

2010

Caperton: Correct Today, Compelling Tomorrow

James Sample

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 Syracuse L. Rev. 293 (2010)

Available at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship/496

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

CAPERTON: CORRECT TODAY, COMPELLING TOMORROW

James Sample[†]

CONTENTS

INTRODUCTION	293
I. CAPERTON: CORRECT TODAY	294
II. CAPERTON'S IMPORT TOMORROW.....	296

INTRODUCTION

*The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge. We certainly believe that, in this case, acting Chief Justice Benjamin crossed that line. — Theodore B. Olson.*¹

This symposium article asserts that *Caperton v. A.T. Massey Coal Co.*² is correct in result; correct in its narrowness; and correct in calling on courts to be more rigorous in recusal than due process requires. The article argues that *Caperton* is a model of judicial restraint and that, paradoxically for a decision overturning a state justice's non-recusal, the majority's approach is a model of cooperative federalism. These characteristics are particularly exemplified by the degree to which the opinion tracks the counsel offered by the Conference of Chief Justices, both as to what the opinion decides, and as to what it does not decide. Second, the article asserts that the breadth of support for the petitioners in *Caperton*, combined with state-level developments in the decision's aftermath, support the proposition that the decision's greatest impact will be not as dispositive precedent in itself, but in spurring greater

[†] Associate Professor, Hofstra Law School; J.D., Columbia Law School, 2003. From 2005 to June 2009, Professor Sample was counsel at the Brennan Center at NYU School of Law, where he co-authored multiple reports on judicial elections and recusal, and served as counsel on certiorari and merits stage amicus briefs in support of the petitioners in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

1. Paul J. Nyden, *Mining Appeal Moving Along*, THE CHARLESTON GAZETTE, May 16, 2008, at 1A (announcing Mr. Olson's representation of Harman Mining Company and its president, Hugh M. Caperton, in its petition for a writ of certiorari based on Justice Benjamin's refusal to recuse himself from *Caperton v. A.T. Massey Coal Co.*).

2. *Caperton*, 129 S. Ct. at 2252.

vigilance in recusal, both systemically and among individual jurists.

I. CAPERTON: CORRECT TODAY

Ted Olson's framing of the issue in *Caperton* was masterful, and, as the above quotation reflects, smartly limited in scope. The victory Olson earned is appropriately narrow and yet, simultaneously, significant for both client and cause. First, the decision ameliorates the wrong inflicted on Harman Mining Company and its owner, Hugh M. Caperton. The myriad extreme facts in the case presented the Court with a landmark question of constitutional law.³ But it was an easy state question that gave birth to the difficult federal issue. West Virginia's Code of Judicial Conduct required Justice Benjamin's disqualification whenever his impartiality "might reasonably be questioned."⁴ Under the code, Justice Benjamin's responsibility to disqualify was not a close call. Applying the facts to the terms of the state rule, "might" it have been "reasonable" to question Benjamin's impartiality? To answer that question in the negative not only strains credibility, but also renders the provision a nullity.

For those who argue that disqualification ought to be handled exclusively at the state level—that is, those who effectively argue that there is absolutely no constitutional floor regardless of whether the expenditures total \$3 million or \$30 million—it is important to acknowledge that if Benjamin had complied with the state rule, or if the state had otherwise ensured Benjamin's disqualification, there would have been absolutely no constitutional case. Yet the failure at the state level was so glaring that twenty-seven former state supreme court justices from around the country—hardly a group inclined to comment on close calls involving matters of their fellow jurists' ethics—filed an amicus brief stating unequivocally that, even apart from the

3. Respondents attempted to make much of the fact that Benjamin had voted against Massey—a frequent litigant in the West Virginia courts in close and clear cases alike—in other matters, including in cases with greater financial stakes. Brief for Respondents at 50-51, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165. Critics who have since repeated this argument are being careless at best. As petitioners noted in their reply, "neither Massey nor Justice Benjamin identifie[d] a single case . . . where Justice Benjamin has cast an outcome-determinative vote against Massey." Reply Brief for Petitioners at 10, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 476570.

