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## ELECTING JUDGES, JUDGING ELECTIONS, AND THE LESSONS OF CAPERTON

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Few Supreme Court cases inspire a bestselling novel *before* they're decided. But *Caperton v. A.T. Massey Coal Co.*<sup>1</sup> did: the story of how a big damages verdict prompted the head of a large corporation to pour millions of dollars into a judicial election for the court that would hear the company's appeal inspired John Grisham just as it appalled the Court.<sup>2</sup>

*Caperton* calls to mind far more than the plot of a page-turner. This Comment shows how *Caperton* also taps into several long-running themes in the law of democracy — the set of doctrines and jurisprudential positions that create the structure within which politics, elections, and governance occur. In Part I, I discuss how *Caperton* fits into a stream of cases involving judicial elections. Judicial elections confront the Supreme Court with an uncomfortable fact. The Court has often drawn a sharp distinction between judges and other public officials. But while the Court holds itself apart from the “political thicket,”<sup>3</sup> the vast majority of American judges cannot es-

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In the interest of full disclosure — *Caperton*, after all, is a case about how “psychological tendencies and human weakness” can produce “bias or prejudice,” *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (internal quotation mark omitted) — I note that I participated in the following cases discussed or cited in this Comment: *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009) (counsel for amici curiae NAACP et al. in support of petitioners); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008) (counsel for petitioners); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (counsel for amici curiae Texas House Democratic Caucus et al. in support of appellants); *Shaw v. Hunt*, 517 U.S. 899 (1996) (counsel for amici curiae North Carolina Legislative Black Caucus et al. in support of appellees); *Miller v. Johnson*, 515 U.S. 900 (1995) (counsel for amici curiae Georgia Association of Black Elected Officials in support of appellants); *Chisom v. Roemer*, 501 U.S. 380 (1991) (counsel for petitioners); and *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987) (counsel for plaintiffs).

<sup>1</sup> 129 S. Ct. 2252.

<sup>2</sup> See Paul J. Nyder, *Novel Linked in State Election; Author Details Idea on “Today,”* CHARLESTON GAZETTE, Jan. 30, 2008, at 1A (noting the connection Grisham drew between the events in West Virginia that gave rise to *Caperton* and his novel *The Appeal*); cf. Supreme Court Associate Justice Ruth Bader Ginsburg, Remarks at the Second U.S. Circuit Court of Appeals Judicial Conference (June 13, 2009) (transcript available at LEXIS, Federal News Service File) (noting the similarity between the Grisham novel and *Caperton*).

<sup>3</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.).

cape that thicket altogether: they get or retain their positions through popular election.<sup>4</sup> The Court's discomfort with judicial elections has prompted two responses. Sometimes, Justices have argued for relaxing or modifying election rules to account for the distinctive post-election role played by judges. Other times, the Justices have seemed almost to revel in confronting the public with the consequences of its choice to select judges by election, rather than appointment. While the Court's opinion in *Caperton* focused explicitly only on the way that extraordinary infusions of money into a judicial election may threaten judicial impartiality, the Court's analysis cannot be so easily cabined. Money, after all, gains its power in elections because it is the fuel of politics and can be converted into votes.<sup>5</sup> If gratitude for a past financial contribution can pose a sufficiently serious "risk of actual bias or pre-judgment" to threaten "the guarantee of due process,"<sup>6</sup> then what should we make of the more direct effect that comes from fear of future electoral retaliation? Political calculations could influence judges' decisions in a wide range of cases and might influence them in less visible, and thus more pernicious and less potentially self-correcting, ways than campaign spending does.

In Part II, I turn from what *Caperton* says about electing judges to how *Caperton* reflects broader themes about judicial regulation of politics. Across a variety of domains, a central problem in the law of democracy concerns articulating when and how courts should intervene. *Caperton* echoes several key elements of the Court's prior decisions, such as the relationship between the justiciability of constitutional claims and the availability of clear-cut rules for adjudicating them; the salience of appearance and "expressive harms" in the regulation of politics; and the effect of judicially announced rules on the broader political culture. Most fundamentally, *Caperton* continues the Court's problematic insistence on addressing structural problems through the lens of protecting individual rights.

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<sup>4</sup> See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004) (calculating that "87% of the state and local judges in the United States have to face the voters at some point if they want to win or remain in office," that twenty-one states use elections for all judicial positions, and that thirty-nine states use elections for at least some judicial positions).

<sup>5</sup> See Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 116 (explaining that votes are a candidate's ultimate goal; campaign contributions are only valuable if they produce votes, as "51 percent of the vote dominates an infinite amount of campaign money").

<sup>6</sup> *Caperton*, 129 S. Ct. at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

## I. ELECTING JUDGES: *CAPERTON* AND THE RISKS OF JUDICIAL BIAS

In 2002, a West Virginia jury returned a \$50 million verdict against the A.T. Massey Coal Company (Massey) in a commercial dispute.<sup>7</sup> The central claim advanced by the petitioners in *Caperton* was that Justice Brent Benjamin's decision to participate in Massey's appeal from that verdict violated the Due Process Clause of the Fourteenth Amendment in light of the extraordinary support he had received during his 2004 campaign for a seat on the West Virginia Supreme Court of Appeals from Don Blankenship, a high-level Massey official.<sup>8</sup> Given that *Caperton* was framed as a case about the constitutional rights of litigants, it makes sense that both Justice Kennedy's opinion for the Court and Chief Justice Roberts's principal dissent began their analyses by looking to the Court's prior decisions involving recusal. But having recognized the limited relevance of cases that did not address the interplay between elections and judicial bias,<sup>9</sup> it is somewhat surprising that the Court never addressed several decisions that *did* directly plumb that relationship. Perhaps the Court was distracted by the fact that those cases involved not the rights of litigants, but rather the rights of voters and candidates for judicial office. Nevertheless, those decisions — in particular, *Chisom v. Roemer*<sup>10</sup> and *Republican Party of Minnesota v. White*<sup>11</sup> — not only offer a richer account of judicial impartiality than the relatively spare account in *Caperton*, but also highlight some profound questions that *Caperton* may raise.

### A. Impartiality in the Vote Dilution Cases

Since the Reapportionment Revolution of the 1960s, judicial elections have been subject to a series of challenges based on the claim that the way they were being conducted illegally diluted the voting strength of an identifiable group. Plaintiffs in these challenges sought to apply theories that had initially been developed in the context of legislative elections — for example, that electing members of multi-member governmental bodies from districts with materially different populations violates the Equal Protection Clause or that choosing pub-

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<sup>7</sup> *Id.* at 2257.

<sup>8</sup> *See id.* at 2256 (“The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion.”).

<sup>9</sup> *See id.* at 2262 (noting that *Caperton* “arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed”); *id.* at 2268 (Roberts, C.J., dissenting) (arguing that the Court had never before recognized a due process constraint outside of a judge's direct financial interest or previous involvement in a criminal contempt case).

<sup>10</sup> 501 U.S. 380 (1991).

<sup>11</sup> 536 U.S. 765 (2002).

lic officials in a way that unfairly prevents members of racial minority groups from electing their preferred candidates violates the Voting Rights Act of 1965.<sup>12</sup> States responded in cases involving judicial elections by arguing that judicial contests were distinctive: judges were not expected to “represent” the citizens who elected them and thus the concerns that animated the requirements of one-person, one-vote and the Voting Rights Act were irrelevant. In a pair of cases involving elections to Louisiana’s highest court, the Supreme Court addressed this response.

