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Changing the Rules of the Game: Deriving New Rules and Practices from *Caperton v. A.T. Massey Coal Co.*

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Changing the Rules of the Game:

Deriving New Rules and Practices from *Caperton v. A.T. Massey Coal Co.*

By

Aman L. McLeod

Abstract:

In 2009, the United States Supreme Court decided the case of *Caperton v. A.T. Massey Coal Co.*, in which it ruled that judges must recuse themselves in cases involving those who have provided a disproportionate amount of financial support to their campaigns. This decision has forced states to reconsider their campaign finance laws and their judicial recusal rules. This article proposes practical and modest reforms that states could adopt that would effectively respond to the *Caperton* decision.

I. Introduction:

States have been using elections to choose and retain their judges since the early 1800's.¹ Today, thirty-nine states use one of several types of judicial elections, and over 90% of state judges must face the voters in order to keep their jobs.² In all of these elections, judges are permitted to accept campaign contributions to finance their campaigns,³ and individuals and other interest groups are permitted to spend money to influence the outcome of these elections.⁴

¹ Matthew J. Streb, *The Study of Judicial Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTION 1,9 (Matthew J. Streb ed., 2007)

² *Id.* at 7.

³ See Aman McLeod, *Bidding for Justice: A Case Study about the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. Det. Mercy L. Rev. 385, 389 (2008).

⁴ See Kurt Hohenstein, "*Clio, Meet Buckley-Buckley, Clio*": Re-Introducing History to Unravel the Tangle of Campaign Finance Reform. 1 Alb. Gov't L. Rev. 63, 68-69 (2008).

For years, scholars,⁵ commentators⁶ and interest groups⁷ have decried judicial elections in part because of the perception that contributors can purchase justice with their campaign spending. Forty-seven states and the federal government have adopted rules that are similar to Canon 3E(1) of the American Bar Association's Model Code of Judicial Conduct, which reads as follows: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."⁸ However, historically, states have not required judges to recuse themselves from a case involving someone who had financially supported a judge's election.⁹

The law governing the relationship between elected judges and their financial supporters was altered by the United State Supreme Court issued its decision in *Caperton v. A.T. Massey Coal Co.*¹⁰ In that case, the Court held that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution demanded that elected judges recuse themselves from cases involving litigants who had given a disproportionate amount of financial support to their campaigns. This decision has prompted state governments to consider revising their rules regarding judicial recusal so as to bring them into

⁵ See e.g., James J. Alfani & Terrance J. Brooks, Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7, 77 KY. L.J. 671 (1989); David Barnhizer, "On the Make": Campaign Funding and the Corruption of the American Judiciary, 50 Cath. U. L. Rev. 361 (2001); Erwin Chemerinsky, Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections, 74 CHI.-KENT L. REV. 133 (1998); Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. CHI. L. REV. 689 (1995) Charles Gardner Geyh, Why Judicial Elections Stink, 64 Ohio. St. L.J. 43 (2003).

⁶ E.g., Marie Cocco, *Conflicted Justice: When Appearances Count*, YORK DISPATCH, Jun. 12, 2009, at Opinion; Editorial, *For Sale? That's the Perception in Appellate Judge Races*, LUFKIN DAILY NEWS, Mar. 4, 2009; Editorial, *Justice not for Sale*, N.Y. TIMES, Mar. 3, 2009, at 26; Thomas R. Phillips, *When Money Talks the Judiciary Must Balk*, WASH. POST, Apr. 14, 2002, at B2.

⁷ E.g., Ill. Campaign for Pol. Reform, <http://ilcampaign.org/> (last visited Jun. 23, 2009); La. Org. for Jud. Excellence, <http://www.loje.org/> (last visited June 23, 2009); Pennsylvanians for Mod. Cts., <http://www.pmconline.org/> (last visited June 23, 2009); Texans for Pub. Just., <http://www.tpj.org/> (last visited June 23, 2009)

⁸ See Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 518 (2007).

⁹ John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2000); Alfani and Brooks, *supra*, note 5, at 714.

¹⁰ 129 S.Ct. 2252 (2009).

compliance with *Caperton*.¹¹ Some believe that the standard that *Caperton* sets will overburden the courts with frivolous recusal motions,¹² burden judges with having to engage in lengthy discovery,¹³ force them to try to comply with a hopelessly vague standard,¹⁴ and allow contributors to avoid having their cases heard by unsympathetic judges.¹⁵

This article argues that most of the concerns of *Caperton*'s critics can be addressed with a set of relatively simple reforms, and that these reforms are even more imperative in the wake of the Court's decision in *Citizens United v. Federal Election Commission*,¹⁶ which has eliminated statutory restrictions on corporate and labor union spending in election campaigns. After discussing the events that gave rise to the case, and the Courts decision, the article will suggest a set of ethics rules and disqualification procedures, along with changes to campaign finance disclosure laws that will facilitate compliance with *Caperton*'s holding about when recusal is required.