4. See W. VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2009) (requiring a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."); see also James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, BRENNAN CTR. FOR JUST. (2008), available at http://brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ (noting the near universality of this standard in the states).

constitutional issue, the justices “uniformly believe[d] that the participation of Justice Benjamin created an appearance of impropriety. All *amici* participating in this brief would have recused if they had benefited from the level and proportion of independent expenditures by the CEO of a party to a case pending before the court.”⁵ Conspicuously, neither the dissenters nor other critics of federalizing the floor for disqualification offer anything to remedy that extant state-level shortcoming.

The dissents are efforts at misdirection, focusing on hypothetical future questions not before the Court,⁶ while conceding, in Justice Scalia’s words, that it is “[u]ndoubtedly” clear that “[i]n the best of all possible worlds” judges should “sometimes recuse even where the clear commands of . . . due process law do not require it.”⁷ The implication is that while ethical rules and judicial prudence counseled Benjamin’s recusal, Benjamin’s lack of compliance was simply Caperton’s “tough luck.” It is an approach that responds to the absence of a bright-line rule with a conception of a completely impotent constitution, incapable of providing case-by-case remedial protection. To be sure, Chief Justice Roberts’s questions in dissent point to several prospective challenges with which to grapple. But the questions, raised as a means of excoriating the Court’s majority, are addressed to the wrong audience.⁸ Chief Justice Roberts’s questions will be addressed (if at all) most appropriately in the first instance by the state courts themselves.⁹ This was a point made express in the most noteworthy brief in the case,

5. Brief *Amici Curiae* of 27 Former Chief Justices and Justices in Support of Petitioners at 5, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45979.

6. See *Caperton*, 129 S. Ct. at 2269-72 (Roberts, C.J., dissenting) (listing forty numbered questions that he characterizes as “only a few uncertainties that quickly come to mind.”).

7. *Id.* at 2275 (Scalia, J., dissenting).

8. Legal ethics expert Keith Swisher recently wrote an excellent piece in which he “respectfully dissent[ed] from the dissent” stating that “every question, save one or two, can be answered (and the ones that cannot seem to reflect more poorly on the questioner’s drafting than the majority’s analysis).” Posting of Keith Swisher to Judicial Ethics Forum, *Caperton: Answers to the Chief Justice’s “Twenty Questions” Times Two*, <http://judicialethicsforum.com/2009/06/15/caperton-answers-to-chief-justice-roberts-twenty-questions-times-two> (June 15, 2009, 8:50 EST). Swisher also noted that “an umpire who merely calls balls and strikes should be less concerned with questions not before the court, and indeed, [that] every case could spawn a multitude of forward-looking questions not raised by the facts at hand.” *Id.* Swisher’s article goes on to propose answers to each of the 40 questions, and should be considered a must-read for those interested in the case. *Id.*

9. Brief of the Conference of Chief Justices as *Amicus Curiae* in Support of Neither Party at 10, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45973 [hereinafter C CJ Brief].

that of the Conference of Chief Justices (CCJ).¹⁰ The CCJ's unique perspective was lost neither on Olson, nor on the Court majority—a fact strikingly indicated by an astounding ten express mentions of the CCJ brief at oral argument.¹¹ Crafted on behalf of the CCJ by former Texas Chief Justice Tom Phillips, Georgetown Professor Roy Schotland, and D.C. attorney George Patton, the brief said, in essence, four things: (1) “the Constitution may require the disqualification of a judge in a particular matter because of extraordinarily out-of-line campaign support from a source that has a substantial stake in the proceedings”;¹² (2) “[b]ecause the applicability of the Due Process Clause in the campaign spending context depends on the particular facts of each case, no bright-line rule can or should be attempted”;¹³ (3) fears that a ruling constitutionally requiring disqualification would “open the floodgates”—such as those ultimately articulated by Chief Justice Roberts and Justice Scalia—were “unfounded”;¹⁴ and (4) “due process review . . . would be limited to cases of extraordinary support.”¹⁵

