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Caperton v. A.T. Massey Coal Co.: A Ten-Year Retrospective on Its Impact on Law and the Judiciary

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CAPERTON V. A.T. MASSEY COAL CO.: A TEN-YEAR RETROSPECTIVE ON ITS IMPACT ON LAW AND THE JUDICIARY

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I. INTRODUCTION

On June 8th, 2009, the United States Supreme Court issued its decision in *Caperton v. A.T. Massey Coal Co*.[1] The *Caperton* decision was important because it marked the first time *any* American court ruled that the Constitution's guarantee of due process required a judge's recusal, if that judge received a disproportionate amount of financial support from a litigant in an election campaign.[2] This was true, although states had been popularly electing judges and litigants had been able to financially support their campaigns, since 1832.[3] Judicial recusal to avoid conflicts of interest has been a part of the American legal landscape from its inception. The idea that judges should not preside over cases in which their financial interests were at stake traveled with the common law to England's North American colonies and became a part of American legal tradition.[4] Over decades, the grounds for recusal expanded beyond the narrow grounds originally prohibited by England's common law, as the United States developed its own common law,[5] and as the states and the federal government enacted statutes that made more conflicts of interest subject to judicial recusal.[6] However, until *Caperton*, financially supporting judges in their election campaigns through lawful means had not been seen as creating a conflict of interest that called a judge's impartiality into question.

Caperton prompted a bevy of predictions from journalists, activists, academics, and judges about what its implications would be for judicial elections, and judicial recusal rules generally, throughout the United States' judicial system. The dissenting justices in *Caperton* expressed fear that the reputation of state courts would be undeservedly brought into disrepute and that a loss of public confidence in the judiciary would be the result.[7] Outside of the Court,

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1 556 U.S. 868 (2009).

2 Robert Barns, *Court Ties Campaign Largess to Judicial Bias*, WASH. POST, June 9, 2009, at A1.

3 PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 3 (1980).

4 *See, e.g.*, John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611 (1947); Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 680 (2011); Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 826 (2009).

5 *See generally* Geyh, *supra* note 4, at 680–81.

6 *Id.*

7 Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 902–03 (2009) (Roberts, C.J., dissenting) (Scalia, J., dissenting).

some predicted that *Caperton* would not be followed by lower courts because of its extreme facts or because of its unworkable standards.[8] Others opined that *Caperton* would lead to the "federalization" of state recusal law,[9] while others believed that *Caperton* would spur states to reform their recusal procedures.[10] Some hoped that the decision would highlight the significant sums of money being spent in judicial election campaigns and encourage the use of public financing in these elections.[11] Some feared that the decision could mean the end of judicial elections.[12]

By surveying state and federal case law, and by looking at changes in state judicial recusal rules, this study will examine how *Caperton* was received by the nation's courts and legislatures over its first decade. Overall, the survey reveals that federal and state courts chose not to use *Caperton* as a vehicle for changing judicial ethics rules: less than 250 published cases even mentioned *Caperton*, and in only one of those cases did a court find that a litigant's due process rights had been violated because of disproportionate financial support for the judge's campaign.[13] The survey also revealed that among the 40 states that hold judicial elections, and that did not already have rules addressing judges presiding over cases involving contributors before 2009, only 15 states adopted statutes or ethics rules that establish a duty of recusal in some situations when a case involves lawyers or litigants who have contributed to a judge's campaign, and that only four of those states adopted a rule that resembled the American Bar

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8 *See, e.g.*, James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of* Caperton v. Massey, 60 SYRACUSE L. REV. 305, 327 (2010); Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After* Republican Party of Minnesota v. White, Caperton *and* Citizens United, 64 ARIZ. L. REV. 1, 5 (2011)*; see also* Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. APP. PRAC. & PROCESS 47, 121–22 (2015); *cf.* Brief of the States of Ala. et al. as Amici Curiae Supporting Respondents at 18–27, *Caperton*, 556 U.S. 868 (No. 08-22).

9 Terri R. Day, *Buying Justice:* Caperton v. A.T. Massey*: Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. COLL. L. REV. 359, 363 (2009).

10 *See, e.g.*, Burt Brandenburg, *Funding Justice: Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 213–14 (2010); Adam Liptak, Keith Swisher, James Sample, & Bradley A. Smith, *Caperton and the Courts: Did the Floodgates Open?*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 481, 486–88 (2015); Amanda Bronstad, *Stage Set for Litigation over Judicial Recusal*, NAT'L. L.J. (June 22, 2009, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202431597348/stage-set-for-litigation-over-judicial-recusal/ (quoting James Alexander, Executive Director of the Wisconsin Judicial Commission, "Obviously, this will force states to review how they look at recusal, especially in light of the campaign contributions and the issue of financial support given to candidates by third parties, whether independent expenditures or through third-party groups.").

11 *See, e.g.*, Brandenburg, *supra* note 10, at 207–08; James Sample, *Court Reform Enters the Post*-Caperton *Era*, 58 DRAKE L. REV. 787, 788 (2010).

12 *Cf.* Brief of Ten Current & Former Chief Justices & Justices as Amici Curiae in Support of Respondents at 11–17, *Caperton*, 556 U.S. 868 (No. 08-22).

13 *See infra* Sections III.E, III.F.

Association's Model Rule 2.11(A)(4), which lists specific amounts of contributions that require a judge's recusal.[14]

This Article also suggests several factors that might have contributed to the reception that *Caperton* received in the nation's courts and state legislatures. First, *Caperton*'s reception in the courts can be partially explained by the language used in the opinion of the Court. Scholars have long understood that state and federal courts can blunt the impact of a Supreme Court decision by distinguishing it from the cases before it or by narrowing it to its facts.[15] However, recent scholarship suggests that the Court can induce greater compliance with its decisions in the lower courts by using specific types of language in its opinions, and this Article suggests that *Caperton* could be an example of the Court exercising this kind of control.[16] Second, this Article adopts a novel approach to understanding states' decisions about whether to change their judicial recusal laws to address campaign finance conflicts of interest by testing the hypothesis that the likelihood of reform efforts was linked to perceived levels of corruption in state government.[17]

Part II of the Article will discuss *Caperton*'s facts, along with the opinion of the Court and the dissenting opinions. Part III will discuss predictions that were made by the justices, academics, state court judges, and others about *Caperton*'s impact. Part IV will examine how *Caperton* has been interpreted and applied by state and federal courts in its first decade, along with the states' legislative and regulatory responses to the judicial conflict of interest problem that it highlighted. Part V offers explanations for *Caperton*'s reception at the state level. Specifically, it presents an argument about how the wording of the Court's opinion in *Caperton* might explain its reception in the judiciary. It also presents a model to test the hypothesis that perceived levels of government corruption might have influenced states' decisions about whether to reform their judicial ethics rules to during the decade. Part VI offers final thoughts about future research questions and a possible future scenario under which *Caperton* could become a more influential decision.

II. AN EXTRAORDINARY CASE BORN OF EXTRAORDINARY FACTS

Caperton v. *A.T. Massey Coal Co*. was a case born of extraordinary facts. It started when Hugh Caperton, the lead plaintiff,[18] sued A.T. Massey Coal Co. and its affiliates for fraudulent misrepresentation, concealment, and tortious

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14 *See infra* Section IV.A.

15 *See infra* Section IV.C.

16 *See infra* Section IV.C.

17 *See infra* Sections IV.C, V.A–V.B.

18 The other plaintiffs in the case were Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009).

interference with existing contractual relations in West Virginia.[19] In August 2002, a jury awarded the plaintiffs $50 million in compensatory and punitive damages.[20] The trial court denied Massey's motion to have the verdict and damage award set aside in June 2004 and denied its motion for judgment as a matter of law in March 2005.[21]

As the state's only appellate court, the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court") would consider any appeal that Massey filed.[22] Hoping to improve Massey's chances of winning on appeal, Don Blankenship, Massey's chairman and chief-executive officer, decided to intervene in the state's upcoming supreme court elections in fall 2004.[23] In that election, Democratic Justice Warren R. McGraw was seeking reelection against a Republican challenger, Brent Benjamin. Blankenship began a campaign to unseat McGraw, charging that McGraw was bad for the business climate in West Virginia and criticizing him for voting to release a convicted sex offender.[24]

Blankenship went to extraordinary lengths to elect Benjamin. He gave $1,000 in direct contributions to Benjamin's campaign, which was the maximum allowed under state law.[25] He also gave $2.5 million to a non-profit organization called "And for the Sake of the Kids."[26] The organization took advantage of a provision of the federal tax code[27] which allowed it to raise unlimited funds to engage in political advocacy without having to pay federal income taxes.[28] Blankenship hired a political consultant to run "And for the Sake of the Kids," which ended up raising and spending a total of $3.7 million to elect Benjamin.[29] Blankenship spent an additional $500,000 in independent campaign expenditures in support of Benjamin[30] and gave $100,000 to another political action committee

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19 *Id.*

20 *Id.*

21 *Id.*

22 *Supreme Court of Appeals*, W. VA. JUDICIARY, http://www.courtswv.gov/supreme-court/index.html (last visited Sept. 3, 2021).

23 *See Caperton*, 556 U.S. at 873.

24 Brad McElhinny, *Big-Bucks Backer Felt He Had to Try, Coal Executive Put $1.7 Million into Fierce Battle Against McGraw*, CHARLESTON DAILY MAIL, Oct. 25, 2004, at 1A.

25 *Caperton*, 556 U.S. at 873.

26 *Id.*

27 26 U.S.C.A. § 527 (West 2021).

28 *See Caperton*, 556 U.S. at 873.

29 Hoppy Kercheval, *Beth Walker Challenging Justice Brent Benjamin for Supreme Court Seat*, WV METRO NEWS (June 5, 2015), https://wvmetronews.com/2015/06/05/beth-walker-challenging-justice-benjamin/.

