of those same justices personally opposed same-sex marriage, but concluded that the Iowa Equal Protection Clause compelled a contrary judicial ruling.

It will not be too long—one or two election cycles at the most—before the Supreme Court will have to weigh in again and decide whether disqualification for "issue bias" will rise to

the constitutional level. If robust campaign speech (including independent expenditures) can be purchased only by more and more frequent disqualifications, based on nothing more substantial than a judge's presumed "psychological tendencies and human weakness," the 80% of Americans who want to elect judges (but do not care enough to vote) might finally begin to soften their enthusiasm for an elected judiciary.

## Endnotes

1 The signature theme of the Model Code of Judicial Conduct (CJC) as revised by the American Bar Association in February 2007, is not only to promote, but to require the "independence, integrity, and impartiality" of the judiciary; dozens of provisions are couched in those terms explicitly. Although there is some overlap between what became known during the drafting process as the "3 I's," each is separately defined in the Terminology section that precedes the substantive Rules of the CJC.

The 3 I's are employed in both the black letter Rules and in the Comments, either singly or in some combination. In matters of disqualification of judges, for example, the focus is almost exclusively on "impartiality," whereas with respect to judicial elections the focus is chiefly on "independence," with some concern for "integrity."

2 It has been estimated that over 85% of all state court judges face the electorate at some point in their careers, either upon initial selection, in an up-or-down retention vote, or both. *See* Richard Briffault, *Judicial Campaign Codes After* Republican Party of Minnesota v. White, 153 U. Pa. L. Rev. 181 (2004).

3 It is not widely known (or remembered) that in *Wells v. Edwards*, 409 U.S. 1095 (1973) (per curiam), the Supreme Court summarily affirmed a three-judge court's decision that the one-person, one-vote principle did *not* apply to judicial elections, presumably because it agreed with the lower court's view that judges do not "represent" or "espouse the causes" of the larger or smaller number of citizens in each judicial district. The understanding of *Baker v. Carr*, 369 U.S. 186 (1962), and of *Reynolds v. Sims*, 377 U.S. 533 (1964), that each citizen in a district with a larger than average population has proportionally less of a voice in government affairs, simply had no relevance in the case of elected judges.

On the other hand, in *Chisom v. Roemer*, 501 U.S. 380 (1991), the Court held that Section 2 of the Voting Rights Act of 1965, as amended in 1982, *did* apply to judicial elections, because the crucial statutory language that was designed to protect the ability of racial and language minorities "to elect representatives of their choice" used the word "representatives" as a term of art meaning "the winners of representative, popular elections," *id.* at 399, or those who have "prevailed in a popular election," *id.* at 400.

4 Although the Supreme Court not only recognized the reality of judicial elections in the states, and stretched somewhat the statutory language at issue in *Chisom v. Roemer*, 501 U.S. 380 (1991), in order to bring them under federal regulation, it went out of its way to express its unease with the whole enterprise of electing judges. It acknowledged that the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office." 501 U.S. at 400-01. And although judges who prevailed in a popular election were technically deemed to be "representatives," in the sense described in note 3, the relationship between election and service in office is such that "public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment." *Id*. at 400.

Bemusement at the Supreme Court's persistent refusal to do more than cluck its collective tongue at these troubling structural difficulties was the central theme of Pamela Karlen, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 Harv. L. Rev. 80 (2009). As Professor Karlen—herself an experienced constitutional litigator and the victorious lead counsel in *Chisom v. Roemer*—astutely pointed out, the Court tinkers at the margins, sets some guidelines for the lower courts in future cases, but does not come to grips in any systematic way with the fact that electing judges does not fit at all comfortably within our system of governance.

Most important, in Karlen's view, is the Court's "problematic insistence on addressing structural problems through the lens of protecting individual rights." *Id.* at 81. As she explained, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), involved the rights of individual litigants to an unbiased judge; *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), involved the rights of individual candidates to more freedom of speech during campaigns for judicial office; and *Chisom v. Roemer*, 501 U.S. 380 (1991), involved the rights of individual voters not to suffer vote dilution under the Voting Rights Act of 1965, in judicial as well as other elections.

5 129 S. Ct. 2252 (2009).

6 273 U.S. 510 (1927).

7 In a later case, *Ward v. Monroeville*, 409 U.S. 57 (1972), a similar statutory scheme involving traffic fines was invalidated on the same grounds, even where the mayor did not personally receive part of the fine; the temptation for the executive officer of the town to raise revenue while wearing a supposedly neutral hat was too great.

8 475 U.S. 813 (1986).

9 This understanding was crucial to the decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), in which the Court recognized that states have a compelling interest in the impartiality of their judges, but insisted that the requisite "impartiality" refers to lack of bias as between *parties*, not lack of well-formed views as to the merits of legal *issues*. It was on this basis that the Court found that the First Amendment prevented states from censoring the campaign speech of candidates for judicial office.

10 Interestingly, twenty years earlier Eric Embry had been lead trial counsel for the defense in the landmark First Amendment case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which established an extremely high bar for public figures to overcome in prosecuting libel cases. Defending *The New York Times* against an elected City Commissioner was not a popular thing to do in Montgomery, Alabama in the 1960s.