The Chief Justice's failure to heed his state counterparts' counsel, resulted in what one editorial called “the only truly alarming thing about [the] decision”—the lack of unanimity despite Chief Justice Roberts's fondness for “likening a judge's role to that of a baseball umpire,” noting that “[i]t is hard to imagine that professional baseball or its fans would trust the fairness of an umpire who accepted \$3 million from one of the teams.”¹⁶ The majority, on the contrary, issued a restrained, fact-bound opinion. It set a floor without drawing unnecessary and sweeping bright lines, and without answering questions not presented—i.e., the majority decided the case in exactly the manner suggested by the state chief justices themselves. Accordingly, *Caperton* can be seen as a model of cooperative federalism, and Olson, indisputably among the nation's premier federalists, deserves credit for recognizing so early on the case's potential to be just that.

II. *CAPERTON*'S IMPORT TOMORROW

Ameliorating a real-world wrong in a \$50 million case is hardly

10. *Id.*

11. See Transcript of Oral Argument at 16, 17, 19, 23-24, 46, 53, *Caperton*, 129 S. Ct. 2252 (No. 08-22), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf.

12. CCJ Brief, *supra* note 9, at 4.

13. *Id.* at 22.

14. *Id.* at 23.

15. *Id.*

16. Editorial, *Honest Justice*, N.Y. TIMES, June 9, 2009, at A26.

trivial, yet the case's potentially lasting influence is reflected in Olson's quotation above: *Caperton* establishes, for the first time, against a national backdrop of recent, exponential increases in judicial campaign spending, an outer boundary of constitutional magnitude.¹⁷ While the decision, like the petitioners' position before the Court, was mostly though not unanimously cheered across the legal, judicial, and media spectrum,¹⁸ a few observers perceive it to be a kind of one-trip-only case.¹⁹ Whether or not that proves true over time, the Court's analytical

17. Nyden, *supra* note 1, at 1A.

18. *Caperton* has been particularly well received among jurists. See John Schwartz, *Uncertainty in Law Circles Over New Rules for Judges*, N.Y. TIMES, June 10, 2009, at A20 (citing Alabama Chief Justice Sue Bell Cobb's view that *Caperton* is a "good thing" because it will push judges to be more careful"); Posting of Nathan Koppel to Wall Street Journal Law Blog, *Massey Coal Ruling Getting Thumbs Up in Judicial Circles*, <http://blogs.wsj.com/law/2009/06/08/massey-coal-ruling-getting-thumbs-up-in-judicial-circles> (June 8, 2009, 14:47 EST) (noting, among others, Indiana Justice Randall Shepard's view that "it was wise of the majority to focus not just on the amount of a particular contribution . . . , but its size relative to the total amount of contributions"); see also Posting of Tony Mauro to The BLT: The Blog of the Legal Times, *Coping with Caperton*, <http://legaltimes.typepad.com/blt/2009/06/coping-with-caperton-a-conversation-with-tom-phillips.html> (June 10, 2009, 16:21 EST) (quoting former Texas Chief Justice Tom Phillips's view that "Caperton established a principle that is really important: There are constitutional concerns with a judge sitting in judgment of a case where a party is a significant donor."). Meanwhile, academics and media have largely echoed American University's Amanda Frost's assessment of the opinion as "a victory for common sense and fundamental fairness." Amanda Frost, Op-Ed., *Only a Partial Win*, NAT'L L.J., June 15, 2009, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431401637&Only_a_partial_win&sIreturn=1; see, e.g., Editorial, *Honest Justice*, *supra* note 16 (describing the "right to a fair hearing before an impartial judge" as "more secure" following the decision).