II. The Massey Case

¹¹ E.g., Amanda Bronstad, *Stage Set for Litigation over Judicial Recusal*, NAT'L. L. J., June 22, 2009; David Kihara, *Supreme Court Ruling Involving Disqualification of Judges Prompts Review*, LAS VEGAS REV.-J., June 23, 2009 (2009).

¹² Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan & Utah as Amici Curiae in Support of Respondents at 28-29, *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009) (No.08-22); Brief for the James Madison Center for Free Speech in Support of Respondent at 24-26, *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009) (No.08-22); Brief for Law Professors Ronald D. Rotunda and Michael R. Dimino in Support of Respondent, at 15-17, *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009) (No.08-22); Brief for Respondent AT Massey Coal Co., Inc., et al., at 44, *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009) (No.08-22).

¹³ *Id.* at 30; see also Brief of Ten Current and Former Chief Justices as Amici Curiae in Support of Respondents at 12-17, *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009) (No.08-22).

¹⁴ See Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan & Utah as Amici Curiae in Support of Respondents, *supra* note 12, at 31; Brief for Law Professors Ronald D. Rotunda and Michael R. Dimino in Support of Respondent, *supra* note 12, at 12-15, 17-20; Brief for Respondent AT Massey Coal Co., Inc., et al., *supra* note 12, at 28-44.

¹⁵ Brief for the James Madison Center for Free Speech in Support of Respondent at 26-28, *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009) (No.08-22).

¹⁶ No. 08-205 (U.S. Jan. 21, 2010).

In 2002, a West Virginia jury awarded \$50 million in compensatory and punitive damages to Hugh M. Caperton, the owner of Harmon Development Corp.¹⁷ (Caperton), in its suit against the A.T. Massey Coal Co. (Massey), for illegally interfering with the Harmon Development Corp.'s commercial relationships.¹⁸

Don Blankenship is Massey's chairman, chief executive officer, and president. While the litigation was still ongoing in 2004, and in the knowledge that the Supreme Court of Appeals of West Virginia would consider any appeal of Massey's case,¹⁹ Blankenship made a concerted effort to defeat Justice Warren McGraw who was running for reelection that year. Business groups in West Virginia opposed McGraw, a Democrat, because they believed that many of his rulings were hostile to business interests.²⁰ Blankenship gave \$1,000 to McGraw's Republican opponent, Brent Benjamin, which was the maximum contribution to a candidate's campaign allowed by state law.²¹ However, Blankenship also gave \$2.5 million to an organization called "And for the Sake of the Kids,"²² an organization that spent heavily to defeat McGraw.²³ Blankenship's contributions represented more than two-thirds of the funds that this organization raised.²⁴ He also spent over \$500,000 in support of Brent Benjamin independently.²⁵ The \$3 million that Blankenship spent to support Benjamin's candidacy was more than the total spent by all other Benjamin supporters and more than three

¹⁷ *Caperton*, 129 S.Ct. at 2257.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *E.g.*, Scott Wartman, *W.Va. Business Leaders Hope Court Change Improves Image*, HERALD-DISPATCH, Nov. 10, 2004, at 1A.

²¹ *Caperton*, 129 S.Ct. at 2257.

²² *Id.*

²³ Brad McElhinny, *Massey Chief Pours \$1.7 Million into Race*, CHARLESTON DAILY MAIL, Oct. 15, 2004, at 1A.

²⁴ *Caperton*, 129 S.Ct. at 2257.

²⁵ *Id.*

times the amount spent by Benjamin's own campaign committee. Benjamin defeated McGraw in the general election 53.3% to 46.7%.²⁶

In October 2005, Caperton filed a motion with the court arguing that the West Virginia Constitution and Due Process Clause required Justice Benjamin's disqualification from any proceeding involving coming Massey's appeal, arguing that the level of financial support that his candidacy received from Blankenship created an appearance of bias.²⁷ In April 2007, Justice Benjamin issued a memorandum in which he denied Caperton's motion to recuse himself from the case, saying that Caperton had failed to produce any objective reason that indicating that he would be biased in favor of or against any litigant in the case at issue.²⁸

After granting Massey's petition for review, the West Virginia Supreme Court of Appeals reversed the trial court's verdict in November 2007. The vote was three-to-two with Justice Benjamin joining the majority.²⁹ When Caperton filed for a rehearing, he again requested that Justice Benjamin (along with Chief Justice Elliot Maynard who was revealed to have had ties to Blankenship) recuse himself from the case.³⁰ Although Chief Justice Maynard recused himself, Justice Benjamin again refused. As the next in line for the court's rotating chief justiceship, Justice Benjamin appointed a trial judge to replace Chief Justice Maynard. After the newly reconstituted court granted the request for a rehearing, Justice Larry Starcher also recused himself citing public statements that he had

²⁶ *Id.*

²⁷ See Brief for Petitioner Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. at 9, *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009) (No.08-22).

