JUDICIAL RECUSAL:

SAFEGUARDING THE INTEGRITY OF JUSTICE

By

RENE MATUSIAK

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A Thesis Submitted to The Honors College

In Partial Fulfillment of the Bachelors degree
With Honors in

Law

THE UNIVERSITY OF ARIZONA

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Approved by:

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Dr. Andrew Coan
James E. Rogers College of Law

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Rene Matusiak[*]

ABSTRACT

The American legal system requires a fair and impartial judiciary. This much is common ground. The manner in which to ensure judicial neutrality is the subject of much more debate. This essay explores one mechanism for preserving such neutrality—judicial recusal. The case of *Caperton v. A.T. Massey Coal Co.* will serve as a vehicle for exploring the difficult issues raised by a constitutional recusal requirement. Normative resolutions to the problems posed by such a requirement will be offered, while accepting that there may be other, more appropriate, ways to achieve the goal of judicial neutrality.

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[*] BA in Law student, University of Arizona, 2017. Special thanks to Professor Coan for his patience and insightful guidance towards the completion of this paper. Thanks also to Craig Jennings for his early feedback and perspectives on the paper. I am grateful for the unwavering support of my family, friends and colleagues along this academic journey.

Introduction

The importance of fair and neutral judges in American jurisprudence is undeniable. Parties in a legal case expect to be faced with an impartial judge that seeks to facilitate a fair hearing from both sides of the case, while maintaining the basic requirements of due process. An ability to remain impartial originates, in large part, with the method in which a judge is selected. The US Constitution necessitates that federal judges are appointed by the president and approved by the Senate, but it falls largely silent as to the way that states decide how to select judges. A crucial decision such as this—deciding the method of judicial selection—puts each state in a critical position when it comes to safeguarding the bench from the possibility of corruption and partiality towards a party.

There exist two prominent options for a state's judicial selection process: election and appointment. Currently, 38 states elect judges to their highest court, while the rest utilize some type of appointment scheme[1]. The variation in appointment processes include, but are not limited to, gubernatorial appointments from nominating commissions, gubernatorial appointment from a judicial nominating commission, and gubernatorial appointment with senate confirmation[2]. Alaska offers an interesting perspective into the utility of judicial appointment with its own Judicial Council, which acts as a nominating commission for judicial positions with little to no regard for political affiliation[3]. Of course, the state of Alaska presents a rather neat way of

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[1] Methods of Judicial Selection, National Center for State Courts, November 12, 2016, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.
[2] State Supreme Courts, Ballotpedia, October 21, 2016, https://ballotpedia.org/State_supreme_courts#tab=Courts
[3] Erwin Chemerinsky, THE CASE AGAINST THE SUPREME COURT (2015).

selecting judges for state court positions, but its supposed success in making judicial appointments should not be taken for granted.

State courts, by a large margin, represent the first legal stage for cases filed in the United States. The 2009 calendar year illustrated that fact with over 100 million cases starting at the state level—further emphasizing the importance of an impartial judiciary[4]. It should be noted however, that this is not just a trivial distinction in American federalism. In fact, about 95% of all legal cases originate at the state court level, which is no small number considering the sheer amount of legal areas that state judges could be facing on a daily basis (e.g. contract disputes, criminal cases, etc.) [5] These statistics—however helpful they may be in the macro sense of things—only work to provide a certain framework for the issue at hand. It is my aim to confront the nature of judicial selection through a normative lens rather than an empirical one. For the purposes of this essay, one such case—out of the 100 million or so in 2009—was *Caperton v. A.T. Massey Coal Co.*

The *Caperton* case will serve as a type of conduit for the issue of judicial recusal in this essay. As it will be articulated in the sections below, *Caperton* is a case which transcends the boundaries of a traditional courtroom setting, but has significant implications as to that very setting. Put simply, the case surrounds a judge that refused to recuse himself in a case where one of the parties had donated a significant amount of money during his election campaign. Such circumstances raise obvious concerns for even the most foreign of spectators. The majority contended that the Due Process Clause requires a judge to recuse himself in such circumstances

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[4] R. LaFountain, *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads*, NATIONAL CENTER FOR STATE COURTS (2011).
[5] Ryan J. Suto, The Harm of Judicial Elections in America, Fair Observer, November 8, 2016, http://www.fairobserver.com/region/north_america/harm-judicial-elections-america-33007//.

