

UNDERSTANDING *CAPERTON*: JUDICIAL DISQUALIFICATION UNDER THE DUE PROCESS CLAUSE

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INTRODUCTION

It is virtually impossible to discuss the Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.* without hearing some variant of the following response: "I can't believe it was as close as it was." And it does not matter whether you are chatting with your next-door neighbor who had never thought about judicial ethics in his life or discussing the case with a judicial-recusal expert.¹ Nearly everyone seems to agree: *Caperton* was an "easy" case and that four justices dissented is an indication that there is something terribly wrong. Not only has *Caperton* elevated the issue of judicial impartiality to the national spotlight, but it has triggered a firestorm: Congress has held hearings examining judicial recusals in light of *Caperton*;² states have grappled with new recusal rules and procedures, as well as changes to state judicial elections;³ and law schools around the country have held conferences and symposia dedicated to *Caperton* and judicial ethics.⁴ Together with the Court's earlier ruling in *Republican Party of Minnesota v. White*, and this year's decision in *Citizens United v. FEC*, *Caperton* is part of a trilogy that will shape our views of judicial independence and accountability for years to come.

This essay argues that *Caperton* is often misunderstood and concludes that *Caperton* was not an easy case in large part because the Court rejected

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¹ The terms "recusal" and "disqualification" are used interchangeably throughout this article. These terms originally had slightly different meanings, with "recusal" referring to withdrawal at the judge's discretion and "disqualification" meaning exclusion by force of law, but this distinction is no longer recognized. John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PRO. 43, 45 (1970). See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES §20.8 at 3-4, *passim* (2d ed. 2007).

² On December 10, 2009 the House Judiciary Committee's Subcommittee on Courts and Competition held a hearing entitled "Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*."

³ West Virginia, Michigan, and Wisconsin are just a few of the states where contentious debate regarding the appropriate response to *Caperton* took place.

⁴ See, e.g., Syracuse Law Review Symposium on *Caperton*, Georgetown Law School conference entitled "State Courts and U.S. Supreme Court Rulings: Will *Caperton* and *Citizens United* Change the Way States Pick Judges," and the Seattle University conference titled "State Judicial Independence – A National Concern."

the well-established appearances-based recusal standard in favor of a probability-based one that looks at the likelihood of actual bias. And this seemingly minor shift changes the recusal landscape to a greater degree than is or has been appreciated. Furthermore, I argue, *Caperton's* probability-based standard may contain a blueprint for an improved recusal framework across state and federal judiciaries.

This essay proceeds in three parts. Part I explains the role that appearances have historically played, and currently play, in recusal decisions in the United States. Today, appearance of partiality, rather than actual fairness, is the key factor in judicial recusal under the federal recusal statutes and state judicial codes. This was not always so.

Part II argues that Justice Kennedy's majority opinion in *Caperton* properly limited, if not excluded, the role of appearances from its due process analysis. Some scholars, judges, and commentators, however, have wrongly interpreted *Caperton's* "probability of bias" standard to be coterminous with the "appearance of bias" standard that currently controls recusal under federal statutes and state judicial codes. In this part, I will explain why I believe this interpretation is incorrect and why the Court's opinion should be read to reject an appearance-based disqualification standard under the Constitution's Due Process Clause.

The final part of this essay discusses the implications of adopting a probability-based—rather than an appearance-based—recusal standard, and how states can use *Caperton*, and recusal generally, to address the public's growing concern about the impartiality of an elected judiciary. I argue that in response to *Caperton*, states should change their recusal procedures—procedural like who reviews motions for recusal, appellate review of recusal decisions, the standard of appellate review, whether a written opinion explaining the recusal decision should be required—tailoring those procedures to the newly-announced probability-based substantive standard for judicial disqualification.⁵ In adopting these new recusal procedures, states should pay special focus to appearances, ensuring that the newly-adopted procedure creates an appearance of impartiality and fairness. As a result of greater emphasis on the appearance of procedural fairness, public's confidence in the judiciary will increase.

I. THE ROLE OF APPEARANCES IN JUDICIAL RECUSALS

In the United States, judicial recusal is largely about appearances. Under the federal recusal statutes, as well as the state judicial codes, judges

⁵ In my next article, tentatively titled *Making Appearances Matter: Establishing a Coherent Theory of Judicial Impartiality, Disqualification, and the Appearance of Bias*, I seek to establish precisely which recusal procedures maximize the appearance of fairness and impartiality.

must recuse themselves to avoid even the appearance of bias.⁶ Although universally accepted throughout the United States today, this is a relatively new concept. Undoubtedly the need for judicial impartiality was recognized in early Jewish, Roman, and English law,⁷ but there is virtually no evidence suggesting that mere *appearance* of partiality prevented judges from participating in cases before the adoption of an appearance-based recusal standard in the United States.⁸

A. Federal Recusal Statutes

Judicial recusal was on the minds of our founding fathers from the time of this nation's birth. Congress passed the United States' first recusal statute in 1792.⁹ The legislation was narrowly drawn, narrowly interpreted, and did not even prohibit judges from hearing cases in which they might have a bias for or against a party.¹⁰ The statute largely codified the common-law disqualification rules and called for disqualification of a district court judge who was "concerned in interest," as well as judges who had "been of counsel for either party."¹¹ Even late in the nineteenth century, a judge was permitted to preside over a bankruptcy proceeding even though he was a creditor of the bankrupt.¹²

Often in response to high-profile scandals or controversies involving federal judges, over the next two centuries the federal recusal statute was amended and shaped. The federal statute that governs disqualification by any federal court today, 28 U.S.C. § 455, is divided into two parts. The first section (and, for our purposes, the most relevant), § 455(a), is a general

⁶ Susan Liontas, *Judicial Elections Have No Winners*, 20 STETSON L. REV. 309, 312 (1990).

