

ELECTING OUR JUDGES AND JUDICIAL INDEPENDENCE: THE SUPREME COURT’S “TRIPLE WHAMMY”

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In the classic 1947 movie “Miracle on 34th Street,”¹ Macy’s Department Store’s Santa Claus claims to be the real Kris Kringle and is committed to Bellevue Mental Hospital. Kringle challenges his commitment in court at a formal hearing, in which Kringle’s lawyer argues that Kringle is sane because he really is Santa Claus. There is a scene that illustrates the classic conflict in ideology as to how, in reality, our judges are selected. In the movie, the trial judge wants to expedite the hearing, finding the claim by “Kris Kringle” ridiculous. However, his political advisor² warns him of the consequences of ruling that there is no Santa Claus because the judge is up for re-election.³ For those favoring election of judges, this is democracy in action. A judge’s perhaps precipitous action is tempered by his recognition that the voters

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1. MIRACLE ON 34TH STREET (Twentieth Century Fox 1947).

2. The political advisor, Charlie Halloran, is played by William Frawley. Some of you are old enough to remember that Mr. Frawley played Fred Mertz on “I Love Lucy.”

3. For those of you who have forgotten the story, when the post office delivers sacks and sacks of letters addressed to Santa Clause to the individual who calls himself “Mr. Kringle,” sitting in the courtroom, the judge rules that if the government of the United States believes him to be the real St. Nick, who is he to argue!

who observe his behavior will determine his future career. For those opposing election of judges, this is the worst kind of political influence. A party hack, called a political advisor, tells a judge how he should rule.

I. *CAPERTON V. A.T. MASSEY COAL CO.*

Moving up to the early 21st century, a recent case, which was the basis for a John Grisham novel,⁴ also illustrates the impact of and debate over the method of selection of judges. A.T. Massey Coal Company was sued by Hugh Caperton for interfering in his contractual relationship with a third company.⁵ Caperton won a \$50 million verdict.⁶

Don Blankenship, the Chairman, CEO and President of Massey Coal Company⁷ was obviously concerned that the West Virginia Supreme Court of Appeals might uphold the \$50 million jury verdict. However, his case would not be decided until after the next election and one of the sitting Justices, Warren McGraw, who was most likely to vote against him, was up for re-election.⁸ Blankenship had counted the votes. If he could get one more State Supreme Court Justice on his side, he would win his appeal. In other words, if Blankenship could oust McGraw and replace him with his opponent, Brent Benjamin, and let Benjamin know that Blankenship's support led to his election, Blankenship could win the appeal.

Both directly and indirectly, Blankenship donated more than \$2.5 million to the Benjamin campaign and also paid out \$500,000 in independent expenditures and direct mailings to support Benjamin.⁹ As stated by the United States Supreme Court:

To provide some perspective, Blankenship's \$3 million in contributions were more than the total amount spent by all the other Benjamin supporters and three times the amount spent by Benjamin's own committee. Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.¹⁰

4. See JOHN GRISHAM, *THE APPEAL* (2008); Joan Biskupic, "Supreme Court case with the feel of a best seller", USA TODAY, Feb. 16, 2009, http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

5. *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 329-32 (W.Va. 2009), *rev'd*, 129 S. Ct. 2252, 2257 (2009).

6. *Caperton v. A.T. Massey Coal Corp.*, 129 S. Ct. 2252, 2256 (2009).

7. See *id.* at 2257.

8. *Id.*

9. *Id.*

10. *Id.*

When the case finally came before the West Virginia Supreme Court of Appeals, Caperton asked Benjamin to recuse himself.¹¹ However, Benjamin refused and then cast his vote to make the three to two majority that reversed the jury's verdict against Massey (and Blankenship).¹² Caperton first sought reconsideration from the West Virginia Supreme Court of Appeals,¹³ and when that was denied, sought and received a grant of certiorari from the United States Supreme Court.¹⁴ The United States Supreme Court reversed the decision below in a five to four decision, *Caperton v. A.T. Massey Coal Company*,¹⁵ stating that the due process clause mandated recusal in this case where there was a serious risk of bias, as indicated by the large campaign contributions involved and the "temporal relationship between the campaign contributions, the justice's election, and the pendency of the case."¹⁶ No proof of actual bias was needed.¹⁷

