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Recommended Citation

Jed H. Shugerman, *In Defense of Appearances: What Caperton v. Massey Should Have Said*, 59 DePaul L. Rev. 529 (2010)

Available at: <https://via.library.depaul.edu/law-review/vol59/iss2/10>

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IN DEFENSE OF APPEARANCES: WHAT *CAPERTON V. MASSEY* SHOULD HAVE SAID

*Jed Handelsman Shugerman**

INTRODUCTION

In June of 2009, the U.S. Supreme Court ruled for the first time that an elected judge must recuse himself from a case that involves a major campaign contributor. In *Caperton v. A.T. Massey Coal Co.*, a coal company had been hit with a \$50 million jury verdict. While appealing this verdict, the company's CEO, Don Blankenship, spent \$3 million to help a challenger, Brent Benjamin, who had no judicial experience, defeat the incumbent, West Virginia Supreme Court Justice Warren McGraw. Blankenship funded political attack ads by a political organization (And for the Sake of the Kids) that was created to defeat McGraw, alleging that he was soft on child molesters.¹ The well-financed Benjamin won, 53% to 47%, and was the deciding vote to overturn the jury verdict. In a 5–4 ruling, Justice Anthony M. Kennedy concluded, “There is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds . . . when the case was pending or imminent.”² Such political and financial influences on the court violate due process and “threaten to imperil ‘public confidence in the fairness and integrity of the nation’s elected judges.’”³

In dissent, Chief Justice John G. Roberts, Jr. expressed concern for public confidence too, but with a very different result. The majority’s

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1. Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1; *Court Race Goes Negative: Benjamin Opens Campaign with Ads Attacking McGraw*, CHARLESTON DAILY MAIL, Aug. 25, 2004; see also YouTube, And for the Sake of the Kids, <http://www.youtube.com/watch?v=HPVTVg56gic&feature=related>. A follow-up ad defended these claims. See YouTube, McGraw Wrong Again, <http://www.youtube.com/watch?v=KZCSMqVMZjI&feature=related>. The script is also available at http://www.ncjudges.org/media/news_releases/11_11_04.html.

2. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2255 (2009).

3. *Id.* at 2266 (quoting Brief for Conference of Chief Justices as Amicus Curiae 4, 11).

decision, Roberts feared, “will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.”⁴ Roberts concluded that future *Caperton* motions will “bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”⁵ In *Caperton*, Justice Kennedy and Chief Justice Roberts engaged in a battle of appearances. For Kennedy, litigants who buy seats on courts create an appearance of bias that is severe enough to implicate the right to due process. For Roberts, simply the claims of bias create an appearance of bias, which he believes is undeserved. Roberts then goes on to raise “forty questions” about the future applications of *Caperton* and its ambiguities, concluding that it creates more problems than it resolves.

I suggest that in explaining the new recusal rule, the Supreme Court should have been even more clear that appearances matter. *Caperton* requires recusal when a party’s campaign support for a judicial candidate creates a “risk of actual bias” or a “probability of bias,” rather than an “appearance of bias.” However, the “appearance of bias” standard is more rooted in precedent, and in response to Chief Justice Roberts’s practical concerns in dissent, the “appearance of bias” standard is actually more practical. I also address Chief Justice Roberts’s pragmatic concerns about the manageability of *Caperton* motions with some observations about civil procedure and the actual practice of judicial elections. Part II argues that the problem of money in judicial elections is real, and not just an isolated case, as Chief Justice Roberts suggested.⁶ Part III then argues that *Caperton* motions will be relatively manageable.⁷ Part IV focuses in particular on the “appearance of bias” standard as a more established, more practical, and more manageable standard than the “probability of bias” standard.⁸ Justice Kennedy’s switch from “appearance of bias” language to the “actual bias” and “probable bias” language is not an accident. Perhaps mere “appearances” seem superficial, but the dismissal of appearances because of its mere appearance, if you will, is itself superficial. The “appearance of bias” standard is arguably more rooted in Anglo-American precedents, and appearances of bias are real harms in them-

4. *Id.* at 2267 (Roberts, C.J., dissenting).

5. *Id.* at 2274 (Roberts, C.J., dissenting).

6. *See infra* notes 10–31.

7. *See infra* notes 32–48.

8. *See infra* notes 49–96.

selves. This Article also suggests that the Court should add an “appearance of justice” standard to capture what may have really been going on in West Virginia: the purchasing of a seat for a true believer who needed no political pressure to bias him in favor of Blankenship and Massey. Part V suggests that the Court does not need to seek perfect clarity in these rulings. In fact, ambiguity and uncertainty have their distinct advantages among reputation-protecting judges and risk-averse parties and lawyers, as long as the Supreme Court does not ignore these issues now that it already has entered the fray. The most important decisions in the future are the decisions to grant certiorari every so often, rather than the exact wording of its decisions.

II. IS THERE A REAL PROBLEM?

Chief Justice Roberts argues that the majority is opening up a flood of motions that allege bias, and he worries that these motions will create an unfair appearance of a problem in state courts. If there is little reality to the problem of political donations to judicial campaigns, then there is not much cause to worry about frivolous *Caperton* motions. If there is a real underlying problem, then resolving these motions is potentially complicated. Which is it?

The multi-million-dollar price tag on a West Virginia state supreme court seat and the nastiness of its campaign are increasingly common.⁹ Almost 90% of state judges face some kind of popular election.¹⁰ Thirty-eight states put all of their judges up before the voters.¹¹ Spending on judicial campaigns has doubled in the past decade, with 44% of those donations coming from business groups and 21% from lawyers.¹² In 2004, the seventeen most expensive judicial elections cost a total of \$47 million in direct contributions.¹³ In 2006, the eleven most expensive elections cost over \$34 million, including \$13 million raised for an Alabama supreme court seat and over \$2 million per supreme court seat in Kentucky, North Carolina, Nevada, Ohio, and

9. See generally David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008).

10. Matthew J. Streb, *The Study of Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS 1, 7 (Matthew J. Streb ed., 2007).

11. The nine states that select judges by gubernatorial appointment are Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont. New York's lower court judges are elected, but not the judges on its highest court, the Court of Appeals. South Carolina and Virginia use legislative appointment.

12. JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006*, at 18 (Jesse Rutledge ed., 2006), <https://www.policyarchive.org/bitstream/handle/10207/8749/9/The%20New%20Politics%20of%20Judicial%20Elections%20-%202006.pdf?sequence=1>.