⁷ RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 1.2, at 5. Bracton set out the common law rule for disqualification in the thirteenth century:

A justiciary may be refused for good cause, but the only cause for refusal is a suspicion, which arises from many causes, as if the judge be a blood relative of the plaintiff, his vassal or subject, his parent or friend, or an enemy of the tenant, his kinsman or a member of his household, or a table-companion, or he has been his counsellor or his pleader in that cause or another, or in any like capacity.

6 BRACTON, LEGIBUS ET CONSUEUDINIUS ANGLIE 249 (Twiss ed. 1883).

⁸ In 18th century England, for instance, the common-law recusal practice was exceedingly simple: only if he had a direct financial interest in the case was the judge to be presumed biased and disqualified. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-12 (1947). This was the law at the time of the colonization of America, rejecting the broader standard contained in Bracton, *supra* note 6.

⁹ Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278-79 (1792).

¹⁰ *Id.*

¹¹ *Id.*

¹² *In re Sime*, 22. Cas. 145, 146 (C.C.D. Cal. 1872 (No. 12,861)).

catch-all provision that requires disqualification whenever “a judge’s impartiality might reasonably be questioned.”¹³ It is now uncontroverted that this standard was intended to promote not only the impartiality of the judiciary but also the public perception of the impartiality of the judicial process.¹⁴ As a result, a mere appearance of bias, as viewed from the perspective of an objective observer, requires recusal.

B. ABA Codes of Judicial Conduct

While 28 U.S.C. § 455 is controlling only in federal courts, the American Bar Association’s *Code of Judicial Conduct*¹⁵ has been adopted by nearly every state, and therefore governs judicial disqualification in most American courts.¹⁶ The Code, which applies to all full-time judges and all legal and quasi-legal proceedings, addresses when judicial disqualification is necessary.¹⁷

The general standard imposed by the Code is similar to 28 U.S.C. § 455(a). Rule 2.11 states: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned . . .”¹⁸ Impartiality means the “absence of bias or prejudice in

¹³ 28 U.S.C. § 455(a). The second section, 28 U.S.C. § 455(b), enumerates certain specific factual situations when recusal is required. For example, disqualification is mandatory when the judge “has . . . personal knowledge of disputed evidentiary facts concerning the proceeding” or if the judge previously served as the lawyer, or had been a material witness, in the matter in controversy. 28 U.S.C. § 455(b)(1), (2).

¹⁴ H.R. Rep. No. 93-1453, at 5 (1974). See also S. Rep. No. 93-419, at 5 (1973); Liljeberg, 486 U.S. at 858 n.7 (“The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective ‘in his opinion’ standard with an objective test.”).

¹⁵ The original *Canons of Judicial Ethics* were adopted in 1924 by the House of Delegates of the American Bar Association, and ultimately by a majority of the states over the course of the next five decades. The House of Delegates adopted more explicit standards of judicial conduct in 1972, and ultimately adopted a revised *Model Code of Judicial Conduct* in 1990. That code was superseded by a revised Code adopted in February 2007 by the ABA House of Delegates. The 2007 revision is available at http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

¹⁶ Forty-nine states have adopted the Code in one form or another. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 55 (2000).

¹⁷ The Code of Conduct for United States Judges is another ethical code that applies to most federal judges and is largely similar to the ABA Model Code. That Code, adopted and revised by the Judicial Conference of the United States, does not govern the Justice of the United States Supreme Court, however, because the Conference has no authority to create rules controlling the Supreme Court. See Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 386 (2006).

¹⁸ *ABA Model Code of Judicial Conduct*, Rule 2.11 (February 2007). The rule goes on

favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”¹⁹ Although the standard itself makes no mention of appearances, as with the federal statute, when interpreting the ABA Code courts and commentators have focused on appearance of impropriety,²⁰ leaving judges with broad discretion in interpreting and applying this standard.²¹ In short, the Code and the federal disqualification statute are largely coterminous, and both impose appearance-based recusal standards.

C. Due Process Clause

1. Pre-Caperton

Although the Constitution’s Due Process Clause also guarantees litigants a right to have their cases heard and decided by fair and impartial judges,²² and the Supreme Court has periodically held that prejudice or bias by the presiding judge violates the litigant’s constitutional rights,²³ it has long been thought that the Constitution mandates disqualification only in very limited circumstances. The Supreme Court has explained that “matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion” rather than a constitutional recusal floor.²⁴ And, until *Caperton*, it was unclear whether improper appearances alone could rise to the level of a due process violation. In fact, historically there have been only two types of cases where the Due Process Clause was held to require recusal.

First, the Due Process Clause has been read to require disqualification when the judge has a financial interest in the litigation. The leading case is *Tumey v. State of Ohio*.²⁵ In *Tumey*, an Ohio statute authorized judges to preside over cases in which the judge would receive court costs assessed against a convicted defendant, but not an acquitted one. The Court held that

to list specific situations in which the likelihood of prejudice or its appearance is presumed, although the list is not exhaustive.

¹⁹ *Id.*

²⁰ Abramson, *Appearance of Impropriety*, *supra* note 15 at 55, n.2 (“Whether a judge’s impartiality might reasonably be questioned is also referred to as the appearance of partiality, appearance of impropriety, or negative appearances.”).

²¹ Linda Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L. J. 657, 680 (2005).