Massey argued against overturning the West Virginia Supreme Court's decision and the denial of the recusal request by stating that "in the end the people of West Virginia elected [Benjamin]."¹⁸ Blankenship's contributions were just one factor, among others, that contributed to his success.¹⁹ Massey and others also warned that to overturn the West Virginia court might lead to "unnecessary interference with judicial elections."²⁰ But, the Supreme Court, per Justice Kennedy, held that this was an extraordinary case and "application of the constitutional standard in this case [that the potential for bias was a violation of the due process clause] will thus be confined to rare instances."²¹

11. *Id.*

12. *Id.* at 2258.

13. After the request for a rehearing, two of the five justices were disqualified. One of the justices who voted for the coal company had been photographed vacationing with Blankenship in the French Riviera when the case was pending. A justice who voted for Caperton recused himself, at the request of Blankenship, because of his public criticism of Blankenship's role in the judicial election. Benjamin refused to disqualify himself and then, as acting Chief Justice, picked the two replacements. A divided court then voted again, 3 to 2, to reverse the jury verdict. *Caperton*, 129 S. Ct. at 2258-59.

14. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 593 (2008).

15. *Caperton*, 129 S. Ct. 2252.

16. *Id.* at 2264.

17. *Id.* at 2263 ("[O]bjective standards may also require recusal whether or not actual bias exists or can be proved.").

18. *Id.* at 2264.

19. *Id.*

20. *Id.* at 2265.

21. *Id.* at 2267.

Again, the debate over this case focused on the interaction of democratic principles and judicial independence. For those supporting the popular election of judges, *Caperton* is the exception that proves the rule. It is the “extreme and rare” case that requires action. As detailed by Justice Scalia for the Supreme Court in *Republican Party of Minnesota v. White*,²² voters have a right to know what judicial candidates’ views are in order to determine if they should vote for that candidate, and interest groups have a right to know a judicial candidate’s views in order to determine if they should support or oppose a candidate.²³ Such support is not only appropriate, but is the core of the democratic principle of “representative government.”²⁴ Impartiality, which under one definition means “lack of preconception in favor or against a particular *legal* view[,] . . . is not a *compelling* state interest” justifying restrictions on a judicial candidate’s election speech.²⁵

“[D]ebate on the qualifications of candidates’ is ‘at the core of our electoral process and of the *First Amendment* freedoms’”²⁶ The “complete separation of the judiciary from the enterprise of ‘representative government’” is not a true picture of the American system. “Not only do state court judges possess the power to ‘make’ common law [like a legislator], but they have the immense power to shape the States’ constitutions as well.”²⁷

For those opposing the election of judges, *Caperton* is an excellent example of the inherent problem of forcing judges to run for office and the necessity for them to secure campaign contributions to do so. Such contributions will have an impact and, in some cases, a determining impact on the elected judge’s decision-making.²⁸ As described by Justice Sandra Day O’Connor in her concurring opinion in *Republican Party of Minnesota v. White*:

[T]he very practice of electing judges undermines [the government’s interest in an impartial judiciary]. . . . [I]f judges are subject to regular elections, they are likely to feel they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help

22. 536 U.S. 765 (2002).

23. *Id.* at 782, 788.

24. *Id.* at 784.

25. *Id.* at 777 (emphasis in original).

26. *Id.* at 781 (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989)) (emphasis added).

27. *Id.* at 784.