13. Editorial, *The Best Judges Business Can Buy*, N.Y. TIMES, June 18, 2007, at A18.

Texas.¹⁴ In 2008, incumbent supreme court justices in Michigan and Wisconsin were defeated in multi-million-dollar campaigns. In Wisconsin, Justice Louis Butler lost his race, which cost a total of almost \$6 million.¹⁵ In Michigan, Chief Justice Cliff Taylor lost a race costing more than \$7 million between the two sides.¹⁶ Studies find that elected judges disproportionately rule in favor of their campaign contributors, although it is difficult to prove whether the contribution causes the judge to reach that result or whether the contributors have picked true believers in their cause.¹⁷

Cases like *Caperton v. Massey* have come up recently. For example, in May 2003, the Illinois Supreme Court heard oral arguments in a class action against State Farm Insurance.¹⁸ State Farm was challenging a \$1 billion verdict, including \$456 million in contractual damages, in favor of a class consisting of 4.7 million policyholders in forty-eight states.¹⁹ The court was split on the case, and the Justices held their decision until the seventh and deciding Justice was elected in November 2004, about a year and a half later.²⁰ With the case hanging in the balance, Republican Lloyd Karmeier and Democrat Gordon Maag raised a total of \$9.3 million, mostly from repeat players in Illinois courts.²¹ State Farm employees and other insurance groups gave almost \$1.5 million directly to Karmeier, plus \$2.3 million from the U.S. Chamber of Commerce.²² Trial lawyers gave \$2.8 million to Maag through the state Democratic Party.²³ Remarkably, the race was not even state-wide, but in one of the rural districts in southern Illinois outside the expensive Chicago media market. Outside groups attacked both candidates for leniency in graphic criminal cases.²⁴ One

14. *Id.*; JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 at 16 fig. 9 (2006), http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf.

15. Stacy Foster, *Spending in Supreme Court Race Just Under \$6 Million*, MILWAUKEE J. SENTINEL, July 22, 2008.

16. Justice at Stake, 2008 Supreme Court Elections: More Money, More Nastiness, <http://temp.justiceatstake.org/node/63>.

17. See Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making* (Aug. 10, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=991364>; Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14; Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.

18. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 810 (Ill. 2005).

19. *Id.*

20. James Sample, *The Campaign Trial*, SLATE, Mar. 6, 2006, <http://www.slate.com>.

21. JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 19 (2004), <http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf>.

22. *Id.*

23. *Id.*

24. *Id.* at 10.

anti-Karmeier ad, over ominous music and a blurry image of children at a playground, warns, “He used candy to lure the children into the house. Once inside, the three children were sexually molested. A 4-year-old girl, raped. Despite prosecutors’ objections, Judge Lloyd Karmeier gave him probation.”²⁵ True, he had sentenced Bryan Waters, a mentally disabled man, to probation, but only after his original six-year sentence was overturned by an appeals court, which recommended probation instead.²⁶

Karmeier survived these attacks (in part because of his financial advantage) and won the race. He commented that the fundraising was “obscene,”²⁷ but he did not complain about winning, and he did not recuse himself from the State Farm case. He cast the decisive vote overturning the verdict against State Farm for breach of contract. One might say that State Farm received a return of \$456 million on a savvy investment of about \$1 million.²⁸ In 2006, the U.S. Supreme Court refused to hear the appeal, and it did not address this issue until *Caperton*.²⁹

More and more polling indicates that the public already perceives a problem, with or without *Caperton* creating new litigation. For example, in the midst of Michigan’s expensive 2008 race, large majorities of Michigan voters perceived a problem of bias: 63% believed that campaign contributions affect judges’ decisions, and 85% answered that judges should recuse themselves from a case when a party had contributed more than \$50,000 to their campaigns.³⁰ The briefs in *Caperton* offered similar polling results.³¹ These facts undercut Chief Justice Roberts’s argument that the *Caperton* decision is creating a false impression of a problem. But perhaps these facts bolster his main dissenting argument: the majority’s decision will produce an unmanageable wave of due process litigation. The next Part explains why federal courts and most state courts will not be overwhelmed.

25. Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1.

26. *Id.*

27. Sample, *supra* note 20.

28. *Id.*

29. *Avery v. State Farm*, 547 U.S. 1003 (2006).

30. Ed Brayton, *Symposium Puts Spotlight on Danger of Judicial Elections*, MICH. MESSENGER, Mar. 23, 2009.

31. *See, e.g.*, Brief for Petitioner at 13, *Caperton v. A.T. Massey Coal Co.*, 192 S. Ct. 2252 (2009) (No. 08-22); *id.* at 24; Brief of Justice at Stake et al. as Amici Curiae in Support of Petitioners at 15, *Caperton v. A.T. Massey Coal Co.*, 192 S. Ct. 2252 (2009) (No. 08-22). *But see* Brief of Amicus Curiae James Madison Center for Free Speech Supporting Respondents at 3–4, 20–21, *Caperton v. A.T. Massey Coal Co.*, 192 S. Ct. 2252 (2009) (No. 08-22); *id.* at 9–10, 32–34.

III. FORTY QUESTIONS, AND SOME ANSWERS

To argue that *Caperton* motions create an appearance of bias in the courts is similar to arguing that claims of ineffective assistance of counsel create an appearance of incompetence in criminal trials, or that the Fourteenth Amendment or the Civil Rights Act of 1964 create an appearance of racial or gender bias in society. The problems of unfairness are real, and a wave of litigation draws more attention to those problems. Yet it is still valid to ask, as Chief Justice Roberts does with his forty practical questions, whether “the cure is worse than the disease.”³² However, the cure’s side effects should not be exaggerated.

Above, I discussed the explosion of money in many state judicial races over the past decade.³³ But it is also important to recognize that this explosion is limited to a fairly defined set of states. There are four basic models of judicial selection in the states: gubernatorial appointment; partisan elections; nonpartisan elections; and the “merit plan,” in which a nominating commission composed of bar professionals and a mix of other officials offers three names to the governor, the governor appoints one from the list, and that judge later runs in a yes-or-no retention election to hold that seat. All of the million-dollar and multi-million-dollar judicial elections were from two of these models: partisan or non-partisan races, with partisan races tending to be more expensive than non-partisan races. A dozen states have appointed judges, and although appointments are not immune from politics, the influence of money is far less direct. The retention elections that are part of the merit plan also stand in stark contrast to partisan and non-partisan races, based upon a closer look at state-by-state campaign finance reporting.³⁴ In ten retention elections in 2004, the incumbent raised not a single dollar and outside funds were marginal.³⁵ In only two retention elections in 2004, incumbents raised relatively small amounts of money—\$400,000 in New Mexico and \$8,000 in Idaho.³⁶ The patterns were similar in 2000, 2006, and 2008, in which almost every judge running in retention elections raised no money, and all

32. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2274 (2009) (Roberts, C.J., dissenting).

33. See *supra* notes 9–17 and accompanying text.

34. The state-by-state campaign finance reporting is collected from the American Judicature Society and from the National Institute of Money in State Politics. See American Judicature Society, *Judicial Selection in the States*, <http://www.judicialselection.us> (last visited Sept. 6, 2009); National Institute on Money in State Politics, *Follow the Money*, <http://www.followthemoney.org> (last visited Sept. 6, 2009).

35. *Id.*

36. *Id.*

won their retention elections.³⁷ From 2000 to 2008, only the New Mexico merit-plan retention election and a quasi-merit retention election in California cost more than \$100,000.