²² U.S. Const. amends. V, XIV.

²³ *In re Murchison*, 349 U.S. 133, 136 (1955) (explaining that “a fair trial in a fair tribunal is a basic requirement of due process.”)

²⁴ *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) (citing *Wheeling v. Black*, 25 W. Va. 266, 270 (1884)).

²⁵ 273 U.S. 510 (1927).

this incentive scheme created too much partiality, and it invalidated the statute on due process grounds, explaining that due process is violated when a judge is “paid for his service only when he convicts the defendant.”²⁶ This result is neither controversial nor surprising; a judge should not be incentivized to reach a particular result. Ronald Rotunda has likened this motivation to convict a defendant to contingency fees for judges.²⁷

A judge’s interest need not be a direct financial one. For example, in *Ward v. Village of Monroeville*, the Court held that a mayor may not preside as a judge over ordinance violations and traffic offenses when the mayor received contributions to the town’s budget from the fines assessed by the court.²⁸ While the mayor’s salary did not depend on his conviction rate, the mayor still had a financial incentive to convict; he was responsible for the town’s revenue production. That incentive, held the Court, is inconsistent with due process.

Similar incentives were held to violate due process in *Aetna Life Insurance Co. v. Lavoie*.²⁹ There, Alabama Supreme Court Justice Embry ruled in favor of the plaintiff on his bad-faith claim against Aetna. It turned out, however, that Justice Embry had filed two actions against other insurance companies making similar allegations and seeking punitive damages.³⁰ The Supreme Court held that Justice Embry’s refusal to recuse was in violation of the Due Process Clause.³¹ As with *Tumey* and *Ward*, the judge’s decision furthered his own financial interests, allowing him to act as “a judge in his own case.”³²

Second, the Court has held that the due process forbids a judge from wearing too many hats. For example, in *In re Murchison*,³³ the Court found a violation of the Due Process Clause although the judge did not have a personal pecuniary interest in the outcome of the case. Rather, the judge served as a one-person grand jury before presiding over a hearing to determine that two grand-jury witnesses were guilty of contempt.³⁴ This

²⁶ *Id.* at 531.

²⁷ Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 249 (2010).

²⁸ 409 U.S. 57, 60 (1972). Between 1964 and 1968, the fines, forfeitures, costs and fees that the court had imposed provided nearly one-half of the Village’s annual revenue. *Id.* at 58.

²⁹ 475 U.S. 813, 825 (1986).

³⁰ *Id.* at 817.

³¹ The reason recusal was necessary was not because of Justice Embry’s ill-will towards insurance companies. Rather, the opinion rendered by Justice Embry “had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case.” *Id.* at 824.

³² *Id.*

³³ 349 U.S. 133 (1955).

³⁴ *Id.* at 134-37.

procedure, held the Court, ran afoul of due process.³⁵

Mayberry v. Pennsylvania is also instructive.³⁶ There, the defendant orally attacked the presiding judge,³⁷ and continuously interrupted court, to the point where he had to be removed from the courtroom.³⁸ The Supreme Court held that when the defendant is charged with criminal contempt, he “should be given a public trial before a judge other than the one reviled by the contemnor.”³⁹

2. Post-Caperton

This was the state of recusal law under the Due Process Clause until *Caperton v. A.T. Massey Coal Co.*⁴⁰ There, West Virginia Supreme Court Justice Brent Benjamin cast the deciding vote in favor of the appellant, Massey, whose CEO, Don Blankenship, was an extremely generous supporter of Justice Benjamin in Benjamin’s West Virginia Supreme Court election campaign. Indeed, Massey’s CEO contributed more to Benjamin’s campaign than all other donors combined (a total of approximately \$3 million), all while his lawyers were preparing the *Caperton* case for an appeal.⁴¹ Justice Benjamin refused Caperton’s recusal requests, and voted with the majority in a 3-2 decision overturning the trial court’s verdict against Massey.

The United States Supreme Court reversed, holding that Justice Benjamin’s failure to recuse violated Caperton’s right to due process. The Court relied on the principles announced in its prior decisions and applied them to the facts of this case. Quoting *Tumey*, the Court once again announced that due process requires judicial recusal when the circumstances “offer a possible temptation to the average . . . judge to . . .

³⁵ *Id.*

³⁶ *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

³⁷ The defendant referred to the judge as a “hatchet man for the State,” a “dirty sonofabitch” and a “dirty, tyrannical old dog.” *Id.* at 456-57.

³⁸ *Id.* at 462.

³⁹ *Id.* at 466. The same rule applies when a trial judge, following trial, punishes a lawyer for contempt committed during trial without giving that lawyer an opportunity to be heard in defense or mitigation. *See Taylor v. Hayes*, 418 U.S. 488, 499-500 (1974). In such circumstances, a different judge should conduct the trial in place of the judge who initiated the contempt).

⁴⁰ 129 S. Ct. 2252 (2009).