30 *Caperton*, 556 U.S. at 873.

that was also working to defeat McGraw.[31] In total, Blankenship spent over $3 million to elect Benjamin, which was more than the amount spent by all other Benjamin supporters combined, and three times the amount that Benjamin's campaign spent.[32] Benjamin ultimately unseated McGraw 53.3% to 46.7% in the November general election.[33]

In October 2005, Caperton moved to disqualify the newly elected Justice Benjamin from participating in the case, even before Massey petitioned for an appeal.[34] Caperton argued that Blankenship's support for Benjamin created a conflict of interest that required Benjamin's disqualification under the Due Process Clause of the Fourteenth Amendment and the West Virginia Code of Judicial Conduct.[35] In April 2006, Justice Benjamin denied the motion to disqualify himself, claiming that he had not been presented with any "objective information" indicating that he was biased against either side in the case.[36]

Massey filed its petition for appeal to the West Virginia Supreme Court in December 2006.[37] The court granted the petition, and, in November 2007, reversed the $50 million verdict against Massey, three-to-two, with Justice Benjamin casting the deciding vote in favor of Massey.[38] Caperton sought a rehearing, and both Massey and Caperton moved for disqualification of three of the five justices who decided the case: Justice Benjamin, Justice Elliot Maynard, and Justice Larry Starcher.[39] Justice Maynard granted Caperton's motion, acknowledging that he had vacationed with Blankenship while the case was pending, and Justice Starcher granted Massey's motion, acknowledging that he had publicly criticized Blankenship's involvement in Justice Benjamin's 2004 election.[40] Of the three justices, only Justice Benjamin refused to disqualify himself from the case.[41] The court granted the rehearing with Justice Benjamin assuming the role of acting chief justice.[42] In that capacity, he appointed two lower court judges to replace the recused justices.[43] Caperton then made a third motion for Justice Benjamin's disqualification, arguing that Justice Benjamin

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31 Paul J. Nyden, *Opponents in Massey Suit Want Benjamin Off Bench*, CHARLESTON GAZETTE, Oct. 22, 2005, at 2A.

32 *Caperton*, 556 U.S. at 873.

33 *See id.*

34 *Id.* at 873–74.

35 *Id.*

36 *Id.* at 874.

37 *Id.*

38 *Id.*

39 *Id.* at 874–75.

40 *See id.* at 874–75.

41 *Id.*

42 *Id.* at 875.

43 *Id.*

had applied the wrong standard for disqualification under West Virginia law, and citing opinion polling evidence that two-thirds of West Virginians doubted his ability to be impartial in this case.[44] Justice Benjamin again refused to withdraw from the case.[45]

The reconstituted court again divided three–two in favor of Massey in April 2008, with Justice Benjamin again in the majority.[46] In July 2008, Caperton petitioned the Supreme Court of the United States for a writ of certiorari to review the West Virginia Supreme Court's decision overturning the plaintiffs' verdict, which the Court granted.[47]

A. The Supreme Court's Opinion and the Dissents

The Court considered Caperton's claims that the Due Process Clause gave him a right to an impartial tribunal[48] and that Blankenship's overwhelming efforts to elect Justice Benjamin created a probability of bias in favor of Blankenship that violated this right.[49] A five-justice majority decided the case in Caperton's favor. Writing for the Court, Justice Anthony Kennedy rooted his opinion in the Court's previous decisions regarding due process and judicial disqualification. He began by noting that at common law, judges were required to recuse themselves when they had "a direct, personal, substantial, pecuniary interest" in the case and that this principle was enshrined in the Constitution's due process guarantee.[50] Kennedy then noted two additional situations in which the Court previously held that due process required recusal. The first situation was when a judge had a financial interest in the outcome of a case that was not as direct as that required by common law.[51] The situation that typifies such a conflict is when a judge receives compensation for finding a defendant guilty.[52] Summarizing the Court's cases involving these situations, Kennedy claimed that the mere existence of an incentive to be biased against a litigant constituted a due process violation; proof of actual bias was not required.[53]

The second situation in which the Court held that recusal was mandated by the Due Process Clause was when a judge had a conflict of interest in a case arising from the judge's participation in an earlier proceeding in the same case.

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44 *Id.*

45 *Id.*

46 *Id.*

47 *See id.* at 875–76.

48 Brief for Petitioners at 3, *Caperton*, 556 U.S. 868 (No. 08-22).

49 *Id.* at 15–16.

50 *Caperton*, 556 U.S. at 872, 876.

51 *Id.* at 877–78.

52 *Id.* at 877 (citing Tumey v. Ohio, 273 U.S. 510, 520 (1927)).

53 *Id.* at 878.

As an example, Kennedy mentioned the Court's decision in *Mayberry v. Pennsylvania*,[54] which concerned a judge who found a defendant guilty of several counts of criminal contempt for repeatedly insulting the same judge during the defendant's trial on different criminal charges. The Court overturned the contempt convictions in that case, stating that no judge "so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication,"[55] and held that contempt charges that carry serious punishment should be tried by a judge different from the one that presided in the proceedings where the contempt took place.[56] Kennedy used *Mayberry*, and other cases involving similar conflicts of interest, to reinforce his argument that the Court had long held that the Due Process Clause's guarantee of a fair tribunal could be violated without demonstrating that a judge was actually biased against a litigant.[57]

Claiming to have identified the common thread that bound together the Court's earlier opinions regarding due process and recusal, Kennedy derived the standard that he would apply in *Caperton*.[58] Under this standard, due process demanded recusal whenever "'under a realistic appraisal of psychological tendencies and human weakness,' the interest [of the judge in the case] 'poses such a risk of actual bias . . . that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'"[59] Applying this standard, Kennedy listed the facts that he thought demonstrated that Benjamin should have recused himself. Although he noted that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, . . . this is an exceptional case."[60] Kennedy concluded that Blankenship's campaign efforts had a "significant and disproportionate influence" in helping Benjamin win the election, placing emphasis on the fact that Blankenship spent three times more during the campaign to help Benjamin than all other Benjamin supporters combined.[61] Kennedy also noted that the timing of Blankenship's intervention was important because it was reasonably foreseeable that if Benjamin won, he would be one of the five justices that would decide Massey's appeal.[62] Taken together, the disproportionate amount of financial support that Blankenship gave to Benjamin and the timing of the contributions created a probability of actual bias that violated Caperton's right to due process.[63]

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54 400 U.S. 455 (1971).

55 *Id.* at 465.

56 *Id.* at 469.

57 *Caperton*, 556 U.S. at 881.

58 *See id.* at 883.

59 *Id.* at 883–84 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

60 *Id.* at 884.

61 *Id.*

62 *Id.* at 886.

63 *Id.* at 886–87.

It is important to note that in his opinion, Kennedy used the word "extreme"[64] four times to describe the facts in *Caperton* and the words "extraordinary"[65] and "exceptional"[66] once each. Kennedy also observed that the parties could not name another judicial election where a judge received such disproportionate support from a litigant.[67] Notably, Kennedy wrote that "extreme cases often test the bounds of established legal principles," but that it was the same extremity of their facts that made them more likely to transgress constitutional limits, and that all of the cases in which it found that due process required recusal were cases involving extreme facts.[68] *Caperton* was meant to provide an objective standard for courts to apply that would, in part, help them to distinguish the extreme facts of cases like *Caperton* from situations that were less extreme and, therefore, did not rise to the level of a constitutional violation.[69]

As if to further downplay the applicability of the Court's opinion in future cases, Kennedy repeatedly noted that this decision would not displace state ethics rules as the primary source of regulation for judicial campaign conduct,[70] and made clear that states were free to adopt ethical standards for judges that were more rigorous than the minimum standards required by due process.[71] Kennedy concluded his opinion with the following prediction: "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances."[72]

Chief Justice John Roberts' dissent, which was joined by three other justices, focused mainly on the supposed tidal wave of litigation that the Court's opinion might set loose upon the American judiciary. Roberts charged that the Court created a rule under which the probability of a judge's bias dictated whether that judge should recuse herself from a case, without any guidance about what level of probability of bias required recusal.[73] Roberts predicted that the vagueness of the rule would invite a great number of recusal motions from litigants claiming that judges were biased against them, that many of these motions would be groundless, and that the increasing prevalence of these motions would lead to more public skepticism about the impartiality of the

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64 *Id.*

65 *Id.*

66 *Id.* at 884.

67 *Id.* at 887.

68 *Id.*

69 *Id.*

70 *Id.* at 876, 889 (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).

71 *Id.* at 889.

72 *Id.* at 890.

73 *Id.* at 890–91.

judiciary.[74] Roberts then listed 40 questions that the Court's opinion raised but did not answer, which was intended to illustrate how difficult it would be for lower courts to apply Kennedy's objective standard test.[75] Roberts noted the majority's acknowledgement that *Caperton*'s facts were "extreme," but he expressed doubt that this would stem the tide of recusal motions that he feared the decision would cause, noting that many litigants were not deterred by a low chance of success.[76] Justice Antonin Scalia also wrote a dissent that echoed Roberts' concern that *Caperton* would lead to a flood of recusal motions that would undermine public confidence in the courts.[77]

III. PROGNOSTICATIONS AND PROPHECIES

Predictions about the implications of a Caperton victory came from many quarters. This part of the Article will discuss the most prominent predictions that were made about the consequences of a Caperton victory from outside of the Court.

A. A Flood of Caperton *Motions*

As discussed above, the *Caperton* dissenters were deeply concerned that the Court's opinion would lead to an in increase in the number of recusal motions.[78] Furthermore, Massey and several amici gave similar concerns as reasons that the Court should not rule in favor of Caperton.[79] On the other hand, the justices in the majority[80] and some voices from academia[81] cast doubt on the prospect of a dramatic increase in recusal motions if Caperton prevailed, saying

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74 *Id.* at 891.