In *Wells v. Edwards*,<sup>13</sup> the Court summarily affirmed a three-judge court’s decision that one-person, one-vote — one of the bedrock principles of modern equal protection law — did not apply to judicial elections and that Louisiana could therefore elect the members of the state supreme court from districts with vastly different numbers of inhabitants.<sup>14</sup> Although the Court provided no explanation for its decision,<sup>15</sup> Justice White’s dissent assumed that the Court’s ruling rested on its agreement with the lower court’s statement that judges “are not representatives in the same sense as are legislators or the executive” because “[t]heir function is to administer the law, not to espouse the cause of a particular constituency.”<sup>16</sup>

By contrast, in *Chisom v. Roemer*, the Court held that the process for electing the Louisiana Supreme Court *was* covered by section 2 of the Voting Rights Act of 1965, which forbids states from using election procedures that result in members of racial or language minority groups having “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>17</sup> In an opinion by Justice Stevens, who later joined Justice Kennedy’s opinion for the Court in *Caperton*, the Court held that “the word ‘representatives’ describes the winners of representative, popular elections,”<sup>18</sup> and that judges accordingly were representatives within the meaning of section 2. In a footnote, the Court elaborated,

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<sup>12</sup> 42 U.S.C. § 1973 (2006).

<sup>13</sup> 409 U.S. 1095 (1973) (per curiam).

<sup>14</sup> The least populous district had roughly 369,000 residents, while the most populous had over 682,000. *Id.* at 1095 n.1 (White, J., dissenting).

<sup>15</sup> See generally *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (explaining that when the Court issues a summary affirmance, it “affirm[s] the judgment but not necessarily the reasoning by which it was reached” (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring))).

<sup>16</sup> *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)); see *Wells*, 409 U.S. at 1095–98 (White, J., dissenting) (addressing the district court’s reasoning).

<sup>17</sup> 42 U.S.C. § 1973(b).

<sup>18</sup> *Chisom v. Roemer*, 501 U.S. 380, 399 (1991).

noting that its recent decision in *Gregory v. Ashcroft*<sup>19</sup> had “recognized that judges do engage in policymaking at some level”.<sup>20</sup>

“It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.” A judge brings to his or her job of interpreting texts “a well-considered judgment of what is best for the community.” As the concurrence notes, Justice Holmes and Justice Cardozo each wrote eloquently about the “policymaking nature of the judicial function.”<sup>21</sup>

Thus, the Court declined to exempt judicial elections from compliance with section 2.<sup>22</sup>

That the *Chisom* Court treated judges as “representatives” with respect to the rules governing elections did not mean that it was happy about how judges were being chosen. It described a “fundamental tension between the ideal character of the judicial office” — in which “public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment” — and the “real world of electoral politics.”<sup>23</sup> It recognized the difficulty of “crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.”<sup>24</sup> And it allied its view with that of the Framers, who provided for lifetime appointment of federal judges.<sup>25</sup>

Justice Scalia, in a dissent joined by Chief Justice Rehnquist and Justice Kennedy, would have gone further in distinguishing judges

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<sup>19</sup> 501 U.S. 452 (1991).

<sup>20</sup> *Chisom*, 501 U.S. at 399 n.27.

<sup>21</sup> *Id.* (quoting *Gregory*, 501 U.S. at 466, 467; *id.* at 482 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (citations and parentheses omitted)).

<sup>22</sup> In a companion case decided the same day as *Chisom*, *Houston Lawyers’ Ass’n v. Attorney General of Texas*, 501 U.S. 419 (1991), the Court expressly left open the question whether the totality-of-the-circumstances test for deciding whether section 2 has been violated should take into account the distinctive role played by judges. *See id.* at 426–28. On remand, the court of appeals ultimately held that the state’s distinctive interest in linking the electoral and jurisdictional bases of judges — an interest that would not have been determinative had the plaintiffs been challenging at-large elections for other officers — defeated the plaintiffs’ claim that Texas’s use of countywide at-large elections to select judges diluted the voting strength of black and Latino communities. *See League of United Latin Am. Citizens (LULAC) v. Clements*, 999 F.2d 831, 869–76 (5th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1071 (1994). Although there had been several successful challenges to judicial election systems prior to *Chisom*, *see, e.g.*, *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987), following the Fifth Circuit’s decision in *LULAC*, courts of appeals often relied on theories of linkage in rejecting plaintiffs’ claims. *See, e.g.*, *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995).

<sup>23</sup> *Chisom*, 501 U.S. at 400.

<sup>24</sup> *Id.* at 400–01.

<sup>25</sup> *See id.* at 400.

from other elected officials. He agreed that judicial elections were covered by section 2's prohibition on practices that denied minority voters the right "to participate in the political process,"<sup>26</sup> but would not have extended section 2's protection of the right "to elect" to judicial elections because the object of that verb was the word "representatives":<sup>27</sup>

Surely the word "representative" connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf* of the people. Judges do that in a sense — but not in the ordinary sense. As the captions of the pleadings in some States still display, it is the prosecutor who represents "the People"; the judge represents the Law — which often requires him to rule against the People. It is precisely because we do not *ordinarily* conceive of judges as representatives that we held judges not within the Fourteenth Amendment's requirement of "one person, one vote."<sup>28</sup>

Neither Justice Scalia nor the majority, however, expressed any doubt that the underlying factual premise of vote dilution claims — that how elections are run affects who gets elected — applied to judicial elections. And although the majority and the dissent disagreed over the legal constraints on states' choices about how to aggregate voters for purposes of electing judges, they were unified on the question of how electoral outcomes should influence post-election governance.<sup>29</sup> All the Justices thought that elections should not affect how judges conduct themselves once they are elected.<sup>30</sup>

### B. *Impartiality in the Campaign Speech Case*

A decade later, the Court confronted from another angle the question whether judicial elections are materially different, this time focusing on the rights of candidates rather than voters. In *Republican Party of Minnesota v. White*, the Court held that Minnesota's "announce clause," which prohibited a "candidate for a judicial office" from "announc[ing] his or her views on disputed legal or political is-

<sup>26</sup> *Id.* at 417 (Scalia, J., dissenting) (internal quotation marks omitted).

<sup>27</sup> *Id.* at 405.

<sup>28</sup> *Id.* at 410–11 (citing *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973)).

<sup>29</sup> I develop the participation-aggregation-governance taxonomy in Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993). Participation concerns individuals' ability to cast a ballot and have it counted; aggregation concerns the rules used to prescribe how results will be determined (for example, by using at-large or districted elections); and governance concerns the way elected officials make policy. *Id.* at 1709–19.

<sup>30</sup> See *Chisom*, 501 U.S. at 400 (noting that judges must sometimes defy the popular will); *id.* at 411 (Scalia, J., dissenting) (explaining that judges' duty to represent the law often requires them "to rule against the People").

sues,”<sup>31</sup> violated the First Amendment’s Free Speech Clause.<sup>32</sup> Ironically, although the Court’s bottom line was consistent with *Chisom* — in both cases, the Court refused to exempt judicial elections from general legal rules — only Justice O’Connor, who later expressed regret over her vote in *White*,<sup>33</sup> was in the majority both times.<sup>34</sup>

The various opinions in *White*<sup>35</sup> offer a sustained treatment of the relationship between judicial elections and judicial impartiality. Every member of the Court recognized that the Due Process Clause requires that judges be impartial.<sup>36</sup> To be sure, the Justices differed somewhat in how they defined “impartiality.” Justice Scalia’s opinion for the Court expressed its view in relatively narrow terms, describing impartiality as “the lack of bias for or against either *party* to the proceeding.”<sup>37</sup> As long as “[a]ny party taking [a particular] position is just as likely to lose,”<sup>38</sup> the Constitution would be satisfied. By contrast, Justice Ginsburg’s dissent argued that prior due process decisions had inquired “more broadly” into “the surrounding circumstances and incentives” to consider whether the judge had a “personal interest in resolving an issue a certain way.”<sup>39</sup> Due process, she declared, would “not countenance the latter situation, even though the self-interested judge ‘[would] apply the law to [the losing party] in the same way he [would apply] it to any other party’ advancing the same position.”<sup>40</sup> To illustrate this situation, Justice Ginsburg pointed to *Aetna Life In-*

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<sup>31</sup> 536 U.S. 765, 768 (2002) (citing MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

<sup>32</sup> *Id.* at 788.

