

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2010

Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal

Jeffrey W. Stempel

University of Nevada, Las Vegas – William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Constitutional Law Commons](#), and the [Judges Commons](#)

Recommended Citation

Stempel, Jeffrey W., "Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal" (2010). *Scholarly Works*. 235.

<https://scholars.law.unlv.edu/facpub/235>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Completing *Caperton* and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal

Jeffrey W. Stempel*

I.	INTRODUCTION.....	250
II.	THE ROAD TO <i>CAPERTON</i>	254
	<i>A. The Underlying Action</i>	254
	<i>B. The 2004 West Virginia Supreme Court Elections</i>	255
	<i>C. Review and Recusal</i>	257
	<i>D. The Supreme Court Intervenes</i>	261
	<i>E. Caperton’s Test for Determining When Recusal is Required by the Due Process Clause</i>	265
III.	ASSESSING <i>CAPERTON</i>	268
	<i>A. The “Reasonable Question as to Impartiality” Standard for Nonconstitutional Recusal under Federal and State Law as Contrasted with the Constitutional Due Process Standard of an “Serious Risk of Actual Bias”</i>	268
	<i>B. The Dissenters’ Perspective in Caperton</i>	277
	<i>C. The Unpersuasive Criticisms of Caperton</i>	281
	1. States’ Rights Federalism.....	283
	2. Limits on Free Expression	287
	3. Practical Problems of Implementation	290
	<i>D. The Correctness of the Caperton Holding and the Legitimacy of Concerns about It</i>	292
IV.	MAKING <i>CAPERTON</i> BETTER THROUGH CLARITY AND EXPANSION RATHER THAN RETRENCHMENT	296
	<i>A. The Value of Harmonizing Constitution-Based Disqualification and Recusal Based on Rule or Statute</i>	296
	<i>B. Fear Not the Floodgates</i>	299

* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Janette Bloom, Bill Boyd, George Kuhlman, Doris Lee, Ted Lee, Bill Maupin, Ann McGinley, Jim Rogers, Tuan Samahon, John White, and the members of Nevada’s Judicial Code Commission for ideas and continuing support (but not necessarily agreement with the suggestions in this article). Thanks also to Jeanne Price, Shannon Rowe, David McClure, Jennifer Gross, and Chad Schatzle for valuable research assistance. © 2009 Jeffrey W. Stempel

C.	<i>Procedural and Substantive Due Process Regarding Disqualification</i>	301
1.	Primarily a Problem of Procedure.....	306
2.	The Practical Problems of a Purely Procedural Approach.....	309
D.	<i>Continuing Concern over Substantive Due Process and Disqualification</i>	317
E.	<i>Guidelines for Invoking Substantive Due Process Disqualification</i>	320
1.	In Campaign Support Cases.....	320
2.	In General.....	321
V.	CONCLUSION.....	325

I. INTRODUCTION

In *Caperton v. A.T. Massey Coal Co.*,¹ the U.S. Supreme Court vacated a state supreme court decision in which a justice who had received \$3 million in campaign support from a litigant cast the deciding vote to relieve the litigant of a \$50 million liability.² The Court reached this result, one I view as compelled by common sense, through a 5–4 vote,³ with the dissenters, led by Chief Justice John Roberts and Justice Antonin Scalia, minimizing the danger of biased judging presented by the situation⁴ and questioning the practical

1. 129 S. Ct. 2252 (2009).

2. See *infra* text accompanying notes –. Technically, the campaign contributor was not a formal party to the litigation. He was, however, the CEO of litigant Massey as well as the personification of the company.

3. See *Caperton*, 129 S. Ct. 2252 (Kennedy, J., joined by Stevens, Souter, Ginsburg & Breyer, JJ., forming the majority voting to vacate West Virginia Supreme Court decision where state court justice casting deciding vote had received \$3 million in campaign aid from CEO of defendant Massey; and Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ., voting to let the decision stand in spite of key participation by challenged state court justice); *id.* at 2274–75 (Scalia, J., dissenting) (shorter dissent criticizing majority for extending due process review to cases of judicial recusal based on campaign activity).

4. See *id.* at 2273 (Roberts, C.J., dissenting) (“And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a \$1,000 direct contribution from Blankenship, [disqualified West Virginia Supreme Court of Appeals] Justice [Brent] Benjamin and his campaign had no control over how this money was

feasibility of the Court's approach as well as the wisdom of expanding review of state court judicial disqualification pursuant to the Due Process Clause.⁵

Although its critics see *Caperton* as an unwise intrusion into state elections and state disqualification practice,⁶ *Caperton*'s biggest problem is that it did not go far enough and make due process congruent with prevailing state and federal disqualification standards. By crafting an "serious risk of actual bias" test for due process-based constitutional disqualification that differs (albeit perhaps not greatly) from the well-established general approach to disqualification of a judge when his or her impartiality may be reasonably questioned, the Court has been unduly tentative and confusing in setting the parameters of judicial impartiality. The Court should recognize that any error in failing to recuse⁷ deprives

spent."); see also *id.* at 2273 ("Moreover, Blankenship's [\$3 million in] independent expenditures do not appear 'grossly disproportionate' compared to other such expenditures in this very election."); *id.* at 2275 (Scalia, J., dissenting) ("The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable.").

5. See *id.* at 2267 (Roberts, C.J., dissenting) (contending that the "end result [of the majority's decision favoring disqualification] will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case" and raising a list of specific questions regarding application of majority's standards for judicial impartiality satisfying constitutional due process); *id.* at 2274 (Scalia, J., dissenting) ("In the best of all possible worlds, should judges sometimes recuse even where the clear commands of our prior due process law do not require it? Undoubtedly. The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.").

More precisely, the Roberts dissent posed 40 questions in defense of its view that the majority's invocation of the Due Process Clause to require judicial disqualification due to receipt of enormous campaign contributions was not a sustainably practical approach to policing the judicial integrity of state courts. *Id.* at 2267, 2269–72 (Roberts, C.J., dissenting). Forty enumerated questions, that is, with many containing subparts or follow-up questions. If one calculates the total number of questions in the Roberts dissent as one would in reviewing litigation interrogatories, the total number of questions actually totals 80 queries.

6. See *infra* Part III.C.

7. This article treats the words "disqualification" and "recusal" as synonyms. Some courts and commentators have historically distinguished the terms, suggesting that disqualification is a judge's mandatory obligation to avoid participation in a case while recusal is a more voluntary, discretionary act

the affected litigant of a fundamental constitutional right—the right to have the case heard by a neutral adjudicator. Consequently, any erroneous rejection of a request to recuse is at least technically one of constitutional dimension that should be potentially subject to U.S. Supreme Court review and correction.⁸

However, the Court need not become mired in the flood of disqualification cases predicted by the dissenting justices in *Caperton*. Insistence upon review of disqualification decisions by a neutral body of judges can be used to ensure that litigants receive sufficient procedural due process. The constitutional question surrounding judicial recusal is primarily one of procedural due process. If states put in place adequate procedures for deciding and reviewing disqualification motions, few *Caperton*-like situations compelling high court intervention are likely to ensue.⁹ Where erroneous recusal decisions occur in spite of such safeguards, U.S. Supreme Court review should be at least potentially available as necessary to vindicate the strong constitutional interest in neutral courts and fair adjudication, an interest sounding in substantive due process.¹⁰ The Court need exercise this potential power only in relatively egregious cases, thereby promoting judicial economy while nonetheless discouraging disqualification abuses.

In making its assessments regarding whether review of non-disqualification is required, the Court should generally consider the five factors set forth in this article¹¹ and, in cases involving campaign support as a basis for recusal, the considerations outlined in the amicus brief of the Conference of Chief Justices.¹² Using these

informed by the judge's own preferences as well as prevailing law. See RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* § 20.8, at 604–12 (2d ed. 2007) (noting traditional distinction but using terms interchangeably throughout the treatise); JAMES J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN & CHARLES GARDNER GEYH, *JUDICIAL CONDUCT AND ETHICS*, § 4.04 at 4–11 (2007) (tending to use disqualification as preferred term but using recusal as acceptable synonym); Geoffrey P. Miller, *Bad Judges*, 83 *TEX. L. REV.* 431, 460 (2004) (outlining traditional distinction between the terms); Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 *IOWA L. REV.* 1213 (2002) (using terms interchangeably).

8. See *infra* Part III.D.

9. See *infra* Part IV.B.

10. See *infra* Part IV.A.

11. See *infra* Part IV.E.2.

12. See *infra* note 48 and accompanying text. This amicus brief, which will generally be referred to as the Chief Justices' brief, should be distinguished from

yardsticks, the Court can, as necessary, make infrequent forays into judicial disqualification matters without unduly burdening the Court or creating either uncertainty or paranoia among state judges and justices.

Part I of this article reviews the *Caperton* case and the Court's decision. Part II assesses *Caperton* and criticisms of the decision, including comparison of *Caperton*'s constitutional standard (existence of an objective probability of bias by the judge or justice under review) with the nonconstitutional standard for judicial neutrality under federal law and state law patterned after the ABA Code of Judicial Conduct (existence of a reasonable question as to the challenged jurist's impartiality). Finding that the latter standard better protects litigants and can be employed without undue strain on the judicial system, Part III advocates that *Caperton*'s constitutional due process disqualification standard be harmonized with the prevailing nonconstitutional standards. It also examines the issues of procedural and substantive due process and outlines the factors for use in recusal cases growing out of campaign support and those applicable to Supreme Court policing of state court disqualification decisions generally.

Rather than maintaining a separate standard for policing judicial disqualification pursuant to the Due Process Clause, the Court should recognize that any erroneous failure to recuse deprives a litigant of due process and makes a resulting judgment subject to review. However, the Court, using its broad discretion in controlling its docket, need not give serious consideration to every claim of inadequate judicial disqualification but should grant review only in cases such as *Caperton* where permitting a tainted jurist to sit constitutes a clear and serious violation of the norms of judicial ethics.

two other additional amicus briefs, one submitted by 27 former chief justices in support of *Caperton* and another one supporting Massey filed by ten former state justices. *See infra* note , which lists the amicus briefs. I shall resist the temptation to refer to the first two briefs as the "good" justices' briefs and the latter as the "bad" justices' brief, but that would not be an unfair characterization. *See infra* Part III.D (finding *Caperton* clearly correctly decided on the merits).