(i.e. fairness and impartiality), while the dissent, headlined by Chief Justice Roberts, asserts that the majority's recusal criteria is too broad and vague. The *Caperton* majority opinion, and the subsequent dissents, will set the stage for a discussion concerning judicial selection processes and constitutionally required recusal.

In order to adequately articulate the potential pitfalls of an elected judiciary, one must be vigilant not generalize the mistakes illustrated in the *Caperton* case. The case in question presents an interesting, albeit unique, set of circumstances that put a spotlight on states' judicial selection process. This essay does not aim to discredit or disavow all state level judges that happen to be elected; instead, my essay hopes to address Chief Justice Roberts' pertinent concerns about the majorities decision in light of the corruption surrounded elected judges in *Caperton*.

The discussion will proceed in three parts. Part I seeks to explicate the relevant legal literature that preceded the *Caperton* case and then discusses the Supreme Court's majority opinion. Part II will address the controversies identified by Chief Justice Roberts in his dissenting opinion. Part III will then attempt to resolve a compressed version of Justice Roberts' concerns in the form of potential doctrinal solutions for courts to adopt in the future.

I. Caperton and the Law as it Stood

For one to comprehensively understand the *Caperton* case, it's important to first familiarize oneself with the judicial literature that occurred before the case in question. Many of these cases operate in a retrospective manner of sorts. In other words, the court deliberated on the appropriate grounds for judicial recusal, which then translates into a better understanding of the criteria for maintaining impartiality. The Supreme Court's majority focused on five specific cases which served as a certain precedent to the *Caperton* controversy.

A. Decisions that preceded Caperton

Tumey v. Ohio is the first, at least chronologically speaking, case that the majority mentions. This case from 1927 featured a man that violated the Eighteenth Amendment and contented that he was deprived of his due process when a law financially compensated judges for hearing liquor related cases[6]. The court decided that the Due Process Clause warranted a recusal from a judge when there is "a direct, personal, substantial, pecuniary interest" in the case, which there presently was[7]. This early case illustrated that the court was not only concerned with financial interests, which were of chief concern in *Tumey*, but also with the potential loss of neutrality that may coerce a judge under the circumstances stated above.

The next case, *Ward v. Monroeville,* makes a temporal jump of about 50 years and elaborates on the precedent set in *Tumey.* In *Ward,* a mayor would allocate court fines straight in the town's general financial treasury instead of his own pocket—as was the case in *Tumey*[8]. This meant that the court was expanding what it meant to receive financial incentive as it was more of an indirect stake as opposed to a direct one. "Possible temptation," on the part of the mayor sitting on the bench led the court to believe that such behavior crossed the line in terms of impartiality because it could compromise the nonpartisan nature of a judicial position[9].

The court turns its attention once again to the Due Process Clause for the 1986 case of *Aetna Life Ins. v. Lavoie.* A justice in the Alabama Supreme Court issued the deciding vote for upholding financial damages against an insurance company, all the while acting as the lead plaintiff in a very similar case. Now, at first sight, these circumstances may seem even fictional

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[6] *Tummy v. Ohio*, 273 U.S. 510 (1927).
[7] *Id.* at 523.
[8] *Ward v. Monroeville,* 409 U.S. 57 (1972).
[9] *Id.* at 60

to some, but situations like this in *Lavoie*—although relatively infrequent—must be monitored vigilantly and the court did just that. For the purposes of this essay, the court maintained, similarly to the *Ward* case, that a judge need not be actually influenced, but rather have the possibility of temptation as per the average judge[10]. Thus, the court qualifies the need for recusal in comparison to the average judge; this operates almost like the 'reasonable person' standard in so many of civil and criminal case.

Apropos criminal cases, the next instance of recusal was from a case called *In re Murchison* where a single judge was involved in both the examination of witnesses and the trial. The Supreme Court then decided to set aside the convictions on the grounds that the judge maintained a conflict of interest, as opposed to a financial incentive, because "it is difficult if not impossible for a judge to free himself from the influence" of what took place at the grand jury level [11]. Interestingly enough, the *Murchison* case is oddly similar to a case (*Williams v. Pennsylvania)* where a state supreme court justice failed to recuse himself from a case in which he himself was the district attorney many years prior to appeal[12]. It's certainly an odd set of circumstances, but the important thing to remember is that relationships can play a vital role in discerning the impartiality of a judge. Prior relationships between the judge and a party in the case do in fact require recusal and are backed up by the Due Process Clause continues the—hopefully apparent—trend which is the broadening and refining of recusal guidelines as to the neutrality of a judge.