<sup>33</sup> Matthew Hirsch, *Swing Voter’s Lament: At Least One Case Still Bugs O’Connor*, LEGAL INTELLIGENCER, Nov. 9, 2006, at 4 (quoting Justice O’Connor as saying that *White* “does give me pause”).

<sup>34</sup> Justice Scalia, who had dissented in *Chisom*, wrote the opinion of the Court in *White*. Chief Justice Rehnquist and Justice Kennedy joined him both times. Justice Stevens, who had written the opinion of the Court in *Chisom*, wrote one of the two dissents in *White*. He was joined both times by Justice Souter. Justices Thomas, Ginsburg, and Breyer joined the Court after *Chisom* and before *White*, replacing Justices Marshall, White, and Blackmun, respectively. For an interesting discussion of the relationship between *White* on the one hand and *Gregory*, *Chisom*, and *Houston Lawyers’ Ass’n* on the other, see Sherrilyn A. Ifill, *Through the Lens of Diversity: The Fight for Judicial Elections After Republican Party of Minnesota v. White*, 10 MICH. J. RACE & L. 55, 67–74 (2004).

<sup>35</sup> In addition to Justice Scalia’s opinion for the Court, there were concurrences by Justices O’Connor and Kennedy and dissents by Justices Stevens and Ginsburg.

<sup>36</sup> See *White*, 536 U.S. at 776 (agreeing with respondents’ suggestion that due process requires impartiality, but construing impartiality as applying only to parties and not issues); *id.* at 804, 813–14 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting) (stating that the Due Process Clause protects a right to an impartial decisionmaker).

<sup>37</sup> *Id.* at 775 (majority opinion).

<sup>38</sup> *Id.* at 777.

<sup>39</sup> *Id.* at 815 n.3 (Ginsburg, J., dissenting).

<sup>40</sup> *Id.* (quoting *id.* at 776 (majority opinion)).

*surance Co. v. Lavoie*,<sup>41</sup> a case in which the Court had held that the Due Process Clause was violated when a justice on the Alabama Supreme Court participated in deciding a case that recognized a new cause of action at the same time that the justice was a plaintiff in a lawsuit that depended on the newly recognized theory.<sup>42</sup> It was the nature of the claim, rather than the identity of the litigant, that created the judge's personal pecuniary interest. But given that the Court's opinion also cited *Lavoie* — describing it as an example of a judge violating “due process by sitting in a case in which it would be in his financial interest to find against one of the parties”<sup>43</sup> — it is not clear that there is a material disagreement among the Justices on this point.

The Justices also all recognized the way in which judicial elections might color judges' decisionmaking by creating a personal (and pecuniary) stake related to their desire to retain office.<sup>44</sup> Justice O'Connor put the point plainly:

[I]f judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.<sup>45</sup>

What really separated the Justices in the *White* majority from those in the dissent were two considerations. First, the dissenters thought campaign statements posed an especially great threat to judicial impartiality.<sup>46</sup> By contrast, Justice Scalia's opinion for the Court down-

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<sup>41</sup> 475 U.S. 813 (1986). Coincidentally, *Lavoie* marked the first oral argument on behalf of a private party by Theodore Olson, the counsel who argued *Caperton* for the petitioners.

<sup>42</sup> *Id.* at 824–25.

<sup>43</sup> *White*, 536 U.S. at 776. The Court also noted *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), as examples of this type of violation.

<sup>44</sup> I discuss this point at more length in Pamela S. Karlan, *Judicial Independences*, 95 GEO. L.J. 1041, 1046–48 (2007).

<sup>45</sup> *White*, 536 U.S. at 788–89 (O'Connor, J., concurring); see *id.* at 782 (majority opinion) (stating that “elected judges — regardless of whether they have announced any views beforehand — always face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench”); *id.* at 799–800 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) (observing that in light of the “conflict between the demands of electoral politics and the distinct characteristics of the judiciary, . . . [a]s a practical matter, we cannot know for sure whether an elected judge's decisions are based on his interpretation of the law or political expediency”).

<sup>46</sup> See *id.* at 798 (Stevens, J., dissenting) (arguing that “to the extent that [campaign] statements seek to enhance the popularity of the candidate by indicating how he would rule in specific cases if elected, they evidence a lack of fitness for the office” that is not suggested by expressions of one's views unconnected from office-seeking); *id.* at 816 (Ginsburg, J., dissenting) (stating that “[w]hen a judicial candidate promises to rule a certain way on an issue that may later reach the courts, the potential for due process violations is grave and manifest” because a successful candidate who “fails to honor her campaign promises, . . . will not only face abandonment by supporters of her professed views; she will also ‘ris[k] being assailed as a dissembler,’ willing to say one



played the relative risk of campaign speech in influencing judges' behavior on the bench.<sup>47</sup> And the two concurrences pointed to the risk that a different aspect of the electoral process — the recent influx of serious money into judicial elections — might pose a significant threat, not only to judicial impartiality in discrete cases, but also to public confidence.<sup>48</sup>

Second, the dissenters thought that restrictions on candidate speech were an appropriate means of ensuring impartiality and public confidence, particularly in light of their view that judges' relationship to the electorate differed so fundamentally from that of other elected officials.<sup>49</sup> By contrast, in an unusually candid passage, the majority rejected the "complete separation of the judiciary from the enterprise of 'representative government.'"<sup>50</sup> This separation, it observed:

[M]ight have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature[, but i]t is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well.<sup>51</sup>

And Justice Kennedy, in particular, emphasized that the state had means of pursuing its compelling interests that did not trench on First Amendment rights:

[Minnesota] may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.<sup>52</sup>

Taken together, the Court's judicial election cases offer a refined account of the interplay between judicial elections and judicial impar-

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thing to win an election and to do the opposite once in office" (final alteration in original) (citation omitted) (quoting *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 878 (8th Cir. 2001)).

<sup>47</sup> *Id.* at 780–81 (majority opinion).

<sup>48</sup> *See id.* at 789–90 (O'Connor, J., concurring) (noting the high cost of judicial elections and the ensuing public belief that judges are influenced by campaign contributions); *id.* at 794 (Kennedy, J., concurring) (observing that "Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system").

<sup>49</sup> *See id.* at 797 (Stevens, J., dissenting) (criticizing the majority for "obscuring the fundamental distinction between campaigns for the judiciary and the political branches"); *id.* at 806 (Ginsburg, J., dissenting) (arguing that "the rationale underlying unconstrained speech in elections for political office — that representative government depends on the public's ability to choose agents who will act at its behest — does not carry over to campaigns for the bench").