II. THE ROAD TO *CAPERTON*

A. *The Underlying Action*

The *Caperton v. Massey* drama began when Hugh Caperton purchased the Harman Mine in southwestern Virginia in 1993. The mine contained “high-grade metallurgical coal, a hot-burning and especially pure variety that steel mills crave to fuel the blast furnaces used to make coke needed in their production process.”¹³ A.T. Massey Coal Company, led by CEO Don L. Blankenship, wanted to acquire the Harman Mine and its high-grade coal, but Caperton was unwilling to sell.¹⁴ Through a series of commercial and legal initiatives, which Caperton viewed as fraudulent and predatory but Massey characterized as merely aggressive business, Massey eventually drove the Harman Mining Corporation and other Caperton corporate entities into bankruptcy.¹⁵ “Through a series of complex, almost Byzantine transactions, including the acquisition of Harman’s prime customer and the land surrounding the competing mine, Massey both landlocked Harman with no road or rail access and left Caperton without a market for his coal even if he could ship it.”¹⁶ In 1998, Caperton agreed to sell the Harman Mine to Massey but the deal collapsed down the home stretch as Massey insisted on changes that Caperton contended reflected bad faith and an attempt to ruin the Caperton interests.¹⁷

Caperton’s companies (Harman Mining Corporation, Harman Development Corporation, and Sovereign Coal Sales, Inc.),¹⁸ filed for Chapter 11 bankruptcy in 1998 facing \$25 million in claims.¹⁹ Caperton, who had personally guaranteed \$1.9 million of his companies’ debt,²⁰ sued Massey in West Virginia,²¹ alleging fraud

13. John Gibeaut, *Caperton’s Coal*, A.B.A. J., Feb. 2009, at 52.

14. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 232 (W. Va. 2008).

15. *Id.* at 229–33 (providing extensive background of case in opinion written by three state court justices who ruled for Massey), *rev’d*, 129 S. Ct. 2252 (2009).

16. Gibeaut, *supra* note , at 52; *see also Caperton*, 679 S.E.2d at 230–33 (providing factual background).

17. Gibeaut, *supra* note , at 52.

18. The relation of the Caperton companies and Mr. Caperton is discussed at *Caperton*, 679 S.E.2d at 230.

19. Brief of Appellee Hugh M. Caperton at 13, *Caperton* 679 S.E.2d 223 (No. 33350), 2007 WL 2886509.

20. *Id.* The Caperton guarantees included interest on the unpaid amounts. *Id.*

and tortious interference with contract, obtaining a \$50 million jury verdict in 2002 that survived vigorous post-trial attack by Massey.²² The trial court rejected Massey's new trial and remittitur motions in June 2004 and in March 2005 denied Massey's motion for judgment as a matter of law.²³

B. *The 2004 West Virginia Supreme Court Elections*

Elections for the West Virginia Supreme Court²⁴ were slated for November 2004, with Justice Warren McGraw seeking re-

21. Other plaintiffs in the West Virginia action were Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. *Id.* at 2. In addition to Massey, other defendants in the case were Massey subsidiaries Elk Run Coal Co., Inc., Independence Coal Co., Inc., Marfork Coal Co., Inc., Performance Coal Co., Inc., and Massey Coal Sales Co., Inc. *Id.* at 3. Unless otherwise noted, these plaintiffs will generally be referred to as "Caperton," as the U.S. Supreme Court did in its opinion. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

Harman Mining and Sovereign Coal also sued Wellmore, a Massey subsidiary, in Virginia for breach of contract and bad faith in connection with Wellmore's failure to purchase Harman coal as promised, which was based on Massey's assertion of a force majeure excuse from contract performance due to the closing of an LTV steel plant that was Wellmore's primary customer. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 233 (W. Va. 2008). According to Massey counsel, Harman Mining "voluntarily withdrew" the tort claim originally pleaded "prior to trial in the Virginia action with assurances that [Harman] would not later assert such a claim." Appellant Brief of A.T. Massey Coal Company, Inc. at 9, *Caperton*, 679 S.E.2d 223 (No. 33350), 2007 WL 2886508. The jury in the Virginia breach of contract action rendered a jury verdict of \$6 million for Harman. "The appeal to the Virginia Supreme Court was refused on technical grounds." *Id.* The parties' dispute over the preclusive effect, if any, of the Virginia action over the West Virginia action was perhaps the key issue before the West Virginia Supreme Court and was the basis for Massey's success in the case when it involved Justice Benjamin. *See infra* note and accompanying text.

22. *See, e.g., Caperton v. A.T. Massey Coal Co.*, No. 98-C-192, 2005 WL 5679073 (W. Va. Cir. Ct. Mar. 15, 2005) (entitled "Final Order: Denying Defendants' Rule 50(b) Motion for Judgment as a Matter of Law; Rule 50(c)/59 Motion for New Trial, or in the Alternative, Motion for Remittitur"—a 17-page opinion denying Massey motions and awarding post-judgment interest at ten percent annual rate from date of August 15, 2002 judgment for Caperton).

23. *See Caperton*, 129 S. Ct. at 2257 ("In March 2005, the trial court denied Massey's motion for judgment as a matter of law.").

24. The proper name of the state's highest court is the Supreme Court of Appeals of West Virginia. For ease of reference, this article will generally refer to it as the West Virginia Supreme Court.

election. Massey CEO Blankenship threw his support to challenger Brent Benjamin.²⁵ Blankenship contributed the statutory maximum of \$1,000 to the Benjamin campaign committee and also donated nearly \$2.5 million to a political organization named “And For The Sake Of The Kids,” which opposed Justice McGraw and advocated Justice Benjamin’s election.²⁶ In addition, Blankenship spent more than \$500,000 independently on television and newspaper advertisements favoring Justice Benjamin as well as for fundraising on behalf of Justice Benjamin.²⁷ As the U.S. Supreme Court summarized, “Blankenship’s \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee. Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.”²⁸

Justice Benjamin won with slightly more than 53% of the more than 700,000 votes cast.²⁹ Although Justice McGraw appears to have had some significant electoral baggage that may have more than offset the advantage incumbents traditionally possess,³⁰ the

25. Elliot G. Hicks, Editorial, *Merit selection, not elections, must be how we choose justices*, CHARLESTON GAZETTE, Dec. 14, 2004, at 5A; *Millions spent to defeat Warren McGraw*, CHARLESTON GAZETTE, Dec. 4, 2004, at 3A; Cecil E. Roberts, Editorial, *Blankenship’s hollow rhetoric; His money defeated McGraw, now he must help miners*, CHARLESTON GAZETTE, Dec. 13, 2004, at 5A.

26. See Paul N. Nyden, *U.S. SUPREME COURT; They are not friends dinner; Campaign report shows connections between Blankenship, Benjamin*, CHARLESTON GAZETTE, Feb. 15, 2009, at 1A (noting that And For the Sake of The Kids “specialized in running negative ad[vertisements]” targeting Justice McGraw); Marcia Coyle, *Amici Urge Recusals in Cases of Substantial Election Contributions*, TEX. LAW., Jan. 12, 2009, at 5, 5 (noting that And For The Sake of The Kids worked to defeat Justice McGraw).

27. See, e.g., DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004* 4–5 (Jesse Rutledge ed., 2004), available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf> (advertisement opposing McGraw accused him of letting a child rapist out of prison and allowing him to work as a high school janitor).

28. *Caperton*, 129 S. Ct. at 2257 (internal citation omitted).

29. See *id.* (“Benjamin won. He received 382,036 votes (53.3%) and McGraw received 334,301 votes (46.7%).”).

30. The dissenters in particular stressed McGraw’s perceived deficiencies as a candidate as part of their argument that the election outcome, and Benjamin’s purported gratitude toward Blankenship, could not conclusively be said to flow from Blankenship’s massive financial support of Benjamin’s candidates:

consensus of observers appears to be that Blankenship's heavy financial support was a key factor in Justice Benjamin's election.³¹

C. *Review and Recusal*

After the election and adjudication of post-trial motions in *Caperton v. Massey*, Massey sought review of the \$50 million judgment. Caperton sought Justice Benjamin's recusal, which he denied in April 2006.³² According to Justice Benjamin, there was "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters

It is also far from clear that Blankenship's expenditures affected the outcome of this election. Justice Benjamin won by a comfortable 7-point margin (53.3% to 46.7%). Many observers believed that Justice Benjamin's opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as "deeply disturbing" and worse. Justice Benjamin's opponent also refused to give interviews or participate in debates. All but one of the major West Virginia newspapers endorsed Justice Benjamin. Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent. Unlike the majority, I cannot say with any degree of certainty that Blankenship "cho[se] the judge in his own cause." I would give the voters of West Virginia more credit than that.

Id. at 2274 (Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ., dissenting) (alteration in original) (internal citations omitted).

Although Justice Roberts's confidence in the electorate is touching, it is at considerable odds with a substantial amount of political science literature finding that voters are extremely ill-informed in low-visibility races such as judicial elections and that advertising and campaign spending play a particularly pivotal role in such races. See Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 18–26 (2003) (arguing that voters in judicial elections get little information and tend to make uninformed decisions); GOLDBERG ET AL., *supra* note , at 40 (commenting that low voting rates allow special interest groups to swing campaigns and suggesting judicial voter guides as a solution); Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 45–46 (2003) (noting that the media affects judicial elections).

In addition, a review of contemporary news accounts of the hard-fought 2004 West Virginia Supreme Court election suggests that Blankenship's financial support translated into an effective media campaign on behalf of the Benjamin candidacy. See sources cited *supra* note .