The final precedent, with respect to the *Caperton* case, comes in the name of *Mayberry v. Pennsylvania* from 1971. There, the court touched upon the relationship basis for recusal

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[10] *Aetna Life Ins. v. Lavoie,* 475 U.S. 813 (1986) at 825.
[11] *In re Murchison,* 349 U.S. 133 (1955) at 138.
[12] *Williams v. Pennsylvania,* 579 U.S. (2016)

standards while noting that a judge "becomes embroiled in a running, bitter controversy," which weakens, if not, eliminates the reasonable possibility for a judge to remain neutral during the proceedings of a case[13]. This does not mean that every single relationship to a judge could theoretically require recusal. In fact, the court—when trying the articulate the last five cases in general terms—relies on the idea of "an average judge's" likelihood to remain neutral, or, in the words of Justice Douglas, "potential for bias[14]."

B. The Majority Opinion from Caperton

The five precedents above, offer a sort of judicial literature when it came time for the Supreme Court to decide on *Caperton v. A.T. Massey Coal Co.*. This time however, the spotlight extends to the regions of judicial elections as well. That's not to say that the cases above were totally independent of judicial selection processes. One would be rather close minded to assume that recusal criteria's are absent judicial selection processes, but *Caperton* seems to blur those lines a bit more than the previous cases had.

The controversy at hand originated squarely at the campaign level—meaning, a judge was running for election in order to serve on the bench. Justice Brent Benjamin is the judge in question and he was elected to the West Virginia Supreme Court of Appeals in November 2004. Donald Blankenship, the CEO of A.T. Massey Coal Co., spent over $3 million on the campaign to defeat Justice Benjamin's opponent. Blankenship's contributions amounted to more than 60% of all spending in support of Justice Benjamin's candidacy. Justice Benjamin won a seat on the court with 53.3% of the vote after a decidedly unpleasant campaign. In 2002, prior to Blankenship's judicial campaign involvement, Massey Coal had been sued by Hugh Caperton,

[13] *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971) at 465.
[14] *Id.* at 466.

head of Harman Mining Corp. The case involved claims that Harman Mining was driven out of business through Massey Coal's unlawful practices. Caperton won $50 million in damages at trial, and Massey Coal appealed the case to the West Virginia Supreme Court of Appeals in 2006—after Justice Benjamin had taken his seat on the bench. Justice Benjamin did not recuse himself from hearing the appeal, despite several requests both before and after the appeal was filed. The court ruled 3-2 in favor of Massey Coal, with Justice Benjamin in the majority. The dissenting justices argued that Justice Benjamin should have recused himself because of the appearance of bias in the case. In his opinion, Justice Benjamin said that there was no proof of "actual" bias, and said that a judge should not recuse himself on the appearance of bias alone[15].

The question before the court was a relatively simple—well, at least to Justice Kennedy and the majority it was—but nonetheless it was an important one. The court needed to decide "whether the Due Process Clause was violated when one of the justices (Justice Benjamin) in the majority denied a recusal motion[16]." In other words, did Justice Benjamin's failure to recuse himself, in a case with which he has considerable ties to one of the parties (financial contributions), violate Caperton's right to a fair trial in the Due Process Clause of the 14th Amendment?

When it came to the rule that applied to these "extraordinary" circumstances, the court decided to utilize and combine many of the previous precedents[17]. The court states that the recusal of a judge is warranted when there is "a significant and disproportionate influence [on the judge] by raising funds…when the case was pending or imminent[18]." In many ways, such a rule

[15] *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009) at 12
[16] *Id.* at 1.
[17] *Id.* at 16.
[18] *Id.* at 14.

combines the previous rhetoric of judges having relationships with a party in the case, as well as financial incentive from which was articulated in the precedents above.

To that effect, the Supreme Court concluded the majority opinion with a statement saying that the "probability of actual bias rises to an unconstitutional level," and thus administering their opinion with that of the Due Process Clause[19]. The 5-4 decision was decided in favor of Caperton, but stipulated as to the relative financial contributions, total amount of money spent in an election, and the actual effect of said contributions to the election[20]. To many, the buck stops here, but American jurisprudence offers future litigants a useful tool in the form of dissent and one such dissent was penned by Chief Justice Roberts.