²⁸ See *id.* at 8

²⁹ *Id.*

³⁰ See *id.* at 11-12.

made that were critical of Blankenship.³¹ Following Justice Starcher's recusal, Caperton asked Justice Benjamin to recuse himself for a third time, citing public opinion polls indicating that 67% of West Virginia residents doubted his ability to fairly decide this case.³² Justice Benjamin again refused to step aside from the case citing the unreliability of the poll results.³³ The West Virginia high court, now including two trial court judges that had been assigned by Benjamin to replace the two justices who had recused themselves, again ruled in favor of Massey by a three-to-two vote, with Justice Benjamin in the majority.³⁴

Caperton then sought a writ of certiorari to the United State Supreme Court, asking the Court to overturn the West Virginia high court decision. Caperton's claim was that Justice Benjamin's participation in the case violated his rights under the Due Process Clause of the Fourteenth Amendment to the Constitution, because there was an objective probability that Justice Benjamin was biased in favor of Massey.³⁵

The Court's Opinion:

In his opinion of the Court, Justice Anthony Kennedy started by analyzing the Court's earlier decisions involving judicial conflicts of interest.³⁶ In his view, these cases stood for the principle that when the issue is whether a party's right to due process had been denied by a judge's alleged conflict of interest, "The Court asks not whether the

³¹ See Ben Fields, *Starcher Steps Away from Massey Case*, HERALD-DISPATCH, Feb. 16, 2008, 4A (noting that Justice Benjamin also appointed a replacement for Justice Starcher).

³² See Brief for Petitioner Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc., *supra* note 27 at 13.

³³ *Id.*

³⁴ *Caperton v. Massey*, 2008 WL 918444 (W.Va.).

³⁵ *Caperton*, 129 S.Ct.at 2265.

³⁶ *Id.* at 2259-62. (analyzing the following cases: *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Ungar v. Sarafite*, 376 U.S. 575 (1964); *In re Murchison*, 349 U.S.133 (1955); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927).

judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"³⁷

Noting Justice Benjamin's denial that there was any proof that he had acted improperly or that he was biased in favor of Massey, Justice Kennedy said that judges often analyze their own "motives and purposes"³⁸ when deciding a case, in order to insure that no personal bias or other improper motivation is behind their decisions.³⁹ The opinion noted that when a judge believed that such bias was a real possibility, recusal was the proper remedy, but that in addition to this private inquiry, judges needed objective rules about when recusal is required to protect against the possibility that judges will misconstrue their real motives and remain involved in a case where their impartiality is actually compromised.⁴⁰ According to the Court, the proper, more objective inquiry, required judges to ask whether "...under a realistic appraisal of psychological tendencies and human weakness," the [alleged conflict of] interest "poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented."⁴¹

Turning to the issues presented by the case at hand, the Court found that a serious risk of actual bias had been created because of the disproportionate amount of money that Blankenship had spent in order to help elect Justice Benjamin, while his company's case was still before the courts.⁴² Also, the Court pointed out that the election was decided by less than 50,000 votes, and highlighted how important Blankenship's disproportionate

³⁷ *Caperton*, 129 S.Ct.at 2262.

³⁸ *Id.* at 2263.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2264-65.

financial support had been to Justice Benjamin’s victory in reaching its conclusion the risk of bias on his part was serious.⁴³ Although there was no evidence of a quid-pro-quo between Justice Benjamin and Blankenship, the Court stressed that Blankenship, in effect, chose the judge that he could be fairly certain would hear Massey’s case, and that this situation created an unacceptable risk of bias in the proceedings that required Justice Benjamin’s recusal.⁴⁴

In response to points made by Massey⁴⁵ and the dissenters,⁴⁶ the Court denied that its decision would lead to a flood of motions demanding recusal, given that the facts of this case were so unusual.⁴⁷ The Court also made it clear this decision only defined the “outer boundaries for judicial disqualifications,” and stressed that the states remained free to adopt more rigorous standards for recusal if they wished.⁴⁸

III. Deriving Concrete Reforms from *Caperton*:

The dissenters’ attacks on the Court’s decision notwithstanding,⁴⁹ *Caperton* is now the law of the land. Although Chief Justice Roberts’ dissent criticized the Court for failing to announce any “judicially discernible and manageable standard”⁵⁰ to help judges, lawyers and the rest of the public determine if a litigant’s right to due process has been violated, the Court’s decision provides the outlines for manageable rules and procedures for states to adopt in order to ensure compliance with *Caperton*, and to avoid

⁴³ *Id.* at 2264.