One reason that merit-selected judges raise no money is that retention elections offer strong job security, and thus, these judges very rarely face organized and well-financed opposition. And one reason potential opponents decide not to invest in challenges is that it is so difficult to defeat incumbents. Between 1% and 2% of judges running in retention elections have been defeated, while incumbents in partisan elections are defeated in 23% of their races, and incumbents in non-partisan elections are defeated in roughly 8% to 9% of their races.³⁸ By comparison, 5% to 6% of incumbent congressmen were defeated over the same time period.³⁹ Judges in merit selection states tend to face a built-in competitive disadvantage because they run in retention elections without necessarily having any background in campaigning. They were appointed to their seat, and although they often run in an election for the very first time to retain that seat, they win overwhelmingly. The retention election system reduces the incentives for a judge's opponents to invest in her defeat because those opponents do not choose the replacement, but instead rely on a merit commission to fill the seat. If these interests do not control the pluralist merit commissions and the governorship as well, they have little reason to expect much return on their investment in defeating the incumbent. And perhaps merit selection produces better judges who get reelected more easily.

A plurality of states use the merit plan, and when combined with the appointive states, a total of over thirty states have no campaign money flowing.⁴⁰ Of course, that leaves almost twenty states with varying amounts of campaign money and varying degrees of *Caperton* complexity. However, these states do not create serious problems for federal courts in managing *Caperton* claims. The only federal court that can review these kinds of claims from state civil cases is the U.S. Supreme Court on direct appeal from state supreme courts. The federal district courts cannot review civil cases in state court for *Caperton* due process questions, and there is nothing like habeas corpus in civil

37. *Id.*

38. Melinda Gann Hall, *Competition As Accountability in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS* 165, 167 (Matthew J. Streb ed., 2007).

39. *Id.* at 167.

40. See American Judicature Society, *Judicial Selection in the States*, <http://www.judicialselection.us> (last visited Sept. 6, 2009); National Institute on Money in State Politics, *Follow the Money*, <http://www.followthemoney.org> (last visited Sept. 6, 2009).

cases. On direct appeal, the Supreme Court can use the discretionary certiorari procedure to ignore as many *Caperton* claims as it wants, and four justices can simply wait for an extreme case for which to grant certiorari. The Supreme Court's discretionary and direct jurisdiction over the state courts resolves some of the procedural problems, but others remain. What about *Caperton* claims in habeas corpus appeals from state criminal cases? Justice Kennedy's opinion in *Caperton* focused on the problem of donations and campaign support from litigants and lawyers: "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."⁴¹ The state and the prosecutor do not donate to the judges' campaigns. *Caperton* could be expanded to cover other questions of political bias relating to criminal defendants, and perhaps federal courts should do so. However, that result is unlikely, and current habeas law under the Antiterrorism and Effective Death Penalty Act (AEDPA) gives skeptical federal courts the tools to dispatch these claims quickly.⁴² Chief Justice Roberts expressed concern that, under 42 U.S.C. § 1983 (2006), civil state litigants might be able to sue their judges in federal courts for the violation of their constitutional rights.⁴³ However, judicial immunity casts a broad shield against such litigation.⁴⁴

There is also a "gaming the system" or "chutzpah" problem. The amicus briefs filed on behalf of Massey Energy, and opposing recusal, argue that parties could donate money strategically in order to trigger the recusal of unsympathetic judges.⁴⁵ They cite then-Circuit Judge Stephen Breyer's warning in 1989 that the recusal standard must be crafted to "prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."⁴⁶ A litigant might even donate money to a judge who is generally unsympathetic to his or her interests, just to be able to disqualify that judge

41. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264 (2009).

42. 28 U.S.C. § 2254 (2006).

43. *Caperton*, 129 S. Ct. at 2271 (Roberts, C.J., dissenting).

44. See *Butz v. Economou*, 438 U.S. 478, 512 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872).

45. Amicus Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan and Utah in Support of Respondents at 36, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22).

46. *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989).

in the future.⁴⁷ Imagine a labor union giving money directly to a conservative judge or providing indirect support in the form of advertising so that this conservative judge must later recuse himself, to the benefit of the labor union. This direct strategic move might seem to be a real problem for recusal's manageability, but it is not. The solution rests in what I would call the "chutzpah" rule: you may not give money to a judge and then complain of bias. Doing so is analogous to the classic example of chutzpah: killing your parents and then throwing yourself on the mercy of the court as an orphan. Similarly, a litigant might also spend money to defeat a judge unsuccessfully (for example, in a retention election) and then step into court and move for recusal based on his own past opposition to that judge. This would be a no-lose situation in which one either tries to defeat the judge or later gets to avoid the judge, but again, the chutzpah rule applies. An individual has no right to complain of the effects of one's own freely chosen donations. A litigant may invoke *Caperton* only with respect to another person's donations.

But there is actually a more complicated scenario. Let us say that State Farm Insurance gives a large amount of money to a Louisiana judge, Judge X. That Louisiana judge then presides over a case against defendant Aetna with millions of dollars at stake. Aetna moves to recuse, or the plaintiffs move to recuse. When is recusal the right result? Was State Farm's donation an indication of pro-insurance bias or anti-insurance bias? In other words, when is the donation a kind of strategic manipulation of a recusal rule, such that recusal would subvert due process? Consider the following four scenarios.

Scenario 1: Was State Farm's donation "direct support" or "collusive support"? Judge X is pro-insurance, and State Farm wants the pro-insurance judge to hear the case and establish pro-insurance precedents. In the alternative, State Farm may have a mutual collusive deal to help out Aetna when either company has pending litigation.

Scenario 2: Was State Farm's donation "direct strategy" or "collusive strategy"? Judge X is pro-consumer and anti-insurance, and State Farm's donation was made in collusion with Aetna in order to trigger X's recusal, either to get a more favorable precedent for State Farm or to execute a collusive deal to help Aetna.

47. Amicus Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan and Utah in Support of Respondents at 36, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22) ("[I]t would be a simple expedient for a party or a lawyer to 'mold' the court that will hear his or her cases by tailoring contributions and opposition contributions.").

Scenario 3: Was State Farm's donation a form of competitive support for Judge X? Judge X is pro-consumer and anti-insurance, and State Farm is seeking a competitive advantage over Aetna. Let us say that Aetna is over-exposed in Louisiana due to Hurricane Katrina, and State Farm wants a liberal judge who will maximize Aetna's losses.

Scenario 4: Was State Farm's donation a "competitive strategy"? Judge X is pro-insurance or anti-consumer, and State Farm wanted to trigger Judge X's recusal—by the plaintiff's recusal motion—in order to eliminate a judge who otherwise would have minimized Aetna's losses.

Are these scenarios outlandish? Given the amount of money at stake in state courts, it would be naïve to assume that parties would not attempt to manipulate court cases. After all, State Farm and Massey Coal Co. demonstrated that they could buy seats, and therefore buy court decisions worth tens of millions, if not hundreds of millions, of dollars. If it takes millions to win a seat, why not spend less money on a strategy to force unsympathetic judges to recuse themselves?