⁴¹ During the campaign, Mr. Blankenship spent approximately \$3 million to help Justice Benjamin. However, only \$1000, the West Virginia limit for direct campaign contributions, was given directly to Benjamin. The rest of the money funded (i) a tax-exempt organization, And For The Sake Of The Kids, which was formed to defeat incumbent Justice McGraw, and (ii) newspaper and television advertising attacking McGraw. *See* Brief for Petitioners at 5-8.

lead him not to hold the balance nice, clear and true.”⁴² The Court explained that “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 or directing the judge’s election campaign when the case was pending or imminent,” the risk of actual bias violates due process.⁴³

After *Caperton*, there is little doubt that recusal is required under the Due Process Clause even when the judge has no personal interest in the outcome of the litigation and did not act as both a judge and a prosecutor or witness in the same case. But the question remains: What about appearances? Can an appearance of bias rise to the level of a due-process violation?⁴⁴

II. DUE PROCESS AND THE “APPEARANCE OF BIAS”

A. *Are Appearance of Bias and Probability of Bias Synonymous?*

As Part I shows, recusal for almost all judges in the United States—at the state and federal levels—is governed by an appearance-driven standard. Of course, actual bias is prohibited as well, but rarely does a disqualification inquiry turn on a judge’s actual bias, in large part because judges deciding their own recusal motions tend to downplay the existence of actual bias and because, under the appearance-of-bias test, the party need not go so far as to argue for actual bias. But does the Due Process Clause require only an absence of actual bias, or does it prohibit even its appearance? Justice Benjamin himself took the position that due process does not require recusal based solely on the appearance of impropriety and at least some state courts had agreed.⁴⁵

In *Caperton*, the Supreme Court was asked to resolve the issue. But by

⁴² 129 S. Ct. at 2261.

⁴³ *Id.* at 2263-64.

⁴⁴ *Compare* Del Vecchio v. Ill. Dept. of Corrs., 31 F.3d 1363, 1373 (7th Cir. 1994) with *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

⁴⁵ See *State v. Canales*, 916 A.2d 767, 781 (Conn. 2007) (“[A] judge’s failure to disqualify himself or herself will implicate the due process clause only when the right to disqualification arises from actual bias on the part of that judge.”); *Cowan v. Bd. of Comm’rs*, 148 P.3d 1247, 1260 (Idaho 2006) (“[W]e require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness.”). *But see* *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) (“Due process requires not only that a judge be fair, but that he also appear to be fair.”) (citation omitted); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) (“[T]here need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns.”); *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) (concluding that due process requires that justice “satisfy the appearance of justice”).

the time the case came up for oral argument, there was some confusion about whether Caperton had abandoned the argument that an appearance of bias alone was enough to trigger a due process violation. During oral argument, two interesting exchanges about the role of appearances under the Due Process Clause took place between the justices and counsel for Massey. First, Justice Stevens expressed incredulity that appearances alone could not rise to the level of a constitutional violation.

JUSTICE STEVENS: Mr. Frey, is it your position that the appearance of impropriety could never be strong enough to raise a constitutional issue?

MR. FREY: Well, we might have appearance of impropriety overlapping with conditions that would justify --

JUSTICE STEVENS: I'm assuming appearances only. Are you saying that appearances without any actual proof of bias could never be sufficient as a constitutional matter?

MR. FREY: I think we are.

JUSTICE STEVENS: Is that your position?

MR. FREY: We are saying that the Due Process Clause does not exist to protect the integrity or reputation of the State judicial systems.

JUSTICE GINSBURG: Why --

JUSTICE STEVENS: That's not an answer to my question.

MR. FREY: Well, I thought I said --

JUSTICE STEVENS: Supposing, for example, the judge had campaigned on the ground that he would issue favorable rulings to the United Mine Workers, and the United Mine Workers campaigned, raising money saying, we want to get a judge who will rule in our favor in all the cases we're interested in. Would that create an appearance of impropriety?

MR. FREY: Well --

JUSTICE STEVENS: Or take another example. The Chief Justice asked what if there are ten members of a trade association and would all -- and they all contributed to get a judge to vote in their favor in a case that involved a conspiracy charge among the -- charged the ten of them for violations of the Sherman Act, something like that. And if all ten of them raise money publicly for the very purpose of getting a judge who would rule favorably in their favor, that

would clearly create a very extreme appearance of impropriety. Would that be sufficient, in your judgment, to raise a constitutional issue?

MR. FREY: If you were -- if -- if you thought there was no basis for believing there was actual bias, but it looked bad --

JUSTICE STEVENS: No, it would meet the test in the -- in the judges' brief of an average judge would be tempted under the circumstances. That's the test that the Conference of Chief Justices judges --

MR. FREY: That I don't --

JUSTICE STEVENS: And do you think that could ever, just appearance, could ever raise a due process issue?

MR. FREY: No, I don't think just appearance could ever raise a due process issue.⁴⁶

Later in the argument, Justice Ginsburg suggested that the two phrases—appearance of bias and probability of bias—are synonymous.

MR. FREY: I don't -- I think, first of all, the Petitioner has not advanced on the merits in this case an appearance standard. A lot of the --

JUSTICE GINSBURG: Would you please clarify that? Because I was taking appearance, likelihood, probability as all synonyms⁴⁷

The questioning suggests that Justices Stevens and Ginsburg—two of the five Justices in the *Caperton* majority—believe that (a) mere appearance of bias can rise to the level of a due process violation and (b) that “appearance of bias” and “probability of bias” are interchangeable terms. Perhaps as a consequence, some scholars and commentators read the majority opinion in *Caperton* to hold that the appearance of impartiality violates the Due Process Clause.⁴⁸

⁴⁶ Transcript of Oral Argument at 27-29, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf.

⁴⁷ *Id.* at 34-35.