19. This critique has been credibly raised by, among others, Linda Greenhouse, for whom I have enormous respect, but with whom I disagree on this score. Linda and I, along with others including Rick Pildes, have engaged in something of a public dialogue on the topic of her critique. See Posting of Linda Greenhouse to The Supreme Court Breakfast Table, <http://www.slate.com/id/2220927/entry/2221229/> (June 24, 2009, 10:06 EST) (in which Greenhouse laments the grant of certiorari because, in her view, the case always "promised more than it could possibly deliver"). My response to Linda along with her rejoinder may be found at http://www.brennancenter.org/blog/archives/phillips_on_caperton/. See Posting of James Sample to Brennan Center for Justice Blog, *Phillips on Caperton*, http://www.brennancenter.org/blog/archives/phillips_on_caperton (June 25, 2009); see also Posting of Rick Hasen to Election Law Blog, *A Clearer Read of James Samples' Comments on Greenhouse on Caperton*, <http://electionlawblog.org/archives/013954.html> (June 25, 2009, 10:30 EST) ("For what it's worth, I agree with James. I think Linda understates the potential of the opinion to change the role of money in judicial elections."); Posting of Rick Pildes to Balkinization, *Caperton and Boundary-Enforcing Justices Part II: How Vague Law Can Create Stable Outcomes*, <http://balkin.blogspot.com/2009/06/caperton-and-boundary-enforcing.html> (June 25, 2009, 14:15 EST) (asserting that in analyzing the decision, Greenhouse and Chief Justice Roberts "fail to consider . . . that the enforcement might include other institutional actors not constrained in the same way the Court is.").

approach makes clear that judicial campaign expenditures implicate, in addition to the First Amendment, unique countervailing due process interests—interests that the states must protect to a minimum degree, and should protect to a greater degree. In ordinary, garden variety conflicts, the hortatory “should” will almost certainly prove more consequential than the mandatory “must.” Regardless, it is now a matter of settled law that due process interests warrant an accounting. It is the boundary-enforcing aspect that makes *Caperton*, in the words of Rick Pildes, a “pathbreaking” decision of “momentous” import “for the future of judicial elections and disputes over judicial bias.”²⁰ Similarly, Rick Hasen, one of the nation’s leading election law experts, asserts that “*Caperton* provides a backstop for the most egregious cases of large campaign spending,” particularly when other measures are “off the table or severely limited.”²¹

The magnitude of the broader national crisis in the courts—embodied at its extreme by *Caperton*—is perhaps best articulated by Justice Sandra Day O’Connor, who opened an April 2008 conference by stating bluntly: “We put cash in the courtrooms, and it’s just wrong.”²²

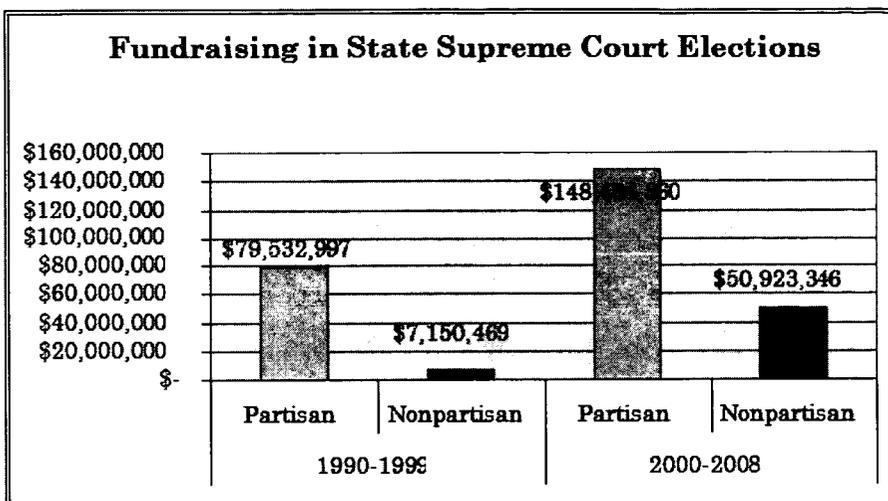
Trends indicate recent, game-changing increases in the amount of that cash. In the four election cycles concluding in 2006, judicial candidates raised \$157 million, nearly double the amount raised in the four election cycles preceding 1999.²³ Another way to look at the numbers is to compare the increases in partisan and nonpartisan state supreme court elections respectively. As the graph below indicates, in both instances candidate fundraising in the 2000s through the year 2008 alone, literally dwarfs the totals for the entirety of the 1990s.