⁴⁴ *Id.* at 2265.

⁴⁵ *E.g.* Brief for Respondent A.T. Massey Coal Co., Inc., et al. at 11, *Caperton v. A.T. Massey Coal*, 129 S.Ct. 2252 (2009) (No.08-22).

⁴⁶ *See Caperton*, 129 S.Ct.at 2272, 2274.

⁴⁷ *See id.* at 2266. (noting that the Court’s other decisions concerning conflicts of interest did not result in a flood of motions for judges to deal with).

⁴⁸ *See id.* at 2267.

⁴⁹ *See id.* at 2269-2274. For a detailed rebuttal of the dissenters’ points, *see* Penny J. White, Comment, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009).

⁵⁰ *Id.* at 2272 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004))

the need for judges to consider numerous recusal motions. These proposed rules and procedures described below are derived from a close reading of the Court’s reasoning, and the facts in the *Caperton* case upon which that reasoning was based, along with the assumption that the Court did not intend to narrow its holding to those facts.

New Recusal Rules:

No rules exist that tell judges, litigants and lawyers how to avoid situations like that in *Caperton*. In accordance with that decision, new rules need to deal with situations in which three factors are present: 1) a lawyer, litigant, or amicus,⁵¹ has spent a disproportionate amount of money on behalf of a judge who is deciding their case, 2) that it be foreseeable that the contributing party will be involved in cases in the judge’s jurisdiction, and 3) that the spending was probably decisive in the judge’s victory. In its decision, the *Caperton* Court said that it was dealing with an extraordinary set of facts.⁵² Accordingly, the ethics rules that states craft to comply with *Caperton* need only address unusual situations like the one in *Caperton*, where a judge benefits from disproportionate campaign spending by a litigant or by someone with a legal or financial interest in the case..

The *Caperton* Court found that having spent more than all other contributors combined⁵³ was enough to create a “serious objective risk of actual bias”⁵⁴ that required Justice Benjamin’s recusal. States could adopt a similar standard in their judicial ethics rules, making judges subject to disqualification if a lawyer, litigant, or someone with a

⁵¹ Although the influence of amici curiae was not at issue in *Caperton*, they occupy a position analogous to that of a litigant because they generally have some important interest at stake the case. Courts could also exclude amici contributors by withholding leave to file a brief, but this would deprive courts of the valuable insights that amici can provide.

⁵² *Caperton*, 129 S.Ct.at 2265.

⁵³ *Id.* at 2264.

⁵⁴ *Id.* at 2265.

financial or legal interest at stake in the case spent more than all others combined for the benefit of a judge deciding the case. Campaign spending should be defined as any money or in-kind contribution used to support or defeat a judicial candidate, including money given to organizations (e.g. political parties, political action committees, or non-profit advocacy groups) that supported or opposed the judge deciding the case. It should also be made clear that the word “benefit” or another word like it, would apply to situations like the one in *Caperton*, where Justice Benjamin benefited from massive spending against his opponent, rather than from positive advertising about him.

These rules should aggregate financial support from litigants, lawyers and person’s with a financial interest in cases and the organizations that they belong to. For example, when looking at whether a hypothetical litigant has given overwhelming support to a judge in a previous election, the examination should include support given by an organization that the litigant was employed by, had a substantial financial interest in, or in which the litigant played a leading or directing role. The words “financial interest” could mean a situation where the litigant’s financial investment in the organization represented a substantial portion of its stock, value or operating funds, while the phrase “playing a leading or directing role” would cover situations in which the litigant held a non-paid leadership position in an organization that engages in political advocacy. Looking beyond the actual litigants and lawyers to the organizations and persons that they are affiliated with is strongly recommended by the facts in *Caperton*, where the Court looked at the money that Massey’s Chief Executive Officer spent to benefit Justice Benjamin, not at money that the Massey Corporation spent from its own coffers.

Aggregation of the funds would work in the following way: if a hypothetical litigant spent \$1,000 on behalf of a judge in an election but other employees at the company where the litigant works spent \$60,000 to benefit the same judge, the rules would consider the litigant as having, in effect, spent \$61,000 on the judge's behalf for the purpose of deciding whether "serious objective risk of actual bias" existed. If the judge found that this aggregated amount represented more than the rest of the judge's other supporters spent combined, the judge might be required to step aside from the case.