75 *Id.* at 893–98.

76 *Id.* at 889. (Roberts used the United States Supreme Court as an example, noting that although the Court granted certiorari on 1.1% of the petitions that it received the previous term, it received 8241 petitions).

77 *See id.* at 902–03.

78 *Id.* at 890–903.

79 *See, e.g.*, Brief for Respondents at 44, *Caperton*, 556 U.S. 868 (No. 08-22); Brief James Madison Ctr. for Free Speech as Amicus Curiae Supporting Respondents at 24–26, *Caperton*, 556 U.S. 868 (No. 08-22); Brief of Law Professors Ronald D. Rotunda & Michael R. Dimino as Amici Curiae Supporting Respondents at 15–17, *Caperton*., 556 U.S. 868 (No. 08-22); Brief of the State of Ala. et al. as Amici Curiae Supporting Respondents at 28–29, *Caperton*, 556 U.S. 868 (No. 08-22).

80 *Caperton*, 556 U.S. at 888.

81 *E.g.*, Bruce A. Green, *Fear of the Unknown: Judicial Ethics After* Caperton, 60 SYRACUSE L. REV. 229, 234 (2010); Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts' Concerns in* Caperton *and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. L. REV. 1, 66 (2009); Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 132 (2009).

that the facts of the case were very unusual and that no comparable situation had ever arisen in which a judge was asked to preside over a case involving a litigant who had given such a disproportionate level of financial support to that judge's campaign.[82] Justice Kennedy pointed out that courts had not been flooded with motions following its previous decisions regarding due process and judicial recusal because lower courts recognized "the extreme facts those standards sought to address."[83]

B. Caperton *Will Encourage Reforms Aimed at Increasing Judicial Independence*

Some observers predicted that a ruling for Caperton would aid various reform efforts that were aimed at increasing the independence and impartiality of state courts.[84] The amicus brief filed by several interest groups in support of Caperton cited a survey showing that 70% of Americans believed that campaign contributions had some effect on judges' decisions and that 62% believed that wealthy people received different treatment in the justice system than everyone else.[85] These interest groups argued that a ruling for Caperton would encourage reform efforts in several ways. First, by making it clear that the Constitution establishes a limit beyond which recusal is required, a ruling for Caperton would encourage states to enact clarifying rules that would establish a maximum amount in campaign contributions that a judge could receive from a litigant in a specified time period before having to step aside from a case.[86] Also, these groups argued that a ruling for Caperton would encourage states to adopt systems of public finance for judicial election campaigns, and to adopt merit selection as a system for selecting their judges.[87]

C. Caperton *Will Lead to the End of Judicial Elections*

Some commentators argued that a ruling for Caperton could encourage states to abandon judicial elections. For example, in their amicus brief supporting the Massey Corporation, Professors Ronald Rotunda and Michael Dimino claimed that asking courts to determine whether campaign support by a litigant created an unconstitutionally high probability of bias could not easily co-exist

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82 *Caperton*, 556 U.S. at 887.

83 *Id.* at 888.

84 *E.g.*, Brandenburg, *supra* note 10, at 213–17 (2010) (arguing that *Caperton* put pressure on states to undertake recusal reform and providing several examples); Sample, *supra* note 11, at 793.

85 Brief of Justice at Stake et al. as Amici Curiae Supporting Petitioners at 11–12, *Caperton*, 556 U.S. 868 (No. 08-22).

86 *Id.* at 13–14.

87 *Id.* at 14–16.

with judicial elections.[88] The brief filed by several sitting and former state supreme court chief justices also suggested the incompatibility of the probability of bias standard with judicial elections, predicting increased difficulties with fundraising for judicial campaigns.[89] This author also predicted possible problems with the continued viability of judicial elections after *Caperton* in light of the Court's decision the following year in *Citizens United v. FEC*,[90] in which the Court held that the First Amendment prohibited limits on independent election campaign spending by corporations and labor unions.[91] Specifically, this author speculated that a significant increase in spending in judicial elections by corporations and unions could create more opportunities for *Caperton*-like situations in which judges received disproportionate financial support from a litigant, which would require recusal.[92]

D. Caperton *Will Lead to the "Federalization" of Judicial Recusal Rules*

In their amicus brief in support of the Massey Corporation, seven states argued that a ruling for Caperton would effectively take away the power of the states to regulate recusal in their own courts.[93] The states argued, quoting the Court in *Microsoft Corporation v. United States*, that the applicable recusal inquiry should be "an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."[94] Given that there were different types of judicial elections, and different campaign spending norms across the United States, the states argued that the reasonable observer should take the perspective of a person in the state in question, as opposed to a federal perspective.[95] The states feared that by ruling for Caperton, the Court would mandate the adoption of a federal perspective on judicial campaign norms that would weaken the states' freedom to regulate their judiciaries.[96] Fear of the federalization of recusal rules was echoed in academic quarters as well.[97]

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88 Brief of Law Professors Ronald D. Rotunda, & Michael R. Dimino as Amici Curiae Supporting Respondents at 20–21, *Caperton*, 556 U.S. 868 (No. 08-22).

89 Brief of Ten Current & Former Chief Justices & Justices Supporting Respondents at 11–17, *Caperton*, 556 U.S. 868 (No. 08-22).

90 Citizens United v. FEC., 558 U.S. 310 (2010).

91 *See* Aman McLeod, *Change from on High? The Possible Implications of* Caperton *and* Citizens United *for State Judicial Selection Reform*, 56 WAYNE L. REV. 675, 681 (2010).

92 *Id.*

93 Brief of the States of Ala. et al. as Amici Curiae Supporting Respondents at 9–10, *Caperton*, 556 U.S. 868 (No. 08-22).

94 *Id.* at 11 (quoting Microsoft Corp. v. United States, 530 U.S. 1301, 1301 (2000)).

95 *Id.* at 11–12.

96 *Id.* at 13–14.

97 *See* Day, *supra* note 9, at 377.

E. Caperton *Will Lead to the Delegitimization of the Courts*

Some voices also predicted that a victory for Caperton would spell trouble for the judiciary's reputation for impartiality. Chief Justice Roberts and Justice Scalia expressed fear of this outcome in their dissents.[98] The James Madison Center for Free Speech echoed this prediction, saying that a flood of recusal motions would leave the public with the idea that most judges were corrupt and incapable of impartiality.[99] An amicus brief by several state supreme court chief justices also noted that a victory for Caperton could damage public confidence in the courts because many of the resulting recusal motions and public accusations of bias would not be understood by the public to be baseless, even when they in fact had no merit.[100] Furthermore, the chief justices' brief also mentioned that judges would have to raise more money to fund public relations campaigns to counter the narrative that they were bought and paid for by their campaign backers, which would only reinforce the idea that judges were influenced by their campaign backers.[101] The amicus brief filed by the states also noted that an increase in recusal motions would itself tarnish the reputation of the judiciary.[102]

F. Caperton *Will Encourage Litigation Mischief*

Another prediction was that a ruling for Caperton would lead attorneys and others who anticipated litigating in the state to spend money in judicial elections to avoid having a judge rule on cases in which they were involved in. Routunda and Dimino expressed this concern in their brief,[103] as did the James Madison Center, which worried that "a party can simply contribute to the campaigns of judges he believes are likely to rule against him, thus ensuring that these judges cannot hear his case."[104] The brief filed by the seven states also expressed similar fears that litigants would use a recusal standard that was based

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98 *Supra* Section II.A.

99 Brief of James Madison Ctr. for Free Speech as Amicus Curiae Supporting Respondents at 25–26, *Caperton*, 556 U.S. 868 (No. 08-22).

100 Brief of Ten Current & Former Chief Justices & Justices Supporting Respondents at 18–21, *Caperton*, 556 U.S. 868 (No. 08-22).

101 *Id.* at 21.

102 Brief of the States of Ala. et al. as Amici Curiae Supporting Respondents at 36, *Caperton*, 556 U.S. 868 (No. 08-22).

103 *See* Brief of Law Professors Ronald D. Rotunda & Michael R. Dimino as Amici Curiae Supporting Respondents at 14, *Caperton*, 556 U.S. 868 (No. 08-22).

104 Brief of James Madison Ctr. for Free Speech as Amicus Curiae at 27, *Caperton*, 556 U.S. 868 (No. 08-22).

on a probability of bias as a tool "to shape the court that will decide their disputes."[105]

G. Caperton *Will Have Little Impact on the Judiciary*

Several commentators predicted that the *Caperton* decision would have a negligible effect on the judiciary because its test for deciding when due process demands recusal was so vague, or its facts would be seen as being so extreme, that courts would rarely find that recusal was required. Commenting on *Caperton* following the decision, Rotunda noted the "extreme" facts of the case and the difficulty of determining the probability that a judge is biased against a litigant. Specifically, he concluded the following: "We are not likely to see much principled growth from *Caperton* because the majority does not create a test of when the judge must disqualify himself. It simply lists various factors for the judge to consider."[106] A similar prognostication about *Caperton*'s lack of an impact was made by Bopp and Woudenberg, who argued that *Caperton*'s extreme facts would lead courts to avoid applying it in most cases, which would presumably not involve fact patterns of that extremity.[107]

Professor Anthony Johnstone presented a different argument for *Caperton*'s future irrelevancy. Specifically, Johnstone predicted that *Caperton* would become irrelevant due to developments in campaign finance practices following *Citizens United*.[108] Professor Johnstone wrote:

> [*Citizens United's*] deregulation of independent expenditures, and the subsequent proliferation of networked "outside groups" and "industry associations" engaged in campaign spending, makes an anachronism of the direct, disclosed, and overwhelming contributions at issue in *Caperton*. Now big donors hoping to influence the work of the courts enjoy a range of national and state-based conduits for campaign spending that are practically impossible to track for a litigant who might later have grounds for a recusal motion.[109]

"Dark money" is another name for election spending and donations that have hidden sources by using non-profits as the conduits that Johnstone describes, so named because non-profits are not required to disclose the sources

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105 Brief of the States of Ala. et al. as Amici Curiae Supporting Respondents at 35–36, *Caperton*, 556 U.S. 868 (No. 08-22).