<sup>50</sup> *Id.* at 784 (majority opinion).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 794 (Kennedy, J., concurring).

tiality. First, they recognize that structural features of judicial elections can affect electoral outcomes. The essence of a qualitative vote-dilution claim is the assertion that the challenged electoral practice diminishes the plaintiffs' ability to elect the candidates they prefer and thus results in a court with a different composition than a fairer system would produce.<sup>53</sup> Similarly, judicial candidates' statements about legal issues provide information to voters that can influence their choice among candidates.<sup>54</sup> Second, these cases recognize that electoral outcomes can in turn affect adjudicatory outcomes. Judges, particularly on state supreme courts, often confront novel legal issues and opportunities for making law or policy. There is sufficient play in the joints that many cases will turn on exercises of judgment and discretion. Some of the cases that present these issues or opportunities may have significant public salience. To the extent that judges want to retain their positions, they may be unable to maintain "total indifference to the popular will"<sup>55</sup> on these issues and may confront "a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear, and true."<sup>56</sup>

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<sup>53</sup> Section 2(b) of the Voting Rights Act provides that a violation occurs when the members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (2006). See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 384–85 (1991) (describing the plaintiffs' claim that the placement of majority-black Orleans Parish within a majority-white, two-seat judicial district deprived black voters of the ability to elect a member of the state supreme court); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 423 (1991) (describing the plaintiffs' claim that the choice of countywide, at-large elections rather than subdistricted elections denied black and Latino voters the ability to elect trial court judges).

<sup>54</sup> In fact, to the extent that voters lack information about judicial candidates' legal views, they may be more likely to rely on arguably less relevant, or even affirmatively undesirable, cues. Minnesota had identified such topics as "a candidate's 'character,'" and views on "cameras in the courtroom," *White*, 536 U.S. at 774, as subjects for popular attention, but it is far likelier that voters will rely on factors such as a candidate's race. It is striking that in a comprehensive study of vote dilution litigation under section 2 of the Voting Rights Act, a majority of the cases surveyed in which courts have found candidates using their *opponents'* photographs in their campaign advertisements — conventionally thought of as a bad idea, but often considered a form of racial appeal — have involved judicial elections. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 709 & n.370 (2006).

<sup>55</sup> *Chisom*, 501 U.S. at 400.

<sup>56</sup> *White*, 536 U.S. at 815 (Ginsburg, J., dissenting) (alteration in original) (quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972)) (internal quotation mark omitted).

The grudging approach to judicial elections taken in *Chisom* and *White* is echoed in the Court's recent decision in *New York State Board of Elections v. López Torres*, 128 S. Ct. 791 (2008). That case concerned New York's distinctive process for electing state trial judges, under which party nominations are made at district nominating conventions by delegates ostensibly selected by primary election. *Id.* at 796. The Court acknowledged "the apparent reality that party leaders can control delegates," *id.* at 797, given the relative lack of voter interest in judicial nominating convention delegate primaries, but nevertheless upheld the system against a First Amendment-based challenge, *id.* at 801. While the Justices all agreed that New York's system was con-

### C. Caperton and the Meaning of Judicial Impartiality

The situation that gave rise to *Caperton* fits easily within the framework laid out in the judicial election cases. Money can play a critical role in judicial elections. Especially because many judicial elections are low-salience, down-ballot races,<sup>57</sup> political spending often serves as the major source of information to voters. Just as judicial candidates may face a temptation to shade their decisions to attract voters' support, so too they may face the temptation to shade their decisions to attract the financial support that enables them to appeal to voters.

In contrast to the judicial election cases, where the Court considered prospectively how particular election rules could affect judicial impartiality, *Caperton* has a decidedly retrospective cast. The Court found that Don Blankenship's financial support was instrumental in Justice Benjamin's electoral victory.<sup>58</sup> In light of the salience of that support, "a realistic appraisal of psychological tendencies and human weakness" suggested to the Court "such a risk of actual bias or pre-judgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."<sup>59</sup> The Court referred, with evident approval, to the petitioners' assertion that Justice Benjamin

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stitutional, *id.* at 795, several Justices again expressed general reservations about judicial elections. Justice Stevens, joined by Justice Souter, concurred in order "to emphasize the distinction between constitutionality and wise policy," *id.* at 801:

Our holding with respect to the former should not be misread as endorsement of the electoral system under review, or disagreement with the findings of the District Court that describe glaring deficiencies in that system and even lend support to the broader proposition that the very practice of electing judges is unwise. But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws."

*Id.* (Stevens, J., concurring). Justice Kennedy, joined by Justice Breyer, observed that while it might sometimes be "difficult to reconcile" the aspirations for "a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges . . . with elections," a well-designed judicial election system *could* provide "an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates." *Id.* at 803 (Kennedy, J., concurring). But New York's system, he intimated, was "open to manipulation, criticism, and serious abuse" that undermined "both the perception and the reality of a system committed to the highest ideals of the law." *Id.*

<sup>57</sup> See James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 64 (2008) (describing recent changes in judicial elections); Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 541 (1999).

<sup>58</sup> To be slightly more precise, the Court's opinion reflects some ambiguity. *Compare Caperton*, 129 S. Ct. at 2264 (concluding that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case"), *with id.* (stating that "[w]hether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry" in light of the possibility that they might have had an influence sufficient to affect Benjamin's thinking).

<sup>59</sup> *Id.* at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (internal quotation marks omitted).

would “feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected” and that that feeling would create a temptation “as strong and inherent in human nature” as the conflict that arises when a judge will benefit financially in the future from his decisions.<sup>60</sup>

I found myself pausing over this passage: Justice Benjamin, unlike the judges in the Court’s prior judicial election cases who were concerned with upcoming contests, had already irrevocably received Blankenship’s support in his 2004 campaign. Regardless of what he did in Massey’s appeal, he would enjoy roughly another decade on the Supreme Court of Appeals.<sup>61</sup> Thus, any day of reckoning was either long in the future or well in the past.

More fundamentally, there is an ambiguity in the Court’s reference to “the practice [that] must be forbidden if the guarantee of due process is to be adequately implemented.” What “practice” is that? It cannot be the practice of political spending. *That* practice receives the highest First Amendment protection under *Buckley v. Valeo*,<sup>62</sup> and *White* reiterated, in the context of judicial elections, that “[d]ebate on the qualification of candidates” lies “‘at the core . . . of First Amendment freedoms,’ not at the edges.”<sup>63</sup> On a related note, perhaps the most surprising aspect of the Court’s opinion in *Caperton* was its erasure of the distinction between campaign “contributions” — money given directly to candidates and subject to relatively stringent regulation — and other forms of political spending that receive greater constitutional protection.<sup>64</sup>

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<sup>60</sup> *Id.* at 2262.

<sup>61</sup> See W. VA. CONST. art. VIII, § 2 (providing twelve-year terms for justices on the Supreme Court of Appeals).

<sup>62</sup> 424 U.S. 1, 57 (1976) (explaining that “[t]he First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise”).

<sup>63</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989)).

<sup>64</sup> The Court’s opinion repeatedly refers to the exceptional or “extraordinary” nature of Blankenship’s “campaign contributions.” See *Caperton*, 129 S. Ct. at 2256, 2257, 2264. But in its prior campaign finance jurisprudence, the Court had drawn a bright line between campaign “contributions” — money given directly to candidates or their campaign committees — and other forms of political spending. See *Buckley*, 424 U.S. at 20–21 (permitting limitations on contributions while striking down analogous limitations on independent expenditures). While Blankenship’s “contributions” to Benjamin’s victory in the everyday sense of the word might well have been remarkable — he spent more than \$500,000 on direct mailings, letters seeking donations from others, and advertisements, and he donated almost \$2.5 million to a political organization with the moniker “And For The Sake Of The Kids,” which supported Benjamin and opposed the incumbent justice against whom he was running — his “contributions” in the legal sense were not. Blankenship contributed only \$1000, the statutory maximum, to Benjamin’s campaign committee. *Caperton*, 129 S. Ct. at 2257.