⁴⁸ Cf. Terri R. Day, *Buying Justice: Caperton v. A.T. Massey: Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. C. L. REV. 359, 363 (2009) (discussing the terms “appearance,” “perception,” and “probability” and treating the terms as synonymous); Gerard J. Clark, *Caperton's New Right to Independence in Judges*, 59 Drake L. Rev. 661, 707 (2010) (“The Court’s due process standard, however, is really no different than the standards in recusal statutes and judicial codes.”). See also Joan Biskupic, *Court*

Such a reading is incorrect. The majority opinion focuses not on appearances but rather on the probability that Justice Benjamin is *actually biased*.⁴⁹ And probability of bias is not the same thing as appearance of bias, although many commentators, and even Justice Ginsburg, conflate the two. The difference is crucial: An appearance-based standard focuses on the public's perception of the fairness of the court, while a probability-based standard centers on a reasonable judge's likelihood of actual bias. The subject of the former inquiry is a member of the public, and the focus is on that person's perceptions; the subject of the latter inquiry is the judge in question, and the focus is on the probability that that judge is actually biased. These are two very different tests, and the relevant factors in determining whether the test is met may be wildly different.

There are two reasons why I believe the Court's majority opinion adopts the latter approach.⁵⁰ First, the Court makes little mention of appearances throughout its opinion, instead embracing the old constitutional test that focuses on "whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.'"⁵¹ In other words, the spotlight is directly on the judge, not on the observations of the public, which is consistent with a probability-based disqualification standard. The word "appearance" is used only in two contexts in the majority's opinion: first, when discussing Justice Benjamin's own decision,⁵² and second, when explaining that most states have implemented an even more stringent, appearance-based standard for recusal,⁵³ and these appearance-based codes "provide more protection than due process requires."⁵⁴

Second, the Court explained that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's

Says Judges Must Avoid Appearance of Bias with Donors, USA Today, June 9, 2009, at 2A; <http://judgesonmerit.org/2010/02/18/demise-of-judicial-elections-and-lessons-from-the-lonestar-state/> ("Caperton plainly lays out that even the appearance of impartiality due to large campaign contributions may violate due process.")

⁴⁹ See, e.g., 129 S. Ct. at 2265 ("On these extreme facts the probability of actual bias rises to an unconstitutional level.").

⁵⁰ Cf. Jeffrey W. Stempel, *Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, available at http://works.bepress.com/jeffrey_stempel/2 (2009) (arguing that the Supreme Court did not go far enough to make the due process recusal standard congruent with the prevailing state and federal recusal standards).

⁵¹ *Caperton*, 129 S. Ct. at 2260, 2261, 2264, 2265

⁵² *Id.* at 2258.

⁵³ *Id.* at 2266 ("One must also take into account the judicial reforms the States have implemented to eliminate *even* the appearance of partiality") (emphasis added).

⁵⁴ *Id.* at 2267.

recusal.”⁵⁵ Rather, the Court held, “this is an exceptional case.”⁵⁶ But as explained in greater detail below, there is nothing exceptional about this case from an appearance-of-bias perspective. Had the Court intended to adopt an appearance-based test for judicial recusal, Blankenship’s contributions to Justice Benjamin would not be seen as extraordinary because even minor contributions create an appearance of bias.⁵⁷

B. *Why Caperton is Not an Easy Case*

After the Supreme Court issued its decision in *Caperton*, various commentators expressed surprise that the Court was closely divided. Charles Geyh, an expert in judicial ethics who has written prolifically about judicial bias, and Stephen Gillers, a leading ethics scholar, both commented that the case was “easy.”⁵⁸ This, presumably, because of the large sum contributed by the defendant’s CEO. Also focusing on the size of the contribution, Lawrence Lessig wrote “if contributions were small . . . the fact that money was contributed to a judge’s campaign could not lead anyone reasonably to believe that the contribution would affect any particular result.”⁵⁹

Yes, *Caperton* is indeed an easy case if the Court is applying an appearance-based recusal standard.⁶⁰ Of course a large contribution or expenditure by one of the litigants to elect a judge creates an appearance of bias. But wouldn’t a “mini-*Caperton*” also be an easy case? Wouldn’t a contribution of even a few hundred dollars to Justice Benjamin by Blankenship also create an *appearance* of bias? After all, research shows that even a small contribution—a contribution too small to play any role in the election’s outcome—may create an appearance of impropriety.⁶¹ More

⁵⁵ *Id.* at 2263.

⁵⁶ *Id.*

⁵⁷ *See infra*, note 62.

⁵⁸ Marcia Coyle, *Hot Recusal Case Debated: Justice Will Decide What Standard Due Process Requires*, THE NATIONAL LAW JOURNAL (March 3, 2009), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428674548&slreturn=1&hbxlogin=1>.

⁵⁹ Lawrence Lessig, Comment, *What Everybody Knows and What Too Few Accept*, 12 HARV. L. REV. 104, 106 (2009).

⁶⁰ As Professor Gillers seems to do. He explained that “[t]he appearance of justice is just as important as justice.” Coyle, *supra* note 58.

⁶¹ James L. Gibson and Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Legitimacy of Courts Be Rescued by Recusals?*, manuscript on file with author. According to a 2009 Harris Interactive poll, conducted for Justice at Stake, 85 percent of all voters believe judges should not hear cases in which a litigant spent \$50,000 or more to help elect them. Full results of Justice at Stake’s poll are available at http://staging.justiceatstake.sitevizerprise.com/media/cms/Justice_at_Stake_Campaign_

surprising is a recent study showing that merely *offering* a campaign contribution, even when it is rejected by the judicial candidate, creates an appearance of bias and partiality.⁶² In other words, relatively minor contributions, and even rejected offers of contributions, create an appearance of bias and may lead someone to question the judge's impartiality.⁶³