Given these four different scenarios, when is recusal appropriate and when would it be a strategic subversion of the rule? One answer is to rely on the judge, but relying on judges to recuse themselves is how we arrived at judicial plutocracy to begin with.

The answer is that one must impute a political identity to Judge X. Only when a court is willing to say explicitly that "Judge X is pro-insurance" or "Judge X is pro-consumer" can we resolve this puzzle. But what court is so deeply committed to legal realism that it is willing to impute political preferences—and regularly undermine judges' reputations—in its official decisions? There are limits to legal realism in judicial opinions. Just as it is inappropriate to complain in a dissent that the judge writing the majority should have eaten something else for breakfast, it is understandable that reviewing judges would prefer to avoid such explicit rulings with a ten-foot pole, and that they would show great deference to the recusal decisions of other judges.

Some of the scholars who have addressed the problem of judicial campaign contributions have called for campaign finance regulations. Most of these proposals would be swept under by a "trickle-around" effect. Samuel Issacharoff and Pamela Karlan have described the hydraulics: "[P]olitical money, like water, has to go somewhere."⁴⁸

48. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999); see also Daniel R. Ortiz, Commentary, *Water, Water Everywhere*, 77 TEX. L. REV. 1739, 1742–43 (1999) (citing Issacharoff and Karlan's "evocative hydraulic metaphor" and noting that "[i]f we constrict one path, it will take another").

Under this new recusal regime, money surely will go into strategic manipulation. It is important to recognize that the Supreme Court can use its discretionary jurisdiction to deny certiorari and prevent the manipulation of recusal rules.

Yet questions still persist, even beyond Chief Justice Roberts's forty. Why is recusal limited to campaign support in judicial elections? Arguably, there is more risk of bias in appointments when judges owe more of their seat to one individual, and when judges rely on one individual for promotion to higher courts. Parties may not exercise as much power over judicial appointments as in partisan elections, but they still wield a lot of influence. Political power also affects a judge's prospects of elevation, so fear and favor can affect judges who enjoy life tenure at one level, but who also have ambitions to move up the judicial hierarchy, or perhaps run for other offices. Federal judges and appointed judges are thus subject to similar concerns about bias.

These concerns about risks and appearances are not limited to past donors and past supporters. What about a judge who is facing a reelection and is hearing a case before a particularly powerful litigant or lawyer who has not donated in the past but who would be more likely to do so after a favorable ruling—or even more, to support an opponent after an unfavorable ruling? The past contribution is a signal to the judge of an interest, but what about potential future support or opposition creating an appearance of bias?

The Supreme Court's discretionary use of certiorari may keep the federal courts clean, allowing the Court to pick out an extreme case every so often for full review. But the states do not have such procedural freedom. State litigants will file *Caperton* claims at each stage. Most of these claims will be dismissed easily, but some will be more difficult. Now that the Supreme Court has entered the fray, it should continue to hear these cases to clarify the standard and to embolden appellate judges who may feel the awkwardness of disqualifying their colleagues and lower court judges, or the confusion of sorting through real versus manufactured conflicts. The first step is changing the *Caperton* standard to make it more clear and more practical, as I discuss in the next Part.

IV. "APPEARANCE" OVER REALITY

Chief Justice Roberts is right: the majority in *Caperton* leaves lots of unresolved questions, and they will have to be sorted out by the state courts, if not the Supreme Court. The majority decision in *Caperton* could have made that task simpler. Instead of focusing on the

“probability of actual bias,” it should have focused on the “appearance” of bias. Kennedy used the phrase “actual bias” eighteen times and the phrase “probability of bias” twice, and together they constituted the majority’s due process standard.⁴⁹ Kennedy stated that “actual bias” was rooted in Supreme Court precedent.⁵⁰ By contrast, Justice Kennedy used the word “appearance” only four times. The first time, he was setting forth the case’s background, and he quoted Justice Benjamin’s criticism of “a standard merely of appearances” as “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.”⁵¹ The other three times were merely references to West Virginia’s and other states’ non-constitutional ethics rules.⁵² Not once was “appearance” used as part of the Supreme Court’s due process analysis, nor was it ever cited as part of Supreme Court precedent.⁵³ In response to the Court’s choice of wording, Chief Justice Roberts hammers again and again on the “probability of bias” language as a weakness in the majority formulation.

What is the big deal about this apparently minor difference? Is Justice Benjamin right? Why should courts stop at mere appearances instead of inquiring into actual bias? Is it contradictory in a due process case to turn to a seemingly superficial shorthand instead of pursuing the truth? In fact, a rule based on the appearance of justice—and conversely, the appearance of impropriety or partiality—is a remarkably important part of the due process analysis for a number of reasons.

Initially, Justice Kennedy himself seemed to prefer the appearance standard. In oral argument for *Caperton v. Massey*, when the respondents argued against an “appearance of bias” standard, Justice Kennedy defended it with vague references to some of these reasons, and in the process, he tipped his hand on how he would rule:

I want you to be able to elaborate your full theory of the case, but just so you know, it—it does seem to me that the appearance standard has—has much to recommend it. In part it means that you don’t have to inquire into the actual bias; it’s—it’s more objective. Now, of course it has to be controlled, it has to be precise. But I just thought that you know that I—I do have that inclination.⁵⁴

49. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257, 2259 (2009).

50. *Id.* at 2257.

51. *Id.* at 2259.

52. *Id.* at 2266.

53. *Id.*

54. Transcript of Oral Argument at 33, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22).

When the respondents argued that due process is not about something as superficial as appearances, Justice Kennedy replied, “But our whole system is designed to ensure confidence in our judgments. . . . And it seems—it seems to me litigants have an entitlement to that under the Due Process Clause.”⁵⁵ From these unambiguous signals, it appears that an “appearance of bias” standard had five votes as of March 3, 2009.

Justice Kennedy’s switch from “appearance of bias” language to the “actual bias” and “probable bias” language could have been accidental, but more likely, he may have been wary about resting due process on appearances, rather than real harms, and the “probability of actual bias” standard seems to address real harm without having to prove something so inherently subjective. Mere “appearances” may seem superficial, but appearances are actually more substantial than they appear, so to speak. The “appearance of bias” standard is just as firmly rooted in Anglo-American precedents, it is more practical for courts, and moreover, appearances of bias are real harms in themselves.

First, the appearance of impropriety creates actual harms. As Justice Kennedy’s comment in oral argument suggests, a justice system depends upon the public’s faith in the proceedings so that the law remains legitimate. A justice system also depends upon the litigants’ trust so that they comply with the court’s ruling. As Balzac once wrote, “To distrust the judiciary marks the beginning of the end of society.”⁵⁶ The Model Code of Judicial Conduct states, “Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges . . . [which] depends in turn upon their acting without fear or favor.”⁵⁷ The rule of law relies upon the appearance of a rule of law, rather than a rule of politics and personal preferences.