The next section of the essay will seek to identify and distill the 40 concerns that Chief Justice Roberts has with the majority opinion. Three generalized questions will address Chief Justice Roberts' unease about the shortcomings of the majority's rule. For the purposes of this essay, Justice Scalia's dissent will not be discussed.

II. The Roberts 40

Justices Alito, Thomas, and Scalia all dissented in Caperton, but it's Chief Justice Roberts' disapproving opinion that concerns this essay the most. Justice Scalia penned a brief dissent in which he claims that the majority decision will only reinforce the "perception that litigation is just a game[21]." He ultimately settles on the idea that the outcome will do more harm than good in seeking to correct a judicial imperfection. Chief Justice Roberts, by virtue of his disagreements, fundamentally agrees with Justice Scalia but offers a much more scathing opinion to the majority's decision.

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[19] *Id.* at 16.
[20] *Id.* at *14.*
[21] *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009) (Scalia, A., dissenting) at 1

A. Understanding Chief Justice Roberts' concerns

Justice Roberts begins his dissent by establishing that he shares the same concerns that the majority holds. "Fair, independent, and impartial" judges are of the utmost importance if courts are to maintain fundamental legal standards, but Justice Roberts contends that the majority's decision will have a negative effect on those values[22]. One may feasibly argue that this causal connection—between the 'probability of bias' rule and the public's decrease in confidence—is a bit exaggerated, but nonetheless the Chief Justice asserts his disagreements with the court's decision. His concerns rest with the conceived vagueness of the court's new rule (probability of bias) and the potentially negative public reception from a blanketed new standard.

Right from the outset, Justice Roberts lends his lower level colleagues a great deal of leeway in terms of professional ethics. He "trusts that they will live up to" the promise of applying the law impartially and upholding the Constitution[23]. The Chief Justice's faith in judicial recusal ethics is admirable, but in a sense naïve. James Madison understood that men (to which judges are prerequisite of being) are not angels, but either way it would be difficult to imagine the Chief Justice of the Supreme Court to be overtly critical of judicial ethnicity[24]. He goes on to remind the court of Due Process Clause recusal situations.

"Financial interest in the outcome of the case, and…criminal contempt case[s] that resulted from the defendant's hostility towards the judge," are two situations in which precedent is established for Due Process Clause disqualification[25]. Justice Roberts seems to be rather

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[22] *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009) (Roberts, J., dissenting) at 1
[23] *Id.* at 2.
[24] James Madison, *The Federalist No. 51,* (1788), https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51
[25] Roberts, *supra* note 22, at 3

adamant about staying with this precedent throughout his dissent. In the greater scheme of things, he is trying to separate the Caperton circumstances from the legal benefits of a due process claim because, to him, the case resembles a one-off mistake. His claim rests on the idea that probability of bias can range anywhere from simple friendships to religious affiliations, which would be considered too vague for a constitutionally required recusal. Recognizing that states can individually make their own recusal requirements is only briefly mentioned in the dissent[26].

Justice Roberts rounds out his opinion by arguing that the new rule will hurt judicial capacity for litigation and that Justice Benjamin may have won the election despite the financial contributions of Mr. Blankenship. Appeasing the legal needs of this one extreme case tests "the bounds of established legal principles," which Justice Roberts prefers to keep intact and trust the judges to make recusal evaluations[27]. Additionally, he raises concerns surrounding the possibility of courts succumbing to a flood of 'Caperton motions' that could regrettably return to the court in a future case. Justice Roberts concludes the opinion by putting on his umpire mask and questioning the practical correlation between Mr. Blankenship's donations and the certainty of Justice Benjamin's victory.

Justice Roberts' dissent could be interpreted one of two ways: a reasonable and cool headed rebuttal to a ham-handed majority, or an overly concerned response that nit-picks a well-intended resolution to a plausible case of human error. Either way, the dissent is worth taking a second look at. The dissent seems to be in the opposite corner when it comes to evaluating a person's human nature (as it pertains to judges recusing themselves when need be), but

[26] Roberts, *supra* note 22, at 4
[27] Roberts, *supra* note 22, at 11

legitimate concerns can be raised as to the "indeterminate and unpredictable" nature of the majority opinion[28]. Conveniently—or perhaps inconveniently to some—Justice Roberts pens a type of laundry list that articulates his problems with the pragmatic application of the court's new rule.