Were a judge required to recuse herself every time there was an *appearance* of bias towards a contributor to her campaign, a contributor against her campaign, or even somebody whose contribution the judge declined, judges would be unable to adjudicate the very cases that they were elected to decide. Furthermore, if recusal were necessary every time a contributor appeared in front of a judge, judicial elections would become a major obstacle to operation of the justice system. States put in place—and people overwhelmingly support—judicial elections so that judges are held accountable for their decision and to strengthen the separation of power between the legislative and judicial branches.⁶⁴

An elected judiciary assumes that there will be campaign supporters and contributors, and many of those supporters and contributors will be the very parties who will appear in front of the judge they worked to elect (or defeat). For example, a recent study showed that nearly two-thirds of cases heard by the Pennsylvania Supreme Court in 2008 and 2009 involved at least one party, lawyer, or law firm that contributed to the campaigns of at least one of the justices.⁶⁵ And even if that number is an aberration, surely the people and groups with the most interest in judicial elections are the lawyers and parties who are most likely to appear in front of the judges. Requiring judges to recuse in such circumstances would unduly burden the courts and create opportunities for campaign contributors to game the system by making contribution offers to judges perceived as unfavorable to their side.⁶⁶

But if *Caperton* is not about appearances but about the probability of

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⁶² Gibson & Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality*, *supra* note 61.

⁶³ The Talmud's proscribes that "even a judge who had refused a trivial favor from a litigant might find himself leaning in [the litigant's] favor." See John Leubsdorf, *Theories of Judging and Judge Disqualification* at 248 n.65 (discussing Jewish law's recognition of a judge's potential propensity toward bias).

⁶⁴ Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

⁶⁵ See *Campaign Contributions and the Pennsylvania Supreme Court*, available at http://www.brennancenter.org/content/elert/campaign_contributions_and_the_pennsylvania_supreme_court.

⁶⁶ This concern was expressed by Chief Justice Roberts in his *Caperton* dissent.

actual bias, it becomes a much more difficult case. What is the likelihood of actual bias when a CEO of one of the parties spends his own money on a judge's campaign? Would an offer of a campaign contribution, or a contribution too small to have made any difference in the outcome of the election, create an undue risk of bias?⁶⁷ Whatever the answers to these questions, the recusal analysis is much more complicated when focus is shifted away from an appearance of bias to a probability of bias.⁶⁸

III. JUDICIAL IMPARTIALITY AND DUE PROCESS: IS PROCEDURAL RECUSAL REFORM THE ANSWER?

There is another important question raised by adopting a probability-based recusal standard rather than an appearance-based one: what procedures are appropriate for recusal? It is a question that is rarely asked; when it comes to recusal, procedure is often ignored. In fact, while substantive recusal standards have undergone significant transformation in the last few centuries as the public's view and understanding of the judiciary has changed, recusal procedures have remained stagnant. For example, neither 28 U.S.C. § 455, nor the judicial codes adopted by the states, set out guidelines for what procedures should be followed in the event disqualification is sought. In *Caperton*, the Court had an opportunity to address the issue and prescribe certain procedures but declined. It is time for a fresh approach, one where disqualification procedures under the Due Process Clause are tailored to the substantive recusal standards set forth by the Supreme Court in *Caperton* and reflect the modern understanding of judicial bias and the judicial role.

There are three reasons why new procedures are necessary for disqualification under the Due Process Clause and *Caperton's* probability-of-bias recusal test. First, we must tailor recusal procedures to the substantive standard for judicial disqualification, and *Caperton's* new

⁶⁷ The Supreme Court suggested that these circumstances would not rise to the level of a due process violation when it explained that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal.” *Caperton*, 129 S. Ct. at 2263.

⁶⁸ Of course, the fact remains that even if the due-process disqualification standard is based on the probability of actual bias, most judges are still required to recuse based on the non-constitutional appearance-of-bias test contained in the federal disqualification statute and the Code of Judicial Conduct. In an article, tentatively titled *Making Appearances Matter: A New Approach to Judicial Impartiality, Disqualification, and the Appearance of Bias*, I argue that policy-makers and courts have paid undue attention to the substantive recusal standards and the actual recusal decision, and conclude that public confidence in the impartiality and legitimacy of the judiciary depends instead on (1) *ex-ante*, forward-looking rules that eliminate the appearance concerns that ultimately lead to recusal, as well as (2) appearance-based recusal procedures.

substantive standard calls for at least a consideration of a new procedure, and may even require it. Second, eliminating the role of appearances in the substantive disqualification standard under the Due Process Clause requires an *increased* emphasis on appearances in the disqualification procedures. Third, to give *Caperton* some teeth, states must address the corrosive effect that money in judicial campaigns has on judicial impartiality. The best way to do so, however, is not by eliminating judicial elections altogether but by revising the disqualification procedures to limit the potential corrupting influence of money.

*A. Tailoring Recusal Procedures to Caperton's
Probability-Based Recusal Standard*

Scholars commenting on judicial disqualification rarely ask whether existing disqualification procedures are appropriate for the substantive disqualification standard.⁶⁹ As a result, while substantive recusal standards have gradually evolved in response to judicial controversies, recusal procedure has remained stagnant. One of the those procedures is that the very judge being asked to disqualify himself makes the disqualification decision, often without any written decision, and subject to minimal appellate review. We must ask whether the Supreme Court's pronouncement of a probability-based substantive disqualification rule calls for a new, concordant procedure for judicial disqualification.