31. See sources cited *supra* note .

32. *Caperton*, 129 S. Ct. at 2257.

which comprise this litigation, or that this Justice will be anything but fair and impartial.”³³

In November 2007, the West Virginia high court reversed the \$50 million judgment against Massey in a 3–2 decision in which Justice Benjamin joined two others for the decisive vote.³⁴ The dissenting justices characterized the majority’s pro-Massey opinion, based on a forum selection clause and *res judicata*, as “new law” at odds with prior Court precedent—a convenient instance of law reform to assist Justice Benjamin’s major benefactor.³⁵

Caperton sought rehearing and more recusal motions followed, with Caperton and Massey moving for disqualification of three of the five justices involved in the November 2007 decision:

Photos had surfaced of [majority opinion, pro-Massey] Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. Justice Maynard granted Caperton’s recusal motion. On the other side Justice Starcher granted Massey’s recusal motion, apparently based on his public criticism of Blankenship’s role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well.³⁶

33. *Id.* at 2258 (alteration in original); *see also* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223 (W. Va. 2008) (full Benjamin opinion refusing disqualification), *rev’d*, 129 S. Ct. 2252 (2009).

34. Caperton v. A.T. Massey Coal Co., No. 33350, 2007 WL 4150960 (W. Va. Nov. 21, 2007), *superseded on reh’g*, 679 S.E.2d 223 (W. Va. 2008).

35. The West Virginia Court reasoned:

[F]irst, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and second, that *res judicata* barred the suit due to an out-of-state judgment to which Massey was not a party. Justice Starcher dissented, stating that the “majority’s opinion is morally and legally wrong.” Justice Albright also dissented, accusing the majority of “misapplying the law and introducing sweeping ‘new law’ into our jurisprudence that may well come back to haunt us.”

Caperton, 129 S. Ct. at 2258 (internal citations omitted).

36. *Id.*

Justice Starcher also characterized Blankenship's sociopolitical electioneering activities as a "cancer" on the West Virginia high court.³⁷

Justice Benjamin again refused to recuse and also rejected a third Caperton motion for disqualification.³⁸ In his capacity as acting chief justice, he was not only free to participate in the rehearing, but also replaced the two recused justices.³⁹ In April 2008, the West Virginia Supreme Court again ruled 3–2 in Massey's favor, with Justice Benjamin again in the slim majority.⁴⁰ The two justices appointed to the case by Justice Benjamin split their votes.⁴¹ Again, the two-justice dissent was strong, raising serious questions about the majority's rulings on the substantive law⁴² and complaints

37. *Id.*

38. *Id.*

39. *Id.*

40. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 285 (W. Va. 2008).

41. *Caperton*, 129 S. Ct. at 2258.

42. *See id.* (noting concerns of dissenting justices); *Caperton*, 679 S.E.2d at 284 (Albright & Cookman, JJ., dissenting) ("Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.").

What distressed Justices Albright and Cookman was the Benjamin majority's ruling that Caperton's West Virginia claims were barred because of the prior Harman Mining litigation in Virginia against Wellmore. *See* discussion *supra* note . Although the West Virginia and Virginia cases are connected by virtue of the Blankenship–Massey machinations aimed at taking control of the Harman Mine, the cases largely involved different legal claims and arguments, different facts and evidence, and different parties. Consequently, only the broadest view of the "logical relationship" test for assessing res judicata would bar the West Virginia action due to Harman's success in the Virginia lawsuit. Further, as *Caperton* was argued, the controlling Virginia precedent on res judicata (applicable to the West Virginia case via choice of law principles), purported to follow the same–law–facts–evidence test rather than the logical relationship test. *See Caperton*, 679 S.E.2d at 281–82 (Albright & Cookman, JJ., dissenting) (citing Virginia caselaw on res judicata, including *Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504 (Va. 2003)), *rev'd* 129 S. Ct. 2252 (2009); *see generally* FLEMING JAMES, GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* 671–739 (5th ed. 2001) (comprehensive review of res judicata); RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 1094–97 (5th ed. 2009) (outlining established approaches to determining res judicata). The other successful ground in Massey's challenge to the \$50 million verdict was the assertion that a forum selection clause in a Wellmore–Harman Mining contract controlled and that Massey, which was not a party to that contract, had standing to enforce the clause. *See Caperton*, 679 S.E.2d at 234–35. The clause in question provides that the Wellmore–Harman Mining

about Justice Benjamin's refusal to recuse pursuant to the West Virginia Code of Judicial Conduct and the Due Process Clause.⁴³

[a]greement, in all respects, shall be governed, construed and enforced in accordance with the substantive laws of the Commonwealth of Virginia. All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia

Id. at 234 (alterations in original).

A full discussion of the merits of Massey's *res judicata* and forum selection arguments lies beyond the scope of this article. However, even a brief look at these issues suggests that the West Virginia decision favoring Massey is problematic and open to criticism. For example, the West Virginia Supreme Court majority's discussion of the forum selection clause issue, despite its length, is shockingly bad in that it fails to grapple with the key question: Is the Caperton fraud and tortious interference action brought in West Virginia sufficiently closely connected to the Wellmore–Harman Mine breach of contract action that it also was required to be brought in Buchanan County, Virginia?

The West Virginia *Caperton* majority simply glosses over this question in a manner that would dismay a law professor reading student exams in that it resembles twenty pages of a mediocre student answer that fails to address the determinative and most difficult question posed. Rather than reflect seriously on the issue, the West Virginia majority instead opts for the “C” student's trick of showering the reader with statements of doctrine unmoored from the context of the case. My own view is that the term “in connection with,” although perhaps not narrow, is far less sweeping than phrases such as “relating to” or “arising out of” typically found in forum selection clauses. Consequently, it is to me not at all obvious that the Caperton fraud action needed to be brought in Buchanan County, Virginia.

More substantively, the issue is whether the Virginia contract action, which involved Massey and Blankenship's allegedly unfounded assertion of a force majeure exception to performing the Wellmore contract with Harman Mine, was sufficiently intertwined with the larger Massey–Blankenship efforts to bring down Caperton to require that the second suit be subject to the Buchanan County forum requirement. Although there was of course a connection between Massey's alleged improper breach of contract and other Massey actions against Caperton (they were all part of a “get Caperton” effort), many or perhaps most courts would view the West Virginia court's enforcement of the forum selection clause as an example of the Wellmore contract “tail” wagging the Massey-conspiracy-against-Caperton “dog” and would not find the clause to reach so far (even if one gets over the substantial hurdle of letting Massey, a nonparty to the Wellmore–Harman contract, enforce the clause).

On the merits, the West Virginia majority's decision is open to serious question and will appear to be downright wrong to many civil procedure scholars and practicing lawyers. *Caperton* was thus not a case in which it could be said that the correct result was so clear that it precluded concern that lack of neutrality by a judge may have played a critical role in the outcome.

43. *See infra* Part III.A.

D. *The Supreme Court Intervenes*

Caperton successfully sought certiorari.⁴⁴ By this time, the case had become widely discussed in the media.⁴⁵ It was thoroughly briefed,⁴⁶ including amicus briefs from the American Bar Association (which supported Caperton)⁴⁷ and the Conference of Chief Justices, which suggested a list of relevant factors for consideration in assessing due process recusal claims (and that effectively provided tacit support to Caperton)⁴⁸ as well as 15 other

44. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 593 (2008).

45. See, e.g., Marcia Coyle, *Review Sought on Judicial Recusals; W. Va. Case Triggers Key Ethical Query*, NAT'L L.J., Aug. 4, 2008, col. 3 (discussing *Caperton* generally and the implications of possible holdings by the U.S. Supreme Court); Lawrence Messina, *Legal groups blast W. Va. Justice in Massey case*, CHARLESTON DAILY MAIL, Aug. 5, 2008, available at <http://www.dailymail.com/News/200808050215> (discussing the facts of the *Caperton* case generally); Paul J. Nyden, *ABA, groups urge high court to grant Harman appeal; Benjamin shouldn't have heard Massey case, groups argue*, CHARLESTON GAZETTE, Aug. 5, 2008, at 1A (explaining the conflict of interest in *Caperton* and the ABA's request that the U.S. Supreme Court decide the case in a manner mandating judicial recusal in similar cases); Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008, at WK8 (urging the U.S. Supreme Court to "add the Massey case to its docket").

46. See Brief for Petitioners, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5433361 (authored by counsel at prominent firms Berthold, Tiano & O'Dell (Charleston, W. Va.), Buchanan Ingersoll & Rooney, PC (Pittsburgh), Reed Smith LLP (Pittsburgh), and Gibson Dunn & Crutcher LLP (Washington, D.C.) and, most notably, former U.S. Solicitor General Theodore B. Olson); Brief for Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165 (authored by counsel at prominent firms Offutt Nord, PLLC (Huntington, W. Va.), Hunton & Williams LLP (including Lewis F. Powell III), and Mayer Brown LLP (Washington, D.C.) (most notably, veteran Supreme Court advocates Andrew L. Frey and Evan M. Tager as well as UCLA law professor Eugene Volokh)).

47. Brief for American Bar Association as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3199726 [hereinafter Brief for American Bar Association].

48. See Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 4–5, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45973 [hereinafter Brief of the Conference of Chief Justices]. The Chief Justices took the position that:

A judge may be constitutionally disqualified from presiding over a particular matter for reasons other than actual bias or a financial interest in the outcome. These two categories alone are simply not broad enough

amici.⁴⁹ Although the Chief Justices' brief stopped short of endorsing reversal, it connotatively favored Caperton in that it listed

to assure the due-process guarantee, which protects the right to a fair hearing if extreme facts create a "probability of actual bias . . . too high to be constitutionally tolerable," encompasses concerns about "possible temptation to the average . . . judge," "probability of unfairness," and not being "likely to maintain that calm detachment" necessary for a judge to deliver a fair adjudication. In particular, political support for a judge may be so extremely extraordinary that due-process concerns are implicated.

Id. (internal citations to *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *In re Murchison*, 349 U.S. 133, 136 (1955); and *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) omitted).