The line between contributions and other spending has been under attack for years. See Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 747 (2007) (observing that “[s]ave for the notorious crack/powder distinction, it’s hard to

So the “practice” at issue in *Caperton* must be the act of sitting on certain key supporters’ cases. Perhaps this explains why *Caperton* so jarringly fails to mention the Court’s judicial election decisions despite their obvious bearing on the question before it. Applying their framework to the issue raised in *Caperton* would broaden the case far beyond lawsuits involving exceptional amounts of money.<sup>65</sup> It would bring the Court onto a collision course with the practice of electing judges.

To be sure, the *Caperton* majority took some pains to insist that it was not opening the floodgates to litigation challenging the impartiality of state court judges. The “principle”<sup>66</sup> it announced had so many moving parts and was hedged with so many qualifications<sup>67</sup> that it

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think of a line that has been subjected to more withering criticism over the years than *Buckley*’s expenditure/contribution distinction”). For an extended treatment of the difficulties with and perverse consequences of the distinction, see Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1710–17 (1999). The Court’s recent decision in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), suggests that many of the Justices are prepared to abandon the distinction. See *id.* at 2500–01 (Alito, J., concurring in part and concurring in the judgment) (refusing to join the part of Justice Breyer’s opinion announcing the judgment that accepted the continued vitality of *Buckley*); *id.* at 2501 (Kennedy, J., concurring in the judgment) (expressing “skepticism” toward the “legal universe we have ratified and helped create”); *id.* at 2502 (Thomas, J., joined by Scalia, J., concurring in the judgment) (arguing that contribution limits should be subjected to the same heightened standard of review that is applied to expenditure limits); *id.* at 2506–10 (Stevens, J., dissenting) (arguing that *Buckley* should be overturned in the opposite direction, applying the more deferential review now accorded contribution limits to expenditure limits as well); see also Docket Entry, *Citizens United v. FEC*, No. 08-205 (June 29, 2009), available at <http://supremecourtus.gov/docket/08-205.htm> (directing the parties to address the question whether the Court should overrule two of its other significant campaign finance decisions limiting corporate and union spending).

Still, there was something a bit jarring about the casual way in which the *Caperton* Court simply skipped over the distinction. For a characteristically incisive discussion of this elision, see Posting of Bob Bauer to More Soft Money Hard Law Web Updates, <http://www.moresoftmoneyhardlaw.com/news.html?AID=1453> (June 12, 2009).

<sup>65</sup> Surprisingly, although Chief Justice Roberts included in his dissent an unusual laundry list of forty “fundamental” questions left open by the Court’s decision, see *Caperton*, 129 S. Ct. at 2269–72 (Roberts, C.J., dissenting), he never directly pointed out the quite fundamental question whether *Caperton* should permit claims of bias stemming from a judge’s desire to please the electorate (although he did point out that the case triggering recusal might “involve[] a social or ideological issue rather than a financial one,” *id.* at 2269). The Chief Justice did, however, identify other potential sources of influence, such as “a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities” or a “close personal friendship between a judge and a party or lawyer.” *Id.* at 2270.

<sup>66</sup> *Id.* at 2264 (majority opinion).

<sup>67</sup> The Court stated:

[T]here is a serious risk of actual bias — based on objective and reasonable perceptions — when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contrib-

drove the Chief Justice to enumerate forty questions it raised — double the number in the traditional party game and ten times the number at a seder.<sup>68</sup> But the logic of *Caperton* cannot be so easily cabined. Even if extraordinary amounts of money could be driven out of the judicial election process, judicial fear of electoral retaliation would continue to place psychological pressure on judges to do the popular thing. I have little doubt that the Court will reject claims by criminal defendants that the decisions in their cases were influenced by electoral concerns.<sup>69</sup> But that result — like the Court’s unwillingness in *McCleskey v. Kemp*<sup>70</sup> to respond to strong empirical evidence of significant racial bias in Georgia’s administration of the death penalty — will rest on the Court’s reluctance to “throw[] into serious question the principles that underlie our entire criminal justice system,”<sup>71</sup> rather than on a principled distinction between *Caperton*’s case and cases in which unpopular litigants receive justice inflected and infected by po-

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uted to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

*Id.* at 2263–64.

<sup>68</sup> See *id.* at 2269–72 (Roberts, C.J., dissenting); *cf. id.* at 2274–75 (Scalia, J., dissenting) (citing the Talmud).

<sup>69</sup> There is a rich empirical and anecdotal literature suggesting such an influence. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995) (noting that while judges in elective jurisdictions are far more likely to override jury sentences of life and to impose death sentences, in the one state with an appointed judiciary that permits judicial overrides, judges more often override death sentences); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (noting the “substantial” risk that judges will “receive and act upon” the message “that if they want to avoid negative votes, it is best to produce results with which the voters will agree” and suggesting that message may have influenced the votes of two members of the California Supreme Court faced with retention votes); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004) (concluding on the basis of an empirical analysis of sentencing practices in Pennsylvania that judges subject to retention elections imposed sentences for several serious crimes that were “significantly longer the closer the sentencing judge is to standing for reelection”); Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 204–06 (2004) (summarizing the scholarship regarding judges’ sentencing practices and elections); see also Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 170–71 (2009) (concluding, after looking at more than 28,000 decisions by more than 470 state supreme court justices between 1995 and 1998, that the voting behavior of elected judges facing retention is “strongly associated with the stereotypical preferences” of the electorate: judges seeking retention from majority-Republican electorates “are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice disputes, for businesses in products liability cases, for original defendants in torts cases, and against criminals in criminal appeals,” while “[t]he mirror image applies for judges facing retention decisions by Democrats”).

<sup>70</sup> 481 U.S. 279 (1987).

<sup>71</sup> *Id.* at 315.

litical concerns.<sup>72</sup> In short, the logic of *Caperton* is far more destabilizing than the Court might have intended.

## II. JUDGING ELECTIONS: *CAPERTON* AND PROBLEMS OF JUDICIAL LINE-DRAWING

*Caperton* is as much a case about when the federal judiciary should intervene as it is a case about when state court judges should withdraw. The Court described its intervention in circumscribed terms: “Our decision today addresses an extraordinary situation where the Constitution requires recusal. . . . The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.”<sup>73</sup>

Where have we heard that before? For me, the Court’s limiting language was reminiscent of the following passage, coincidentally enough also from a case in which Theodore Olson persuaded the Court that a state court’s actions violated the Fourteenth Amendment:

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.<sup>74</sup>

As in *Bush v. Gore*,<sup>75</sup> so too there was an element of good-for-this-day-and-this-train-only in *Caperton*. And like *Bush v. Gore*, *Caperton* throws into relief some broader themes about judicial regulation of the political process.<sup>76</sup>

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<sup>72</sup> In this sense, *Caperton* reflects a more general focus on the problems within the electoral system caused by money relative to other sources of distortion. Cf. Issacharoff & Karlan, *supra* note 64, at 1731–34 (criticizing political reformers’ “obsession with political spending,” *id.* at 1734, to the exclusion of other problems that beset the American political system, such as a demographically skewed electorate or the use of election rules that distort the relationship between voters’ preferences and outcomes).

<sup>73</sup> *Caperton*, 129 S. Ct. at 2265.