20. Posting of Rick Pildes to Balkinization, *Caperton and the Supreme Court’s Boundary Enforcing Role*, <http://balkin.blogspot.com/2009/06/caperton-and-supreme-courts-boundary.html> (June 8, 2009, 12:05 EST).

21. Posting of Rick Hasen to Election Law Blog, *Initial Thoughts on Caperton v. Massey: First Meaningful Limits on Excesses of Judicial Elections*, <http://electionlawblog.org/archives/013784.html> (June 8, 2009, 7:58 EST).

22. Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash ‘in the Courtroom’*, N.Y. TIMES, Apr. 15, 2008, at A22.

23. JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 15, available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf>.



24

When, as in *Caperton*, the principal sources of financial support are central stakeholders or counsel in cases pending before their beneficiary's courts, the perception of impartial justice suffers.²⁵

24. The fundraising totals in the graph are based upon aggregated data from the National Institute on Money in State Politics. The data is available at Nat'l Inst. On Money in State Politics, <http://www.followthemoney.org>. For purposes of the figures illustrated above, the partisan category includes: Alabama, Illinois, Louisiana, Michigan, North Carolina, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia. The nonpartisan category includes Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Nevada, Oregon, Washington and Wisconsin. Ohio and Michigan are categorized as partisan states, even though candidates are not identified by party on the ballots. In both states, candidates are identified with parties during the campaign season; in Michigan, parties nominate the candidates. Illinois justices are first selected in partisan elections and thereafter stand in retention elections. In New Mexico, justices are appointed but must run in a partisan election the first time they defend their office; after that, all elections are retention contests. In Montana, justices run in nonpartisan, contested elections; incumbents without an opponent run in retention elections. North Carolina held partisan elections until the 2004 cycle, when public funding was introduced and high court elections became nonpartisan. In Pennsylvania, candidates run for a first full term in partisan elections and run in retention elections thereafter.

25. Indeed, polling done by USA Today for a front-page article on the *Caperton* case yielded striking results: "89% of those surveyed believe the influence of campaign contributions on judges' rulings is a problem" and "[m]ore than 90% of the 1,027 adults surveyed said judges should be removed from a case if it involves an individual or group that contributed to the judge's election campaign." Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA TODAY, Feb. 17, 2009, at A1, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm. Other national surveys have indicated that over seventy percent of Americans think campaign contributions have at least some influence on judicial decisions. See GREENBERG QUINLAN ROSNER RESEARCH INC. ET AL., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001),

A cursory glance at scenarios from around the country reveals that, while *Caperton* was exceptional, there is no shortage of less extreme scenarios that nonetheless implicate basic fairness concerns:

Less than two months after being disciplined by the Wisconsin Supreme Court for ruling, while a lower court judge, on eleven cases involving a bank for which her husband served as a director, Justice Annette Ziegler authored a 4-3 decision in favor of the position advocated by a group that spent over \$2 million supporting her 2007 election.²⁶ As with Blankenship's expenditures compared to Benjamin's, that sum alone was more than the entire total of Ziegler's own campaign's expenditures.²⁷ The group had "long considered the case a top priority."²⁸