28. See Genelle I. Belmas & Jason Shepard, *Speaking from the Bench: Judicial Campaigns, Judges’ Speech and the First Amendment*, 58 DRAKE L. REV. 709, 711 (2010).

being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. . . . Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds [and thus]. . . fundraising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups.²⁹

II. IOWA AND SAME-SEX MARRIAGE

The most recent example of the conflict between those supporting elections of judges and those who believe elections compromise judicial independence occurred in Iowa in the 2010 election. On April 3, 2009, a unanimous seven justice Iowa Supreme Court held that denying same-sex couples the right to marry was a violation of various liberty and equality rights, which could be summarized in the doctrine of equal protection, protected by the Iowa Constitution.³⁰

In 2010, three of the justices came before the voters in a judicial retention election.³¹ A push to oust these justices was made by a series of citizens' groups. The push was led by the Washington-based National Organization for Marriage and by Iowans for Freedom, an organization started and directed by Robert Vander Plaats, the former Republican gubernatorial candidate and Sioux City businessman.³² Although all campaign reports are not in yet, over \$1 million was spent to defeat these justices.³³ The Iowan Justices involved chose not to counter the campaign, but their supporters urged their retention, based on the concept of merit selection and an independent judiciary.³⁴

29. 536 U.S. at 788-90 (O'Connor, J., concurring).

30. *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009).

31. They were Justices David Baker, Michael Streit, and Marsha Ternus. Krissah Thompson, *Gay Marriage Fight Targeted Iowa Judges, Politicizing Rulings on Issue*, WASH. POST, Nov. 3, 2010.

32. *Id.*

33. Memorandum from Rachel Paine Caufield, AJS Hunter Center for Judicial Selection to AJS Bd. of Dirs. (Nov. 3, 2010) (on file with author) [hereinafter Caufield Memo]. AJS is the American Judicature Society. I serve as Chair of the National Advisory Commission for AJS and am a member of the AJS Board of Directors. AJS states that its mission "is to secure and promote an independent and qualified judiciary and a fair system of justice." *See* 94 Judicature, Sept.-Oct., 2010, Inside Cover.

34. *See* Caufield Memo, *supra* note 33; Editorial, *In Too Many States, Judges Face Reprisals for Unpopular Rulings*, USA TODAY, Oct. 19, 2010, at 8A [hereinafter *Too Many States*]; Thompson, *supra* note 31.

On Tuesday, November 2, 2010, all three Iowa Supreme Court Justices were voted out of office, with approximately 54% of the voters rejecting their bids for retention.³⁵

Supporters of this ouster argue that this was a victory for the people. “Judges derive their power from the people [and] . . . the voters of Iowa have the civil right, and duty, to hold the judges accountable.”³⁶ This decision will “send a message across the country that the power resides with the people.”³⁷

Opponents of the ouster see this vote as a threat to judicial independence. Here, judges “did their jobs. They read the state constitution without regard to politics, public opinion, or the passions of the moment.” It would be hard to overstate the importance of the principle of judicial independence. Few scenes in American history are uglier than those written when public opinion, sometimes vicious, has ruled the courts.³⁸

Courts have historically been “protector[s] of minority rights [and the decision] ‘really might cause judges in the future to be less willing to protect minorities out of fear that they might be voted out of office.’”³⁹

So, this is the conflict and it goes to some fundamental values in American society. Do we want all decisions to be decided by a majority? Or do we want the safeguard of an impartial and independent judiciary system?

III. WHAT IS “JUDICIAL INDEPENDENCE” AND IS IT IMPORTANT?

In Justice Stevens’ dissent in *Republican Party of Minnesota v. White*, he distinguished the work of a judge from other political officials:

In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity. . . .

35. Caufield Memo, *supra* note 33; Editorial, *Election Takeaways*, USA TODAY, Nov. 4, 2010, at 8A.

36. Brian S. Brown, *Opposing View On Judicial Independence: Hold Judges Accountable*, USA TODAY, Oct. 18, 2010, at 8A.

37. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1 (quoting Robert Vander Plaats).