Second, self-enforcement through recusal is far preferable to appellate enforcement through disqualification. A judge will rarely admit actual bias, in part because such a confession has reputational costs and runs against the professional ethos, and in part because judges often sincerely believe that they can overcome prejudices and adjudicate fairly. A rule of appearances allows the judge to recuse with dignity, without the confession of bias.

55. *Id.* at 37.

56. HONORE DE BALZAC, *SPLendeurs et Misères des Courtisanes and Other Stories* (1898), quoted in Otto Kirchheimer, *Conditions of Judicial Action*, in *THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS* 50, 51 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993).

57. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990).

Third, it arguably makes sense for trial judges to err in favor of recusal in terms of judicial economy. There is less harm in recusing too frequently than too rarely. For example, in the first scenario, a different judge with less of a potential conflict simply hears the case, generating minor procedural costs and delays; in the second, the result will be more appeals with remands and new trials, in addition to the general cost of allowing more actual bias. If a judge recuses herself, it generally comes very early in the proceedings and wastes fewer resources of the parties or the courts.

Fourth, as an evidentiary matter, it is exceedingly difficult to get inside a judge's head and prove actual bias. Risks of temptation and appearances are a more workable approach to due process. When Justice Kennedy commented in oral argument that an "appearance" inquiry is more objective, he was adverting to this advantage in terms of practicality.

Fifth, appellate judges prefer to avoid accusing lower court judges of actual bias; it creates awkward moments at the state courthouse cafeteria. Under an appearance standard, an appellate court can express confidence in its colleague's impartiality but still disqualify that judge while not having to avoid him at cocktail parties.

Finally, the term "appearance" is already the familiar standard in the codes of judicial conduct around the country. Canon 2 of the American Bar Association's (ABA) Model Code of Judicial Conduct states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."⁵⁸ Canon 3E has a variation on the same problem of perceptions: "A judge shall disqualify himself or herself in a proceeding in which his impartiality might reasonably be questioned."⁵⁹ As the majority opinion in *Caperton* notes, the ABA Model Code's test for the 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."⁶⁰ Most states have adopted either the "appearances" language or "perception" language under their codes of conduct or supreme court decisions.⁶¹ State judges al-

58. *Id.* Canon 2.

59. *Id.* Canon 3E(1).

60. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009) (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt.).

61. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES (1996); see, e.g., *Ogden v. Ogden*, 39 P.3d 513, 516 (Alaska 2001) (citing ALASKA CODE OF JUDICIAL CONDUCT Canon 2(A)); *In re Ackel*, 155 Ariz. 34, 38 (1987) (citing Canons 1 and 2(A) of the Judicial Code of Conduct as adopted by the Arizona Supreme Court); ARK. CODE OF JUDICIAL CONDUCT Canon 3(B)(5); CALIFORNIA CODE OF JUDICIAL CONDUCT Canon

ready apply the standard to other questions of bias and interests, such as financial investments.

The Supreme Court's precedents have reflected a concern for appearances and mere temptations, rather than actual bias. *Tumey v. Ohio* was the first major case to establish these principles for disqualification under the due process clause.⁶² In 1926, a mayor who was acting as a judge tried and convicted Tumey for violating Ohio's Prohibition Act.⁶³ The statute provided the mayor with \$12, ostensibly for trial costs, but only for convictions.⁶⁴ Additionally, the town received Tumey's \$100 fine.⁶⁵ The mayor denied Tumey's recusal request.⁶⁶ Holding that such a system violated the defendant's due process guarantee against a biased tribunal, the Supreme Court rejected the requirement of proving *actual* bias.⁶⁷ Writing for a unanimous Court, Chief Justice William H. Taft first approached the disqualification rule narrowly. He recognized that "of course, the general rule [is that judges] are disqualified by their interest in the controversy to be decided."⁶⁸ He first articulated a limited right to disqualify a judge for "a direct, personal, substantial, [and] pecuniary interest" in the case.⁶⁹

There may have been reason to think that this standard, by itself, provided only a narrow right, especially in terms of directness and substance. However, Chief Justice Taft continued in *Tumey* to broaden the right. Instead of returning to the "direct" and "substantial" language, Chief Justice Taft, in the next passage, emphasized that even relatively small incentives were still intolerable.⁷⁰ He quoted Judge Thomas Cooley's *Constitutional Limitations*, which explained

3C(1)(a) ("A judge should disqualify himself in a proceeding in which . . . his impartiality might reasonably be questioned, including but not limited to instances where . . . he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . ."); *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988) (citing COLO. CODE OF JUDICIAL CONDUCT Canon 2); *State v. Shabazz*, 246 Conn. 746, 768 (1998) (citing CONN. CODE OF JUDICIAL CONDUCT Canon 3(c)); *Mejia v. United States*, 916 A.2d 900, 902 (D.C. 2007); *Stein v. State*, 995 So. 2d 329, 344 (Fla. 2008); *State v. Brantley*, 56 P.3d 1252, 1273 (Haw. 2002); *In re Cooks*, 694 So. 2d 892, 903 (La. 1997); *State v. Henderson*, 277 Neb. 240, 261 (2009); *Lujan v. New Mexico State Police Bd.*, 667 P.2d 456 (N.M. 1983); *In re Disqualification of Hoover*, 863 N.E.2d 634, 635 (Ohio 2006); *State v. Gardner*, 789 P.2d 273, 278 (Utah 1989); *City of Bellevue v. Hellenthal*, 28 P.3d 744, 752 (Wash. 2001).

62. See *Tumey v. Ohio*, 273 U.S. 510, 527 (1927).

63. *Id.* at 515.

64. *Id.* at 531–32.

65. *Id.*

66. *Id.* at 515.

67. *Id.* at 522–23.

68. *Id.* at 522.

69. *Id.*

70. *Id.* at 523–24.

that courts required disqualification unless the interest was “so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual.”⁷¹ Even though the mayor did not collect a particularly large sum from each individual conviction or from the total monthly convictions (roughly \$100 a month, or \$960 in 2006 dollars), Taft concluded, “We can not regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest.”⁷² Chief Justice Taft may have been unaware that Thomas Cooley had time to revise the canonical *Constitutional Limitations* and his other treatises because he had been defeated in his reelection bid for a seat on the Michigan Supreme Court in 1884, an election year in which the Democratic ticket trounced the Republican ticket throughout the state.⁷³

Chief Justice Taft continued to expand the standard:

There are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance *nice, clear and true* between the State and the accused, denies the latter due process of law.⁷⁴

Due process disqualifications would apply to interests that were “possible temptations to the average man,” a standard far more expansive than the initial “direct, personal, substantial, [and] pecuniary” language. More an aspirational goal than a legal standard, the language

71. *Id.* at 531 (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 594 (7th ed. 1903)).

72. *Id.* at 532.