Justice Roberts' dissent questioned whether the probability of bias caused by a large expenditure on a judge's behalf diminished over time, or whether the probability of bias was affected by whether the judge planned to run for reelection.⁵⁵ Given the standard that the Court established for objectively determining whether a serious risk of bias exists,⁵⁶ establishing a time limit when examining whether a disproportionate expenditure could create bias would be inappropriate. This is because there is no strong reason to assume that the bias induced by someone who had spent a disproportionate amount of money to support or defeat a judge would diminish over time, since it is unlikely that a judge would forget someone who had gone to such lengths to either support or defeat them.⁵⁷

New Disqualification Procedures:

Clear recusal rules in cases involving contributors will not be enough to ensure compliance with *Caperton*. One of the causes of the *Caperton* case was the dysfunctionality of West Virginia's recusal practices, which is emblematic of the states'

⁵⁵ *Id.* at 2269.

⁵⁶ *Id.* at 2263.

⁵⁷ It is conceivable that a person could spend a disproportionate amount to defeat a judge at one election, and then spend a disproportionate amount to support the same judge at a later election, but in this case, the bias would still exist, and recusal would still be the proper remedy.

general unwillingness to require recusal when elected judges hear cases involving contributors.⁵⁸ Accordingly, states will have to change the way that motions for recusal are decided if *Caperton's* holding is to be effectively implemented.

All states have established procedures for replacing judges that are disqualified from hearing a case.⁵⁹ However, states use different procedures for judicial disqualification. For example, nineteen allows litigants to peremptorily disqualify a trial judge by simply filing affidavit attesting to that party's good faith belief that the judge cannot be fair and impartial in the case, or showing grounds of prejudice.⁶⁰ In most other states, litigants must make a motion requesting a judge's disqualification, presenting evidence and arguments about the existence of the requisite conflict of interest.⁶¹ In a few states, motions requesting a judge's disqualification must be evaluated by a different judge, but in most states judges are permitted to decide for themselves whether to grant these motions.⁶² Furthermore, most states make it optional for judges to hold evidentiary hearing on these motions, which means that they can rule on these motions based entirely on the contents of the motion.⁶³ Appellate review is often a perfunctory exercise since rulings on these motions are usually reviewed under an "abuse of discretion" standard, which means that lower court decisions are rarely overturned.⁶⁴

⁵⁸ See Goldberg et al., *supra* note 8, at 521 (noting that state courts generally have not been receptive to claims that judges should not hear cases involving contributors to their campaigns).

⁵⁹ See e.g., Caprice L. Roberts, *The Fox Guarding the Henhouse? Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 175 n.343 (2004); Vincent Lupo, *Carter Refuses to Step Down from Murder Cases*, AM. PRESS, Aug. 29, 2008, B4; Jamie Satterfield, *Order States that Judge in House Case Replaced*, KNOXVILLE NEWS SENTINEL, June 27, 2008, at 13; Jon Ward, *Sniper Judge Recuses Himself – Cites 'Diverted' Focus*, WASH. TIMES, Sept. 22, 2004, at B1.

⁶⁰ James Sample et. al., FAIR COURTS: SETTING RECUSAL STANDARDS at 26 (2008).

⁶¹ See Goldberg et al., *supra* note 8, at 519-20.

⁶² *Id.* at 522-23.

⁶³ *Id.* at 523.

⁶⁴ *Id.* at 519-20.

Allowing litigants to have one peremptory disqualification per case is sensible, since it allows the removal of a potentially biased judge without the time and expense of associated with consideration of a “for cause” disqualification motion.⁶⁵ Although some say that the use of peremptory disqualifications allows litigants to “shop” for a favorable judge and could cause problems in administering judicial case assignments, limiting each party to one automatic disqualification and ensuring that it is used very soon after the case is initially assigned to a judge should mitigate these problems.⁶⁶ The fact that peremptory disqualification is used in nineteen states suggests that it is a system that could work in other states. Furthermore, allowing lawyers to automatically remove judges whose fairness is in question would reduce the frequency with which recusal motions are litigated, and reduce their use as a litigation delay tactic.

It has been noted that forcing judges to evaluate whether they should recuse themselves, or asking their colleagues to disqualify them, invites under-enforcement of ethics rules.⁶⁷ The current system also deters litigants from even asking that a judge be disqualified, lest that litigant incur the judge’s ire in present and future cases.⁶⁸ While it might be impossible to avoid a judge’s disfavor if a litigant moves for the judge’s disqualification, giving responsibility for deciding these motions to an independent adjudicator who is not a sitting judge would at least increase the chance that the petitioner would receive a fair hearing. A motion could be decided by a randomly assigned group of attorneys or retired judges appointed by the chief justice of the state supreme court or

⁶⁵ *Id.* at 526.