38. Editorial, *Election Takeaways: From Iowa, a Chilling Message to Judges*, USA TODAY, Nov. 5, 2010, at 8A. The Editorial made an interesting analogy: “At his confirmation hearing, U.S. Chief Justice John Roberts famously compared the role of a judge to that of an umpire calling balls and strikes. Imagine what would happen to the integrity of baseball if umpires were hounded from the field for making calls the home crowd didn’t like.” *Id.*

39. Sulzberger, *supra* note 37 (quoting U.C. Irvine Law School Dean Erwin Chemerinsky).

Consistent with that fundamental attribute of the office, countless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them. It is equally common for them to enforce rules that they think unwise, or that are contrary to their personal predilections. . . . [A judge] has a duty to uphold the law and to follow the dictates of the Constitution. If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls. . . . [He or she is to decide] on the merits of individual cases, not as a mandate from the voters. . . . [T]he judicial reputation for impartiality and open-mindedness is compromised by electioneering that emphasizes the candidate's personal predilections rather than his qualifications for judicial office.⁴⁰

Justice Ginsburg, citing a number of Supreme Court decisions, goes even further: “The guarantee of an independent, impartial judiciary enables society to ‘withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’”⁴¹ “Without this, all the reservations of particular rights or privileges would amount to nothing.”⁴²

IV. THE “TRIPLE WHAMMY” THREAT TO JUDICIAL INDEPENDENCE

In addition to Iowa, various interest groups launched ouster campaigns in Alaska, Colorado, Kansas, Illinois and Florida.⁴³ They all

40. 536 U.S. 765, 798-802 (2002) (Stevens, J., dissenting).

41. *Id.* at 804 (Ginsburg, J., dissenting) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

42. *Id.* (Ginsburg, J., dissenting) (quoting *THE FEDERALIST* NO. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961)). She explains:

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed them in office; “judge[s] represent[t] the Law.” Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide “individual cases and controversies” on individual records, neutrally applying legal principles, and, when necessary, “standing up to what is generally supreme in a democracy: the popular will.”

A judiciary capable of performing this function, owing fidelity to no person or party, is a “longstanding Anglo-American tradition,” an essential bulwark of constitutional government, a constant guardian of the rule of law.

Id. at 803-04 (internal citations omitted).

43. Sulzberger, *supra* note 37.

failed.⁴⁴ Still, more was spent on retention elections in 2010 than was spent in the previous decade.⁴⁵ In addition, increasing amounts are being spent on regular elections of judges, often on an ideological and partisan basis.⁴⁶ While there have been numerous cases in the past thirty years where the popular election of judges, either directly or through retention votes, has led to pitched and often ideological battles,⁴⁷ a series of United States Supreme Court decisions in the past decade have made the judicial election process even more ideological and issue based.

V. SECURING THE POSITION OF CANDIDATES

First, in *Republican Party of Minnesota v. White*, a five to four decision written by Justice Antonin Scalia, the United States Supreme Court held that any restrictions placed on judges running for re-election or retention and judicial candidates “from announcing their views on disputed legal and political issues” is in violation of the First Amendment.⁴⁸ Thus, an interested party (and potential or actual large contributor) can demand that a judge or a judicial candidate announce his or her views on an issue of great import to the contributor as a condition precedent to a gift. The judge or candidate can no longer rely on state statutes or judicial canons as a basis to refuse this request.⁴⁹

VI. FUNDING FAVORED CANDIDATES

Next, as early as 1976, the United States Supreme Court in *Buckley v. Valeo* stated that there can be no limitations on independent campaign spending by individuals and groups, corporations, and unions in any election, including judicial elections. While limits can be placed on the amount that can be contributed directly to a candidate, restrictions on independent expenditures violate that entity’s free speech rights.⁵⁰ In 2003, however, the Court in *McConnell v. Federal Election Commission*

44. *Id.*

45. *Id.* (citing the Brennan Center for Justice at New York University Law School). Thirty-eight states select justices to their highest courts through popular elections. Seventeen of these use “merit selection and retention” systems. Justices in twenty-one states are picked in contested elections. Kenneth Jost, CQ Press, *Judicial Elections: Are Races for Judgeships Bad for Justice?*, 19 CQ Researcher 373, 376 (2009) [hereinafter *Judicial Elections*].