In particular, the Chief Justices suggested that the Court consider the following "Criteria for evaluating whether due process requires recusal for campaign spending in a particular case":

- Size of the Expenditure
- Nature of the Support
- Timing of the Support
- Effectiveness of the Support
- Nature of Supporter's Prior Political Activities
- Nature of Supporter's Pre-existing Relationship with the Judge
- Relationship Between the Supporter and the Litigant

Id. at 25–29 (capitalization removed). The ABA Amicus Brief supported a similar use of similar factors. *See* Brief for American Bar Association, *supra* note , at 19–20 (factors include contribution size, importance, timing, and relationship of judge and supporter). In addition, the ABA Brief noted former Justice Sandra Day O'Connor's strong concern over the issue. *See id.* at 7 n.12 (citing Sandra Day O'Connor, Op-Ed., *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25). Justice O'Connor was sufficiently interested in the outcome of the case that she attended the *Caperton* oral argument. *See* Steve Hooks, *Industry mostly mum on Manchin's judicial reform effort*, PLATT'S COAL OUTLOOK, June 22, 2009 at 6 (discussing *Caperton* and noting that the "retired O'Connor attended the oral arguments on *Caperton v. Massey* before the US Supreme Court in March. She has been vocal in discussion of issues regarding the judiciary and campaign contributions."); Kashmir Hill & David Lat, *Jon Stewart Goes 'Behind the Robes' of Sandra Day*, http://www.abovethelaw.com/2009/03/jon_stewart_sandra_day_oconnor.php ("The retired justice was present in the courtroom to attend argument in *Caperton v. A.T. Massey Coal Company* (a case involving judicial independence, an issue near and dear to her heart).").

Although the Chief Justices' brief did not expressly support either side, its overall message is one favorable to Caperton and it clearly had substantial influence on the majority opinion.

49. Of the twenty-one amicus briefs relating to the merits, fourteen expressly supported Caperton while five expressly supported Massey, with the Chief

Justices' and the Louisiana Supreme Court's amicus briefs not taking a position. The fourteen briefs supporting Caperton were filed by 12 different amici:

Brief for 27 Former Chief Justices and Justices as *Amicus Curiae* in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45979 (former Chief Justices and Justices C.C. Torbert (Ala.); David Newbern (Ark.); Norman Fletcher (Ga.); Charles McDevitt (Idaho); Byron Johnson (Idaho); Harry T. Lemmon (La.); Conrad L. Mallett, Jr. (Mich.); A.M. Keith (Minn.); Kathleen Blatz (Minn.); Russell Anderson (Minn.); Edward D. Robertson, Jr. (Mo.); Jean A. Turnage (Mont.); John Sheehy (Mont.); Robert Rose (Nev.); James Exum (N.C.); I. Beverly Lake, Jr. (N.C.); Herbert L. Meschke (N.D.); Beryl Levine (N.D.); Herbert R. Brown (Ohio); Edwin J. Peterson (Or.); John P. Flaherty (Pa.); Raul Gonzalez (Tex.); Robert Utter (Wash.); Vernon Pearson (Wash.); Richard Guy (Wash.); Richard Neely (W. Va.); and Louis Butler (Wis.));

Brief of Amicus Curiae Public Citizen in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45975;

Brief of Amicus Curiae the Committee for Economic Development in support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3165832 (Intel Corp., Lockheed Martin Corp., Pepsico, Wal-Mart Stores, Inc., Defense Trial Counsel of Indiana, Illinois Ass'n of Defense Counsel, Transparency Int'l-USA);

Brief of the Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research as Amici Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45977;

Brief Amicus Curiae of the Washington Appellate Lawyers Association in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3199727;

Brief of the American Academy of Appellate Lawyers, Amicus Curiae, in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 815213;

Brief for Justice at Stake et al. as Amici Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45976;

Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45978;

Brief of American Bar Association as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3199726;

Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, the Campaign Legal Center, and the Reform Institute in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45972;
Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, the Campaign Legal Center, and the Reform Institute in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3165831;

Brief of American Association for Justice as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45971;

Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 27299;

Brief of Amici Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45974 (corporations and organizations committed to maintaining public confidence in the judicial system in order to promote economic growth and development).

The four briefs supporting Massey were

Brief of Amicus Curiae Center for Competitive Politics in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298463;

Brief of Law Professors Ronald D. Rotunda and Michael R. Dimino as Amici Curiae in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298468;

Brief of Amicus Curiae James Madison Center for Free Speech in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298468;

Brief of Ten Current and Former Chief Justices and Justices as Amici Curiae in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298467 (Perry O. Hooper, Sr., (Ala.), Harold F. See, Jr. (Ala.), Raoul G. Cantero, III (Fla.), Maura D. Corrigan (Mich.), Clifford W. Taylor (Mich.), Robert P. Young, Jr. (Mich.), Burley B. Mitchell, Jr. (N.C.), Evelyn Lundberg Stratton (Ohio), Craig T. Enoch (Tex.), Richard B. Sanders (Wash.)).

Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah as Amici Curiae in Support of Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298466.

The two briefs that did not support either side were

Brief of the Conference of Chief Justices, *supra* note ;

as an important factor the magnitude of collective campaign support for a challenged judge.⁵⁰ Caperton's case was argued by former U.S. Solicitor General Theodore Olson⁵¹ while Massey retained prominent Supreme Court advocate Andrew Frey.⁵²

In June 2009, the Court by a 5–4 majority sided with Caperton and vacated the decision, reversing the \$50 million judgment.⁵³ The Court observed:

that there is 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 contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.⁵⁴

E. Caperton's Test for Determining When Recusal Is Required by the Due Process Clause

The Blankenship–Benjamin situation violated the Due Process Clause, according to the majority, in that it raised for the reasonable lay observer the significant probability that Justice Benjamin could not be fair in assessing such an important case

Brief of Amicus Curiae the Supreme Court of the State of Louisiana as Amicus Curiae in Support of Neither Party, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 434720.

50. See Brief of the Conference of Chief Justices, *supra* note .

51. See *supra* note . Transcript of Oral Argument, *Caperton*, 129 S. Ct. 2252.

52. See *supra* note . Transcript of Oral Argument, *Caperton*, 129 S. Ct. 2252.

53. *Caperton*, 129 S. Ct. at 2267.

54. *Id.* at 2263–64.

implicating his sponsor Blankenship's finances.⁵⁵ Reviewing the Court's due process disqualification precedents, the Court found that Blankenship's campaign support was of sufficient magnitude to be uncomfortably close to the type of personal, judicial, financial self-interest in past cases that had merited judicial recusal.⁵⁶

The majority reviewed the key precedents and concluded they supported recusal in *Caperton*.⁵⁷ It divided past Court precedent on due process disqualification into two broad categories. The first was where a judge had a "direct, personal, substantial pecuniary interest" in a case, a situation reflected in the long-standing Anglo-American axiom that no person should be "allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably, corrupt his integrity."⁵⁸ This basis for disqualification, embracing a recusal standard going back to Blackstonian England, has been expressly recognized since *Tumey v. Ohio* was decided in 1927.⁵⁹ Operationalizing the standard in *Tumey*, the Court stated that where the judge "had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law" he must recuse.⁶⁰ The second established category where due process required recusal was "where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his

55. *Id.* at 2262–64.

56. *See id.* at 2262–64 (noting that his "campaign efforts had . . . significant and disproportionate influence").

57. *See id. passim* (discussing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); and *Tumey v. Ohio*, 273 U.S. 510 (1927)).

58. *Id.* at 2259 (citing *Tumey*, 273 U.S. at 523; THE FEDERALIST NO. 10, at 59 (James Madison) (J. Cooke ed., 1961)).

59. *Id.* (citing *Tumey*, 273 U.S. at 520 as the seminal case in this category). In *Tumey*, the village mayor sat as a judge in trying alcohol violations, receiving extra compensation from his judicial duties that was funded by fines assessed for conviction. 273 U.S. at 520. The *Tumey* Court concluded that this presented the mayor with an unconstitutional conflict of interest. *Id.* at 532.

60. *See, Caperton*, 129 S. Ct. at 2259–60 (discussing *Tumey*, 273 U.S. at 520 and *Ward*, 409 U.S. at 60 as examples).

participation in an earlier proceeding.”⁶¹ This approach has been recognized since *In re Murchison* in 1955.⁶²

Although the Court had not previously found due process to require recusal due to election campaign support, the *Caperton* result is quite consistent with *Tumey* and its progeny. For example, in the 1986 *Aetna v. Lavoie* decision,⁶³ the Court found that an Alabama Supreme Court justice’s participation in a case that could set favorable precedent for his similar suit against an insurer was the type of financial interest that merited disqualification under the Due Process Clause.⁶⁴ The *Caperton* majority viewed campaign financial

61. *Id.* at 2261 (citing *Murchison*, 349 U.S. at 133).

62. *See Aetna*, 475 U.S. at 822 (citing *Murchison*, 349 U.S. at 136).

63. Commentators generally supported the *Lavoie* holding and rationale. *See, e.g.*, Ignazio J. Ruvolo, *California’s Amendment to Canon 3E of the Code of Judicial Conduct Requiring Self-Recusal of Disqualified Appellate Justices—Will it be Reversible Error Not to Self-Recuse?*, 25 T. JEFFERSON L. REV. 529, 551 (2003); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 640 (1987); S. Matthew Cook, Note, *Extending the Due Process Clause to Prevent a Previously Recused Judge from Later Attempting to Affect the Case from Which He was Recused*, 1997 BYU L. REV. 423, 441–42 (1997). The decision, however, caused comparatively little stir when rendered, which arguably suggests that the *Caperton* dissenters (*see infra* Part III.B) are excessively concerned that *Caperton* will create a huge upsurge in recusal motions and related appeals and certiorari petitions.

64. *Aetna*, 475 U.S. at 822. Arguably, however, Justice Benjamin’s non-recusal did violate this norm. Judges who are not re-elected lose their jobs and their income. Although the Court focused on Justice Benjamin’s potential gratitude toward Blankenship, the opposite side of the coin is relevant. Just as Blankenship could be instrumental in advancing a Benjamin candidacy, he could also just as easily turn and help defeat a Benjamin re-election campaign if displeased with Benjamin’s failure to perform as anticipated. Career objectives are pecuniary objectives. Even though Justice Benjamin would not directly benefit from the outcome of *Caperton v. Massey* on the merits, it is only a small step to an impact on his career and compensation should he support an outcome adverse to Blankenship or a similarly well-heeled contributor. Obviously, this reverse side of the coin can be pushed too far. A judge should not be disqualified, for example, simply because a litigant with whom there is no prior relationship is powerful and might oppose the judge in an ensuing election. But where the judge has already enjoyed vast sums of support from an interested party, both the gratitude and retaliation concerns become sufficiently concrete to counsel recusal.