106 Rotunda, *supra* note 8, at 68.

107 *See* Bopp & Woudenberg, *supra* note 8, at 327.

108 *See* Johnstone, *supra* note 8, at 121–22.

109 *Id.* at 120.

of their funding.[110] In his article, Johnstone explained how a corporate CEO who wanted to support the election of sympathetic judges could do so, while reducing the chance that these judges would have to recuse themselves from cases involving the CEO or the company. Johnstone noted that the CEO could direct money from the corporate treasury to a non-profit industry lobbying group that would then give money to a political action committee ("PAC"), which would then make a contribution to another PAC or political non-profit that would contribute to the judicial candidates' campaigns or engage in independent expenditures on the candidates' behalf.[111] Contributing through organizations in this way can attenuate the appearance of a link between the judge and the donor, thereby undercutting the argument that the judge might be biased in favor of the donor.[112] The efficacy of this strategy was further enhanced by the decision of the U.S. Circuit Court of Appeals for the District of Columbia in *SpeechNow.org v. FEC*,[113] which invalidated limits on the amount of money that can be donated to non-profit organizations that engage in independent election advocacy.[114]

IV. EXAMINING *CAPERTON*'S SMALLER THAN EXPECTED LEGACY

Ten years after *Caperton*, it is possible to gain a holistic picture of what the decision's impact has been on judicial recusal rules, judicial selection, and judicial campaigns. It is possible to assemble this picture, in part, by looking at how federal and state courts interpreted and applied *Caperton* in cases in which litigants claimed rights violations under the decision. Other parts of the picture can be obtained by examining the number of states that changed their recusal rules to respond to the campaign conflicts of interest at issue in *Caperton*, along with the nature of the changes that those states made. Still more parts of the picture can come from looking at whether states have changed their judicial selection systems since *Caperton*.

The overall picture gathered from these pieces suggests that *Caperton*'s impact was stymied by a combination of factors. These factors include the following: (1) the unwillingness of state and federal courts to apply *Caperton* broadly and robustly to situations involving claimed conflicts of interest and (2) the failure of most state legislatures and state supreme courts to see a corrupting influence from contributions to judges that required significant changes in their recusal rules.[115]

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110 Samuel C. Rhodes, Michael M. Franz, Erika Franklin Fowler, & Travis N. Ridout, *The Role of Dark Money Disclosure on Candidate Evaluations and Viability*, 18 ELECTION L.J. 175, 176 (2019).

111 Johnstone, *supra* note 8, at 121.

112 *See id.*

113 599 F.3d 686 (D.C. Cir. 2010).

114 *Id.* at 696.

115 *See infra* Section IV.B.

A. Caperton*'s Reception in the State and Federal Judiciary*

To understand *Caperton*'s reception in the state and federal judiciary, the author surveyed all the cases that mentioned *Caperton* in a majority or concurring opinion in published, non-advisory decisions, from the date of *Caperton*'s publication in 2009 until the end of 2019. The cases were found by looking for references to *Caperton* using the LexisNexis database. This analysis focused on references to *Caperton* in majority or concurring opinions because these opinions dictate the outcome of the case, and because these are generally more influential as precedents than dissents.[116] The study only examined published, non-advisory opinions, because unpublished opinions are generally not cited and are of limited precedential value,[117] and because most states that issue advisory opinions prohibit their use as binding precedent.[118]

The results from the state courts present an interesting picture. There were 16 cases from 13 states where *Caperton* claims were made against judges because of campaign support that they received from litigants or their attorneys.[119] In only one of the 16 cases, a court found that the judge should have recused himself under *Caperton*.[120] Eighty-four state cases involved *Caperton*-based arguments to remove judges or other government decision-makers based on allegations of bias that did not involve contributions, and 77 cases involved situations where *Caperton* violations were claimed but were resolved under a different state or federal law.[121]

Two examples illustrate the aforementioned treatment of *Caperton* in state courts. In both instances, the state courts in question chose not to take the opportunities that these cases presented to interpret *Caperton* broadly so that it would apply to situations in which litigants spent relatively small amounts on behalf of a judge as a proportion of the total campaign spending for that judge. Further, the courts chose not to apply *Caperton* in additional situations where it arguably could have been applied instead of state recusal law. The first example is *Williams v. Kisling, Nestico & Redick, L.L.C. (In re Breaux)*[122] in which a

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116 *See* Thomas B. Bennett, Barry Friedman, Andrew D. Martin, & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 821–23, 839–40 (2018).

117 David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685, 697–99 (2009).

118 Mel A. Topf, *State Supreme Court Opinions as Illegitimate Judicial Review*, 2001 L. REV. MICH. ST. U. DET. COLL. L. 101, 106 n.21 (2001).

119 To study the reception of *Caperton* in the lower courts, the author examined the subsequent legal treatment of *(i.e. Shepardized) Caperton* looking for published cases. These cases were then analyzed and categorized according to their treatment of *Caperton* and case type.

120 Daurbigney v. Liberty Pers. Ins. Co., 272 So. 3d 69, 77 (La. Ct. App. 2019).

121 *See supra* note 119.

122 84 N.E.3d 1038 (Ohio 2017).

plaintiff in a civil action against Kisling, Nestico & Redick, L.L.C. ("KNR"), filed a motion to recuse the trial judge in the case, Judge Breaux, on the grounds that KNR made an in-kind donation of billboard space to Judge Breaux's recent election campaign, which helped her defeat an incumbent judge.[123] Judge Breaux and the plaintiff differed on what the fair market value of the use of the billboard was, and on how much money was contributed to her campaign, but the Supreme Court of Ohio accepted Judge Breaux's claim that the value of the billboard space was $2,561.[124] In deciding the case, the court described *Caperton*'s holding as requiring a judge's recusal "'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.'"[125] Applying this "disproportionate influence" test, the Ohio court noted that it "could not see how" advertising space on the billboard could have a disproportionate influence on the outcome of an election, regardless of its value, and, therefore, denied that *Caperton* demanded Judge Breaux's recusal.[126] In failing to find a *Caperton* violation, the court also noted that the facts of the instant case were less "extreme" than those in *Caperton* and did not create an unconstitutional probability of actual bias.[127] The other case, *People v. Nguyen*,[128] was decided by the Supreme Court of California, and is a case that typifies those cases where a *Caperton* violation was claimed but that was resolved under a different law.[129] In *Nguyen*, a criminal defendant facing the death penalty cited *Caperton* to support his claim that his trial judge was biased against him.[130] Specifically, Nguyen argued that elected judges were inherently biased against capital defendants, out of fear of the political consequences of ruling in favor of such defendants.[131] The California Supreme Court dismissed this argument, saying that *Caperton* was based on an extreme set of facts that created an unconstitutional probability of bias, and that since no such probability had been demonstrated in this case,[132] the case should be resolved based on state law.[133]

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123 *Id.* at 1038–1039.

124 *Id.* at 1039.

125 *Id.* at 1038–39 (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009)).

126 *Id.* at 1039–40.

127 *Id.*

128 354 P.3d 90 (Cal. 2015)

129 *Id.* at 142.

130 *Id.*; Judicial Council of California, *Fact Sheet: California Judicial Branch*, CAL. CTS. 3 (Oct. 2020), https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf (superior court judges in California are chosen in nonpartisan elections).

131 *Nguyen*, 354 P.3d at 142.

132 *Id.*

133 *See id.* at 140–45.

As noted above, these two cases represent instances where state courts failed to take the opportunity to broaden *Caperton*'s holding to more situations, which, in turn, could have increased the impact of the case on each state's law of recusal. Significantly, both courts pointed to the extremity of *Caperton*'s facts as a justification for limiting *Caperton*'s holding to its facts. As we shall see later, the U.S. Supreme Court sometimes leaves lower courts leeway to interpret its decisions in ways that the Court arguably did not intend,[134] but that it seems to be able to limit this leeway by the language it uses in its opinions.[135] These two cases are possible examples of instances where the language that the Court used in its opinion influenced lower courts to limit the use of that opinion as precedent.

The survey of lower federal court cases produced a similar picture. There were only five cases involving claims of *Caperton* violations by judges, and in no case did a court find that the judge had violated *Caperton* by refusing to recuse. Interestingly, none of these federal cases involved conflict of interest claims related to campaign contributions. There were 36 cases in which a *Caperton* violation was claimed but resolved under some other state or federal law. Also, *Caperton* was invoked in 30 state and 45 federal cases that did not involve any claim of bias or request for recusal, but mentioned *Caperton* as a case that stood for the constitutional guarantee of due process of law.

Caperton was cited in four U.S. Supreme Court cases.[136] The Court mentioned *Caperton* in *Citizens United,* claiming that *Caperton* did not stand for the proposition that independent spending in elections undermines the public's faith in democracy and that *Caperton* only addressed the issue of judicial recusal.[137] *Caperton* was mentioned in Justice Kennedy's concurrence in *Nevada Commission on Ethics v. Carrigan*,[138] and by the Court in *Williams-Yulee v. Florida Bar*,[139] decisions in which the Court upheld the constitutionality of state judicial ethics rules against First Amendment challenges. In both instances, *Caperton* was cited as indicating the constitutional and political significance of the appearance of judicial impartiality. The Court has found a *Caperton* violation in only one case. In *Williams v. Pennsylvania*,[140] the Court overturned a death sentence because one of the Pennsylvania Supreme Court justices that heard the case on appeal had been the head of the prosecutor's office that sought the

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134 *See infra* Part IV.B–C.