⁶⁶ *Id.* at 527.

⁶⁷ *Id.* at 524-25; *see also* Goldberg et. al. at 517 n.74 (describing the author’s empirical study of 571 judges in four states regarding their willingness to disqualify themselves in several different hypothetical situations. Nearly 75% of the respondents indicated that they were highly ambivalent about disqualification across all of the hypotheticals).

⁶⁸ *Id.* at 525.

selected by the state bar. Adjudicators should also be empowered to hold hearings, and should be required to explain their decisions with written opinions. These opinions should also be subject to de novo review by the state supreme court in order to ensure that claimed conflicts of interest receive careful scrutiny.⁶⁹ No state currently uses a system like this today,⁷⁰ but any administrative complications that it might create would be outweighed by the increased public confidence in the integrity of the judiciary that its adoption would bring.⁷¹

A new system for dealing with recusal in the aftermath of *Caperton*, would also have to address additional concerns. For example, it is possible that a person or an organization could pick its own judges by providing a great amount of money to judges that it believed would be unfavorable to its interests, forcing these judges to recuse themselves whenever a case involving the contributor came before them.⁷² However, this problem could be avoided by having a rule prohibiting the litigant that made the contribution to the judge from moving for the judge's removal.⁷³ A related issue that the *Caperton* Court did not address, but that was raised by Justice Roberts' dissenting opinion, is whether a judge would be required to step aside if a litigant had made disproportionate expenditures in support of a judge's opponent in the latest election.⁷⁴ It stands to reason that such a situation could create a serious, objective risk of actual bias on the part of the judge that would demand recusal, but a rule prohibiting contributors

⁶⁹ See Goldberg et al., *supra* note 8, at 531-32.

⁷⁰ See Leslie W. Abramson, Deciding Recusal Motions: Who Judges the Judges? 28 VAL. U.L. REV. 543, 560-61 (1994); *but see* Sample et. al., *supra* note 60 at 31 (noting that West Virginia has considered adopting a committee of sitting or retired judges to hear recusal motions).

⁷¹ See Goldberg et al., *supra* note 8, at 531.

⁷² Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 488-89 (1988).

⁷³ *Id.*

⁷⁴ See *Caperton*, 129 S.Ct.at 2270.

from making motions for recusal in these situations would mitigate the problem. New laws would also have to prevent judges from recusing themselves *sua sponte* in situations involving contributors to prevent judges from rewarding contributors by leaving the case.

In effect, such a rule would remove any advantage that a litigant might achieve through disproportionate spending on a judge's campaign, by giving the power to initiate recusal proceedings to the litigant who had not spent any money (or had spent less money) on behalf of or against the judge. If the out-spent litigant does not feel that the judge will be unfairly biased, the litigation can proceed. Admittedly, this aspect of the plan steps away from language of *Caperton* suggesting that the mere existence of a serious, objective risk of actual bias requires recusal,⁷⁵ but this deviation is necessary to guard against large contributors' attempts to create conflicts of interest with judges that they regard as hostile.

New Campaign Finance Disclosure Laws:

Finally, meaningful reform would require that most states mandate more detailed contribution reporting from candidates and independent campaign organizations. Individuals or organizations can make independent expenditures, and they are believed to have been pivotal in the outcome of several high profile state supreme court races in the last twenty-five years.⁷⁶ Organizations that engage in independent expenditures go by many different names, but state and federal election law have generally given them greater freedom than candidates to raise money, and have saddled them with less

⁷⁵ *Id.* at 2263.

⁷⁶ *E.g.*, Lorie Hearn, *Rose Bird, Grodin, Reynoso all ousted*, SAN DIEGO UNION, Nov. 5, 1986, at A1; Traciell V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White* in RESEARCH ON JUDICIAL SELECTION 1999 (The Hunter Center for Judicial Selection 2000).

stringent reporting requirements for contributions and expenditures.⁷⁷ As of 2008, forty-four states required individuals and groups engaging in to report their independent expenditures, and only thirty-eight states require these reports to name the candidate that is the subject of the expenditure.⁷⁸ Federal law provides a back stop to these state laws however, since many independent campaign organizations are organized under a provision of the federal tax code that requires them to report some of their expenditures and some of the contributions that they receive to the federal government.⁷⁹ By contrast, all states require candidates to report sources of all of their campaign contributions and to report how the money was spent.⁸⁰

Any reform done in response to the *Caperton* decision should require all organizations that engage in independent campaign expenditures to file detailed finance reports that contain detailed information about contributors, including the identity of their employers. Also, individuals making independent expenditures should be required to report these expenditures. Efficient and consistent administration of these proposed rules about contribution based recusal will be impossible without such detailed information, and if that information is not made readily available over the Internet.