73. See George Edwards, *Why Justice Cooley Left the Bench: A Missing Page of Legal History*, 33 WAYNE L. REV. 1563–65 (1987); PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION 67 (1999); see also Paul D. Carrington, *Law As “The Common Thoughts of Men”: The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495, 495–97 (1997).

74. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (emphasis added). Alternatively, Chief Justice Taft explained that the mayor’s role as the executive of his village placed him in “two practically and seriously inconsistent positions, one partisan and the other judicial, [which] necessarily involves a lack of due process of law.” *Id.* at 534. If a partisan position undermines one’s judicial position and thus due process, the Taft Court would probably have had questions about judicial elections. But alas, it did not address that issue.

of “a balance nice, clear and true” has appeared in recent Supreme Court cases, such as *Hamdi v. Rumsfeld*.⁷⁵

In the 1950s, the Supreme Court extended the law of disqualification under due process to the appearance of bias and the “appearance of justice.” In 1955, the Supreme Court elaborated upon *Tumey*. After citing *Tumey*’s “possible temptation” and “balance nice, clear and true” language, the Court acknowledged, “Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’”⁷⁶

The Burger Court broadened the disqualification rule to include less and less direct financial incentives. The Court extended *Tumey* in a similar case, *Ward v. Village of Monroeville*, in which the mayor did not receive compensation for convictions but the town received the fines.⁷⁷ The influence of the public financing over the proceedings was less direct than the immediate payoff in *Tumey*, and the Court found no “direct, personal, substantial, [and] pecuniary interest.”⁷⁸ Instead, the Court applied the “possible temptation” standard from *Tumey* and found a violation of due process.⁷⁹ In a later case, the Burger Court also found a violation of due process in criminal proceedings where there was a “likelihood of bias or an appearance of bias.”⁸⁰

In 1986, the Supreme Court dramatically extended this rule in *Lavoie v. Aetna*.⁸¹ Margaret Lavoie sued Aetna Life Insurance in an Alabama state court for refusing to pay for her medical treatment.⁸² For payment of her original claim and for punitive damages for the tort of bad faith refusal to pay a valid claim, a jury awarded \$3.5 million in

75. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004); *accord* *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 618 (1993); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986).

76. *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). In *Aetna Life Insurance Co. v. Lavoie*, 75 U.S. 813, 825 (1986), the Supreme Court cited this language approvingly.

77. 409 U.S. 57 (1972).

78. *Id.* at 60–62.

79. *Id.* at 60.

80. *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *see also* *Connally v. Georgia*, 429 U.S. 245, 250 (1977) (holding that a payment of \$5 to a justice of the peace for each warrant he issued—his sole compensation—is a “direct, personal, substantial, [and] pecuniary interest” that violates due process).

81. 475 U.S. 813 (1986).

82. *Id.* at 815.

punitive damages.⁸³ In a 5–4 per curiam decision, the Alabama Supreme Court affirmed the award.⁸⁴ Aetna then learned that Justice T. Eric Embry, one of the Justices in the majority, had filed two suits in state court alleging bad faith failure to pay a claim against two other insurance companies; both suits sought punitive damages and one was a class action.⁸⁵ Aetna filed a motion for rehearing with a request for the Justice to recuse himself, but the motions were denied.⁸⁶ Aetna then discovered that Justice Embry had written the per curiam. On appeal, the U.S. Supreme Court noted that he received a \$30,000 settlement for his claims after the state court decision, and then he resigned “for health reasons” in between the state proceedings and the U.S. Supreme Court decision.⁸⁷

Writing for a unanimous Court, Chief Justice Warren Burger began with the narrow *Turney* rule against “direct, personal, substantial, [and] pecuniary interest.”⁸⁸ He then added the broader *Murchison* rule that “under the Due Process Clause no judge ‘can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome,’” and that the degree or kind of interest that would be sufficient to disqualify a judge from sitting “cannot be defined with precision.”⁸⁹ He summed up the rule with the broad *Turney* language: “Nonetheless, a reasonable formulation of the issue is whether the ‘situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”⁹⁰

The Court found that Justice Embry’s per curiam opinion had the “clear and immediate effect” of strengthening his own case, and that he acted as “a judge in his own case.”⁹¹ Rather than relying on the narrow disqualifying factors, the Court concluded its discussion of Justice Embry’s conflict with the broadest language:

We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.” The Due Process Clause “may sometimes bar trial by judges who have no actual bias and who would do

83. *Id.* at 816.

84. *Id.*

85. *Id.* at 817.

86. *Id.* at 817–18.

87. *Id.* at 822 n.2.

88. *Id.* at 821–22.

89. *Id.* at 822.

90. *Id.* (internal quotation marks omitted) (citation omitted).

91. *Id.* at 824, 829.

their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'⁹²

The Court also returned to Thomas Cooley's limiting principle that recusal is not required where the interest is "so remote, trifling and insignificant that it may fairly be supposed to be incapable of affecting the judgment of or of influencing the conduct of an individual."⁹³

Justice William Brennan's concurrence noted that the Court previously had found due process violations in cases that had fallen short of the "direct, personal, substantial, [and] pecuniary" test, and he suggested that even under this test, "an interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding."⁹⁴ The Court's decision in *Lavoie*, regardless of the doctrine, may have been driven by the audacity of Judge Embry's behavior. Nevertheless, the Court chose remarkably open-ended language, raising high expectations for impartiality and recusal in the face of indirect conflicts. Later, Justice Kennedy himself applied an "appearance of partiality" test in a 1994 concurrence.⁹⁵

The maxim "justice must satisfy the appearance of justice" runs throughout the cases from *Tumey* to *Lavoie*.⁹⁶ Thus, the appearance

92. *Id.* at 825 (citations omitted).

93. *Id.* at 826 n.3. For an example of a remote and insignificant interest, see *Marshall v. Jerico, Inc.*, 446 U.S. 238 (1980). In *Jerrico*, a Labor Department official penalized Jerrico for violating child labor laws, and a portion of the fines reimbursed the agency's enforcement costs, as provided by statute. The Court held that this payment did not create a sufficient interest in the case because the official would not profit personally, and the payment to the institution was not sufficiently large so as to affect his judgment.

94. *Aetna*, 475 U.S. at 829–30 (Brennan, J., concurring). Justice Harry Blackmun wrote a concurrence, joined by Justice Thurgood Marshall, noting that this decision did not turn on the fact that Justice Embry was the deciding vote. *Id.* at 833 (Blackmun, J., concurring) ("The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues.").

95. *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring).

96. An insightful article on these cases suggests that "the Court seems much more concerned with probabilities than with appearances, and the 'appearance of impropriety' language seems to be mere icing on the 'probability of unfairness' cake." Mark Andrew Grannis, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 390 n.49 (1988). Still, the article concludes that appearances are a part of the Court's due process inquiry. *Id.* at 390. *But see* Note, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675, 1676–77 (1985) (citing *Taylor v. Hayes*, 418 U.S. 488 (1974), and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), for the holding that appearances alone are sufficient).

standard is more practical and arguably more established in the precedents than the standard adopted in *Caperton*.