135 *See infra* Part IV.C.

136 Williams v. Pennsylvania, 136 S. Ct. 1899, 1910 (2016); Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445 (2015); Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 132 (2011); Citizens United v. FEC, 558 U.S. 310, 360 (2010).

137 *Citizens United*, 558 U.S. at 360.

138 564 U.S. at 132.

139 575 U.S. at 445.

140 136 S. Ct. at 1910.

imposition of the death penalty on the petitioner. The Court applied *Caperton*'s objective test and found an unacceptable risk of bias in this situation.

B. State Changes to Recusal Rules After Caperton

A discussion of *Caperton*'s influence on judicial recusal rules must start with the American Bar Association's (ABA) Model Code of Judicial Conduct. The ABA has issued model judicial ethics rules since 1924,[141] and most states have adopted some version of those model rules.[142] Since 1999, the ABA has included a provision in the Model Code that requires judges to recuse themselves from a case when a judge knows or is informed that a lawyer or a litigant has made more than a specified amount in campaign contributions to the judge over a given number of years, with the amounts and the time periods left to the states to decide.[143] This provision was initially Canon 3(E)(1)(e), but now it is known as Rule 2.11(A)(4).[144] Before *Caperton* was decided in 2009, Alabama,[145] Mississippi,[146] and Alaska[147] had ethics rules that addressed judges presiding over cases involving campaign contributors.[148] Many supporters of judicial campaign finance reform believed that a ruling for Caperton would encourage states to adopt some version of Rule 2.11(A)(4), or some other rules clarifying when recusal was required when lawyers or litigants had spent money to secure a judge's election.[149] They argued that states would want to define the circumstances giving rise to recusal for themselves, which would presumably be preferable to leaving the matter for the courts, which might set vague and uncertain boundaries.[150] Although the ABA model rule did not address

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141 Brandon A. Mullings, *Impropriety of Last Resort: A Proposed Ethics Model for the U.S. Supreme Court*, 58 HOW. L.J. 891, 896 (2015).

142 Terry Carter, *Judicial Races, Litigation Likely to Heat Up*, 34 A.B.A. J. E-Report 1 (2005).

143 Cynthia Gray, *Judicial Disqualification Based on Campaign Contributions*, NAT'L CTR. FOR STATE CTS. 1 (Nov. 2016), https://www.ncsc.org/__data/assets/pdf_file/0024/16647/disqualificationcontributions.pdf.

144 *Id.*

145 Hon. Joseph D. Russo, Richard G. Johnson, & Jack DeSario, *A Legal, Political, and Ethical Analysis of Judicial Selection in Ohio: A Proposal for Reform*, 28 CAP. U. L. REV. 825, 831 (2010).

146 *Id.*

147 ALASKA CODE OF JUD. CONDUCT, CANON 5(C) cmt. (1998).

148 Note that in March 2009, while *Caperton* was pending, Kansas adopted a rule directing judicial candidates to instruct their campaign committees to be cautious about soliciting contributions from lawyers and others likely to appear before the candidate if elected so that no grounds for disqualification are created. Kansas is included in the states studied below because its rule is not as specific as that of Alabama, Alaska, and Mississippi, and it adopted the rule when the *Caperton* decision was pending. *See* KAN. SUP. CT. R. 601B, Canon 4, r. 4.4, cmt. 2 (2009).

149 *See generally* Brief of Justice at Stake et al. as Amicus Curiae Supporting Petitioners, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08-22).

150 *Id.* at 14.

independent spending in judicial campaigns by litigants, its adoption by more states could have provided a more definite benchmark for determining how much financial support from a litigant created a conflict that demanded judicial recusal. However, as discussed below, ten years after *Caperton*, only four states have codified Rule 2.11(A)(4), even though the rule was intended to prevent the sort of conflict at issue in *Caperton* and the flood of recusal litigation that some feared following the decision.

A look at the legislative and administrative reaction to *Caperton* and the larger issue of conflicts of interest created by litigant campaign spending reveals that the states' responses ranged from inaction to the adoption of clear and specific rules aimed at preventing judges from deciding cases involving those who have financially supported their campaigns. A survey by the author using the Westlaw database[151] revealed that among the 40 states that hold judicial elections, and that did not already have rules addressing judges presiding over cases involving contributors before 2009, 15 states made some legislative or rule change that addressed the subject in the decade following *Caperton*.[152] These responses took a variety of forms, and some more specifically addressed the situations that require recusal than others. Michigan, for example, amended its rules to mention *Caperton* and included more commentary to explain the applicability of the decision, but it did not adopt any language approaching the specificity of Model Rule 2.11(A)(4) about situations in which recusal is necessary.[153] Eight states adopted statutes or ethics rules that establish a duty of recusal in some situations when a case involves lawyers or litigants who have contributed to a judge's campaign; however, unlike Model Rule 2.11(A)(4), these regulations omit any reference to contribution thresholds beyond which recusal is required.[154] In 2009, Connecticut and Kansas adopted a rule that merely informs judges to instruct their campaign committees not to put the judge into a position where the judge's impartiality could be questioned by soliciting contributions from those likely to appear before the judge if elected.[155] Only Arizona, California, New York, and Utah adopted a version of Model Rule 2.11(A)(4) that mandates recusal when lawyers and litigants have donated a

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151 The author used different databases for different portions of the research due to the differing availability of information on various subjects in each database.

152 The research for this was done by searching for the relevant provisions of each state's judicial ethics code wherever that was codified and examining the history of the provision to see if any changes occurred during the time period under study.

153 MICH. CT. R. 2.003(C)(1)(b)(2019).

154 ARK. CODE OF JUD. CONDUCT, r. 2.11, cmt. 4A (2019); GA. CODE OF JUD. CONDUCT, r. 2.11(A)(4) (2019); IOWA CODE OF JUD. CONDUCT, r. 51:2.11(4)(a)–(b) (2019); N.M. CODE OF JUD. CONDUCT, r. 21–211, cmt. 6–7 (2019); OKLA. CODE OF JUD. CONDUCT, r. 2.11(A)(4) (2019); PA. CODE OF JUD. CONDUCT, r. 2.11(A)(4) (2019); TENN. CODE OF JUD. CONDUCT, r. 2.11(A)(4) (2019); WASH. CODE OF JUD. CONDUCT, r. 2.11(D) (2019).

155 CONN. CODE OF PROB. JUD. CONDUCT, r. 4.4, cmt. 3 (2019); KAN. CODE OF JUD. CONDUCT, r. 4.4, cmt. 2 (2019).

specified amount to the presiding judge.[156] The supreme courts of Nevada and Wisconsin considered and rejected rules that closely resembled Model Rule 2.11(A)(4),[157] and West Virginia added commentary to its Code of Judicial Conduct noting that it had not adopted Model Rule 2.11(A)(4).[158] Interestingly, Colorado took the step of clarifying that judges are allowed to hear cases involving contributors but, in accordance with a different provision of the state judicial ethics code, should not be told who gave money to their campaigns.[159]

This author suggested that states might adopt peremptory challenges as a way of reducing litigation over *Caperton* recusal issues.[160] Currently, 17 states that have judicial elections allow litigants to make a peremptory challenge against a judge who has been assigned to hear their case.[161] A peremptory challenge permits a litigant to have a judge removed from a case without having to persuade that judge or another judge that a conflict of interest exists that would warrant disqualification under the state's code of judicial conduct. This right only exists in trial courts,[162] and states differ as to whether this right can be invoked in criminal cases, civil cases, or in both.[163] In all these states, the rules allowing for peremptory challenges coexist with rules mandating recusal in certain situations.[164] Research by the author using the Westlaw database showed that no additional states adopted peremptory challenges in the decade following the *Caperton* decision.

C. Other Relevant Developments in Judicial Elections Since Caperton

Clearly, predictions that *Caperton* would lead to a new era of judicial selection reform did not come to fruition. Ballotpedia maintains a website that

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156 ARIZ. CODE OF JUD. CONDUCT, r. 2.11(A)(4) (2019); CAL. CIV. PROC. § 170.1 (West 2021); N.Y. CT. R., § 151.1 (2019); UTAH CODE OF JUD. CONDUCT, r. 2.11(A)(4) (2019).

157 Gray, *supra* note 143, at 11–12.

158 W. VA. CODE OF JUD. CONDUCT, r. 2.11, Clerk's Notes (2019).

159 COLO. CODE OF JUD. CONDUCT, Canon 4, cmt 3 (2020).

160 Aman McLeod, *Changing the Rules of the Game: Deriving New Rules and Practices from* Caperton v. A.T. Massey Coal Co., 45 NEW ENG. L. REV. 569, 579–82 (2011).

161 *See* RICHARD E. FLAMM, RECUSAL AND DISQUALIFICATION OF JUDGES 311–604 (3d ed. 2018) (the author here excludes Texas, which allows preemptory recusal only for visiting judges; West Virginia, which only allows them for magistrate judges, is included in this list).

162 *See, e.g.*, IDAHO R. CIV. P. 40(d)(1) (allowing for peremptory challenges against trial judges in civil cases); MONT. CODE ANN. § 3-1-804 (West 2021) (allowing for peremptory challenges against district court judges only).

163 *Compare* ARIZ. R. CIV. P. 42(f)(1)E (2019), *with* ARIZ. R. CRIM. P. 10.2(a) (allowing for peremptory challenges against judges in civil and criminal cases respectively), *and* CAL. CIV. PROC. § 170.6 (2019) (allowing for peremptory challenges against any judge in a civil case).