11 475 U.S. at 825-826 (quoting in the last instance from the *Tumey* decision).

12 Most readers of this essay will not need to be reminded of the substantive difference between "contributions" and "expenditures." Certainly no Justice of the United States Supreme Court needed to be reminded that that distinction has been the single most important distinction in the regulation of political campaigns since the Supreme Court made it so over thirty years ago, in *Buckley v. Valeo*, 424 U.S. 1 (1976).

In a nutshell, *Buckley* established the proposition that while contributions to a candidate's campaign may be regulated to some extent, a supporter of a candidate may make his *own* expenditures without limit—if not coordinated with the campaign—because such expenditures are the equivalent of pure political speech, and thus entitled to the highest level of protection under the First Amendment.

13 Justice Benjamin's final opinion denying disqualification was quoted by the United States Supreme Court, 129 S. Ct. 2252, 2259.

14 *Caperton*, 129 S. Ct. at 2263. The language was taken from *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), a case in which the Court unanimously *rejected* the claim of a physician charged with misconduct that the Wisconsin Medical Examining Board violated his due process rights when it combined both investigatory and adjudicatory functions.

15 129 S. Ct. at 2265 (emphasis supplied).

16 130 S. Ct. 876 (2010).

17 Actually, Justice Benjamin sat on several other cases in which Massey Coal was a party without any objection or motion to disqualify being filed. In some of those cases, he voted *against* the interests of Massey, including one in which he voted to deny review, thus permitting a $243 million verdict against Massey to stand. See Ronald Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 Syracuse L. Rev. 247, 270-71 (2010).

As Professor Rotunda further reported, the State of West Virginia also opposed Massey Coal in cases pending before Justice Benjamin, but also did not seek to remove him. This is striking, in light of the fact that the Attorney

General of West Virginia at the time was Darrell McGraw, the brother of former Justice Warren McGraw, whom Benjamin defeated in the 2004 election.

18 536 U.S. 765 (2002).

19 Federalist Society National Lawyers Convention, Panel Discussion, *The Bloody Crossroads:* Republican Party of Minnesota v. White *Runs Into* Caperton v. Massey, Nov. 18, 2010. In addition to Mr. Bopp, the panelists were Hon. Thomas R. Phillips, former Chief Justice, Supreme Court of Texas; Hon. Patience Drake Roggensack, Justice, Wisconsin Supreme Court; and Hon. Clifford W. Taylor, former Chief Justice, Michigan Supreme Court. The moderator of the panel was Hon. Thomas M. Hardiman, Judge, United States Court of Appeals for the Third Circuit.

20 Not long after *Caperton* was decided, the American Bar Association Standing Committee on Judicial Independence, Judicial Disqualification Project, proposed complex campaign finance amendments to the Model Code of Judicial Conduct, despite the fact that *no* state had adopted the CJC's then-existing simple requirement that judges be disqualified if a party or lawyer in a case had made campaign contributions over a certain amount.

The proposed new Rule would have applied equally to contributions and independent expenditures made to a successful candidate *or* to the successful candidate's opponent, explicitly on ground that a "debt of gratitude" and a "debt of hostility" were constitutionally (and ethically) indistinguishable.

In January 2011, the Standing Committee formally abandoned its effort to amend the CJC, and will instead present a one-page Resolution to the ABA House of Delegates that will merely "urge" states having elected judges to adopt "disclosure requirements for litigants and lawyers who have provided, directly or indirectly, campaign support in an election involving a judge before whom they are appearing."

The accompanying Report makes clear that "campaign support" includes both contributions and independent expenditures, and that such support "in" an election includes support for either the winning or the losing candidate.

21 536 U.S. 765 (2002).

22 Under the regime of the "announce" clause, candidates often contented themselves with vapid generalities about "serving the community" and "the majesty of the law," while others made overt racial and ethnic appeals by legally changing their names to sound more (or less) Italian, Polish, Jewish, or Latino, depending on the demographics of the electorate. Of course, in the majority of states that held partisan elections, the dominant reason for favoring a candidate was often simply a matter of party affiliation.

23 That is the language now contained in Model Code of Judicial Conduct, Rule 2.11(A)(5). The key "commits or appears to commit" language was first introduced into the CJC in 2003, in Canon 3E (1)(f).

24 *See* James Bopp & Anita Woudenberg, *An Announce Clause by Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves for Exercising Their Freedom to Speak*, 55 Drake L. Rev. 723 (2007).

25 Steve Krane was general counsel and partner in the New York City law firm of Proskauer Rose at the time of his death in June 2010, at the age of fifty-three. He was a member of the ABA Board of Governors, Chair of the ABA Standing Committee on Ethics and Professional Responsibility, and former president of the New York State Bar Association. He had been heavily involved in activity of the organized Bar, especially in the area of legal ethics.

26 Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 Ohio St. L.J. 43 (2003).

27 763 N.W.2d 862 (Iowa 2009).