I acknowledge the inconvenient fact that many judges leaving the bench, even involuntarily, will often, or even perhaps usually, be able to make more money in private practice. But even these judges ordinarily want very badly to retain their judicial posts. They left practice for the bench for a reason and their set of preferences is unlikely to have changed. In addition, there are some judges who, if

support as something other than the type of direct pecuniary interest that made a jurist a “judge in his own case.”⁶⁵ Nonetheless, the majority found the Benjamin non-recusal fell easily within the zone of cases requiring recusal on due process grounds:

The proper constitutional inquiry is “whether sitting on the case then before the [court] would offer a possible temptation to the average judge to . . . lead him not to hold the balance nice, clear, and true.”⁶⁶

By this standard, Justice Benjamin’s recusal was clearly required. The average judge presiding over a very important (\$50 million) case to a very substantial benefactor (\$3 million) would of course be tempted to be biased in favor of the benefactor and prejudiced against his litigation opponent.

III. ASSESSING *CAPERTON*

A. *The “Reasonable Question as to Impartiality” Standard for Nonconstitutional Recusal under Federal and State Law as Contrasted with the Constitutional Due Process Standard of a “Serious Risk of Actual Bias”*

Justice Benjamin was also clearly disqualified under then-operative Canon 3(E)(1) of the West Virginia and ABA Codes of Judicial Conduct (now Rule 2.11 in the 2007 revision to the ABA Judicial Code) in that his impartiality was subject to reasonable question. Rule 2.11, the substance of which has been essentially the

defeated, might not do as well in practice. One common criticism of direct election of judges is that it can result in the election of lawyers who pursue the bench because their practices have not been successful. By contrast, nearly all appointed judges, whatever their other talents or shortcomings, have enjoyed success in private practice or government lawyering. For former government lawyers, ascension to the bench may be a net gain in compensation, especially if pension benefits and health insurance are considered.

65. *Caperton*, 129 S. Ct. at 2260–61 (discussing *Aetna*, 475 U.S. at 825; *Ward* 409 U.S. at 60; *Tumey*, 273 U.S. at 532).

66. *Id.* at 2261 (quoting *Aetna*, 475 U.S. at 825; *Ward*, 409 U.S. at 60; and *Tumey*, 273 U.S. at 532).

same since the 1972 Model Code, provides that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might be reasonably questioned,”⁶⁷ enumerating specific examples of when disqualification is required.⁶⁸ The ABA has in

67. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007); see John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1972) (describing history of judicial recusal and evolution of ABA Model Code); Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813 (2009) (same); see also FLAMM, *supra* note , § 5.5 (2d ed. 2007) (describing the standard for determining judicial bias); Bassett, *supra* note , at 1223–31 (summarizing federal and state law on recusal).

68. Rule 2.11 listed the “following circumstances” in which the judge shall recuse:

- (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.
- (2) The judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
 - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - (b) acting as a lawyer in the proceeding.
 - (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
 - (d) likely to be a material witness in the proceeding.
- (3) The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, domestic partner, parent, or child, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or is a party to the proceeding.
- (4) The judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer, has within the previous [insert number] year[s] made aggregate contributions to the judge’s campaign in an amount that is greater than \$[insert amount] for an individual or \$ [insert amount] for an entity [is reasonable and appropriate for an individual or an entity].

effect stated that in the enumerated situations, many of which seem far less troublesome than Blankenship's campaign support of Justice Benjamin, reasonable question as to impartiality is a given. Impartiality is defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."⁶⁹

-
- (5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
 - (6) The judge:
 - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
 - (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding or has publically expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
 - (c) was a material witness concerning the matter; or
 - (d) previously presided as a judge over the matter in another court.

ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1)–(6) (2007) (asterisks for defined terms eliminated) (the terminology section of the Model Code defines terms such as "aggregate," "domestic partner," "fiduciary," "impartiality," "know," and "personal knowledge"). Rule 2.11(B) requires the judge be kept reasonably informed about his and his family's financial interests. *Id.* R. 2.11(B). Rule 2.11(C) permits the parties to agree to the judge's continued participation in the case, provided that there is no Rule 2.11(A)(1) ground for disqualification on the basis of personal bias or prejudice toward attorney or litigant or the judge's personal knowledge of disputed facts. *Id.* R. 2.11(C).

69. ABA MODEL CODE OF JUDICIAL CONDUCT, Terminology Section (2007); *accord* Republican Party of Minn. v. White, 536 U.S. 765, 775–79 (2002) (noting possible definitions of impartiality, including "openmindedness," and that "root meaning" of impartiality "is the lack of bias for or against either party to the proceeding"); *see also id.* at 775–76:

Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to

Case law interpreting the ABA Code's "reasonable question regarding impartiality" standard and equivalent language in the federal judicial code generally views a judge as disqualified if a reasonable layperson aware of the relevant facts would harbor significant doubt about the judge's ability to be impartial.⁷⁰ Consequently, disqualification based on a violation of due process is somewhat different than disqualification under the ABA Judicial Code and state analogs or under 28 U.S.C. § 455(a) (the general federal disqualification statute), which, in language similar to the ABA Model Code, states that "[a]ny justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."⁷¹ In a manner similar to the Model Code's disqualification provision,

him in the same way he applies it to any other party. This is the traditional sense in which the term is used. . . . It is also the sense in which it is used in the cases cited by respondents [the State of Minnesota defendants] and amici for the proposition that an impartial judge is essential to due process.

(internal citations omitted).

70. *See, e.g.*, LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 13–16 (2d ed. 1992) (providing general discussion of the appearance of partiality); ALFINI, ET AL., *supra* note , Ch. 4 (providing general discussion of disqualification and conflicts of interest); FLAMM, *supra* note , §§ 5.6.3, 5.7 (offering definition of the "reasonable" layperson); Bassett, *supra* note , at 1238 n.127 (comparing several federal cases dealing with the reasonable layperson); John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. REV. 237, 243–44 (1987) (stating that a judge should step down if there are reasonable reasons to question his or her partiality); Stempel, *supra* note , at 822 ("The locus of case law on disqualification adopts an objective reasonably informed lay observer test mandating disqualification when [a] mythical reasonable viewer would harbor serious doubts regarding a judge's impartiality."); *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858–62 (1988) (applying this standard to disqualify federal trial judge who sat on board of university that stood to profit from land sale if particular party prevailed in dispute over right to build hospital); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th Cir. 1980) (stating that judge faced with disqualification motion should consider how participation in a given case appears to average citizen); *United States v. Ferguson*, 550 F. Supp. 1256, 1259–60 (S.D.N.Y. 1982) ("The issue [of impartiality] . . . is not the Court's own introspective capacity to sit in fair and honest judgment with respect to controverted issues, but whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality.").

71. 28 U.S.C. § 455(a) (2008).

§ 455(b) lists a number of specific instances (essentially the same as those of the Model Code) where disqualification is required, codifying particular circumstances that create a per se question as to a judge's impartiality.⁷²

Again, as with the Model Code, the particular instances where disqualification has been required under federal statutory law present circumstances that, for many a reasonable observer, must seem to pose far less risk of bias than Justice Benjamin's receipt of \$3 million in campaign aid from the CEO of a litigant appearing before him in an important case. Put another way, one might ask which is more troubling: Justice Benjamin's situation or Mrs. Benjamin owning a share of stock in Massey? Although the latter should not be minimized (particularly if she owned a large amount of stock or a significant percentage of company stock) disqualification of Justice Benjamin would have been required had there been any spousal stock ownership that amounted to more than a de minimis financial interest. Yet Justice Benjamin saw no problem participating in *Caperton* when the problem was not a modest investment but instead involved \$3 million in key campaign support.

Although there are some minor differences between the Model Code and § 455(a),⁷³ they are the same regarding the core

72. *See id.* § 455(b)(1)–(5) (requiring recusal in essentially the same specific circumstances delineated in Rule 2.11 of the Model Code); ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1)–(6) (listing similar factors), quoted in full *supra* note 68. Section 455(e) provides that where these enumerated grounds apply, the parties may not agree to let the judge preside but, like Rule 2.11(C), federal law permits the parties to waive disqualification and agree to permit the judge to preside even if his impartiality might be subject to question. 28 U.S.C. § 455(e).

73. For example, 28 U.S.C. § 455(d) defines several key terms such as “fiduciary” and “financial interest” in the statute itself rather than referring to a terminology section. Regarding waiver, 28 U.S.C. § 455(e) permits the parties to agree to let a judge subject to § 455(a) hear the case but forbids such stipulations if one of the § 455(b) grounds for recusal applies, most of which involve financial interest of the judge or a family member. The strong federal bar to litigant consent when a judge has even modest financial conflict is in part a legacy of now-disparaged past practice in which a judge would announce that he owned stock in a litigant company and then actively seek litigant consent to his continued involvement, placing lawyers and parties in an awkward position should they refuse to consent. *See* JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 96–97 (1974) (discussing this situation and describing it as a game of “velvet blackjack,” wherein a litigant “must weigh the consequences of betraying apparent distrust and the risks of offending the other party”). The great Learned Hand, for example, used this “velvet blackjack” approach regularly. *See id.* at 95–97 (detailing how

standard governing a judge's eligibility to hear and decide cases. Under the Judicial Code and § 455(a), the reviewing court asks whether the judge's impartiality may be reasonably questioned. Under a due process analysis, the inquiry is similar, but disqualification is harder to obtain in that the Court's precedents appear to require not just reasonable question as to impartiality but a probability of bias. At least this appears to be the *Caperton* majority's approach:

In defining these standards [for required due process recusal rather than general disqualification] the Court has asked whether, "under a realistic appraisal of psychological tendencies, and human weakness," the interest "poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented."⁷⁴

Applied to the instant matter, the Court found:

that there 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

Judge Hand owned twenty-five shares of Westinghouse stock and would disclose that fact to counsel, yet litigants would never object to his participation in the case); *see also* Stempel, *supra* note , at 631 n.170 (describing Judge Hand's use of "velvet blackjack" and inferring that litigants refused to ask for his recusal because "they wanted Judge Hand's mind on the case or because they feared offending him, or both").