164 FLAMM, *supra* note 161, at 7–8.

describes the history of state judicial selection reform.[165] A survey of that site revealed that between 2009 and 2019, no state abandoned judicial elections.[166] During that decade, North Carolina switched to partisan elections for its state supreme court and court of appeals in 2016,[167] while West Virginia switched from partisan to nonpartisan elections the same year.[168] Turning to judicial campaign finance, Wisconsin enhanced its existing public financing program for supreme court elections in 2009,[169] only to defund the program in 2011.[170] North Carolina also ended its program of public financing for judicial campaigns in 2013,[171] while West Virginia commenced a system of public financing for supreme court elections in 2012.[172] With that move, West Virginia joined New Mexico as the only two states that offer public financing for any judicial elections.[173]

Regarding some of the other prognostications about *Caperton*, fears that a decision in favor of the plaintiff would lead to the federalization of state recusal law never materialized, and if there was a flood of *Caperton* motions, few appear to have been litigated to the appellate stage, which suggests that the courts have not had their work greatly disrupted by these motions. Also, it cannot be ruled out that there was some increase in voluntary recusals because of *Caperton* or that more litigants might have engaged in strategic spending in judicial races to influence which judges decided their cases than would have without *Caperton*. However, if an increase in recusals or the use of strategic contributions had been a serious problem in the eyes of state legislatures or of courts, one would assume that there would have been a more robust regulatory or judicial response to alleviate these problems. As it happened, the rather muted response that occurred

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165 *See Judicial Selection Methods by State*, BALLOTPEDIA https://ballotpedia.org/Judicial_election_methods_by_state (last visited Sept. 3, 2021).

166 *Id.*

167 *Judicial Selection in North Carolina*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_North_Carolina (last visited Sept. 9, 2021).

168 Stephanie Wilmes, *West Virginia Moves to Nonpartisan Judicial Elections in 2016*, WILLIAM & MARY L. SCH.: STATE OF ELECTIONS (Nov. 2, 2015), http://electls.blogs.wm.edu/2015/11/02/west-virginia-moves-to-nonpartisan-judicial-elections-in-2016/.

169 Patrick Marley & Lee Bergquist, *Doyle Signs High Court Bill*, MILWAUKEE J. SENTINEL, Dec. 2, 2009, at 1.

170 Bill Lueders, *Public Financing of Elections a State Budget Casualty*, WIS. ST. J., July 4, 2011, at A1.

171 Brent Laurenz, *Key Judicial Elections on the Horizon for N.C.*, DAILY COURIER, Nov. 10, 2013, at A5.

172 Julie Archer, *Fund-raising Sullies Judicial Candidates; W.Va. Should Finish Its Foray in Public Financing*, CHARLESTON DAILY MAIL, Aug. 16, 2012, at P5A.

173 *Public Financing of Campaigns: Overview*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx#clean (last visited Sept. 3, 2021).

suggests that neither of these issues was deemed serious enough to warrant sweeping changes in judicial recusal rules.

There is little evidence to support the notion that *Caperton* led to a decrease in the legitimacy of courts, as Chief Justice Roberts and others feared that litigants would use the case to highlight alleged judicial conflicts of interest.[174] Polling on the legitimacy of state courts in general during the period is not available; however, a publication by the National Center for State Courts suggests that the size of state courts' civil dockets did not fall dramatically during the period from 2009–2016,[175] which might be expected if the public had lost a significant amount of confidence in the judiciary. Given that around half of Americans have a relatively low level of knowledge about national politics,[176] and an even lower level of knowledge about state politics and government,[177] it is reasonable to infer that most of the public is not aware of potential conflicts of interest in state courts involving judges and litigants who financially support their campaigns.

Turning to spending in judicial races, *Caperton* does not appear to have had a significant impact on campaign spending. Data from the Brennan Center for Justice indicate that there was no overall downward trend in spending in state supreme court races between 2009 and 2018.[178] Total spending (in 2018 dollars) on supreme court campaigns in the 2009–2010 cycle was $46.1 million, while it was $39.7 million in the 2017–2018 cycle. However, in the three intervening cycles, spending reached a high of $72.8 million in the 2015–2016 cycle and a low of $37.4 million in the 2013–2014 cycle. What these data seem to show is that while spending fluctuates depending on whether the cycle contains a presidential election, *Caperton* does not seem to have discouraged judicial candidates from accepting contributions, nor has it discouraged anyone from spending to get their favored candidates elected.

Another related factor that could have contributed to *Caperton*'s lack of impact is the prevalence of dark money in campaigns. It is hard to know how

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174 Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009).

175 *State Court Case Load Digest: 2016 Data*, NAT'L CTR. FOR STATE CTS. 1, 2 (2018), https://www.courtstatistics.org/__data/assets/pdf_file/0029/29819/2016-Digest.pdf.

176 *See, e.g.*, MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 101–02 (1996); ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE 17–45 (2013); Robert S. Luskin, *From Denial to Extenuation (and Finally Beyond): Political Sophistication and Citizen Performance*, *in* THINKING ABOUT POL. PSYCH. 281, 282 (James Kuklinski, ed., 2002).

177 *See, e.g.*, Samuel C. Patterson, Randall B. Ripley, & Stephen V. Quinlan, *Citizens' Orientations Toward State Legislatures: Congress and the State Legislature*, 45 W. POL. Q. 315, 320 (1992); Donald R. Songer, *Government Closest to the People: Constituent Knowledge in State & National Politics*, 17 POLITY 387, 390–95 (1984).

178 Douglas Keith, Patrick Berry, & Eric Velasco, *The Politics of Judicial Elections, 2017–18*, BRENNAN CTR. FOR JUST. 3–5 (2019), https://www.brennancenter.org/sites/default/files/2019-12/2019_11_Politics%20of%20Judicial%20Elections_FINAL.pdf.

many donors are spending dark money, or how much of the spending on campaigns is dark money, since the groups spending this money are not required to report all of the expenditures that they make.[179] However, if Johnstone is correct, the increased ability of corporations and unions to disguise their money through nonprofits might have resulted in fewer *Caperton* challenges than there might have been in the absence of *Citizens United* and *SpeechNow.org,* which increased the amount of money that can be spent on campaigns. Also, it cannot be ruled out that *Caperton* has caused more judges to voluntarily recuse themselves from cases involving litigants who financially supported their campaigns than would have done so in the absence of the decision. However, the presence of dark money or changes in some judges' recusal propensities could not have made *Caperton* irrelevant, given that large amounts of money are still spent through identifiable channels.[180] The courts could have robustly applied *Caperton* to require recusal in cases where litigants were known to have spent disproportionate amounts to secure a judge's election in those cases that reached appellate courts, and more state governments could have made recusal laws more robust to prevent these conflicts of interest. The fact that neither reaction occurred[181] suggests that other causes for *Caperton*'s reception in the courts and state governments must be investigated.

V. UNDERSTANDING THE RESPONSES TO *CAPERTON*

This Article presents hypotheses that offer some explanation for *Caperton*'s treatment by the lower courts and state actions regarding judicial campaign conflicts of interest in the decade after the decision. The hypothesis regarding *Caperton*'s reception in the courts relies on recent scholarship suggesting the ability of the United State Supreme Court to induce lower court compliance with its precedents with the language that it uses in its opinions. The hypothesis regarding the reasons for the states' responses to *Caperton* posits a relationship between the level of perceived corruption in state government and the likelihood that a state would make significant recusal rule changes regarding litigant contributors between 2009 and 2019.

A. Lower Court Compliance Through Opinion Language

The lower courts' failure to use *Caperton* as an opportunity to limit perceived conflicts of interest caused by campaign spending is interesting considering the concern that many judges have expressed about the possible effects that campaign contributions have on the judiciary. Although several current and former state supreme court chief justices wrote a brief urging the

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179 *See* Rhodes, *supra* note 110, at 177.

180 *See* KEITH, *supra* note 178, at 3–5.

181 *See supra* Parts III.G–IV.A.

Court to rule in favor of Massey,[182] many other judges have expressed concerns about the influence that campaign contributions can have on judges.[183] For example, according to one survey of state judges in the early 2000's, 80% of the respondents expressed concern that judges were hearing cases involving people who contributed to their campaigns.[184] Furthermore, state judges promoted efforts to eliminate judicial elections because of concerns about the influence of contributors,[185] to provide public financing for judicial campaigns, and to enact recusal rules that prohibit judges from hearing cases involving contributors.[186]

Considering this evidence, why did *Caperton* receive the treatment that it did in the lower courts? Scholars have established that lower courts can exercise discretion in how they interpret and apply United States Supreme Court decisions in order to shape the impact of those decisions on the law and public policy.[187] For example, Professor Neil T. Romans studied this phenomenon by examining the lower courts' treatment of two of the Supreme Court's landmark criminal procedure decisions of the 1960s, *Escobedo v. Illinois*[188] and *Miranda v. Arizona*.[189] Romans found the 36 state supreme courts narrowed *Escobedo* to its facts by distinguishing it from the facts in the cases they were considering,[190] and 34 courts gave *Miranda* narrow interpretations that limited its effects.[191] In both instances, these lower courts arguably limited each case's influence in ways that the Supreme Court did not intend.[192] Given the concerns that many judges have about the effect of election spending on judicial impartiality, and with these examples of lower court disobedience in mind, the question is, why did the lower courts pass up the opportunity to enforce a more rigorous rule of recusal in

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182 Brief of Ten Current & Former Chief Justices & Justices Supporting Respondents at 11–17, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (No. 08-22).

183 *E.g.*, Paul J. De Muniz, *Eroding the Public's Confidence in Judicial Impartiality: First Amendment Federal Jurisprudence and Special Interest Financing of Judicial Campaigns*, 67 ALA. L. REV. 763, 768 (2004); Bill Rankin, *Ex-Justice: Drop Judicial Elections*, ATLANTA J.-CONST., Aug. 13, 2013, at 3B.