In addition to adding the “appearance of bias” to the standard for recusal, the Supreme Court should reconsider its emphasis on the notion that a “debt of gratitude” may generate bias. As the Court began its discussion of applying the due process precedents to the facts of *Caperton*, it found a “probability of actual bias” because of Blankenship’s past efforts: “Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”⁹⁷ Surely the Court is right that a judge might be biased by gratitude to campaign contributors, but this backward-looking emotional tug is less important than forward-looking political pressure and political incentives. The long-standing label for this threat to judicial independence is “fear and favor,”⁹⁸ an emphasis on forward-looking pressures that force a judge to deviate from his or her own judgment and bend under the weight of political pressure and other improper influences. A judge might side with a donor out of appreciation for past support, but the bigger danger to independence is the incentive to maintain that support in the future (“favor”) and the disincentive to turn that support into opposition in the next election (“fear”).

In West Virginia, Supreme Court Justices serve twelve-year terms, among the longest terms of state judges around the country.⁹⁹ Elsewhere, judges generally serve six or eight year terms.¹⁰⁰ Long terms may insulate judges from pressure after their election, but they encourage a great investment of resources before the election. Diminishing political pressure *ex post* simply increases pressure *ex ante*. For that reason, Blankenship and other special interests have an incentive to spend more on the initial election, and have an incentive to find true believers: judges who do not need ongoing incentives to vote a particular way because they have internalized that view and truly believe in the cause as a matter of ideology. Where there are long terms, a pro-life or pro-choice group would seek to elect a true believer, not someone who needs political pressure to stay in line. The same thing is true with industry, labor, trial lawyers, and other special interests, as well as majoritarian interests in law and order. Blankenship may have found a true believer in Brent Benjamin, a judge who did not need political pressure or gratitude to vote in Massey’s favor. Thus, the

97. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262 (2009).

98. MODEL CODE OF JUDICIAL CONDUCT Canon I (1990).

99. W. VA. CONST. art. VIII, § 2.

100. Other state judges’ term lengths are available at www.judicialselection.us.

question in judicial elections is not always one of political pressure and gratitude, but of another fundamental problem of due process and appearances of justice: the injustice of buying a seat on a court. Blankenship could not get himself elected and subsequently hear his own case. Why should he be able to finance a proxy for his interests, even if that judge truly believes those interests follow the rule of law? Thus, “the appearance of bias” standard is incomplete. The Court should add the traditional “appearance of justice” to capture the problem of buying a seat for a true believer.

If the Supreme Court is going to need to rely on state judges to enforce its recusal rule for other state judges, the standard needs to be attuned to the psychological and institutional factors at play. An “appearance of bias” standard, an “appearance of justice” standard, and a forward-looking emphasis on fear and favor would be substantive and practical improvements on *Caperton*.

V. DYNAMIC EFFECTS OF SMALL STEPS

If the U.S. Supreme Court and state courts demonstrate even a minimal commitment to enforcing *Caperton* by granting certiorari every once in a while, the effects may multiply out to affect judicial behavior all the way down, and then the behavior of litigants, lawyers, political parties, and state leaders. The Supreme Court does not need to review every close call. Let the Court use its “passive virtues,” in Alexander Bickel’s terms.¹⁰¹ It can use its discretionary jurisdiction and take recusals case-by-case, perhaps granting certiorari to police one or two extreme cases each year. While this Article suggests that the Supreme Court should adopt the “appearances” standard, the Court does not need to clarify the recusal rule by narrowing it. Bright lines are not necessary for getting lower courts to follow its due process ruling. Ambiguity and minimalism in opinion writing have a number of advantages in terms of compliance in this particular field. The most important action of the Supreme Court in these cases is not crafting a perfect decision, but rather, simply granting certiorari every so often in order to strike some fear in judges’ hearts. Steady incrementalism and ambiguity offer four advantages.

First, the Court does not have to worry about the exact parameters and the limiting principles of its recusal rule for lower courts to administer because they can feel out those principles on their own. One can question whether there is a difference between financial support

101. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111 (2d ed. 1986).

of elections and behind-the-scenes support of appointments, but the Court does not need to draw such a bright line in an opinion. The Court can wait to cross that bridge if a similarly obvious case of bias comes before it in the future, or it can choose to observe such a distinction silently by denying certiorari on other kinds of bias questions.

Similarly, the Court can simply sidestep the “legal realism” problem of strategic manipulation. Instead of announcing that a particular judge is “liberal” and “pro-choice” or “conservative” and “pro-industry,” the Court can deny certiorari. In these potential strategic cases, the appellant seeking the grant of certiorari will be the one seeking recusal. In denying certiorari, the Court would be allowing the judge below to deny the recusal request, thereby thwarting any strategic game-playing. The main point is that the Court can control the cases it selects—either for the degree and kind of bias involved, or for the kinds of legal reasoning it deems appropriate or inappropriate.

Second, some continuing ambiguity in the Supreme Court precedents would cause judges to err in favor of recusing themselves. No judge ever wants to be in Judge Brent Benjamin’s position, as the poster-child for judicial corruption and with his integrity questioned in every major newspaper in the country. One could not count the number of news stories, op-eds, and editorials excoriating Judge Benjamin as bought and sold by Massey Coal Co. This media firestorm endangered Judge Benjamin’s reelection chances much more than any amount of money that was used to finance his opponent. The Supreme Court’s granting of certiorari is the sword of Damocles, true to the original anecdote: with the power of the black robe and the gavel comes responsibility and accountability. For too long, state judges have had zero accountability for their shady campaign financing. The prospect of sharing the harsh spotlight with Judge Benjamin will change those expectations, and judges will start to recuse themselves if they can smell the chance of a granted certiorari petition.

Third, the litigants and lawyers will self-regulate, even if the lines are not clear. They will be accordingly risk averse and shy away from crossing the fuzzier line. In high stakes elections, every additional dollar spent to elect a judge gets one dollar closer to a potential recusal by the judge herself, or eventually, the threat of the Supreme Court’s grant of certiorari. The litigant’s marginal advantage of each additional dollar for electing a judge is more than counterbalanced by the larger disadvantage of losing that same judge to recusal. The litigant is better off staying under the radar with smaller donations, hoping that the judge it favors gets elected, while facing no risk of recusal. Certainly, one method of staying below the radar is diffusing the fi-

nancial support through other employees or laundering the money through trade groups or political action committees that could run their own ads. But a savvy opponent knows how to alert the courts to those evasions. The advantage of ambiguity is that the litigants will be uncertain where the line is and will probably err in favor of avoiding that line. Furthermore, no litigant wants to be the next Massey Coal Co. or its C.E.O. Don Blankenship, just as no judge wants to be in the shoes of Judge Benjamin. There is such a thing as bad publicity. Certainly, money will still flow into judicial elections, but the recusal rule will create a constitutional chilling effect on political spending, and the funding of judicial elections will be on a more level playing field.