In a 2004 race for a seat on the Illinois Supreme Court, two candidates raised more than \$9.3 million combined, a figure that outpaced candidates in 18 U.S. Senate races that year, and which was nearly double the previous national record for a judicial election.²⁹ The winner of the election, then-trial judge Lloyd Karmeier, reflected on the six-figure checks that poured into both sides of the campaign—including from competing sides in a then-pending appeal—saying: "That's obscene for a judicial race . . . What does it gain the people? How can people have faith in the system?"³⁰ Karmeier nonetheless refused to recuse himself from the pending appeal and then ruled in favor of his supporters.³¹

The perception that campaign contributions buy influence on the bench in pending or imminent cases is so strong that litigants and lawyers give even when their candidate cannot lose: A 2006 *Los Angeles Times* study found that even Nevada judges running

available at http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf; JUSTICE AT STAKE CAMPAIGN, MARCH 2004 SURVEY HIGHLIGHTS: AMERICANS SPEAK OUT ON JUDICIAL ELECTIONS 4 (2004), available at <http://www.faircourts.org/files/zogbypollfactsheet.pdf>; JAMES L. GIBSON ET AL., THE EFFECTS OF JUDICIAL CAMPAIGN ACTIVITY ON THE LEGITIMACY OF COURTS: A SURVEY-BASED EXPERIMENT, PENNSYLVANIA, 2007, at 5 (2009), available at <http://polisci.wustl.edu/media/download.php?page=faculty&paper=157> (finding that many citizens believe contributions to judicial candidates imply a conflict of interest and undermine perceptions of court legitimacy).

26. Patrick Marley & Stacy Forster, *Ziegler, Big Lobby Think Alike*, MILWAUKEE J. SENTINEL, July 12, 2008, at A6, available at <http://www.jsonline.com/news/statepolitics/29473254.html>.

27. *Id.*

28. *Id.*

29. DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 14-15, 32 (2005), available at http://brennan.3cdn.net/dd00e9b682e3ca2f17_xdm6io68k.pdf.

30. *Id.* at 19.

31. See James Sample, *The Campaign Trial*, SLATE, Mar. 6, 2006, <http://www.slate.com/id/2137529>.

unopposed collected hundreds of thousands of campaign dollars from litigants and lawyers.³² The study noted that the donations were frequently via checks dated “within days of when a judge took action in the contributor’s case.”³³

The worsening of these trends prior to *Caperton* is at least partly attributable to an unexpected source—judicial independence advocates whose singular focus on appointments rather than elections may, in certain instances, distract from more achievable fairness protections.

Judicial selection presents something of a familiarity divide. Even in the most fiercely contested jurisdictions, dynamics associated with sleeper periods in state judicial politics, such as low voter turnout, persist.³⁴ One consequence of this divide is the further ossification of judicial selection practices. Thus, while many reformers and commentators call for changes, including most frequently, for state judiciaries to abandon the elective process,³⁵ that drumbeat, from the

32. Michael J. Goodman & William C. Rempel, *In Las Vegas, They’re Playing with a Stacked Judicial Deck*, L.A. TIMES, June 8, 2006, at A1, available at <http://articles.latimes.com/2006/jun/08/nation/na-vegas8>.