184 Gary Martin, *Gifts to Judges' Campaigns Troubling to Voters, Jurists*, SAN ANTONIO EXPRESS-NEWS, Feb. 15, 2002.

185 *See North Carolinians Favor Change in Judicial Selection Process*, PR NEWSWIRE ASS'N, Mar. 15, 1989.

186 Shirly S. Arbrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 999 (2001).

187 *See, e.g.*, Jerry K. Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U. L. REV. 260, 283–85 (1971).

188 Escobedo v. Illinois, 378 U.S. 478 (1964).

189 Miranda v. Arizona, 384 U.S. 436 (1966).

190 Neil T. Romans, *The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda, and the Use of Judicial Impact Analysis*, 27 W. POL. Q. 38, 48 (1974).

191 *See id.* at 56.

192 *See id.* at 58.

situations where litigants have given significant financial support to a judge's campaign?

Although studies have looked at a number of factors that affect the likelihood of lower court compliance with Supreme Court precedent,[193] *Caperton*'s reception in the lower courts could be seen as an example of a phenomenon identified in recent studies that have been done on the Supreme Court's use of language in its opinions to influence different audiences.[194] This is arguably the newest approach to understanding how the Supreme Court influences the behavior of lower courts and has been made possible by the development of software that can analyze millions of words in thousands of opinions, using many different methods to measure clarity or other features of a text.[195] Specifically, Black et al.[196] found evidence suggesting that the Supreme Court writes clearer opinions when the federal circuit courts are more ideologically dispersed in an effort to ward off conflicting interpretations of its opinion by those circuits, while Professors Pamela C. Corley and Justin Wedeking found that higher levels of certainty expressed in the language of a Supreme Court opinion, as measured by the use of certain words, was associated with more positive treatment by the precedent in lower courts.[197]

The findings regarding the Supreme Court's opinion language offer a new and interesting approach to understanding *Caperton*'s reception in the lower courts. Note that Justice Kennedy repeatedly mentioned the extraordinary nature

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193 *See, e.g*, Scott A. Comparato & Scott D. McClurg, *A Neo-Institutional Explanation for State Supreme Court Responses in Search and Seizure Cases*, 35 AM. POL. RSCH. 726, 736–44 (2007); Benjamin J. Kassow, Donald R. Songer, & Michael P. Fix, *The Influence of Precedent on State Supreme Courts*, 65 POL. RSCH. Q. 372, 378–80 (2012); Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkins' Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1157–58 (2005); Donald R. Songer, Jeffrey A. Segal, & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 690–92 (1994).

194 *See generally*, RYAN C. BLACK, RYAN J. OWENS, JUSTIN WEDEKING, & PATRICK C. WOFLFARTH, U.S. SUPREME COURT OPINIONS AND THEIR AUDIENCES (2016); Amanda C. Bryan & Eve M. Ringsmuth, *Jeremiad or Weapon of Words?: The Power of Emotive Language in Supreme Court Dissents*. 4 J.L. AND CTS. 160 (2016); Pamela C. Corley & Justin Wedeking, *The (Dis)Advantage of Certainty: The Importance of Certainty in Language*, 48 L. & SOC'Y REV. 35 (2014); Ryan J. Owens, Justin Wedeking, & Patrick C. Wohlfarth, *How the Supreme Court Alters Opinion Language to Evade Congressional Review*, 1 J.L. & CTS. 35 (2013); James F. Spriggs, II, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122 (1996) (discussing the results of studies showing that language used in judicial opinions can influence the behavior of other government institutions, the media, and public opinion).

195 *E.g.*, BLACK, *supra* note 194, at 46–53.

196 *Id*. at 74–79.

197 Corley & Wedeking, *supra* note 194, at 49–53.

of the facts of *Caperton*.[198] He also expressed his confidence that state recusal rules would remain the primary source for recusal law[199] and his belief that application of the constitutional standard enunciated in the case would be rare.[200] In fact, the entire thrust of Kennedy's argument was that although there had been a due process violation in *Caperton*, such violations would be rare because due process violations of this type will only be found in the most unusual of circumstances, such as those where the actions of a government official "shock the conscience."[201] In light of the findings of Black et al. suggesting that the clarity of a Supreme Court opinion affects its reception by lower courts, and Corley and Wedeking's findings about the effects of the certainty expressed in Supreme Court opinion language on lower courts, it is possible that the lower courts' reluctance to apply *Caperton* or to find violations of its rule in more cases, was partly a result of the language that the Court used in its opinion. Specifically, the clear, definite, and repetitive language that the Court used to express its view that *Caperton* violations should only be found in very rare circumstances, along with expressions of its confidence that state law and judicial codes of conduct would resolve most disputes regarding judicial recusal without resort to the Due Process Clause, can help to explain why the lower courts refused to apply this case more broadly.

B. Perceived Corruption and Judicial Conflict of Interest Regulation

1. The Independent Variables

Peremptory Challenges: A peremptory challenge allows a litigant to force the recusal of a judge that she believes would be biased due to campaign contributions. It seems possible that allowing these challenges could make it less likely that a state would feel the need to change its ethics rules to demand recusal due to excessive financial support for a judge's campaign, since the litigants themselves can eliminate any perceived conflict of interest created by such financial support. Accordingly, whether a state allows peremptory challenges in

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198 *See supra* Part II.A. Note that studies of textual clarity, often referred to as readability, have highlighted the fact that repetition of words can enhance clarity. *See, e.g.*, S. Alan Cohen & Joan E. Steinber, *Effects of Three Types of Vocabulary on Readability of Intermediate Grade Science Textbooks: An Application of Finn's Transfer Feature Theory*, 19 READING RSCH. Q. 86, 100 (1983); George R. Klare, *The Role of Word Frequency in Readability*, 45 ELEMENTARY ENG. 12, 20 (1968); Graciela Rosemblat, R. Logan, Tony Tse, & Laurel Graham, *Text Features and Readability: Expert Evaluation of Consumer Health Text*, NAT'L. INST. HEALTH 1 (2006), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.572.6491&rep=rep1&type=pdf.

199 *See supra* Part II.A.

200 *Id.*

201 Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 887 (2009).

its trial courts was included as a variable in the model. This variable is coded as a one if a state allows peremptory challenges, and a zero if it does not.

Social Indicators of Perceived Corruption: Caperton's original motion to disqualify Justice Benjamin claimed that Blankenship's involvement in Benjamin's campaign created a conflict of interest that required the Justice's recusal.[202] Many scholars have studied conflicts of interest on the part of public officials as a form of government corruption both in the United States and around the world.[203] Some interest groups believe that campaign contributions to judges and independent spending on their behalf, create a conflict of interest that biases the judiciary.[204] Furthermore, some studies have found that contributions can influence judicial decisions[205] and studies by Professor James L. Gibson[206] and by Gibson and Professor Gregory A. Caldeira[207] found that acceptance of contributions and spending on behalf of a judge by litigants harmed the perceived legitimacy of a judge (operationalized as the judge's perceived impartiality) in the eyes of the public.

Dr. Rajeev K. Goel and Professor Michael A. Nelson[208] studied the correlates of perceived government corruption at the state level in the United States, using a measure of perceived corruption developed by Professors Richard T. Boylan and Cheryl X. Long.[209] Goel and Nelson found the level of perceived government corruption to be negatively correlated with per capita state personal income, positively correlated with the percentage of the state population living in urban areas, and positively correlated with the state being in certain regions of

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202 *Id.* at 868.

203 *E.g.*, Seini O'Connor & Ronald Fischer, *Predicting Societal Corruption Across Time: Values, Wealth, or Institutions?*, 43 J. CROSS-CULTURAL PSYCH. 644 (2012); Lorenzo Pellegrini & Reyer Gerlagh, *Causes of Corruption: A Survey of Cross-Country Analyses and Extended Results*, 9 ECON. OF GOVERNANCE 245 (2008); Jakob Svensson, *Eight Questions About Corruption*, 19 J. ECON. PERSPS. 19 (2005).

204 *E.g.*, Keith, *supra* note 178, at 2.

205 *See generally* Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision-Making*, 7 ST. POLS. & POL'Y Q. 281, 282 (2007); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. Rev. 69, 73–74 (2011); Aman McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 400–401 (2008) (finding that in some situations, judges were biased in favor of contributors to their campaigns).

206 James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 69–70 (2008).

207 James L. Gibson & Gregory A. Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey*, 10 J. EMPIRICAL LEGAL STUD. 73, 81, 84–86 (2013).

208 Rajeev K. Goel & Michael A. Nelson, *Measures of Corruption and Determinants of US Corruption*, 12 ECON. OF GOVERNANCE 155, 157 (2011).

209 Richard T. Boylan & Cheryl X. Long, *Measuring Public Corruption in the American States: A Survey of State House Reporters*, 3 ST. POL. & POL'Y Q. 420, 422–25 (2003).

the country (e.g., the South, the West, etc.).[210] In some models, the authors substituted per capita income for educational attainment, and found that higher levels of education were negatively correlated with the level of perceived corruption.[211]

It is here hypothesized that factors correlated with perceived corruption in a state will also be correlated with a state's likelihood of adopting measures to mandate recusal. This hypothesis is based on the supposition that where there is a greater perception of corruption, there will be a greater perceived need for clear rules barring judges from presiding over cases involving their campaigns' financial supporters, as the greater general perception of government corruption increases the perceived need to act against government corruption in all its forms. Goel and Nelson's findings about the correlates of perceived government corruption informed the selection of two of the corruption variables used in this model. Analysis by the author revealed that the region variables that Goel and Nelson used (Northeast and South), are significantly correlated with the use of peremptory recusal, and with personal income and educational attainment, so they were omitted from the current model to avoid problems associated with multicollinearity.[212] Since personal income and educational attainment are also significantly correlated, this model uses educational attainment and omits personal income. Doing this will also allow this study to test the findings of Dr. Seini O'Connor and Dr. Ronald Fischer, who found that self-expression values (which emphasize quality of life, the value of the individual's right to self-expression, and the right to political dissent), are associated with lower perceived corruption within the countries they studied.[213] Another study looked at the correlation between liberalization values, which they measured using a variable computed as an aggregated scale based on the items that have been used in multiple World Values Surveys, and education. The authors found that support for liberalization values was highly correlated with support for self-expression values, and that there was a significant positive correlation between a respondent's educational attainment and support for liberalization values.[214]

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210 Goel & Nelson, *supra* note 208, at 165–68.