46. See Jost, *Judicial Elections*, supra note 45, at 375-76.

47. *Id.* at 382.

48. 536 U.S. 765, 768, 788 (2002).

49. See MODEL CODE OF JUDICIAL CONDUCT Canon 7(B) (1972); MINN. CODE OF JUDICIAL CONDUCT Canon 5(a)(3)(d)(i) (2000). Justice Scalia specifically referenced these two Canons in *Republican Party*, 536 U.S. at 768.

50. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

held that a federal statute could not only prohibit corporations and unions from direct contributions to a candidate but could also bar “electioneering communication,” or “speech expressly advocating the election or defeat of a [specific] candidate.”⁵¹ Corporations were free, under federal law, to use independent expenditures to engage in political speech, so long as that speech did not expressly advocate the election or defeat of a clearly identified federal candidate.⁵² In addition, independent committees and political action committees (PACs), could collect funds and make independent expenditures on behalf of candidates.⁵³

In 2009, in *Citizens United v. Federal Election Commission*, the Court, in a five to four opinion by Justice Kennedy, reconsidered and overruled even the limited restrictions placed on corporations and unions in *McConnell*.⁵⁴ The Court reasoned that, “[t]he First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”⁵⁵

The results of this series of decisions have been a dramatic growth in the amount of campaign expenditures by independent groups advocating particular issues or positions that will come before state courts. From 1990 to 2009, candidates in state high court races raised \$207 million, as compared to \$83.3 million in the previous decade.⁵⁶ The largest contributors were the business groups, trial lawyers groups, unions, and, of course, political parties.⁵⁷ Many of the contributors, who must disclose their identities in these ads, use names that hide their true identity. For example, the “Partnership for Ohio’s Future” is funded by the U.S. and Ohio Chamber; “Texans for Public Justice” was funded by plaintiffs’ lawyers; and the “Center for Individual Freedom” was funded by large tobacco companies.⁵⁸ Issue-based ads, especially television commercials funded by these interest groups,⁵⁹ not only impact elections

51. 540 U.S. 93, 203-09 (2003).

52. See Fed. Election Comm’n v. Wisconsin Right to Life, 551 U.S. 449, 457 (2007).

53. See Fed. Election Comm’n v. Beaumont, 539 U.S. 146, 149 (2003).

54. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2009).

55. *Id.* at 913.

56. James Sample, Adam Skaggs, Jonathan Blitzer, & Linda Casey, THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-2009: A DECADE OF CHANGE, at 1 (2010), available at http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections/. [hereinafter THE NEW POLITICS 2009-2010].

57. *Id.* at 13-15.

58. *Id.* at 42-54.

59. See Editorial, *Judges and Money*, N.Y. TIMES, Oct. 30, 2010, at A18.

but also “corrode public confidence in the judicial system.”⁶⁰ A 2009 USA Today Gallup poll “found that 89 percent of those surveyed believed that campaign contributions were problematic and could influence a judge’s rulings.”⁶¹

VII. RECUSAL OR DISQUALIFICATION

Supporters of the election of judges argue that even if potential contributors can demand that recipients indicate their position on issues and even if there can then be unlimited campaign contributions based on these announced positions, this does not necessarily mean that such individuals cannot and will not be “independent” in individual cases. As Justice Scalia argued in *Republican Party of Minnesota v. White*, impartiality is not the same as independence.⁶² Having an opinion as to the issues involved in a case does not necessarily show a bias towards a party in the proceeding.⁶³

A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”⁶⁴

Having an opinion is not the same as not being open-minded, continues Justice Scalia:

This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at

60. Sample et al., *THE NEW POLITICS 2009-2010*, *supra* note 56, at 22 (quoting Governor and former District Attorney Edward Rendell of Pennsylvania).

61. Editorial, *Judges for Sale*, WASH. POST, Aug. 23, 2010, at A12 [hereinafter *Judges for Sale*].

62. 536 U.S. 765, 775-79 (2002).

63. *Id.* at 777-78.