The most notable part of Chief Justice Roberts' dissent is the formulation of 40 questions. Many pages of the dissent were filled with numbered concerns that the majority left, seemingly, unanswered. For instance, questions that relate to the theoretically unknown boundaries of the probability of bias rule. Most reasonable people can agree that money and judicial politics are not a good combination—some may even say that it's outright wrong—but where do the practical boundaries exist for even the most noble of intentions? To that effect, the remainder of the essay will identify three core issues amongst the forty questions and attempt to resolve their inherently methodical problems.

B. Distilling the Forty Questions Raised

Justice Roberts, if he intended to do so or not, cleverly deployed his checklist of questions in the dissent. To some, a lengthy and burdensome lineup of questions might provoke an inclination to surrender; conceding that the dissenter obviously has a point because of the number of concerns raised. The strategy works similarly to that of a lawyer attempting to swamp the opposing party with motions before the court. Whether that was the intention of Chief Justice Roberts is unknown, but simply bypassing his concerns on the grounds that they are somehow overwhelming would be a mistake.

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[28] Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts' Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, SW. L. REV. 27, (2009).

To that end, and for the sake of establishing a more manageable discussion, I will attempt to distill the forty questions into three core issues. These three generalized questions will hope to encapsulate the overarching concerns of Justice Roberts. Each of the three will be rooted in at least some of the original points made in the dissent. Every single concern cannot feasibly be addressed but the core issues will be reasonably addressed.

The three questions are as follows: What measure or standard would be implemented towards disproportionate expenditures and from which sources? What would the temporal and institutional framework for a biased judge look like? Is the potential threat of many more recusal motions worth the risk for a more refined recusal standard?

The first question, on the face, will be the most straightforward. A simple inquiry into how, and by what ruler, courts will evaluate election funds. For the majority, it's quite simple ("significant and disproportionate influence"), but Justice Roberts begs to differ[29]. Questions numbered 1("How much money is too much money?"), 8 (how will an association's contribution affect the standard of disproportionality?), and 10 ("What if the candidate draws…support from a particular group?) fit nicely into this first core issue[30]. As to how this standard will be implemented—case by case, bright line rule, etc.—will be discussed in the following section.

The second question deals with things a bit more technically. It seeks to flesh out the parameters for what a biased judge looks like in terms of when the election was held and for what position. Questions 7 ("How long does the probability of bias last?"), 16 ("What if the judge voted against the supporter in many other cases?"), and 27 ("How final must the pending case be with respect to the contributor's interest?") all fit the bill for the second core issue[31].

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[29] Kennedy, *supra* note 15, at 14.
[30] Roberts, *supra* note 22, at 6.
[31] *Id.* at 8.

Would the court, while acknowledging the starkly different factual circumstances, use Justice Stewart's "I know it when I see it" opinion for figuring out when a judge is biased[32]? Or will the court establish a bona fide procedural test for judges to comply with at various institutional levels. Revelations to these pressing issues will also be discussed in the next section.

Finally, but perhaps most importantly, is the question that evaluates the cost to which courts must go in order to flesh out the details of the new rule. Justice Roberts claims that this is a case in which "the cure is worse than the disease," where the slippery slope of an amorphous new rule does not 'break-even' with the benefits therein sought[33]. In other words, how will the institutional capacity of today's courts deal with, presumably, more recusal motions and to what doctrinal gain? Something along the lines of the time honored 'trial and error' strategy seems to be what Justice Roberts is getting at here. Questions like number 33 ("What procedures must be followed to challenge a state judge's failure to recuse?") and 35 ("What is the proper remedy?") begin to knock on the door of this core issue, which Justice Roberts generally circumnavigates in his dissent. This concern, along with the previous two stated above, set the stage for an attempt at coming up with viable resolutions to real judicial integrity issues.

These three questions will act as the center piece for the rest of the paper. The overarching themes of money, time, and utility neatly organize Chief Justice Roberts's reasons for opposing the majority opinion. Each of the questions distinguish themselves pragmatically and theoretically. Financial guidelines differ from temporal boundaries, while the normative utility of *Caperton* motions are dissimilar to geographic campaign contribution norms. Simply

[32] *Jacobellis v. Ohio,* 378 U.S. 184 (1964) (Stewart, P., concurring)
[33] Roberts, *supra* note 22, at 14.

put, any effort to refine recusal doctrine must address each of the three broad issues that Justice Roberts so adamantly identifies.