I believe that it does. For appearance-based recusal standards imposed by the federal disqualification statutes and the Code of Judicial Conduct, current recusal procedures (whereby a judge decides his own recusal motion) may be defensible, at least in theory. After all, in conducting the appearance-of-bias inquiry, the judge determines whether a member of the public would *perceive* the judge to be biased. Whatever the problems with an appearance-based recusal standard—it is imprecise,⁷⁰ it allows parties to flippantly accuse a judge of misconduct,⁷¹ and it may lead to overrecusal⁷²—at the very least this is the type of inquiry that judges traditionally engage in and are generally very good at.⁷³

⁶⁹ Recent scholarship, however, has finally begun to pay attention to recusal procedures. See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531 (2005). Professor Frost's article calls for the incorporation of the core tenets of Legal Process theory into recusal law. *Id.* at 535.

⁷⁰ See Ronald Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337 (2006).

⁷¹ *Id.*

⁷² Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007).

⁷³ In a tort case, for example, a judge may consider how a reasonable person would have acted in a certain situation. In a libel case, the judge determines whether plaintiff's

An appearance-driven recusal standard also gives judges an “out” – an opportunity to avoid hearing the case without admitting any actual bias or impropriety. While this may in itself be problematic,⁷⁴ at least it makes recusal easier to stomach for some judges.

But for a probability-based recusal standard established by *Caperton*—one that focuses on the likelihood that a judge is biased—self-recusal makes little sense. How can a biased judge, one that arguably owes one of the litigants a “debt of gratitude” for getting him elected, decide whether there is a probability of a bias in a given situation? Most people would agree that he cannot.⁷⁵ The same incentives that may lead the judge to favor one side on the merits may create an incentive for the judge to find against recusal. Putting in place procedural changes that address this problem will not only help foster fairness and impartiality in the judiciary but will also increase the public’s confidence in the appearance of justice.⁷⁶

B. Keeping Appearances Relevant

The Supreme Court’s rejection of an appearance-based substantive recusal standard does not mean that appearances should play *no* role in our recusal jurisprudence under the Due Process Clause.⁷⁷ In fact, appearances

interpretation of the allegedly defamatory phrase is reasonable.

⁷⁴ Arguably, allowing judges to make recusal decisions based on mere appearances, on the perceptions of the “average person,” is nothing more than a fig leaf—a shield behind which judges can hide in order to avoid acknowledging that judges are human and are subject to bias and prejudice. Of course, using an appearance-based recusal standard, judges can pretend that actual judicial bias is not a problem, and that recusal is necessary only because the public perceives a problem, not because there actually is a problem.

⁷⁵ Many people, including Professor Geyh in his response to this article, have suggested that mine is a distinction without a difference, and that self-recusal is equally problematic regardless of the substantive standard. While I tend to believe, for the reasons already described, that the difference indeed matters, my proposal also has the benefit of allowing states to make a piecemeal procedural change, limited only to disqualification motions under the Due Process Clause.

⁷⁶ See generally, Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703, 734 (1994); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 471 (1989); Tom R. Tyler & Kenneth Rasinsky, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC’Y REV. 621, 621-22 (1991).

⁷⁷ Some scholars have sought to eliminate the role that appearances play in recusal analysis. For example, Professor Sarah Cravens has argued that an appearance-based recusal standard results in too many unnecessary recusals. In her view, recusal rules should not be about promoting public confidence but about the elimination of bias. She proposes that so long as judges are able to adequately explain their rulings, appearance should not play a role in recusal. Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1

should continue to play a central role because of the importance of appearance of impartiality to the judiciary. There are nations where court rulings carry no weight and are routinely ignored.⁷⁸ Judges, lacking both electoral legitimacy and political force,⁷⁹ depend in large part on the public's acceptance of their authority. For the sake of self-preservation and to maintain their own legitimacy, courts should be protective of their reputation from public outrage and rejection.⁸⁰ As Justice Stevens has said, "[i]t is the confidence in the men and women who administer justice that is the true backbone of the rule of law."⁸¹ Therefore, when discussing recusal, the public's perception of the fairness and impartiality of the courts should be relevant.⁸²

But questions remain as to precisely what role appearances should play. If appearance of bias is not the determining factor in judicial disqualification under the Due Process Clause, how should appearances be considered and by whom? I propose that state legislatures, rather than challenged judges, would consider appearances in creating *ex ante* rules—procedural guidelines—that would control judicial disqualification. These disqualification procedures should be designed to foster not only judicial impartiality but the public's confidence in the courts. In other words, in adopting new procedures for judicial disqualification, states must ensure that the newly-adopted procedures create an appearance of impartiality and fairness. Empirical research is necessary to determine precisely what those procedures may be,⁸³ but I believe that at least two rules must be adopted: (a) a rule requiring a different judge, or an impartial panel to rule on a disqualification motion; and (b) a rule requiring that an opinion be published explaining the rationale for a disqualification decision. If appearances are going to play any role in our recusal jurisprudence under the Due Process Clause, it is in the recusal procedures adopted by the states to address future *Caperton* motions.

(2007). Similarly, Professor Ronald Rotunda has argued that the appearance-based recusal standards are too imprecise and make it too easy for litigants to seek a judge's recusal. He, too, argues in favor of abandoning an appearance-based recusal standard. Rotunda, *Judicial Ethics, the Appearance of Impropriety*, supra note 68.

⁷⁸ JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 1 (1974)

⁷⁹ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

⁸⁰ *Id.*

⁸¹ *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

⁸² Cf. Randall J. Litteneker, Comments, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 267 (1978) (identifying the importance of "a judicial system that not only is impartial in fact, but also appears to render disinterested justice").

⁸³ For example, further studies are necessary to determine what effect requiring other judges or independent panels to make disqualification decisions has on public confidence and perception of impartiality.