33. *Id.*

34. Wisconsin’s 2008 contest for a seat on the state’s high court provides one recent exemplar. On the one hand the state witnessed a racially-charged, contentious, and high-profile contest that broke a state record for expenditures in a judicial campaign. The Annenberg Foundation’s popular website, Factcheck.org, described the contest as a “Wisconsin throwdown.” Viveca Novak, *Winning Ugly in Wisconsin*, FACTCHECK.ORG, Apr. 4, 2008, http://www.factcheck.org/elections-2008/winning_ugly_in_wisconsin.html. At the same time, however, voter turnout in the April 1, 2008 election was below 20 percent. See JUSTICE AT STAKE CAMPAIGN, FACT SHEET: WISCONSIN 2008 SUPREME COURT CAMPAIGN, <http://www2.justiceatstake.org/files/WI2008factsheet.pdf> (noting that turnout fell short of the State Board of Elections’ predicted turnout of 20 percent). There is some evidence that the more hotly contested the campaign, the greater the interest. Laurence Baum and David Klein, for example, compared two supreme court elections in Ohio and found that voter roll-off in the lower visibility contest was double that of the higher visibility contest. See Laurence Baum & David Klein, *Voter Responses to High Visibility Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 141-56 (Matthew J. Streb ed., 2007). Relative to top-of-the-ticket races, however, voter roll-off rates in judicial elections are indisputably, and perhaps appropriately, significant. To consider just one recent high profile supreme court election as an example, in 2008 Michigan’s then-Chief Justice, Cliff Taylor, was defeated in one of the nation’s most contentious and controversial judicial elections. Nonetheless—indeed perhaps appropriately—while over five million Michigan voters, cast ballots in the Presidential race, 1.2 million of those voters chose not to vote in the contest for the Chief Justice’s seat. See 2008 Michigan General Election Results, <http://miboecfr.nicusa.com/election/results/08GEN> (last visited Dec. 29, 2009).

35. David Pozen, for example writes, “Those who would have the judiciary be more than just another majoritarian branch might do well to . . . remind the public and each other that there is no adequate remedy for this threat save to dismantle judicial elections.” David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 330 (2008). It is worth noting, however, that Pozen is also an advocate of strengthened recusal standards, having

public's perspective rarely, if ever, reaches levels of widespread salience. In turn, and while only small percentages of citizens in states with elective judiciaries actually vote in judicial races, inertia and/or apathy generally stymies efforts aimed at taking away their right to do so because fundamental changes to state judicial selection methods often require popular approval by the voters.³⁶ Consequentially, repeated calls for fundamental changes prove to be of scant pragmatic value. Moreover, appointment-system proponents may actually be *contributing* to the degradation of judicial fairness via an excessive emphasis on unrealistic, anti-populist changes rather than a focus on achievable incremental measures. The factual backdrop—rarely mentioned in the rhetoric—reflects that the last state to move from a system of judicial elections to merit selection was New Mexico, which did so in 1988.³⁷ Such a picture, when viewed in conjunction with the dramatic worsening of trends in judicial elections, ought to occasion at least a bit of discomfort among appointment advocates who see themselves as agents not only of their preferred reform but more fundamentally, of the values of due process and judicial independence.³⁸ An early acknowledgment of this dynamic appeared in the “Call to Action” coming out of a National Summit on Improving Judicial Selection. The summit, which was comprised of a who’s who of state judges, court administrators, reform groups and scholars, offered a multi-page proposal of selection reforms premised on the notions that “movement away from systems providing for contested election of

co-authored multiple papers on the subject. See Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 504 (2007); James Sample, David Pozen & Michael Young, *Fair Courts: Setting Recusal Standards*, *supra* note 4.

36. An interesting recent op-ed by the former Chief Justice of the Nevada Supreme Court, Bob Rose, a proponent of a commission-based appointive process, criticizes the often false populist outcry of “elitism” against merit-based appointment commissions. Bob Rose, *Nevada’s Judicial Selection Commission Has a Proven Track Record*, RENO GAZETTE-J., July 26 2009, available at <http://m.rgj.com/detail.jsp?key=226716&rc=op&full=1>.

37. New Mexico’s system, for that matter, is hardly resounding in its rejection of the democratic process, involving merit selection to fill all vacancies, followed by contestable partisan elections, followed by retention elections. See Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 793 (2004) (noting that “[p]opular support for constitutional change from judicial elections to merit selection systems has declined significantly over the past three decades.”).