III. Resolutions to Chief Justice Roberts' Concerns

Justice Roberts raises formidable issues in his dissent. He articulates mostly pragmatic problems with the Court's subjective test for unconstitutional bias. In the abstract, his concerns are rooted in the selection process for judges across the country. That discussion, in and of itself, is far too broad for this particular essay but it's worth noting that the problems developed in the dissent stem from Judge Benjamin's election campaign—a campaign which, of course, was fueled by financial contributions.

A. The Financial Stake

The majority ruled that Judge Benjamin received a disproportionate amount of financial support from Don Blankenship who had a personal stake in the case.[34] Blankenship's contributions exceeded 300% of the "amount spent by Benjamin's campaign committee."[35] The court noted many times that the rather extreme financial circumstances of this case make it stand out. It's relatively easy for a reasonable person to determine that a 300% difference in finical support can be classified as disproportionate. It gets trickier when the lines are much more fine.

Chief Justice Roberts however, was quick to point out that Blankenship only provided $1,000 to the judge's campaign, and that such a contribution could not have "affected the outcome of this election."[36] These are justifiably valid points on the part of the dissent. Financial statistics can, and have been, manipulated in a way that favors the argument at hand, but it still doesn't settle the argument of how much money is too much. Sure, $1,000 is not a whole lot

[34] Kennedy, *supra* note 15, at 14.
[35] *Id.*
[36] Roberts, *supra* note 22, at 14.

considering the massive amounts of money surrounding political elections in recent years, but it still raises red flags when a benefactor appears before the judge on the receiving end of campaign expenditures. To that end, the judicial process would benefit from a measuring stick, so to speak, that would help distinguish between a disproportionate and proportionate amount of financial support.

One possible avenue to pursue would be to identify a reasonable percentage number which is disproportionate to other contributions and threatens the professional integrity of the bench. This way, the rule can be a bit more manageable if it's necessary to initiate a *Caperton* claim and it would alleviate the claims of subjectivity articulated in the dissent. The polished rule would regulate "judges once they are presiding on the bench, [and] not on the campaign stump," which would accommodate the constitutionally protected speech of campaign contributions.[37] Donors would be free to spend as much as their hearts desire and pockets can afford. Recusal safeguards would kick in if the donor happens to have a case in front of the judge which benefitted from donations. Free speech, in the form of financial contributions, remains protected all the while trying to eliminate the ambiguity behind disproportionate expenditures.

The trick here is to establish some sort of objective percentage. Ten, twenty, thirty percent of the judge's campaign donations? Surely, not over 50%. One may say that a reasonable proportion to draw the line at would be 10%. Anything above that percentage may raise a few eyebrows as to the ability to remain neutral. Additionally, 10% of $1 million is still $100,000 and, depending on the geopolitical region, could still result in a lack of neutrality. Combining the two modes of measurement, percentages and true dollar values, could potentially be the best. This would work akin to warranties on cars, which combine mileage and years. Determining a

[37] Jen H. Shugerman, THE PEOPLE'S COURT (2012) at 263.

percentage of campaign donations along with a hard dollar amount—whichever comes first—may clear up any uncertainty as to the level of disproportionate spending.

This essay does not seek to establish an exact statistical threshold for determining disproportionate funding. Instead, it offers potential resolutions to the relative vagueness of the rule established by the majority. State governments for instance, are more than free—if not encouraged—to establish procedural threshold markers for election expenditures. For example, "New York's state judicial board required judges to recuse themselves from any case involving a party or firm that had donated more than $2,500," after the *Caperton* ruling.[38] This provides state judicial boards the flexibility to determine their own 'bias' threshold while making an effort to objectify this new recusal rule. Leaving the details up to the states accounts for geopolitical differences and deferential treatment as to the standard's specificity.

B. The Timing of it All

As the idiom goes, 'time is money'. In this case however, the two objects of conventional desire are separated. The aspect of money surrounding judicial elections—and the subsequent entanglement during a case—was covered in the section above, but the temporal question of bias still remains. Timelines as to the 'expiration' of a biased judge may seem a bit formalistic; considering the emotional nature of memory does not help the court establish a clearer rule.

The dissent points to the pragmatic issue of how long judicial bias last for.[39] Justice Roberts emphasizes that the temporal aspect of bias is contingent upon the timing and structure of a judge's election. To that effect, Chief Justice Roberts is right. Some justices may have partisan elections, non-partisan elections, or even simple retention elections. Some may argue

[38] Shugerman, *supra* note 37, at 264.
[39] Roberts, *supra* note 22, at 5.

that increased "politicization, partisanship…and massive fundraising," call into question the judicial system's separation of law from politics.[40]Justice Roberts does not harbor much thought as to the nature of judicial elections per se but, nevertheless, it's worth understanding the context surrounding the importance on 'time'.