C. Making Caperton Matter

Finally, there is yet another reason why the Court's adoption of a probability-based recusal standard under the Due Process Clause should lead to procedural reform. Because *Caperton* adopts a less stringent recusal standard than was already in place in most states (see Parts I & II), *Caperton* itself is largely irrelevant unless states voluntarily make procedural changes to their disqualification practices. After *Caperton*, there is no doubt that the recusal decision should not be left to the challenged judge, and a number of states have grappled with changes to their own recusal rules. If states combine *Caperton*'s substantive probability-of-bias standard with a more aggressive procedural approach, it could lead to an increase in the public's confidence in the courts.

States need not scrap or revise their current recusal rules altogether, and the procedural changes that I propose may only be necessary in the context of judicial elections, and only to address the problems, like those in *Caperton*, associated with the role of money in judicial campaigns. When it comes to judicial disqualification, lawyers and judges tend to think of bias as one monolithic category that should be addressed with a homogenous recusal standard. But there need not be one solution for all types of bias, and sometimes minor alterations with a scalpel will yield much better results than large-scale changes with a sledgehammer. When it comes to impartiality, election-related bias is very important, and should be addressed by procedural changes, even if we retain the same recusal procedures for disqualification in other, non-*Caperton* contexts. After all, empirical research suggests that judges that receive contributions from litigants may in fact be more likely to be actually biased⁸⁴ and that people are truly concerned about the impartiality of elected judges.⁸⁵ This may be a good reason to treat recusal in the election context differently than other types of recusal (for example, when a judge presides over a case involving a former colleague). Large-scale procedural changes for all recusal motions may be a superior solution, but this is a great place to start.

It is precisely in the context of judicial elections, and for due-process challenges of the kind seen in *Caperton*, where procedural changes are most

⁸⁴ Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L. J. 623 (2009) (finding a "strong relationship between campaign contributions and judges' rulings" and demonstrating that elected judges "routinely adjust their rulings to attract votes and campaign money"); Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorney's Contributions on State Supreme Courts*, 28 JUST. SYS. J. 135, 136 (2007); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002).

⁸⁵ Geyh, *Why Judicial Elections Stink*, supra note 73.

crucial. Today, nearly eighty percent of Americans believe that elected judges are biased towards their contributors.⁸⁶ As a result, there is a movement, headed in part by former Supreme Court Justice Sandra Day O'Connor, to eliminate state judicial elections altogether. Professor Meryl Chertoff's article included in this Symposium echoes the calls for the end of judicial elections.⁸⁷ This is the wrong approach to eliminate this concern: despite the perceived problems associated with judicial elections, the public still favors them.⁸⁸ Not only are judicial elections extremely popular, but Americans generally have greater institutional trust in elected courts than appointed ones.⁸⁹ Thus, rather than seeking to eliminate judicial elections, we should implement reforms that will address the problem, starting with recusal reform.⁹⁰ And that reform begins with changes in recusal procedures for challenges under the Due Process Clause.

CONCLUSION

It is important that we see judicial recusal as a key component in the tug-of-war between judicial independence and judicial accountability. Although judicial bias and recusal have always been issues of considerable importance, recusal has recently taken on an even greater importance that demands immediate attention. As judicial elections become "noisier, nastier and costlier,"⁹¹ recusal reform becomes more and more important and may be one of the best ways to retain judicial elections that people overwhelmingly support while addressing the impartiality concerns and the corrupting influence of money that are inevitable in an elected judiciary. But the time for recusal reform is now. Public confidence in the impartiality of the judiciary has been diminishing, and people are rightly concerned about the impartiality of their courts. The public does not believe that elected judges can remain impartial when either a litigant or an

⁸⁶ Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 43 (2003) (explaining that while eighty percent of the public favors judicial elections, a similar number of people believes that elected judges are influenced towards their campaign contributors).

⁸⁷ Meryl J. Chertoff, *Trends in Judicial Elections in the States*, 46 MCGEORGE L. REV. ____ (forthcoming 2010).

⁸⁸ *Id.*

⁸⁹ James L. Gibson and Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality*, *supra* note 61.

⁹⁰ Election reform is also important, although the Court's decision in *Republican Party v. White* and *Citizens United* may limit states' options. Some states, including West Virginia, have recently started experimenting with public financing for judicial elections, although the constitutionality of such measures remains in question.

⁹¹ Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 76 (1985).

attorney contributed significantly to a judge's campaign. Even judges themselves are unsure that their colleagues can be impartial when dealing with those who helped get them elected.⁹²

In light of the United States Supreme Court's decisions in *Republican Party of Minnesota v. White* and *Citizens United v. FEC*, as judicial elections look more and more like legislative elections, recusal reform may be the best way—maybe the only way—to deal with the appearance of partiality that can be created by large campaign contributions to a judge in the course of an election. But it is time for a new generation of recusal reform, one focused on reforming stagnant disqualification procedures rather than substantive disqualification rules.

In this essay, I proposed three procedural reforms that would respond directly to *Caperton*. First, states should tailor the recusal procedure to the substantive recusal standard. This means that a recusal procedure that worked for one substantive rule may not work for a different rule. Second, states must put greater emphasis on appearance of fairness in developing the disqualification procedures that will satisfy the Due Process Clause because the Supreme Court's decision in *Caperton* limited the role of appearance in the substantive disqualification standard. And finally, states should feel free to create different recusal procedures for different factual situations. In other words, rather than following a single procedure every time a litigant seeks disqualification of a judge, states may create more stringent recusal procedures specifically for circumstances raising due-process concerns, as in *Caperton*.

⁹² Pozen, *The Irony of Judicial Elections*, *supra* note 90.