211 *Id.*

212 Multicollinearity refers to a phenomenon in which two or more independent variables predict each other's values with great frequency (i.e. they are highly correlated). If two or more independent variables that are highly correlated are included in a model, it is difficult to measure how much influence each of the correlated independent variables is having on the dependent variable. *See, e.g.*, GARY KING, ROBERT O. KEOHANE, & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY 122–23 (1994).

213 The authors used data from the World Values Survey to measure levels of support for rational and self-expression values in different countries.

214 Alain Van Hiel et. al., *Can Education Change the World? Education Amplifies Differences in Liberalization Values and Innovation Between Developed and Developing Countries*, PLOS ONE 3–4 (June 21, 2018), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0199560.

Accordingly, this model includes variables representing the percentage of the state's population living in urban areas in 2010, and the percentage of the population over 25 that had completed a bachelor's degree in 2009. The data on urban population levels and educational attainment were gathered from the U.S. Census Bureau.[215]

2. The Dependent Variable

The dependent variable in the study is whether a state made changes to its judicial ethics regulations regarding recusal in cases involving litigants or lawyers who had financially supported their campaigns. If a state adopted such a change between 2009 and 2019, the variable is coded one, and zero if it did not. A state is counted as having adopted such a regulation if (1) that rule specifically addressed situations when judges should recuse themselves from cases involving donors to their campaigns and specified either dollar amounts at which recusal is necessary, or (2) contained language directing judges to consider whether disqualifying bias, or the appearance of such bias, caused by presiding over a case involving a contributor was present. Merely mentioning *Caperton*'s relevance in commentary without more specific direction as to how judges were to determine whether they should recuse was not counted. Fifteen states were coded as adopting rules fitting the above criteria during the decade.[216]

3. The Database

The database includes states. States that do not have judicial elections of any kind were excluded, along with Alabama, Alaska, and Mississippi, which hold elections, and which adopted rules regulating recusal in cases involving donors prior to *Caperton*. Information about the state judicial selection methods came from each state's entry in the Ballotpedia database.

4. The Model

The model was estimated using Firth's penalized maximum likelihood, a technique that is appropriately used when the dependent variable is of a binary nature and when the number of observations is relatively small.[217]

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[215] Data available at the United States Census Bureau, https://www.census.gov/data.html (the historical data used for this study are available at this database).

[216] These states were Arizona, Arkansas, California, Connecticut, Georgia, Iowa, Kansas, Michigan, New Mexico, New York, Oklahoma, Pennsylvania, Tennessee, Utah, and Washington.

[217] Gary King & Langche Zeng, *Logistic Regression in Rare Events Data*, 9 POL. ANALYSIS 137, 138–39 (2001).

Table One: Regression Results[218]

	Coefficient	Standard Error	Chi-Square	P-Value
Percent of State Population over 25 with Bachelor's Degree in 2009	-.079	.152	.297	.586
Percent of State Population in Urban Areas in 2010	.047	.029	3.364	.067*
Use of Peremptory Judicial Disqualification	-1.122	.728	2.721	.099*
Intercept	-2.155	2.729	.707	.400

*= variable significant at the .1 level.

5. Analysis

The results of the analysis mostly confirm the hypothesis stated above, in that all the independent variables had the expected signs, and two of them were significant at the .1 level. Specifically, the study finds that the use of peremptory disqualification and higher levels of educational attainment are negatively correlated with a state adopting recusal rule changes regarding litigants who are financial supporters in the decade after the decision, while states with a higher percentage of their citizens living in urban areas were positively correlated with adopting such changes. For example, some of the states with the highest percentage of their people living in urban areas adopted new recusal rules, including Arizona, California, Connecticut, Michigan, New York, Pennsylvania, and Washington, all of which have urban populations that exceed 74%.[219] By contrast, only one state (Arkansas) which had an urban population below 60%

[218] Degrees of Freedom = 3, Likelihood Ratio Test = 5.6039, Model Significance = 0.13554.

[219] Interestingly, Florida and Texas, with urban populations of 91.16% and 84.7% respectively, failed to adopt new recusal rules. *See Florida Demographic and Workforce Facts*, CAMPAIGN FOR ACTION, https://campaignforaction.org/wp-content/uploads/2016/08/Florida-v1.pdf (last visited Sept. 3, 2021); *Urban Texas*, TEX. DEMOGRAPHIC CTR., https://demographics.texas.gov/Resources/publications/2017/2017_08_21_UrbanTexas.pdf (last visited Sept. 3, 2021).

adopted new rules. These results provide some support for the hypothesis that there is a link between the public's perceived levels of government corruption, and modification of state recusal rules to prevent judges from presiding over cases involving those who have financially supported their campaigns.

VI. CONCLUSION

This study of *Caperton*'s aftermath shows that there can be valuable lessons learned by studying a case that did not bring about the significant changes in policy that some observers had predicted. Specifically, this survey has presented evidence that *Caperton*'s reception in the lower courts is consistent with the recent hypotheses that the clarity and certainty of the language of a United States Supreme Court opinion can affect how lower courts interpret and apply its decisions, and that the enactment of judicial ethics regulation might be tied to perceptions of corruption. These findings suggest that more research should be done on the effect that the language of Supreme Court opinions has on lower courts' interpretation and application of those opinions. Two interesting avenues of research in this area might involve studying the effects of the following on lower court treatment of Supreme Court precedents: (1) the repetition of characterizations of the facts in the Court's opinion (i.e., are the facts "extraordinary", "rare," etc.), and (2) the effect of the Court expressing its expectations about how lower courts should or will apply its opinions. The finding that perceived levels of corruption might be linked to a state's willingness to adopt clearer rules to prevent judicial conflicts of interest raises an interesting question about the link between perceived corruption and government ethics reform. For example, do governments change their ethics rules to make them more strictly guard against conflicts of interest at moments when perceived corruption is higher? To answer this question, more research is needed into the correlates of perceived levels of government corruption and government ethics reform.

Although *Caperton* has not had as much effect on recusal law as some had predicted, there is evidence suggesting that it might have more impact in the future. Specifically, a study by Professors Thomas G. Hansford and James F. Spriggs has found evidence that while lower courts tend to initially treat U.S. Supreme Court precedents positively, over time, that treatment moves toward a balance of negative and positive treatment until these treatments occur at nearly the same frequency by the time the precedent is 20 years old.[220] If Hansford and Spriggs are correct about cases being treated differently over time, the lower courts may yet use *Caperton* to bring about more widespread judicial recusal reform in the coming decades if their treatment of it becomes more evenhanded, in the sense that it is relied on to more frequently mandate judicial recusal. The

[220] THOMAS G. HANSFORD & JAMES F. SPRIGGS, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 115–22 (2006).

catalyst for this change might be the push to end dark money in politics. Proposals have been made at the state level[221] and at the federal level[222] aimed at eliminating dark money by requiring nonprofits that in engage in political advocacy to reveal the sources of their funding. If campaign spending continues to rise, and if those who wish to financially support judicial candidates cannot as easily conceal that support, more conflicts of interest of the magnitude of the one at issue in *Caperton* might come to light, which could spur the judiciary or the state legislatures to act on judicial recusal reform. In this way, *Caperton* may yet see its day of influence come.

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[221] *E.g.*, Melanie Dowling, *Commonsense Election Reform Means More Choice for Alaskans*, ANCHORAGE PRESS (Oct. 23, 2020), https://www.anchoragepress.com/opinion/commonsense-election-reform-means-more-choice-for-alaskans/article_9732203e-1567-11eb-9491-67dda11d3933.html; Howard Fischer Capitol Media Services, *Movement to Eliminate 'Dark Money' from Politics Gains Steam*, HERALD REV. (June 6, 2018), https://www.myheraldreview.com/news/business/movement-to-eliminate-dark-money-from-arizona-politics-gains-steam/article_13c92648-6a10-11e8-8539-03e57f390579.html; Charles Stile, *Feud Derailing Legal Weed and More; Dark Money Casualty in Murphy, Sweeney Fight*, COURIER NEWS, May 16, 2019, at A5. *See also Dark Money: Outing Donors State by State*, RECLAIM THE AM. DREAM, https://reclaimtheamericandream.org/progress-disclose/ (last visited Sept. 3, 2021).

[222] *E.g.*, Maggie Miller, *Efforts to Secure Elections Likely to Gain Ground in Democrat-Controlled Congress*, THE HILL, (Jan. 12, 2021, 6:00AM), https://thehill.com/policy/cybersecurity/533744-efforts-to-secure-elections-likely-to-gain-ground-in-democrat-controlled; *Rep. McNerney Introduces Constitutional Amendment to Eliminate PACs and Dark Money*, CONGRESSMAN JERRY MCNERNEY (July 18, 2019), https://mcnerney.house.gov/media-center/press-releases/rep-mcnerney-introduces-constitutional-amendment-to-eliminate-pacs-and; *Tester, Wyden Reintroduce Spotlight Act to Shine a Light on Dark Money in Politic*s, JON TESTER (Jan. 19, 2019), https://www.tester.senate.gov/?p=press_release&id=6601.