64. *Id.*

least *some* chance of doing so. Statements of opinion are not “promises” to vote a particular way.⁶⁵

We must trust our judges.⁶⁶ Elected judges “always face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench.”⁶⁷ But, this has not stopped judges from ruling against the majorities’ wishes.⁶⁸

Moreover, as Justice Kennedy states in his concurrence in *Republican Party of Minnesota*, States can adopt strict recusal standards to assure judicial independence.⁶⁹ Recusal is an adequate remedy for problems associated with campaign contributions and free speech protections for contributors and judges.⁷⁰

The *Caperton* decision would seem to support Justice Kennedy’s concept that recusal is a significant remedy for any negative impacts from the process of electing judges. But, in fact, *Caperton* stands for the opposite position. The case does set some outside limits on how far present law will allow a particular judge to participate in a case where there is a showing of issue based campaign contributions and explicit statements (and perhaps even quiet, secret commitments) on specific issues. But, the case itself indicates how weak those limitations are.

In *Caperton*, four dissenting Justices argue that explicit conflicts are necessary in order to mandate disqualification or recusal—a financial interest in the outcome or criminal contempt prosecutions where the contempt was against the judge.⁷¹ “Vaguer notions of bias or the appearance of bias were never a basis for disqualification All judges take an oath to . . . apply the law impartially and we trust that they will live up to this promise.”⁷²

Even the majority was unwilling to be specific about what should be the basis for mandated recusal or disqualification.⁷³ The Court would not claim that even campaign contributions by a litigant or attorney would create a probability of bias or serve as a basis for mandated

65. *Id.* at 778-79.

66. *See id.* at 796 (Kennedy, J., concurring) (“We should not, even by inadvertence, ‘impute to judges a lack of firmness, wisdom, or honor.’” citing *Bridges v. California*, 314 U.S. 252, 273 (1941)).

67. *Id.* at 782.

68. *Id.*

69. *Id.* at 794 (Stevens, J., concurring).

70. *See Belmas & Shepard, supra* note 28, at 732-33.

71. *Caperton v. A.T. Massey Coal Corp.*, 129 S. Ct. 2252, 2257 (2009) (Roberts, C.J., dissenting).

72. *Id.*

73. *Id.* at 2272 (Roberts, C.J., dissenting).

recusal. The facts in *Caperton* indicate that “this is an exceptional case.”⁷⁴ The facts are “extreme by any measure.”⁷⁵ States have adopted objective standards of judicial conduct as to the appearance of impropriety and disqualification when there is an issue of impartiality.⁷⁶

In other words, even for the majority, decisions on recusal and disqualification are to be made by the judges themselves and only in the extreme case will there ever be a constitutional review of a judge who does not recuse or who is not disqualified by fellow jurists.⁷⁷ There are inherent problems with recusal or disqualification procedures. As described by Professor Gerald J. Clark:

Under the rules of court of most jurisdictions, an application to recuse is heard, at least in the first instance, by the targeted judge. A recusal motion’s usefulness is limited because a party may be reluctant to suggest to the judge of the party’s case that the judge has an ethical problem—such a suggestion may generate retaliation [and even then recusal]. . . . is available only in situations where the personnel is fungible—where an adequate and qualified substitute is readily available. . . . [Because] the targeted judge must judge herself[,] [t]he judge thus has a conflict of interest in deciding . . . [and] alternatives, especially in a court of last resort, are similarly flawed, assuming a

74. *Id.* at 2263.

75. *Id.* at 2265.

76. *Id.* at 2266-67 (“Almost every state . . . has adopted the American Bar Association’s objective standard: A judge shall avoid impropriety and the appearance of impropriety. . . . The ABA’s Model Code’s test for appearance of impropriety is ‘whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.’”).