However, federal law also differs from the Model Code in that § 455(f) specifically provides that if "substantial judicial time has been devoted" to a case when a § 455(b) problem is discovered, recusal is not required "if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for disqualification." 28 U.S.C. § 455(f).

74. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) and drawing upon *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); and *Tumey v. Ohio*, 273 U.S. 510 (1927)).

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

Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.⁷⁵

Responding to the dissent's criticism that a decision favoring Caperton would open the floodgates to vast tracts of recusal litigation, the majority noted that earlier due process disqualification decisions had not had this effect⁷⁶ and emphasized the particularities of the instant case:

Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its amici predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign

75. *Id.* at 2264.

76. *Id.* at 2266:

It is worth noting the effects, or lack thereof, of the Court's prior decisions. Even though the standards announced in those cases raised questions similar to those that might be asked after our decision today, the Court was not flooded with *Monroeville* or *Murchison* motions. That is perhaps due in part to the extreme facts those standards sought to address. Courts proved quite capable of applying standards to less extreme situations.

The Court also noted that the trend in state judicial reforms has strengthened disqualification law, and cited the West Virginia Code of Judicial Conduct Canon 3E(1) and 28 U.S.C. § 455(a) as examples. *Id.*

contributions that presents a potential for bias comparable to the circumstances in this case.⁷⁷

While acknowledging that “extreme cases often test the bounds of established legal principles” and that “sometimes no administrable standard may be available to address the perceived wrong,” the majority concluded that in extreme cases intervention was required to protect the integrity of the legal system.⁷⁸ Referring to three “illustrative” past cases of such intervention, the majority found that “[i]n each case the Court dealt with extreme facts that created an unconstitutional probability of bias that ‘cannot be defined with precision’” but that in each case “the Court articulated an objective standard to protect the parties’ basic right to a fair trial in a fair tribunal” with the Court “careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level.”⁷⁹

The *Caperton* majority took pains not only to state that due process-required recusal would continue to be rare, but also that the standard for due process recusal was distinctly higher than the standard for ordinary disqualification:

“The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.” 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.⁸⁰

77. *Id.* at 2265.

78. *Id.*

79. *Id.* at 2265–66 (citing *Aetna*, 475 U.S. at 825–26; *Mayberry*, 400 U.S. at 465–66; and *Murchison*, 349 U.S. at 137).

80. *Id.* at 2267 (quoting *Aetna*, 475 U.S. at 828). The *Caperton* majority opinion can be properly criticized as less than crystal clear regarding the differences between recusal under 28 U.S.C. § 455(a) and the Judicial Code. At times the opinion appears to suggest that the general “reasonable question as to impartiality” standard used in nonconstitutional disqualification motions also

Further, in announcing its campaign support recusal position, the Court greatly emphasized whether a case was “pending” or “imminent” at the time an interested party supported the judge under scrutiny.⁸¹ For example, Justice Benjamin’s recusal might not have been required had *Caperton v. Massey* commenced after his election, even though Don Blankenship would be just as interested in the case outcome and would have been just as pivotal a figure in Benjamin’s career. Further, Blankenship would have had just as much potential to extract vengeance against Justice Benjamin if Blankenship was displeased with Benjamin’s vote. A benefactor wealthy enough to provide \$3 million presumably has the wherewithal to provide a similar amount to a future opponent thought more hospitable to his or his company’s interests.

Given the narrowness of the *Caperton* holding and the majority’s repeated attempts to set the decision in a far corner of the field of judicial disqualification, it is unsurprising that one leading authority on judicial ethics characterized the decision as “declaring that a judge’s decision not to recuse violates due process ‘when it’s a cold day in hell.’”⁸² Former Texas Supreme Court Chief Justice Thomas Phillips likewise viewed *Caperton* as unlikely to open the floodgates, emphasizing the majority’s “very narrow standard” and the unusual facts of the case.⁸³ Professor Roy Schotland, co-author of the Chief Justices’ amicus brief, called it “preposterous” to predict an explosion of recusal motions based on *Caperton*.⁸⁴ In particular, as another co-author of the Chief Justices’ brief observed, although *Caperton* may permit more due process-based recusal arguments than could have been made prior to June 2009, parties seeking recusal have always possessed the option of seeking disqualification

governs the inquiry into whether due process has been violated. At other junctures, the majority states that something more (probability of bias as opposed to reasonable question of impartiality) is required to support recusal on due process grounds as opposed to nonconstitutional recusal.

81. *See id.* at 822 (stating that a serious risk of bias exists when financial or electoral support is provided while a case [is] “pending or imminent”).

82. *Caperton Ruling May Spur States to Enhance Their Process for Judges’ Recusal*, 25 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 335 (2009) (quoting University of Indiana law professor Charles Geyh).

83. *Id.* (quoting Phillips).

84. *Id.* (quoting Georgetown law professor Roy Schotland).

based on the ABA Model Code or federal statute,⁸⁵ both of which provide broader grounds and a lower threshold for recusal.

B. *The Dissenters' Perspective in Caperton*

Notwithstanding its rather restrained approach to the problem of when failures of judicial disqualification violate due process, *Caperton* divided the Court, engendering dissents by Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito)⁸⁶ and Justice Scalia.⁸⁷ The dissenters appear to have a dramatically different view of human nature and the risk that a judge will be influenced by even massive political and economic support by a litigant appearing before the judge. Largely, however, the Roberts dissent attacks the majority approach as too indeterminate and unpredictable,⁸⁸ which the dissent contends is a sufficient problem to augur in favor of refusing to intervene in state court disqualification decisions of this type, no matter how bad it may look to a casual newspaper reader.⁸⁹

In his dissent, Chief Justice Roberts outlines a long series of particular questions. Notwithstanding the important line-drawing point at the center of the dissent, it appears that all of these forty questions can be adequately addressed.⁹⁰ Although precise lines

85. *Id.* (quoting Washington, D.C. attorney George Patton, Jr.).

86. *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).

87. *Id.* at 2274 (Scalia, J., dissenting).

88. *See id.* at 2269 (Roberts, C.J., dissenting) (“[A]t the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions.”). Chief Justice Roberts also noted “other fundamental questions as well” and listed forty such questions, eighty if one counts subparts. *Id.* at 2269–74; *see* discussion *supra* note .

89. *Id.* at 2267 (“The Court’s new ‘rule’ provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.”).

90. *See* Jeffrey W. Stempel, *Playing Forty Questions: A Brief Response to Justice Roberts' Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SOUTHWESTERN L. REV. (forthcoming Dec. 2009) (responding to Roberts’s questions); *see also Caperton Ruling May Spur States*, *supra* note , at 5 (law professor Charles Geyh, a Reporter for the 2007 ABA Model Judicial Code, describing concerns raised in the Roberts dissent questions as “alarmist,” contending there is only “remote” risk of

cannot be drawn in the absence of concrete cases, a series of presumptive guidelines suggest themselves for application of due process disqualification.⁹¹ One might also criticize the Roberts dissent for engaging in a bit of “straw man” argumentation⁹² in that it announces an unnecessary goal (laying out an encyclopedic view of due process qualification that enunciates particularized rules of application for every conceivable future dispute on the matter)⁹³ and then criticizes the majority for not meeting the dissenters’ perhaps unwise goal. In another context, judicial conservatives like Justices

difficulties concerning the dissenters); *id.* at 4 (law professor Schotland viewing dissent’s prediction of doom as “preposterous” but conceding that the Roberts dissent posed some reasonable questions that may need to be answered in future cases).

91. See Stempel, *supra* note , at text accompanying notes 81–85 (laying out recusal guidelines including “where a judge had a ‘direct, substantial pecuniary interest’ in a case, . . . a financial interest in the outcome of a case,” or where a judge was challenged “because of a conflict arising from his participation in an earlier proceeding”).

92. Straw man is defined as “[a] tenuous and exaggerated counterargument that an advocate puts forth for the sole purpose of disproving it.” BLACK’S LAW DICTIONARY 1461 (8th ed. 2004). Having erected a straw man that is less attractive or compelling than the actual argument opposed, the speaker then proceeds to “knock down” this weaker target but in doing so is largely destroying something other than the argument that was supposed to be at issue.

93. During the past decade, the concept of judicial minimalism has gained a substantial following. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (exploring the connection between judicial minimalism and democratic self-government); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000) (explaining that a resurgence in judicial minimalism has been endorsed by former and current judges and has sparked scholarly debate); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998) (explaining the virtues of judicial minimalism). The concept has also become part of the public discussion surrounding Judge Sonia Sotomayor’s nomination to the U.S. Supreme Court. See, e.g., David D. Kirkpatrick, *Judge’s Mentor: Part Guide, Part Foil*, N.Y. TIMES, June 22, 2009, at A1 (portraying Judge Sotomayor as a judicial minimalist and quoting former Yale Law Dean and Second Circuit Judge Guido Calabresi, who described Sotomayor’s approach in a controversial case as one of “judicial minimalism”). This is an image the Obama administration appeared interested in promoting in order to help her ultimately successful confirmation by refuting charges that she was a judicial activist. See Richard Brust, *No More Kabuki Confirmations*, A.B.A. J. Oct. 2009 at 39 (noting emphasis in Sotomayor confirmation and others in presenting nominee as simply work-a-day judge following the law).