<sup>74</sup> *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

<sup>75</sup> *Id.*

<sup>76</sup> For example, Rick Pildes saw the Court’s division in *Bush v. Gore* as reflecting a deeper disagreement over whether democratic politics requires “judicially-ensured order, stability, and certainty,” or whether “the democratic order [is instead] threatened by undue rigidity, [and] in need of more robust competition and challenge.” Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 714, 715 (2001). I saw *Bush v. Gore* as fitting into the Court’s development of a “structural” approach to equal protection, under which the Court deployed the Equal Protection Clause to regulate institutional arrangements rather than to protect the rights of a discrete group of individuals. See Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 77, 77–78 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

### A. Caperton and Judicially Manageable Standards

*Caperton* ties into a longstanding methodological debate over judicial intervention in the political process. On the one hand, theories of representation reinforcement, most notably John Hart Ely's,<sup>77</sup> have identified an antientrenchment rationale for judicial review: a court actually promotes democracy when it overturns decisions made by political insiders stacking the deck and "choking off the channels of political change to ensure that they will stay in and the outs will stay out."<sup>78</sup> On the other hand, fear of embroiling the judiciary in the "political thicket"<sup>79</sup> creates strong pressure for the Supreme Court to intervene only when it can identify and articulate an objective test for adjudicating politics-related claims.

The paradigmatic example of how this dynamic has played out involves legislative districting. In confronting the problem of malapportionment, the Warren Court moved swiftly from *Baker v. Carr*'s<sup>80</sup> declaration that courts could use "well developed and familiar"<sup>81</sup> judicial standards to evaluate plaintiffs' claims to the mechanical rule of one-person, one-vote in *Reynolds v. Sims*<sup>82</sup> and its progeny.<sup>83</sup>

By contrast, the Court has found itself unable to coalesce around a meaningful limitation on political gerrymanders. In the Court's most important recent foray into the issue, *Vieth v. Jubelirer*,<sup>84</sup> all nine Justices acknowledged that excessive partisan gerrymanders raise serious constitutional questions.<sup>85</sup> But four of the Justices nonetheless found

<sup>77</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>78</sup> *Id.* at 103.

<sup>79</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

<sup>80</sup> 369 U.S. 186 (1962).

<sup>81</sup> *Id.* at 226.

<sup>82</sup> 377 U.S. 533 (1964).

<sup>83</sup> See Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 691–93 (2002) (discussing the move from *Baker* to *Reynolds*). So strong was the desire for a workable standard that in Ely's trenchant view, while one-person, one-vote "is certainly administrable . . . the more troublesome question is what else it has to recommend it." ELY, *supra* note 77, at 121.

<sup>84</sup> 541 U.S. 267 (2004).

<sup>85</sup> See *id.* at 292–93 (plurality opinion) (expressing an assumption that severe partisan gerrymandering is "incompatib[le] . . . with democratic principles" and "unlawful"); *id.* at 313–14, 316 (Kennedy, J., concurring in the judgment) (emphasizing the plurality's assumption that "excessive injection of politics [in districting] is unlawful," *id.* at 316 (alteration in original) (quoting *id.* at 293 (plurality opinion)) (internal quotation mark omitted)); *id.* at 317–18 (Stevens, J., dissenting) (explaining that the Equal Protection Clause's requirement that "the State govern impartially" is violated when redistricting is "subverted for partisan advantage"); *id.* at 343 (Souter, J., joined by Ginsburg, J., dissenting) ("[I]f unfairness is sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality."); *id.* at 355 (Breyer, J., dissenting) ("Sometimes purely political 'gerrymandering' will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. . . . [W]hen that is so, courts can identify an equal protection violation . . .").



such claims nonjusticiable because of the absence of judicially manageable standards for distinguishing between legitimate and constitutionally unacceptable partisanship,<sup>86</sup> and Justice Kennedy, although he held out the possibility of adjudicating gerrymandering claims under some yet-to-be-discovered standard, refused to entertain such challenges until a more determinate test emerges.<sup>87</sup> The *Vieth* dissenters, by contrast, identified standards they found to be sufficiently determinate, although the fact that they produced three separate opinions, each with a distinct multifactor test, should at least give some pause.

Claims of racial vote dilution and excessive race consciousness in redistricting have fallen somewhat in the middle. The Court has sought in a variety of ways to develop objective standards for adjudicating these claims. Most notably, in *Thornburg v. Gingles*,<sup>88</sup> the Supreme Court distilled the totality-of-the-circumstances inquiry that Congress enacted in section 2 of the Voting Rights Act into a relatively mechanical three-part test.<sup>89</sup> This past Term, the Court further refined the test to impose a bright-line rule that only a racial minority group that could constitute more than fifty percent of the population in a single electoral district can bring a vote-dilution claim under section 2.<sup>90</sup> And in *Shaw v. Reno*,<sup>91</sup> when confronted with a claim of excessive race consciousness in the redistricting process, the Court identified what it later termed “traditional and neutral districting principles”<sup>92</sup> — in particular, district compactness and contiguity and respect for preexisting political subdivision boundaries<sup>93</sup> — against which to measure the challenged districts.

The distinctive feature of the *Shaw* cases, however, is their adoption of a theory of expressive harms as the core of the constitutional violation:<sup>94</sup>

[W]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by

<sup>86</sup> See *id.* at 281 (plurality opinion).

<sup>87</sup> See *id.* at 317 (Kennedy, J., concurring in the judgment).

<sup>88</sup> 478 U.S. 30 (1986).

<sup>89</sup> See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 618–19 (3d ed. 2007) (discussing the Court’s substitution of the *Gingles* inquiry for the more free-ranging approach laid out in the legislative history of the Voting Rights Act).

<sup>90</sup> See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244 (2009) (plurality opinion) (finding “support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration”).

<sup>91</sup> 509 U.S. 630 (1993).

<sup>92</sup> *Abrams v. Johnson*, 521 U.S. 74, 88 (1997).

<sup>93</sup> See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (discussing these factors).

<sup>94</sup> See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) (laying out the theory of “expressive” harms as it applies to redistricting).

geographical and political boundaries, and who may have little in common with one another but the color of their skin, . . . reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls. . . .

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.<sup>95</sup>

These concerns — about the inability of the state to police itself, the availability of “objective” standards, the importance of appearance, and the impact of expressive harms — resonate in *Caperton* as well. As with the gerrymander in *Vieth*, no one on the Court actually approved of Justice Benjamin’s conduct. Rather, the divide between the Justices in the *Caperton* majority and those in the dissent was over the availability of a “judicially discernible and manageable standard”<sup>96</sup> for distinguishing between the “extreme” campaign support that requires recusal as a matter of federal constitutional law<sup>97</sup> and the ordinary operation of an elected judiciary in which judges routinely participate in cases involving individuals who supported (or opposed) their election. Explicitly invoking *Vieth*, the dissenters in *Caperton* doubted the Court’s ability to formulate clear-cut standards,<sup>98</sup> while the majority repeatedly deployed the word “objective” to describe the inquiry it was conducting.<sup>99</sup>

<sup>95</sup> *Shaw*, 509 U.S. at 647–48.

<sup>96</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion).

<sup>97</sup> *Caperton*, 129 S. Ct. at 2265.

<sup>98</sup> *Id.* at 2272 (Roberts, C.J., dissenting) (citing *Vieth*, 541 U.S. at 306 (plurality opinion); *id.* at 317 (Kennedy, J., concurring in the judgment)).

<sup>99</sup> See, e.g., *id.* at 2257, 2262–63, 2265 (majority opinion). As in *Vieth*, the Court was presented with a wide variety of multifactor tests. See, e.g., Brief of the Am. Bar Ass’n as Amicus Curiae in Support of Petitioners at 19–20, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (proposing a three-factor due process test); Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 25, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (proposing a seven-factor due process test); Brief of Amicus Curiae Pub. Citizen in Support of Petitioners at 15, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (describing ten factors pertinent to a due process analysis).