77. In a situation not involving campaign contributions, but acceptance of gifts by the Chief Justice of the Pennsylvania Supreme Court, the *New York Times* opined:

[Under the policies set by the Pennsylvania Supreme Court], all state judges . . . can accept any gifts if they disclose them. . . . It permits violations of the American Bar Association’s Model Rules of Judicial Conduct, by casting doubt on judges’ “capacity to act impartially.” . . . In his 17 years on the court, [Chief Justice Castille] stated, “no party has sought recusal on the basis of my financial disclosures. . . . [However, the rule against accepting gifts] is to free a judge from having to worry about whether he or she is influenced, without realizing it. Another is to assure citizens who depend on the court’s fairness that the judge can’t be influenced by anything but the essentials of a case. . . . There is a growing consensus—outside the court—that the justices should change how they handle recusal: requiring a justice to explain any decision to recuse or not, and having a group of justices review each recusal decision.

Editorial, *Untenable Judicial Ethics*, N.Y. TIMES, Nov. 27, 2010, Sunday Opinion, at WK7 [hereinafter *Untenable Judicial Ethics*].

reluctance of members of a court to make an accusatory finding against a colleague.⁷⁸

It must be noted here that West Virginia's recusal rules model and the rules in most of the other states where judges face election and the "insufficiency and impotence" of these rules indicate the flaws in self-regulation.⁷⁹ And, in the remand in *Caperton*, the same result occurred in a decision by the West Virginia Supreme Court, which did not include the recused Justice Benjamin.⁸⁰

VIII. IS REFORM OF THE ELECTORAL SYSTEM POSSIBLE?

The core principle of any system of justice is judicial independence.

International and domestic principles of the rule of law, including the internationally respected model The Bangalore Principles of Judicial Conduct, require that judges be impartial. To the same effect are the United Nations Principles on the Independence of the Judiciary, noting that judges shall decide "impartially . . . without any improper influences, inducements . . . for any reason." The United States Supreme Court has recognized "a litigant's due process right to a fair trial before an unbiased judge." The lack of bias is a "cardinal principle of justice" and an "indispensable feature of democracy."⁸¹

Obviously, those interested in the independence of the judiciary should make every effort to reform the present system within constitutional limits.⁸² But those "constitutional limits" are the "triple whammy": (1) the First Amendment protection of the right of judges and judicial candidates to give specific, explicit statements as to their positions on issues; (2) the First Amendment right of entities to support with unlimited resources, judicial candidates, and often without disclosure of the real source of this campaign support; and (3) finally, any application of restrictive rules are to be enforced by the involved

78. Gerald J. Clark, *Caperton's New Right to Independence in Judges*, 58 DRAKE L. REV. 661, 692-93 (2010).

79. See James Sample, *Court Reform enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 791 (2010) [hereinafter *Court Reform*].

80. *Caperton v. A.T. Massey*, 690 S.E.2d 322, 328 (W. Va. 2009).

81. Norman L. Greene, *How Great Is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 883-85 (2010).

82. For a description of many of these proposed reforms, see Sample, *Court Reform*, *supra* note 79, at 793-818; Sample et al., *THE NEW POLITICS 2009-2010*, *supra* note 56, at 67-77.

judges themselves, or by the limited oversight that courts will exercise over their colleagues.

This may mean that independence is not really possible in any elected judges system. As noted by Justice Kennedy in *New York State Board of Elections v. Lopez Torres*:

When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.⁸³

Some of the remedies that have been considered include public financing and mandatory spending limits, but both would be ineffectual because of the First Amendment free speech protections for independent expenditures by outside and often invisible groups.⁸⁴ Another remedy is stricter rules on judges to recuse themselves,⁸⁵ and for judges, other than the challenged one, to handle disqualification motions.⁸⁶ However, judges often run on political tickets, and an appointment can be seen as a reward for long-term political service and so elected legislators are reluctant to depoliticize the judicial selection process.⁸⁷ Moreover, judges are reluctant to set limits on themselves and their colleagues,⁸⁸ and even if rules are established, they are often vague and judges are reluctant to forcefully apply them.⁸⁹ And if legislatures seek to adopt recusal and disqualification rules, this can lead to “inter-branch conflict . . . even conflict in which a statute is explicitly struck down.”⁹⁰

83. 552 U.S. 196, 212 (2008) (Kennedy, J., concurring).