38. Questions as to the relative merits of elective and appointive systems are beyond the scope of this article. Indeed, my personal agnosticism on that debate is born of pragmatics, i.e., of the view that because of political realities, nuanced incremental protections for judicial fairness—such as public financing and strengthened recusal practices—are more likely to produce real-world results than additional categorical indictments of (depending on the source) elective or appointive systems.

judges has not occurred” and that “[t]oo little attention has been given to incremental changes in the judicial election process to address some of the most serious threats to judicial independence.”³⁹

The broad amicus support for the petitioners in *Caperton*—including CCJ’s strong support for the petitioners’ legal arguments—is not only a tangible product of that call to action, but also represents a further softening in the appointments-or-bust mentality of some judicial reformers. Amici spanning the spectrums of political right and political left; of trial attorneys and business giants like Intel, Wal-Mart, Pepsico, Lockheed Martin; of former jurists and the American Judicature Society along with bar organizations including the ABA; and from both sides of the binary elections versus appointments debate, coalesced around the core principle that, while opinions differ as to optimal selection methods, the judiciary, regardless of how selected, must respect—and protect—core minimum fairness values.⁴⁰ The breadth of support for petitioners, combined with all nine of the justices acknowledging (in their respective opinions) the uncontroversial purview of the states to enact “more rigorous” recusal measures than due process requires, provides real momentum for state-based recusal reform efforts.⁴¹

Noting the split between overzealous advocates who see *Caperton* as the final nail in the coffin for judicial elections, and those, who like Chief Justice Roberts, see it as opening the recusal floodgates, Eliza Newlin Carney writes that “both scenarios miss the mark. The ruling’s more likely outcome is that state supreme courts will establish and enforce clearer recusal rules for judges who may face conflicts of interest, guidelines that are long overdue.”⁴² Strengthened recusal

39. Symposium, *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1354 (2001); see also Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1279 (2008) (noting that changing election systems “can be a worthy goal and one well worth pursuing . . . , but not at the expense of ignoring shorter-term remedies that can make a bad system better in the interim.”). In many respects, the American Judicature Society, which staunchly and unapologetically promotes merit selection, but which has also proven to be a reliable supporter of interim efforts to protect judicial independence in elective systems—such as their support for petitioners in *Caperton*—is a model of the triage advocated by Professor Geyh.

40. A complete list of *amici* in the case, along with highlighted excerpts from their respective legal arguments, may be found at http://www.brennancenter.org/content/resource/caperton_v_massey/.

41. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (“States may choose to ‘adopt recusal standards more rigorous than due process requires.’” (quoting Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring))). “States are, of course, free to adopt broader recusal rules than the Constitution requires.” *Id.* at 2268-69 (Roberts, C.J., dissenting).

42. Eliza Newlin Carney, *A Win for Fairer Courts*, NAT’L J. ONLINE, June 15, 2009,

practice is not a panacea for the courts, but it is an important step. Indeed, since *Caperton*, California, Nevada, Wisconsin, Michigan, West Virginia, Ohio, and Washington have begun or continued reviews of their existing recusal practices.⁴³ Many are zeroing in on what Indiana professor Charlie Geyh calls “the questionable practice” of relying “too heavily on judges to evaluate their own disqualification.”⁴⁴ *The Economist* tartly captured the problem by noting that “Mr. Benjamin found he was unbiased after deliberating with himself.”⁴⁵ If, as seems likely, *Caperton* spurs courts and judges to confront that practice, then regardless of how often *Caperton* applies as dispositive precedent in itself, the decision will not only be correct today, but compelling tomorrow.

http://www.nationaljournal.com/njonline/rg_20090615_7680.php.

43. The Brennan Center will be continually tracking and updating state-level developments on disqualification reform at http://www.brennancenter.org/content/resource/state_judicial_reform_efforts_2009/ (click on 2009 Judicial Disqualification Initiatives in the States).

44. Carney, *supra* note 42.

45. *United States: Not for Sale*, *ECONOMIST*, June 11, 2009, at 36.