For any reasonable lay observer, the circumstances surrounding Judge Benjamin's election victory are too close for comfort—specifically, how close, temporally, the victory came to Blankenship's subsequent appeal. Blankenship submitted his infamous donations all the while his case was pending appeal.[41] Objections to the timing of such expenditures are more than justifiable. Financial donations were made towards the election of Benjamin knowing full well that he could potentially hear the case after the appeal. Similarities can be drawn to Justice Roberts' first general question (how much money is too much) in terms of refining the standard of measurement. How do the courts articulate a framework for the length of time a judge is potentially biased, and, therefore, ethically compelled to recuse himself from the present case?

One possible way to avoid the sort of compromising temporal proximity mentioned above would be to incorporate parameters into the probability of bias—in other words, establish a timetable for how long the lack of impartiality may last as to a specific party. The length of a single election cycle is one potential solution to the problem. In some states however, the judicial term length is quite a long time—it can range from two years, all the way to 12.[42] This type of variance should not compromise the intentions of the plan; instead, it should allow states to establish the temporal boundaries accordingly. Maintaining a type of legal barrier, between the donating party and the judicial benefactor, for the judge's term of office may be a reasonable

[40] Shugerman, *supra* note 37, at 273.
[41] Greg Goelzhauser. CHOOSING STATE SUPREME COURT JUSTICES (2016) at 129
[42] Methods of Judicial Selection, *supra* note 1.

resolution to the vagueness surrounding the majority's rule. The so called "shelf life" of a judge's prejudice towards one party or another is difficult to specify precisely, but requiring recusal for one term in office—in the hopes of refining *Caperton's* recusal rule—seems like a justifiable first step.[43]

The reasoning for such a timeline in the judicial process is clear—to keep the judiciary above the political fray.[44] An additional step to the procedural framework, like ensuring a donor's eligibility before a judge, justifiably helps to refine the recusal doctrine and keep improper political motives at bay. Some may argue that there needs to exist a stronger enforcement mechanism in order to ensure that judges are not ethically compromised. Others however, contend that retention elections are more than enough to incentivize professionalism on the bench.[45] Both sides of the argument desire the same thing, and that is to keep judges away from political motives. A reasonable timeline requirement, like the one mentioned above, hopes to alleviate those concerns and clarify the aggregated arguments from *Caperton's* majority.

C. The Utility of a Caperton Motion

Who is to say that all of these additional procedural regulations and 'roadblocks' will amount to anything good? More guidelines as to when recusal is necessary, or how long an injured party must wait to file suit can appear to detrimentally effect the effectiveness of the judicial system; judges may be inconvenienced and may even suffer in their reputation. Opponents to the *Caperton* ruling may be quick to echo such sentiments—and they might even have some legitimate basis for their apprehensions—but safeguarding the integrity of the bench will almost always be a worthwhile venture.

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[43] Stempel, *supra* note 28, at 34.
[44] Lee Epstein, ADVICE AND CONSENT (2005) at 8.
[45] *Id.*

In the abstract, Chief Justice Roberts asks if a more refined recusal standard is worth the risk of many more potential recusal motions. He makes it abundantly clear that *Caperton* is an extreme case and even uses the majority's words against them. His remarks raise the legitimate fear that every losing party will make a claim towards a biased judge.[46] Courts will supposedly be "forced to deal with a wide variety of *Caperton* motions" which implies some kind of burden conceived from the unique facts of *Caperton*.[47] To an extent, the Chief Justice is right, but the internal (fair results in the court of law) and external (public confidence that the courts are functioning correctly) motives are more than worth the cost of *Caperton* recusal motions.