IV. Conclusion:

The reforms proposed above present a practical way for states to change their laws to comply with *Caperton*. As the Court stated in its opinion,⁸¹ states are free to opt for stricter rules than those proposed, by, for example, lowering the ratio by which a

⁷⁷ Lloyd H. Meyer, *The Much Maligned 527 and Institutional Choice*, 87 B.U.L. REV. 625, 629-37 (2007).

⁷⁸ The Campaign Disclosure Project, <http://www.campaigndisclosure.org/gradingstate/lawfindings.html> (last visited June 26, 2009)(noting that the following states do not require independent expenditures to be reported: Alabama, Indiana, Maryland, New Mexico, North Dakota, and Wyoming).

⁷⁹ See Meyer, *supra* note 77, at 626-27.

⁸⁰ *Id.*

⁸¹ *Supra* note 48.

person involved in case must outspend all others in a campaign in order to make a judge subject to disqualification. Whatever the exact reforms are chosen, the need to enact new rules for campaign finance reporting and recusal became even more urgent in the wake of the Supreme Court's recent decision in *Citizens United*. In an opinion also authored by Justice Kennedy, the Court ruled that the First Amendment of the U.S. Constitution forbids states and the federal government from limiting how much corporations and labor unions spend on electioneering communications prior to a candidate election,⁸² and allows them to directly advocate the election or defeat of candidates.⁸³ The ruling invalidates or seriously calls into question laws in twenty-four states that restrict corporate spending in candidate elections,⁸⁴ and of these state, all but three have judicial elections.⁸⁵ Now that corporations and labor unions can spend freely on judicial elections in more states, the probability of another situation arising like the one that sparked the *Caperton* case will likely increase, as these entities spend more money on election advertising.⁸⁶

It is important to note that these rules proposed above would represent an advance over the rules detailed in the latest version of the American Bar Association's Model

⁸² Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1. The words "candidate election" refer to the fact that the ruling dealt specifically with restrictions on independent campaign expenditures by corporations to influence elections for a political office involving candidates, as opposed to expenditures to influence the outcome of a referendum or a ballot initiative.

⁸³ See No. 08-205 at 50.

⁸⁴ Ian Urbina, *Consequences for State Laws in Court Ruling*, N.Y. TIMES, Jan. 23, 2010, at A1. The states are as follows: Alabama, Alaska, Arizona, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, West Virginia, Wisconsin and Wyoming.

⁸⁵ The three states without judicial elections of any kind are Connecticut, Massachusetts and Rhode Island. See American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts 4-11* (2009), available at <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf> (last visited Feb. 2, 2010).

⁸⁶ Cynthia Littleton, *Affiliates Cheer Supreme Court*, VARIETY, Jan. 29, 2010, <http://www.variety.com/article/VR1118014478.html?categoryId=2526&cs=1>.

Code of Judicial Conduct.⁸⁷ Canon 3E(1)(e) of the Model Code says that judges must recuse themselves when they have received a certain amount of contributions from an attorney or a litigant within a certain amount of time.⁸⁸ The Code makes no mention of money spent by litigants or lawyers on behalf of a judge through *independent* expenditures, which was precisely what the Court ruled on in *Caperton*. To that extent, *Caperton* has rendered the Model Code approach to recusal obsolete, and has created a need for new recusal rules that address its holding.

Strangely, states that have begun to change their recusal rules in the wake of *Caperton* are doing so in ways that do not address all of the issues raised by *Caperton*. Some states have considered reforms similar to those advocated by the latest version of the Model Code of Judicial Conduct that does not. For example, in California, the Commission for Impartial Courts is circulating proposed changes to the state's judicial ethics code that would require automatic recusal in any case involving a litigant that contributed \$1,500 or more to the judge's campaign.⁸⁹ In Nevada, The Commission on the Amendment to the Nevada Code of Judicial Conduct has recommended that judges should be required to recuse themselves in any case involving litigants or attorneys who have arranged for \$50,000 or more in direct contributions or in contributions funneled through third parties who gave directly to the judge.⁹⁰ Of course, this proposal does not

⁸⁷ MODEL CODE OF JUD. CONDUCT § (2004)

⁸⁸ The Model Code intentionally left the contributions amount and the time limit unspecified so that states could provide these details.

⁸⁹ Timm Herdt, Opinion, *When is justice for sale? - Court Ruling Comes as California Ponders its Rules*, VENTURA COUNTY STAR, June 10, 2009.