The division in *Caperton* also mirrors the division among the Justices last Term in *District Attorney’s Office v. Osborne*, 129 S. Ct. 2308 (2009). See Walter Dellinger, *What Anthony Kennedy Sees Is Law*, SLATE, June 23, 2009, <http://www.slate.com/id/2220927/entry/2221226> (pointing out that each case “involve[d] a plaintiff seeking relief from an unjust state practice by asking the court to recognize a new federal due-process right”; that in both cases Justices Stevens, Souter, Ginsburg, and Breyer would have recognized the right while Chief Justice Roberts and Justices Scalia, Thomas, and Alito would not; and that Chief Justice Roberts’s opinions in both cases — for the Court in *Osborne* and in dissent in *Caperton* — argued “that it would be a mistake to ‘constitutionalize’ the state-law practices at issue” for similar reasons).

And as with the *Shaw* cases, *Caperton* involves a complex jurisprudence of appearance. Justice Kennedy framed the issue as whether there was a “serious risk of actual bias — based on objective and reasonable perceptions.”<sup>100</sup> That final clause means that, although Justice Kennedy later distinguished between federal constitutional requirements and state recusal standards that focus on “the appearance of partiality,”<sup>101</sup> his proposed standard was also based on appearances: how do outside observers assess the likelihood of bias or prejudice?<sup>102</sup>

### B. *Caperton and the Penumbra of Judicial Decisions*

One-person, one-vote and the *Shaw* decisions have influenced the broader law of democracy in complex ways. The Court’s initial decision in *Baker v. Carr* holding malapportionment claims justiciable under the Equal Protection Clause prompted a torrent of litigation: within a few years, nearly every state’s legislative apportionment was under attack.<sup>103</sup> That was hardly surprising: the degree of malapportionment in Tennessee was fairly typical of states across the nation.<sup>104</sup> Within two years, as we have already seen, the Court distilled the broad equal protection principle into a more quantifiable form, announcing a requirement of one-person, one-vote in *Reynolds v. Sims*. The *Reynolds* rule gained immense popular traction almost immediately.<sup>105</sup> Justice Stewart may have derided one-person, one-vote for “resolv[ing] . . . a matter of constitutional law in terms of sixth-grade arithmetic,”<sup>106</sup> but that was in fact its genius: not only was the rule judicially manageable, it was also popularly comprehensible and thus amenable to democratic reinforcement and at least a measure of self-enforcement.<sup>107</sup>

<sup>100</sup> *Caperton*, 129 S. Ct. at 2263.

<sup>101</sup> *Id.* at 2266.

<sup>102</sup> The concern with the appearance of bias in judicial election cases also parallels the Court’s concern with appearances in its recent voter identification case, *Crawford v. Marion County Board of Elections*, 128 S. Ct. 1610 (2008). There, Justice Stevens’s opinion announcing the judgment of the Court identified the State’s “interest in protecting public confidence” as a factor supporting the imposition of voter ID requirements that was “independent” of any showing that such requirements actually prevented voter fraud. *Id.* at 1620.

<sup>103</sup> See Jack W. Peltason, *Baker v. Carr*, in *THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS* 17, 20 (Kermit L. Hall & James W. Ely, Jr. eds., 2001) (noting that in the first year after *Baker* thirty-six states were sued).

<sup>104</sup> See Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1062 n.26 (1958) (giving district population figures for each state).

<sup>105</sup> See, e.g., *One Person, One Vote*, N.Y. TIMES, Mar. 21, 1963, at 6; *One Person, One Vote*, WASH. POST, Mar. 19, 1963, at A16.

<sup>106</sup> *Avery v. Midland County*, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting).

<sup>107</sup> To be sure, as a matter of political hydraulics, incumbent officials’ impulse to entrench themselves did not disappear. Instead, they shifted their field of operation to incumbent-protecting gerrymanders that the Court has found difficult to combat. See Samuel Issacharoff &

On the surface, the rule against excessively race-conscious districting the Court announced in *Shaw* would seem quite different. First, *Shaw* itself involved a congressional district that was, by most quantitative measurements, “the least geographically compact district in the Nation.”<sup>108</sup> Thus, it was not immediately clear that *Shaw* cast constitutional doubt on more than a handful of highly irregular districts. Second, the *Shaw* rule was not easily quantifiable — indeed, over time the Court retreated even from relying on quantitative measures of compactness and contiguity — and the Court’s formulation of the Equal Protection Clause’s command shifted materially from case to case.<sup>109</sup> Initially, particularly given the Court’s emphasis on district appearance, it seemed as if the *Shaw* cases might devolve into a form of “Redrapping” in which the Court summarily passed on the constitutionality of particular districts without ever articulating broader principles.<sup>110</sup>

But that did not happen. After an initial spate of litigation, largely involving challenges to legislative districts drawn before the Court announced the *Shaw* rule, *Shaw* cases essentially disappeared. In the post-2000 round of redistricting, courts were not called upon to determine the line between constitutionally acceptable and constitutionally excessive considerations of race in reapportionment. Rather, *Shaw* operated during the course of redistricting itself, as a processual constraint on explicit discussions of racial considerations and as a substantive constraint on the creation of markedly irregular districts.<sup>111</sup> In Professor Pildes’s phrase, “vague law was transformed into settled practice.”<sup>112</sup>

Perhaps *Caperton* will follow a similar trajectory. It is not yet clear precisely how many cases involve the kind of campaign involvement

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Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 570–74 (2004) (discussing the special threat to democracy posed by bipartisan, incumbent-protecting gerrymanders).

<sup>108</sup> *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (describing the district initially challenged in *Shaw v. Reno*). See generally Pildes & Niemi, *supra* note 94, at 564–69 (discussing the most irregular districts across the United States produced by the post-1990 round of redistricting).

<sup>109</sup> For an account of the evolution of the *Shaw* rule, see, for example, Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1576–86 (2002); and Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 300–04 (1996).

<sup>110</sup> For discussions of “Redrapping,” which takes its name from the Supreme Court’s practice in the years between *Redrup v. New York*, 386 U.S. 767 (1967); and *Miller v. California*, 413 U.S. 15 (1973), of issuing summary dispositions in obscenity cases after watching the movies for itself, see Mary Anne Case, *Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of Bush v. Gore as a Chapter in the History of Ideas About Law*, 70 U. CHI. L. REV. 55, 62–63 (2003); and Karlan, *supra* note 83, at 681–82.

<sup>111</sup> See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 67–69 (2004).

<sup>112</sup> *Id.* at 69.

that gives rise to a constitutionally unacceptable risk of bias; that concern about the scope of *Caperton*'s holding was the gravamen of the Chief Justice's forty-question list.

It seems unlikely that the Supreme Court will be able to develop a quantitative framework for analyzing judicial bias claims. *Caperton* claims thus more closely resemble *Shaw* claims than they do one-person, one-vote ones.<sup>113</sup> If anything, *Caperton* claims pose an additional difficulty that neither *Reynolds* nor *Shaw* claims present. The *Reynolds* and *Shaw* principles can be enforced, in the first instance, by the lower federal courts. But the Supreme Court will likely be "the *only* federal court policing the area"<sup>114</sup> of judicial bias, since federal courts other than the Supreme Court "possess no power whatsoever to sit in direct review of state court decisions."<sup>115</sup> Raising the level of complexity further, the rule in *Caperton* speaks in the first instance to the very judge whose impartiality is subject to question: he or she, after all, is the person to whom the recusal motion is normally directed. Thus, if *Caperton* is to have a lasting impact, it will occur through either legislative change<sup>116</sup> or changes in judicial culture rather than

<sup>113</sup> By contrast, consider how the Court has come to articulate an arithmetic standard in a parallel area involving oversight of state courts: review of punitive damages awards. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the Court implicitly held that the Due Process Clause forbids the imposition of excessive punitive damages. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) — coincidentally another case from the Supreme Court of Appeals of West Virginia — a majority of the Justices rejected the possibility of a "test" that depended on "objective criteria." *Id.* at 457–58 (plurality opinion) (opinion of Stevens, J., joined by Rehnquist, C.J., and Blackmun, J.) (internal quotation marks omitted); *see also id.* at 466–69 (Kennedy, J., concurring in part and concurring in the judgment) (rejecting the idea of a constitutional inquiry focused on the amount of the award); *id.* at 470–72 (Scalia, J., joined by Thomas, J., concurring in the judgment) (rejecting the entire enterprise of constitutional proportionality review). But almost as quickly as the Court moved from *Baker* to *Reynolds*, the Court adopted a three-part, objective test for analyzing punitive damages. *See BMW of N. Am. v. Gore*, 517 U.S. 559 (1996). And in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court, in an opinion by Justice Kennedy, announced that, despite its professed "reluctan[ce] to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," *id.* at 424, and its unwillingness "to impose a bright-line ratio which a punitive damages award cannot exceed," *id.* at 425, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *id.* I discuss in another article some of the institutional and analytic factors that pushed the Court toward this standard. *See* Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 903–14 (2004).