Frivolous *Caperton* claims will more than likely be spotted right away. The Chief Justice himself stated that a judge's wisdom or honor should not be questioned.[48] If one were to take that into consideration, then the previous two resolutions mentioned above, coupled with an unquestionably wise bench, makes any recusal motions that much easier to handle. That would be the ideal situation. However, a "challenged judge who fails to recuse logically deprives the plaintiff of due process rights," which are of the utmost importance.[49] The nonrecusal in *Caperton*—as extreme the circumstances may seem—is egregious enough to compromise public confidence surrounding elected judges, which Chief Justice Roberts also notes is at stake here.[50]

It does not take a leap of faith to consider the negative impact that politics, in the abstract, have on judicial candidates and eventually judges. The public at large tend to react poorly to judges who are involved in political battles.[51] Ideally, the judicial branch should be as far away

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[46] Roberts, *supra* note 22, at 11.
[47] Roberts, *supra* note 22, at 12.
[48] Roberts, *supra* note 22, at 2.
[49] Stempel, *supra* note 28, at 56.
[50] Shugerman, *supra* note 37, at 2.
[51] Sarah Binder, ADVICE AND DISSENT (2009) at 137.

from political entanglement as possible but the nature of elections and the tools used to succeed in them run contrary to that ideal. Campaign advertisements are one such tool. Negative ads weaken the public confidence that a judge will have a steady hand in deciding cases.[52] Such mechanisms are simply a byproduct of selecting judges through elections. But if states are to remain steadfast with their approach to selection then they also must be prepared for a reasonable amount of recusal requests.

If states are uncomfortable with that notion, then they are free to change their selection processes. Justice Roberts even mentioned state deferment as to modes of selection and adjustments in recusal rules.[53] One might consider, in a roundabout way, that additional recusal rules may decrease the total amount of large campaign donations and alleviate financial issues before they even happen. That would work as a sort of legal chilling effect on superfluous campaign donations and avoid a *Caperton* recusal motion all together.

All things considered, a potentially demanding and burdensome process is better than a compromised bench. The first two resolutions (identifying thresholds for finances and establishing a temporal boundary on recusal) are, by nature, bright line rules. This does not eliminate the possibility of an effective 'vague' standard, but it does intend to discard certain unwanted characteristics. Uncertainty, inconsistency, and general arbitrariness tend to be associated with vague standards—all of which hamper the improvement of recusal doctrine.[54] Developing and enhancing the doctrine produced in *Caperton* can only lead to a more streamlined recusal process while eliminating situations akin to Judge Benjamin's before they even happen.

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[52] *Id.*
[53] Roberts, *supra* note 22, at 4.
[54] Ofer Raban, *The Fallacy of Legal Certainty*, PUBLIC INTEREST LAW JOURNAL, (2010), at 191.

IV. Conclusion

Caperton's unique dissent sheds valuable light on the difficult issues raised by constitutional recusal requirements in the American legal system. The importance of an unbiased judiciary is more than lauded—in fact, it's quite necessary—but the way in which to ensure impartiality is not clear cut. Chief Justice Roberts's formidable questions point out that the legal doctrine formulated from the majority's opinion, post-*Caperton*, would benefit from additional refinement. Refining recusal doctrine for potentially biased judges will surely benefit the legal system in one form or another—independent of their selection process. The selection process for judges varies across the country and states are more than able to adjust them as they please. *Caperton* shined a light on the potential shortcomings of judicial elections and the subsequent recusal problems, but judicial appointment is not immune from constitutional recusal requirements either. In sum, judicial selection processes are closely intertwined with recusal issues and its respective doctrine—which demands refinement. There are cases which are similar to *Caperton* and, although they may be few in number, they are certainly worth having a discourse over.

This essay explored the importance of a fair and impartial judiciary through the conduit of a case study. *Caperton v. A.T. Massey Coal Co.* was the featured case that explicated the potentially compromising nature of judicial elections. *Caperton* itself presented a unique set of facts that shed some light on campaign expenditures from parties that have personal stake in a case. The conceivably foul nature of combining money and the judiciary resulted in the majority's rather vague rule concerning recusal requirements. A doctrine which hoped to prevent future egregious ethical problems was met with a lengthy response from the dissent. Chief Justice Roberts' main concerns related to the workability of financial disproportionality, the legal

duration of potential bias, and the utility of additional safeguards in the aggregate. The essay aims at providing a stepping stone to potential resolutions. It hopes to operate as a kind of ice breaker towards alleviating Justice Robert's concerns with the subjectivity of the recusal doctrine. The position of a judge is certainly exalted in American culture and this essay does not seek to undermine that position. Judges, especially at the state level, are responsible for the task of administrating justice on a day to day basis and that alone is worth high regard. Refining recusal doctrine will only held to solidify the judiciary and improve the integrity of the American legal system. Finding ideal solutions that refine the doctrine of recusal will be exciting to observe.