84. See Jost, *supra* note 47 at 378.

85. See *Untenable Judicial Ethics*, *supra* note 77; Sample, *Court Reform* *supra* note 79, at 818; Belmas & Shepard, *supra* note 28 at 732-36 (suggesting standards for recusal).

86. Clark, *supra* note 78 at 699 (citing ABA Standing Committee on Judicial Independence, Report to the House of Delegates (2009)).

87. See Greene, *supra* note 81 at 905.

88. See *id.* at 904.

89. See Jost, *supra* note 45 at 379.

90. William Raftery, “*The Legislature Must Save the Court from Itself*”?: *Recusal, Separation of Powers and the Post-Caperton World*, 58 DRAKE L. REV. 765, 783 (2010).

IX. CONCLUSION

The bottom line is that electing judges is “incompatible with the ideal of an independent judiciary.”⁹¹

The job of judging is fundamentally incompatible with political elections. Judges are expected to make difficult and unpopular decisions based on the law and the facts of each case, whereas elected officials in the political branches are expected to be responsive to constituencies in order to be re-elected.⁹²

Judicial elections call into question the impartiality and fairness of even the most upstanding judges. When litigants and attorneys with major economic or ideological interests fund judicial campaigns, the perception (if not the actuality) of improper influence leads people to believe that justice is for sale. Public opinion surveys over the past decade-plus demonstrate this point.⁹³

Judicial elections do not provide meaningful voter participation or accountability to the electorate. Most judges are initially appointed to fill a vacancy, and most sitting judges do not draw challengers.⁹⁴

So what is the alternative? Many scholars and judicial luminaries favor a system where non-partisan commissions submit slates of judicial candidates to the governors.⁹⁵ This system is not perfect. Judges or justices can still face pressure from outside influences⁹⁶--but there is no

91. Clark, *supra* note 78 at 706. Professor Clark continues: “Judges concerned about their re-election will not be independent. The very reason for having elections is to tether the politician to the electorate, making for responsive legislators and executives. Judges tethered to the electorate, on the other hand, will sacrifice justice and the rule of law to public opinion.” *Id.* As noted earlier, these ties are not now just to the voters but to those who fund electoral campaigns based on how they expect the judges to rule on specific issues.

92. See *Republican Party of Minn. v. White*, 536 U.S. 765, 788-89 (2002) (O’Connor, J., concurring). See also *Judges for Sale*, *supra* note 65, at A12.

93. See Bert Brandenburg & Rachel Paine Caufield, *Ardent Advocates*, 93 *Judicature* 79 (2009) (reviewing Chris W. Bonneau & Melinda Gann Hall, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009)).

94. See Ted A. Schmidt, *Fair Courts Under Fire: Part I: Merit Selection of Judges; Under Attack without Merit*, 42 *ARIZ. ATTY.* 13, 18 (2006); Charles Gardner Geyh, *Perspectives on Judicial Independence: Why Judicial Elections Stink*, 64 *OHIO ST. L.J.* 43, 53 (2003); Scott Williams Faulkner, *Still on the Backburner: Reforming the Judicial Selection Process in Alabama*, 52 *ALA. L. REV.* 1269, 1296 (2003); John M. Roll, *Merit Selection: The Arizona Experience*, 22 *ARIZ. ST. L.J.* 837, 855-56 (1990).

95. James J. Sample, Charles Hall & Linda Casey, *THE NEW POLITICS OF JUDICIAL ELECTIONS*, 94 *Judicature* 50, 57 (2010) [hereinafter *THE NEW POLITICS 2010*]. See e.g. Letter from Sandra Day O’Connor in *THE NEW POLITICS 2009-2010*, *supra* note 56, at i; *Too Many States*, *supra* note 34, at 8A.

96. See generally Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 *DRAKE L. REV.* 751 (2010).

direct link of opinions, money, and support. It seems infinitely preferable to the “triple whammies” of judicial election.