

WHEN AN ELECTION IS NOT JUST AN ELECTION:

CAPERTON AND THE FUTURE OF JUDICIAL ELECTION REGULATION

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Thank you so much for the opportunity to be here today for this very important conference, and for the chance to offer some thoughts about the Supreme Court’s recent decision in [Caperton v. Massey](#).

In her dissent in the 2002 case, [Republican Party of Minnesota v. White](#), striking down on First Amendment grounds a judicial speech regulation, Justice Ginsburg lamented the majority’s approach to the First Amendment and elections. She said: “I do not agree with this unilocular, ‘an election is an election,’ approach. Instead, I would differentiate elections for political offices, in which the First

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Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons.”

Justice Ginsburg lost that battle, but in the new *Caperton* case, she may have won the war as Justice Kennedy for a Court majority seemed to acknowledge that different First Amendment standards may apply to judicial elections compared to other elections. I will argue that this recognition makes *Caperton* an even more important case about regulating judicial elections generally than a specific case about judicial recusal standards.

In my brief comments, I plan to make two points. First, though *Caperton* deals with due process issues in the judicial context and not the First Amendment per se, its reasoning cannot be cabined to due process/recusal issues. Instead, the recognition in Justice Kennedy’s opinion that judicial elections are different could affect how courts adjudicate judicial candidate speech cases, and other cases related to the conduct of judicial elections. Second, though the opinion itself stresses the narrow and exceptional nature of the facts supporting a constitutional

recusal requirement, Justice Kennedy’s opinion in *Caperton* is likely to have a broader effect than the narrow holding first suggests. I’m going to address both of these points in turn.

I begin with the point that *Caperton* appears to jettison the “an election is an election” manta in favor of recognition that judicial elections are different. The recognition comes in an indirect way, and requires a bit of background on campaign finance jurisprudence, not directly the topic of *Caperton*. In the 1976 opinion in [*Buckley v. Valeo*](#), the Supreme Court considered the constitutionality of a number of provisions of the 1974 amended Federal Election Campaign Act challenged as violating the First Amendment. Roughly speaking, the Court held that campaign contributions could be limited, because the most important First Amendment aspect of contributions is the *symbolic act* of contributing, and not the amount. Also, contributions could be limited to prevent the corruption or the appearance of corruption of elected officials, who could feel they owe political debts to large contributors.

In contrast to contributions *to* candidates, the Court considered the constitutionality of limits on spending *independent of candidates*. The court held that limits on spending, unlike contribution limits, went to the core of the First Amendment, and that such limits would bar anyone besides candidates, the parties, PACs and the institutional media from being able to influence a campaign. The Court also said that the interest in preventing corruption could not justify limits on independent expenditures, because such spending, being truly independent, could not lead to corruption: the spending might be counterproductive, for one thing.

Throughout the years, the Court has stuck with this contribution/spending line in its cases, apart from its cases involving corporate and union spending—a point now at issue in the [*Citizens United*](#) case. Justice Kennedy has been one of the Justices who has expressed strong belief that independent spending, even by corporations or unions, cannot be limited by the First Amendment.

This history is what makes Justice Kennedy’s decision in *Caperton* so interesting. In *Caperton*, you will recall, Mr. Blankenship gave then-candidate Benjamin only \$1,000—that statutory maximum. Mr. Blankenship then gave \$2.5 million to an independent group (a “527” in election law parlance) supporting candidate Benjamin and spent another \$500,000 on his own supporting the candidate. In his majority opinion in *Caperton*, Justice Kennedy elides over the distinction between contributions and expenditures, and the history of campaign finance jurisprudence. Thus, Justice Kennedy refers to the very large contributions “*received by*” Justice Benjamin. Of course, aside from \$1,000, the contributions were not *received* by Justice Benjamin. But he benefitted from the independent spending: Justice Kennedy refers to the “debt of gratitude” that Justice Benjamin must have felt from these independent expenditures, an observation that makes perfect sense if writing on a clean slate, but it is a view that is inconsistent with *Buckley*’s view of the non-corrupting nature of independent spending.

The tension between what Justice Kennedy wrote in *Caperton* and his usual views on campaign finance could not have been lost on Justice Kennedy. Chief Justice Roberts in his dissent pointed out the majority's repeated use of the term "contributions" and questioned whether the recusal rules apply equally to contributions and to truly independent expenditures. He also specifically noted that independent spending in a campaign, far from creating a debt of gratitude, could be counter-productive from the viewpoint of the candidate.

I think what explains the difference here is the fact that this is a judicial election. Justice Kennedy's ordinary view that the rough and tumble of politics should just play itself out with no (or little) financial limits does not apply in judicial elections. This is quite significant. It is true that the immediate impact of the case will be on judicial recusal cases, but the broader implication—made clearer by Justice Kennedy's treatment of the campaign finance issues—is that it is appropriate to treat judicial elections differently for First Amendment purposes. If not, the independent nature of the pro-Benjamin spending should have been

dispositive. In other words, an election is not always just an election, at least when it is a judicial election.