<sup>114</sup> *BMW*, 517 U.S. at 613 (Ginsburg, J., dissenting) (giving this description in the context of punitive damages review).

<sup>115</sup> *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983) (quoting *Atl. Coast Line R.R. Co. v. Locomotive Eng'rs*, 398 U.S. 281, 296 (1970)) (internal quotation marks omitted); *see also Asarco Inc. v. Kadish*, 490 U.S. 605, 622 (1989) (stating that federal authority to review state court decisions "is vested solely in [the Supreme] Court").

<sup>116</sup> The Court's decision has already precipitated or reinforced calls for changes in the way judges are selected. *See* Christy Hoppe, *Justices Decry Judge-Donor Link*, DALLAS MORNING

through litigation. *Caperton* can work only if it leads to ex ante recusals by judges rather than ex post reversals of judgments.<sup>117</sup> Put in terms of election law cases, it isn't yet clear whether *Caperton* is *Baker v. Carr*, *Shaw v. Reno*, or *Bush v. Gore*.

More profoundly, just as with the one-person, one-vote and *Shaw* cases, *Caperton* is really trying to deal with a structural problem — the way in which money undermines judicial impartiality and public confidence in the judicial process — by recognizing an individual right. For years, scholars of the law of democracy have argued that a critical feature of the Court's districting jurisprudence has been its misguided insistence on analyzing structural questions through an individual-rights framework.<sup>118</sup> *Caperton* provides a powerful illustration of the ways in which such a framework fails to fully appreciate the issues involved. Consider the opening sentences of the Court's opinion:

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion.<sup>119</sup>

The Court's decision to highlight these facts raises the question whether there would have been no constitutional violation had the West Virginia court upheld the jury's verdict, had Justice Benjamin's vote not been essential to the court's disposition of the case, or had the plaintiffs' counsel not moved to recuse the justice. To be sure, under

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NEWS, June 9, 2009, at A1; Ed Murnane, Op-Ed., *Make Judicial Elections Nonpartisan*, CHI. SUN-TIMES, June 21, 2009, at A21; Pete Shepherd, Op-Ed., *Judicial Campaigns Should Be Publicly Financed*, STATESMAN J. (Salem, Or.), June 10, 2009, at 9. See generally Jed Shugerman, "Crime Can Be Curbed": The Puzzle of Merit Selection's Rise 33 (July 15, 2009) (unpublished manuscript), available at <http://www.law.harvard.edu/faculty/faculty-workshops/shugerman-pa-per-summer-2009.doc> (pointing out that "[t]he Supreme Court's granting certiorari in *Caperton* . . . was all it took to get a debate rolling in several states" on reforming judicial elections, that "the decision itself has increased pressure for reform," and that this dynamic is consistent with prior episodes of judicial election reform).

<sup>117</sup> Another possibility, alluded to near the end of the Court's opinion, is that states will ratchet up the level of their ethics, recusal, and disqualification rules to prevent constitutional violations from occurring. See *Caperton*, 129 S. Ct. at 2266–67.

<sup>118</sup> See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 606–09 (2002) (discussing the ways in which the language of individual rights fails to account fully for the problems gerrymandering causes); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1346 (2001) (arguing that the *Shaw* cases and *Bush v. Gore* involve a form of "structural equal protection," in which the Court uses the Equal Protection Clause not to protect individual voters but rather "to regulate the institutional arrangements within which politics is conducted" (internal quotation marks omitted)); Pildes, *supra* note 111, at 48–55 (describing how "frameworks of rights and equality are often ill-suited to the problems courts actually address," *id.* at 48).

<sup>119</sup> *Caperton*, 129 S. Ct. at 2256.

those scenarios, it is unlikely that the *plaintiffs* would have pressed their constitutional challenge. But the central structural problem would have remained.<sup>120</sup> Justice Benjamin's participation would have tainted the impartial administration of justice even if the state court had upheld the jury's verdict by a vote of four to one with Justice Benjamin in the dissent or had overturned the verdict by a supermajority that included him. Indeed, the latter possibility might actually have been *more* troubling to the extent that the lineup was a function of his powers of persuasion over his colleagues.<sup>121</sup>

### III. CONCLUSION

*Caperton* touches on many of the most vexing questions in the law of democracy. It provides a powerful illustration of the "hydraulic"<sup>122</sup> nature of the problem it addresses. Judicial elections are part of a broader ecosystem whose pieces are connected in complicated ways. The initial decision to elect judges set into motion a series of potential consequences for their performance in office. Subsidiary choices, such as the Court's decisions immunizing independent expenditures or judicial campaign speech from meaningful regulation, have themselves changed the nature of judicial elections in ways that may affect judges

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<sup>120</sup> See Posting of Bob Bauer, *supra* note 64 (stating that in *Caperton*, Justice Kennedy used "the only constitutional tool in the kit, Due Process," which ultimately "disguised a large public question as a private wrong, moving the resolution from any public political forum to the federal courthouse").

<sup>121</sup> See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831–33 (1986) (Blackmun, J., concurring in the judgment) (arguing that a potentially biased judge's "mere participation in the shared enterprise of appellate decisionmaking — whether or not he ultimately . . . even join[s] the [court's] opinion — pose[s] an unacceptable danger of subtly distorting the decisionmaking process," *id.* at 831, that focusing on the existence of a one-vote margin "ignores the possibility of a case where [a judge's] powers of persuasion produce an even larger margin of votes," *id.* at 832, and that because the "collegial exchange of ideas [on an appellate court] occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case," *id.* at 833).

The voluminous recent literature on "panel effects" suggests that judges' views are quite often influenced by the composition of the courts on which judges sit. See, e.g., Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1536 (2008) (finding that "race exerted a sizable panel effect" in Voting Rights Act cases in that "white judges who sat on panels with at least one African-American judge were considerably more likely to vote in favor of liability, and this effect was evident for both Democratic and Republican appointees"); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (finding in environmental cases before the D.C. Circuit that a judge's vote was "greatly affected by the identity of the other judges sitting on the panel").

<sup>122</sup> See Issacharoff & Karlan, *supra* note 64, at 1708, 1731–34 (describing the hydraulic principle in the context of campaign finance as having two dimensions — first, that "political money, like water, has to go somewhere[;] [i]t never really disappears into thin air," *id.* at 1708, and second, that "political money, like water, is part of a broader ecosystem," *id.*, that also includes features such as the rules governing who can vote and how elections are conducted).

on the bench and shape the responses available to protect litigants against a risk of judicial bias. And the Court's ability to craft judicially manageable standards for dampening the constitutionally problematic consequences of judicial politics has its own political component. *Caperton* is thus only the latest chapter in an unfolding story.