⁹⁰ David Kihara, *Panel Urges Trigger for Disqualification: Removal of Judges from Cases Would Rest on Contributions Cap*, LAS VEGAS REV.-J., July 21, 2009. The Texas legislature also considered but failed to pass a bill requiring recusal when a justice of its Supreme Court or Court of Criminal Appeals has received contributions totaling \$1,000 or more from, among other things, parties, attorneys, or law firms involved in a case before their court. See *Judicial Campaign Contributions and Expenditures*, GAVEL TO GAVEL (Nat'l. Center for St. Cts., Williamsburg, Va.) Jan. 2010 (special ed.) at 4-5.

address independent expenditures on behalf of a candidate like those that concerned the court in *Caperton*. Furthermore, neither the Model Code nor the California proposal contain any language designed to prevent litigants from “gaming the system” by contributing to judges that they deem undesirable, which only highlights the need to adopt reforms that are like those outlined in this article.

Unfortunately, reform efforts in other states also seem unlikely to address the *Caperton* court’s concerns about the effect of campaign spending on the integrity of the judicial system. For example, Wisconsin has bolstered its existing system for providing public funding for state supreme court campaigns,⁹¹ and several other states are also advancing systems of public financing.⁹²

It is somewhat puzzling that these states are considering public financing schemes in light of the fact that the unacceptable risk of bias in the *Caperton* case mostly sprang from Blankenship’s independent expenditures, which public financing schemes do nothing to curb. Furthermore, in light of the *Citizens United* decision, these independent expenditures are only likely to play a larger role in judicial campaigns, as corporations and labor unions take advantage of the new freedom to spend on judicial campaigns that this decision affords them.

Michigan stands alone among the states as having changed its laws in a way that has some promise of effectively dealing with the ethical issues arising from situations like that in *Caperton*. Specifically, the Michigan Supreme Court has altered the procedures that it uses to decide recusal motions, removing the decision about whether to recuse from the justice who is the subject of the motion, and giving the decision to the

⁹¹ Patrick Marley and Lee Bergquist, *Doyle Signs High Court Election Bill*, MILWAUKEE J. SENTINEL, Dec. 2, 2009, at A1.

⁹² See GAVEL TO GAVEL, *supra*, note 84, at 2-5.

justice's colleagues on the high court.⁹³ The court took this step explicitly to avoid situations like the one in *Caperton*, where Justice Benjamin, who benefited from Blankenship's campaign spending, had the authority to decide for himself whether he would step aside.⁹⁴ Although the rule change has sparked bitter divisions among the court's justices,⁹⁵ it carries some promise of making situations like those in *Caperton* less likely, since the judge who is the subject of the recusal motion will not decide the issue for him/herself. Still, clearer rules on when recusal is necessary in cases involving campaign supporters, and allowing parties to peremptorily disqualify judges might help the Michigan courts to prevent excessive use of *Caperton* motions.

Another solution to the ethics issues presented by *Caperton*, would be for states to completely eliminate judicial elections. However, since this solution would require constitutional amendments in most states,⁹⁶ and given that judicial elections have enjoyed majority support in the few state surveys that ask about them,⁹⁷ an attempt to eliminate judicial elections would face almost certain defeat. On the other hand, the reforms discussed above could be done by legislation, which makes reform a more attractive option than eliminating elections.

If states enact the required reforms they can avoid the wave of litigation that the *Caperton*'s critics say will be its inevitable result, since judges, judicial candidates and

⁹³ Mark Hornbeck, *New Recusal Rules Cause Stir*, DETROIT NEWS, Dec. 1, 2009, at 4A.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Aman McLeod, *If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 522 (2005).

⁹⁷ E.g. Editorial, *People Want to Elect Judges But Don't Know Them*, BIRMINGHAM NEWS, Mar. 22, 2000, at 2-C; Justice at Stake Study - Minnesota (available at <http://www.gavelgrab.org/wp-content/resources/polls/MinnesotaJusticeatStakesurvey.pdf>) (noting that 52% of respondents favored judicial elections); Justice at Stake Study - Missouri (available at <http://www.gavelgrab.org/wp-content/resources/polls/MissouriMemoAndOverallResults.pdf>) (noting that 60% of respondents opposed ending judicial elections).

the general public will better understand when campaign spending subjects judges to disqualification, and there will be better disclosure rules and recusal procedures that will expedite the handling of situations in which a *Caperton*-like conflict arises. Enactment of rules allowing for peremptory disqualification should also limit the ability of lawyers to use recusal motions as a delaying tactic. Finally, these reforms will have the added benefit of giving the public better information about the sources of the funds behind the candidates. In short, the benefits of these reforms outweigh their costs, and their enactment will help to promote the efficient administration of justice and greater confidence in the impartiality of the judiciary.