Justice Kennedy's opinion makes clear the *reasons* for the different treatment. Even though judges are elected, they are not supposed to be accountable in the way elected officials are. Judges are to engage in introspection---looking at text and purpose and history, and probing for potential bias---before deciding a case. Justice Kennedy recognizes a goal of judicial objectivity and neutrality that does not apply to candidates for regular office.

So if a judicial candidate feels a debt of gratitude to someone who engages in a large independent expenditure campaign in her favor (or against his opponent), the very nature of the judge's job—to be a neutral arbiter—is at stake. In contrast, in normal elections for office, elected officials can feel beholden to all kinds of supporters, a system that promotes *accountability to the people*. That system makes sense for ordinary elections but it is an idea which in the extreme raises danger signs when applied to the neutral and objective judiciary.

The other special aspect of judicial elections is the low salience nature of judicial campaigns: because most people don't pay as much attention to the work of judges as to the work of ordinary elected officials, they are going to be less likely to punish at the ballot box those who have benefitted from large, one sided spending.

So the first big lesson for me about *Caperton* is the Court's mostly implicit recognition that judicial elections are a different creature. If that is so, then it is possible that *White* issues get reopened and other special judicial elections rules could withstand constitutional challenge.

Let me turn now to the second issue, the likely effect of the *Caperton* recusal standard on judicial elections. Chief Justice Roberts includes a list of unanswered questions in his *Caperton* dissent, and pointedly cites to Justice Kennedy's decisive opinion for himself alone in the 2004 [Vieth](#) case, holding both that partisan gerrymandering cases are justiciable and that there are not yet any judicially manageable

standards for separating an impermissible partisan gerrymander from acceptable use of party information in redistricting.

Justice Kennedy's *Vieth* opinion took the view that the courthouse door should be left open in case one day someone could devise manageable standards, but Justice Kennedy was not willing to set forth any standards in *Vieth*, leaving the plaintiffs there with no remedy. Unmanageability of the standard doomed plaintiffs' case in *Vieth*.

Chief Justice Roberts saw a similar question of unmanageability in the *Caperton* case, worrying about a flood of follow-on cases asking for recusal, and the many issues that would need to be sorted out by the lower courts.

Justice Kennedy does not make an extended argument for manageability of the standard set forth in his opinion, other than to make the empirical prediction that *Caperton* motions will be rare because the facts will never be this extreme. Beneath the surface, Justice Kennedy seems to have made two determinations relevant on this point.

First, Justice Kennedy seems to have decided that the uncertainties that will accompany resolution of *Caperton* motions are worth dealing with. Justice Kennedy thinks the price of some unmanageability is worth paying in the context of judicial elections, a price that he was not willing to pay in the context of disputes over partisan overreaching in drawing district lines.

Second, Justice Kennedy likely calculated that the vagueness of the opinion will have a kind of *in terrorem* effect on the worst kinds of abuses in judicial elections. An unclear boundary, as [Rick Pildes](#) has [pointed out](#), can sometimes effectively police bad behavior. In this case, not knowing precisely what would trigger a *Caperton* recusal order could curb the most egregious campaign spending practices. It also will encourage other institutional actors, such as state supreme courts enacting their judicial codes, to fill in the gaps with more detailed rules and procedures.

I thought it was particularly interesting that the Chief Justice in his *Caperton* dissent pointed out that a 527 organization allied with the

plaintiff's bar spent almost \$2 million supporting Justice Benjamin's opponent in the West Virginia judicial race. Will such groups continue to mount major campaigns for and against judicial candidates, where their groups have regular business before the courts? Or might this cause those who could be seen to have "significant and disproportionate influence on the electoral outcome"—Justice Kennedy's interesting phrase, given his rejection of proportionality ideas in campaign finance cases outside the judicial context—to scale back some of their major spending? The fear of spenders is that they might not benefit from the very people they help to elect.

In the end, the very vagueness of the *Caperton* standard could be its greatest benefit. As I've [argued](#) about vagueness in other election law cases, it might cause some correction by political actors so that these issues never come to the courts. In addition, to the extent the issue comes to the lower courts, these courts will try various approaches to the question of recusal in line with *Caperton*. These varied experiences then can provide valuable information to the Supreme Court should it need to

craft subsidiary rules to put the *Caperton* opinion into action. Lower courts serve as scouts providing advanced information on what works and what does not work.

In the end, Justice Kennedy's opinion in *Caperton* leaves open many questions about the regulation of judicial elections, but that may be precisely the point: its vagueness may leave room for finally jettisoning the unilocular "an election is an election" in the judicial election context.