Fourth, the potential spotlight on judges and litigants is also a potential spotlight on particular states. Just as no one wants to be Judge Benjamin or the C.E.O. of Massey Coal Co. right now, no state wants the attention that West Virginia has been getting. States may feel additional pressure to adopt reforms in order to immunize themselves from being held up as the next judicial disaster area. Some critics were worried that the *Caperton* Court was exceeding its proper role and intruding on the states' roles or the legal profession's role in regulating this problem, and they were concerned that the ruling perhaps had taken pressure off of these other institutions to step in.¹⁰² However, the legal profession's efforts had little effect, and states had been doing little or nothing to address this problem until the Supreme Court granted certiorari in 2008. The movement for merit selection and retention elections (which give judges more job security and almost no pressure to raise money) had stalled since the 1980s, and the public financing efforts for judicial elections had been moving very slowly, with some concerns that the few existing programs were in jeopardy. State campaign financing laws are generally lax, and generally do not differentiate judges from other offices.

Then the U.S. Supreme Court granted certiorari in *Caperton*, and reform efforts gained momentum. With the pending case as an uncomfortable spotlight, West Virginia officials suddenly proposed various reforms of the state's judicial elections, and Governor Joe Manchin appointed an Independent Commission on Judicial Reform that is already garnering praise.¹⁰³ Just before *Caperton's* Supreme Court oral argument, Chief Justice Wallace Jefferson of the Texas Supreme Court called for an end to competitive judicial elections and

102. See, e.g., Lawrence Lessig, Comment, *What Everybody Knows and Too Few Accept*, 123 HARV. L. REV. 104, 115-17 (2009).

103. See Matt Crist, *Judiciary Report: A Starting Point*, W. VA. STATE J., Nov. 19, 2009.

decried “the corrosive influence of money” in judicial elections.¹⁰⁴ “If the public believes that judges are biased toward contributors, then confidence in the courts will suffer.”¹⁰⁵ The Texas media noted that *Caperton* had given Chief Justice Wallace added ammunition.¹⁰⁶ The Washington state legislature debated a public funding plan for its judicial elections, along with other reforms,¹⁰⁷ following public financing in New Mexico, North Carolina, and Wisconsin.¹⁰⁸ Momentum has continued to build in other states.¹⁰⁹ On the other hand, reform efforts run the risk of stalling. The Wisconsin Supreme Court, by a 4–3 vote, rejected a strict rule that donations or other campaign support over \$1,000 triggered recusal.¹¹⁰ In Missouri, merit selection is under attack by groups that are seeking a return to direct partisan elections.¹¹¹ It is not yet clear if the momentum from *Caperton* is sufficient to overcome political inertia. The immovable object of entrenched interests may be able to withstand the force of reform, unless the Supreme Court adds more force so as to make it irresistible.

Certainly, state appellate courts will also face the dilemma of how to apply the recusal rule, but they might find a solution in directing these claims to already existing state judicial ethics panels, and where they do not yet exist, a state supreme court might find enough incentive to create them. Independent ethics panels would shield the state courts from these kinds of debacles, and they could review recusal requests more efficiently. State ethics panels could navigate their own path through the problems of limiting principles and strategic gamesmanship without facing the same kinds of institutional problems that face the state courts.

104. Chuck Lindell, *Chief Justice Seeks to Abolish Judicial Elections*, AUSTIN AM. STATESMAN, Feb. 12, 2009.

105. *Id.*

106. *Id.*; see also Editorial, *High Court Ruling Helps Reform Call*, SAN ANTONIO EXPRESS NEWS, June 28, 2009, http://www.mysanantonio.com/opinion/High_court_ruling_helps_reform_call.html.

107. Brad Shannon, *Bill Looks at Judicial Race Funding*, OLYMPIAN, Feb. 2, 2009; Chris Grygiel, *Big Money and the Courts: When Should Judges Step Aside?*, SEATTLE POST-INTELLIGENCER, June 15, 2009.

108. *Id.*; *Public Funding Available for Supreme Court Races*, WIS. L.J., Dec. 2, 2009.

109. For up to date news on judicial selection and reform, see <http://www.judicialselection.us/news/index.cfm?state=>.

110. Patrick Marley, *State High Court Says Campaign Donations Can't Force Recusals*, WIS. J.-SENTINEL, Oct. 28, 2009, <http://www.jsonline.com/news/statepolitics/67012672.html>.

111. See Jo Mannies, *Group Gets OK to Circulate Petitions Aimed at Ousting Missouri's Judicial Selection System*, ST. LOUIS BEACON, Nov. 12, 2009, http://www.stlbeacon.org/beacon_backroom/group_gets_ok_to_circulate_petitions_aimed_at_ousting_missouri_s_judicial_selection_system.

VI. CONCLUSION

The first and only Supreme Court decision to focus on the problem of money in judicial elections has begun to educate the public about the problems with judicial elections. These reform efforts will be even more successful if they are driven by knowledge, not just fear. The Supreme Court has an opportunity to fulfill its educating function, borrowing from a very different aspect of Bickel's vision for the Supreme Court's role in democracy. The Court has an opportunity to define the rule of law and the basic notions of due process, and it has an opportunity to shape a reform effort. Its actual ruling in *Caperton* could be wisely minimalist and even ambiguous, but its discussion of due process and fairness should be bold, direct, accessible, and inspiring.

It is also crucial that we understand the arguments of the respondents, Massey Coal Co., in this case. Campaign donations by special interests are not the only threat to judicial independence in our society. There are many different forms of fear and favor that undercut the rule of law in both elected courts and appointed courts. Whereas the respondents were making this argument to suggest that reform is futile, history teaches that reform is inevitable, and for much of American history, reformers succeeded in promoting one form or another of judicial independence. But changes in selection generally yield only relative independence: elections create more independence from one institution or set of political forces, but also create more dependence on other institutions and political forces. The same is true for non-partisan elections and merit selection. Reforms that yield independence in more absolute terms include lengthening terms; involving multiple branches or bodies in the selection process; establishing barriers to removal or discipline; fixing salaries and material support; and maintaining protections of jurisdiction. We should be focusing more on absolute independence.

History also teaches that reform comes in sudden waves—the Founding, the sweeping adoption of judicial elections from 1846 to 1851, the lengthening of terms around 1870, the rise of non-partisan elections in the 1910s, and the spread of the merit plan in the 1960s and 1970s.¹¹² Could *Caperton v. Massey* trigger another wave of re-

112. See JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: JUDICIAL ELECTIONS AND JUDICIAL INDEPENDENCE IN AMERICA* (forthcoming 2011); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. (forthcoming March 2011).

form? That is up to Justice Kennedy and the Court's willingness to return to these issues, to clarify that appearances matter, and to demonstrate that *Caperton* was not a one-shot deal for the Court.