Roberts, Scalia, Thomas, and Alito might well label such a project as an impermissible advisory opinion.⁹⁴

In addition to questioning the feasibility of Supreme Court policing of campaign-related state court failures to recuse, the Roberts dissent is a utilitarian attack, contending that whatever benefit is derived from correcting Justice Benjamin's ethical myopia is outweighed by the anticipated avalanche of less meritorious disqualification motions, both because it will add to judicial workload and because it will create in the public unfounded concern about the neutrality of judges.⁹⁵ Concluding, Chief Justice Roberts expressed his view that "opening the door to [due process-based] recusal claims" based on an "amorphous 'probability of bias,' will itself bring our judicial system into undeserved disrepute, and

94. Under the ground rules of justiciability, courts (in particular the U.S. Supreme Court), are to refrain from rendering advisory opinions. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 2.12 (7th ed. 2004) (providing overview of justiciability doctrines and general prohibition on advisory opinions). Conservative jurists are generally viewed as particularly supportive of this doctrine because it tends to reduce the degree to which judicial decisions may amplify or contradict actions of the legislative or executive branch. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (prominent conservative law professor argues for use of justiciability and related doctrines to prevent Court from becoming involved in policy choices better left to other branches of government); RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 328 (1997) (noting Scalia's use of doctrines such as justiciability to reduce federal court involvement in cases involving issues of public policy); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1204–05 (2002) (applying this analysis to "institutional" conservative judges but finding that "political" conservative justice may be quite willing to interfere with legislation they oppose ideologically). But see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL. L. REV. 393, 458–60 (1996) (noting that during New Deal era liberal justices invoked justiciability concepts in attempt to restrain Supreme Court from interfering with legislation); Daniel C. Hulsebosch, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 2016 (1990) (same).

95. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267, 2272–73 (2009) (Roberts, C.J., dissenting) (stressing presumption of judicial impartiality and need to foster respect for courts as well as citing "cautionary tale" of Court's short-lived willingness to permit double jeopardy attacks in civil litigation, leading to many novel claims that forced retreat on the issue and confinement of double jeopardy issues to criminal proceedings).

diminish the confidence of the American people in the fairness and integrity of their courts.”⁹⁶

Justice Scalia’s lone dissent expressed similar cost–benefit concerns in more strident terms. Rejecting the contention that there was a net benefit to setting aside the tainted Massey victory, Justice Scalia argued that the majority “decision will have the opposite effect.”⁹⁷ He contended, without benefit of any cited empirical evidence, that:

[w]hat above all else is eroding public confidence in the Nation’s judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.⁹⁸

According to Justice Scalia, the majority opinion “will reinforce that perception, adding to the fast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim”⁹⁹ producing an attendant sharp rise in disputing costs and further drain on the judicial system.¹⁰⁰ To Justice Scalia, “[t]he relevant question . . . is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule [and the] answer is obvious.”¹⁰¹

96. *Id.* at 2274.

97. *Id.* at 2274–75 (Scalia, J., dissenting).

98. *Id.* at 2274.

99. *Id.*

100. *Id.* (“The facts relevant to adjudicating it will have to be litigated—and likewise the law governing it, which will be indeterminate for years to come, if not forever. Many billable hours will be spent in poring through volumes of campaign finance reports, and many more in contesting non-recusal decisions through every available means.”).

101. *Id.* at 2275.

C. *The Unpersuasive Criticisms of Caperton*

Although commentators generally approved the *Caperton* holding,¹⁰² several prominent commentators, echoing the arguments of the dissents, challenged its prudence and practicality, as well as the correctness of its decision to vacate the West Virginia Supreme Court's decision in which the justice receiving \$3 million in campaign support cast the deciding vote.¹⁰³ Initial criticisms of

102. See, e.g., Editorial, *Honest Justice*, N.Y. TIMES, June 9, 2009, at A22 (praising *Caperton* holding, its “recognition of the threat posed by outside contributions,” and its “crucial statement that judges and justice are not for sale” while finding problems raised by Roberts dissent “exaggerated”); Editorial, *No tolerance for bias; Supreme Court issues sound ruling that instructs judges to remain impartial*, LAS VEGAS SUN, June 11, 2009, at 4 (arguing that “Justice Anthony Kennedy, writing for the majority, used common sense” and praising the Court for being “appropriately careful not to put all contributors to judicial campaigns in the same basket. The decision that judges should recuse themselves applies only to cases in which an interested party was a substantial campaign contributor.”); Editorial, *The Supreme Court raises the bar for judges*, L.A. TIMES, June 9, 2009, at A18 (approving *Caperton* holding and finding Roberts’s dissent “wrong to bewail a decision that will force judges, including members of his own court, to take apparent conflicts of interest more seriously”).

103. See, e.g., Editorial, *Judges and ‘Bias’: The Supremes Trample on State Courts*, WALL ST. J., June 9, 2009, at A18 (“The march away from a credible, accountable judiciary took another leap yesterday.”); Editorial, *Judicial Impartiality: Decision Could Cause More Problems than it Solves*, LAS VEGAS REV.-J., June 11, 2009, at 6B (*Caperton* “ruling unfortunately fails to define at what level recusal is mandatory—leaving the field wide open for all kinds of new court challenges as creative lawyers put ‘judge shopping’ on steroids.”); Hoppy Kercheval, *The High Court Made Hash of the Bias Issue; Supreme Supremes Have Actually Eroded Confidence in Courts*, CHARLESTON DAILY MAIL, June 16, 2009, at A4 (arguing that the court’s decision in *Caperton* was too vague to be a guide for recusal); Political Cartoon, LAS VEGAS REV.-J., June 9, 2009, at 9B (Underneath text stating “**News Item:** U.S. Supreme Court rules that elected judges must recuse themselves in cases where large campaign contributions might create the **perception** of bias” is picture of litigant attempting to enter courtroom but stopped at toll booth by guard stating, “Hey—it’s now the only way the judge can rake in a few campaign bucks.”); see also David Kihara, *Court Rules on Elected Judges*, LAS VEGAS REV.-J., June 9, 2009, at 1A (including phrases “*Opinion: Recusal might be need to avoid appearance of bias*” and “*Dissenters see downside to ruling*,” and also attributing to State Bar president that “it’s very common for parties to complain that a judge is biased, but it’s rarely true,” and quoting law professor that lawyers will “push the envelope” with *Caperton* recusal claims).

The *Wall Street Journal* editorial, in addition to trumpeting states’ rights federalism (“[r]ecusal standards are better handled at the state level, where

individual judges are presumed to be impartial in their courtrooms. . . . Allowing federal courts to second-guess state judges opens the door to unprecedented federal meddling.”), followed the Roberts dissent script of raising concerns of unpredictability and arbitrariness in the application of *Caperton*-style recusal:

Heretofore, judges needed to recuse themselves on due process grounds only if they had a direct financial interest in a case, and in criminal contempt cases in which the judge provoked the original courtroom outburst. Under Justice Anthony Kennedy’s *Caperton* standard, judges must now recuse if there is a “probability of bias.” But this would seem to be open to, well, judicial interpretation. . . .

In his dissent, Chief Justice John Roberts lists 40 questions that represent only “a few uncertainties that quickly come to mind.” The majority opinion “requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?) and psychologists (is there likely to be a debt of gratitude?).”

[The majority’s attempt] to limit any judicial chaos [by characterizing *Caperton* as a rare case is unpersuasive and] . . . support for this position by such opponents of judicial elections as the Brennan Center for Justice and the George Soros-funded Justice at Stake gives away the game.

. . . The ultimate goal of these groups is to have all judges selected by a club of lawyers and insiders that makes judges less accountable to average citizens.

See Judges and ‘Bias’ supra, at A18.

Responding to the *Journal* editorial lies beyond the scope of this article, but the editorial demands at least a brief reply regarding its fallacious premise. According to the *Journal*, appointed judges are antidemocratic and deprive the “average citizen” of voice. But as reflected in the actual facts of *Caperton* (rather than the *Journal*’s imaginary view of the world), the mythical average citizen had far less to do with Justice Benjamin’s election than did \$3 million contributor Don Blankenship. Fears of insider dominance in an appointed judiciary are of course legitimate. But could any insider’s club of the legal establishment be smaller than one wealthy corporate CEO? The *Journal*’s attack on *Caperton*, to use the *Journal*’s own words, “gives away the game.”

See also Editorial, *Bias on the Bench; The Supreme Court weighs in on the corrosive impact of money in judicial elections*, WASH. POST, June 10, 2009, at A18 (taking a relatively moderate and balanced view that the *Caperton* decision “raised more questions than it answered, but it should serve as a call for states to tighten judicial ethics standards and rethink judicial elections altogether.”); Dahlia Lithwick, *The Great Caperton Caper; The Supreme Court talks about judicial bias. Kinda.*, SLATE, June 8, 2009, <http://www.slate.com/id/2220031> (noting apparent introspection of majority opinion and its retreat from traditional mythology that judging is a formal process detached from personal experiences and views, finding portion of the opinion “strikingly resonant with [Supreme Court

Caperton fall roughly into three categories: (1) states' rights federalism; (2) concerns about limits on free expression in elections; and (3) questions about practical problems with *Caperton*.

1. States' Rights Federalism

The states' rights critique argues that *Caperton*, by expanding federal constitutional scrutiny of state court proceedings via the Due Process Clause, intrudes too greatly into a core state function of adjudication. Justice Scalia's dissent states this most strongly¹⁰⁴ but there are elements in the Roberts dissent as well.¹⁰⁵ Justices Scalia and Thomas have been reasonably consistent on this point in that they also have steadily resisted the Court's expanded review of state court punitive damages judgments for compliance with due process.¹⁰⁶ In its simplest form, their view is that the Constitution should not be used as a roving license to correct state court error. While the occasional adjudication by judges who should have recused or the ridiculously large punitive damages award may be regrettable, these are seen by Justices Scalia and Thomas largely as

nominee Judge Sonia] Sotomayor's much-maligned Berkeley speech, about how the average judge goes about deciding a case," and asking whether including "empathy" in factors relevant to judicial outcomes can be far behind).

104. See *Caperton*, 129 S. Ct. at 2274–75 (Scalia, J., dissenting) (“[T]he principal consequence of today’s decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 states that elect their judges. . . . The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution.”).

105. See *id.* at 2267–68 (Roberts, C.J., dissenting) (“Court’s new ‘rule’ provides no guidance to judges and litigants about when recusal will be constitutionally required.”).

106. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (“[T]he Due Process Clause provides no substantive protections against ‘excessive’ or ‘unreasonable’ awards of punitive damages.”); *id.* (Thomas, J., dissenting) (“I continue to believe that the Constitution does not constrain the size of punitive damages awards.”); *BMW of N. Am. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., joined by Thomas, J., dissenting) (“Today we see the latest manifestation of this Court’s recent and increasingly insistent ‘concern about punitive damages that run wild.’ Since the Constitution does not make that concern any of our business, the Court’s activities in this area are an unjustified incursion into the province of state governments.” (internal citation omitted)).

mere error—and the U.S. Supreme Court’s role is not to correct error but to resolve questions of federal and constitutional law.¹⁰⁷

The Scalia–Thomas perspective has much to recommend it and may strike a particularly responsive chord with those who found the Court’s punitive damages precedents problematic.¹⁰⁸ There are even some signs that the Court, which intervened to save large businesses from punitive damages awards it disliked,¹⁰⁹ has been partially moved by their concerns. The Court recently declined to review an \$80 million punitive damages award in a tobacco liability case after initially expressing interest.¹¹⁰ Roving Court intervention pursuant to the Due Process Clause could, at worst, become the substitution of the judgment of five justices for that of an entire state court system (jury, trial judge, appellate panel, and state supreme court). Even if prudently invoked, due process review on what essentially are fairness grounds arguably misapplies scarce judicial resources.

107. See, e.g., *BMW*, 517 U.S. at 598 (Scalia, J., joined by Thomas, J., dissenting) (finding that the Fourteenth Amendment does not guarantee reasonable damages); *State Farm*, 538 U.S. at 429–30 (Scalia & Thomas, JJ., dissenting) (finding no limit to punitive damages in the constitution).

108. See Thomas Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117 (2003) (criticizing Court’s foray into punitive damages field); see also JEFFREY W. STEMPEL, *LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM* chs. 22–25 (2008) (suggesting that Court’s decision to vacate large punitive damages award for insurer bad faith failed to appreciate length, magnitude, willfulness, and wrongfulness of insurer’s behavior).

109. See *Exxon v. Baker*, 128 S. Ct. 2605 (2008) (vacating \$2.5 billion punitive damages award in oil spill case and, in essence, capping maximum award at \$500 million); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (vacating \$79.5 million punitive damages award in tobacco product liability and fraud claim); *State Farm*, 538 U.S. at 408 (vacating \$145 million punitive damages award against insurer in bad faith claim); *BMW*, 517 U.S. at 559 (vacating \$4 million dollar punitive damages award against major automobile manufacturer for failing to disclose touch-up paint job on new car); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (overturning \$5 million punitive damages award in product liability case).

110. *Phillip Morris*, 549 U.S. at 346. After the 2007 remand of this case, the Oregon Supreme Court reaffirmed its support for the jury’s \$80 million punitive damages award, prompting the tobacco company to again seek U.S. Supreme Court review. See *Williams v. Phillip Morris Inc.*, 176 P.3d 1255, 1263 (Or. 2008) (reaffirming the damages award against the tobacco company). After granting certiorari, the Court subsequently dismissed the writ as improvidently granted. See *Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436 (2009) (mem.).

But if the states' rights critique of *Caperton* is correct, it argues for declining to ever overturn a state court decision on disqualification grounds. Once the Court's majority has determined that due process concerns permit some policing of state outcomes involving improperly participating jurists, the Rubicon has been crossed. The Court will be intervening in some state proceeding where a judge has failed to recuse. Indeed, the Court has been engaged in some form of this enterprise since the 1927 *Tumey v. Ohio* decision¹¹¹ and has steadily, if infrequently, intervened to vindicate fairness concerns for more than 80 years in cases like *Ward v. Monroeville*,¹¹² and *Aetna v. Lavoie*,¹¹³ which arguably involved far less judicial self-interest and threat to public confidence than that faced by Justice Benjamin in *Caperton*.¹¹⁴

The issue is not whether the Due Process Clause permits the policing of judicial impartiality. That question is now settled, by however slim a vote, in favor of giving the Court at least the power to intervene. Logically as well, the guarantee of due process, if it is to mean anything, must mean that citizens of the states will not be subject to "kangaroo courts" where judges are viewed as compromised or even corrupt because of the substantial campaign support they have received from litigants or lawyers.¹¹⁵

111. See *Tumey v. Ohio*, 273 U.S. 510, 531–32 (1927) (finding due process violation where mayor presided over alcohol violations court where funds from fines he imposed funded the court and supplemented his salary).

112. See *Ward v. Monroeville*, 409 U.S. 57, 59–60 (1972) (finding due process violation where mayor presided over court that imposed fines that became part of general town funds and stating that mayor's pecuniary interest in case outcomes was too great even though his salary was not directly increased or funded by fines collected).

113. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (finding due process violation where Alabama Supreme Court justice whose case-deciding vote against insurer in bad faith case himself had pending bad faith action presenting similar issues in claim against different insurer and where justice could create favorable precedent that would enhance his monetary claim in violation of constitutional fairness).

114. See also *Gibson v. Berryhill*, 411 U.S. 564, 564–65 (1973) (holding that administrative board of optometrists had sufficient financial interest in cases involving competing optometrists to violate due process in board's adjudication of claims against competitors).

115. See Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 256 (2007) (setting forth definition of term "kangaroo court" and discussing its origin).

The relevant question that should concern the judiciary going forward is the standard that should be used in guiding the Court's occasional interventions. *Caperton*'s "probability of bias" standard, although a seemingly higher threshold than simple error in recusal, is sufficiently malleable that it provides relatively little protection to the states' rights concerns of the dissenters. The Court nonetheless retains the power to upset a state court decision using an unacceptable risk of bias standard just as it could vacate a state court decision using a reasonable question as to impartiality standard.

Further, because the unacceptable risk of bias standard is apparently reserved only for due process disqualification matters rather than judicial recusal generally, it also creates the problem of applying a different standard, seldom deployed, while adoption of the more straightforward reasonable question as to impartiality, error-in-recusal standard provides the court with a far larger body of precedent for determining the propriety of a judge's refusal to recuse.

Adoption of the broader but more familiar "reasonable question as to impartiality" standard for assessing due process violations can provide greater consistency without leading to the flood of litigation feared by the *Caperton* dissenters. As outlined at greater length below, the power to intervene in non-disqualification cases is, like all the Supreme Court's power, almost entirely discretionary.¹¹⁶ In *Caperton*, the majority tacitly used considerations for intervention suggested in the Chief Justices' brief.¹¹⁷ If combined with the additional considerations set forth in this article,¹¹⁸ the Court would possess a template adequate for continuing to vindicate due process fairness where necessary without becoming a court of omnibus error correction in disqualification matters.

116. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 220–21 (8th ed. 2002) (stating that the Judiciary Act of 1925 gave the Supreme Court "firm control over the main body of its work").

117. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263–64 (2009) (utilizing the approach advocated in the chief justices' amicus brief of assessing factors such as relative size of campaign contribution, magnitude of election spending, and impact of contribution to determine whether campaign support was sufficient to raise due process concerns).

118. See *infra* Part IV.E.2.

2. Limits on Free Expression

The free expression objection to *Caperton* contends that the decision conflicts with Court precedent resisting certain types of electoral regulation due to First Amendment concerns. *Caperton* is thus seen as in some tension with *Buckley v. Valeo*,¹¹⁹ *Republican Party of Minnesota v. White*, which struck down at least a portion of efforts to restrict campaign activity on constitutional grounds;¹²⁰ and *New York State Board of Elections v. Lopez Torres*, which upheld the challenged state procedures but reiterated the concerns expressed in *Buckley* and *White*.¹²¹ These cases can be read as standing for the proposition that the constitutional right of free speech in the political arena makes all but the most narrowly tailored restrictions on campaign activity impermissible. In particular, because *Buckley v. Valeo* found campaign contributions to be a form of protected speech, it would seem to support Massey's argument that it should not be penalized (by having a favorable decision vacated) merely because it expressed its support for one of the jurists through campaign contributions.

The persuasiveness of the free expression critique of *Caperton* lies in the eye of the beholder. To those favoring wide open campaigning and tending to dislike any regulation of the process, *Caperton* is indeed in some tension with prior caselaw. However, unlike *New York Times Co. v. Sullivan*, which provided a zone of liability protection for the news media,¹²² the "electoral freedom" First Amendment cases are regarded as problematic by many observers. Many have long harbored concerns that *Buckley v.*

119. See *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (striking down certain limits on campaign contributions and activity as violating the First Amendment).

120. See *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (striking down Minnesota judicial code's "announce" clause prohibiting candidate from stating position on legal issues and past court decisions as violative of First Amendment).

121. See *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 798 (2008) (discussing a state's power to proscribe party use of primaries or conventions as "not without limits").

122. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that First Amendment set constitutional limits on prosecution of defamation matters, including requirement that if defamation plaintiff is a public figure such as a politician, recovery can be had only if media defendant knew published statement defaming plaintiff was false or acted with "reckless disregard" of its truth or falsity).

Valeo was wrongly decided and helped foster significant electoral pathology, including special interest group domination of American politics by monied interests.¹²³ *Republican Party v. White*, like *Caperton*, was a 5–4 decision that many view as having accelerated the trend to judicial elections that look more like *All the King's Men*¹²⁴ or American Idol and less like reflective selection of serious jurists.¹²⁵ At a minimum, one can answer the free expression

123. See, e.g., Robert F. Bauer, *The Demise of Reform: Buckley v. Valeo, the Courts and the "Corruption Rationale,"* 10 STAN. L. & POL'Y REV. 11 (1998) (pointing to Courts' refusal to close "loopholes" allowing "today's 'issue ads' financed by special interest groups with soft money"); Peter M. Shane, Commentary, *Back to the Future of the American State: Overruling Buckley v. Valeo and Other Madisonian Steps*, 57 U. PITT. L. REV. 443 (1996) (stating that contributions "facilitate corrupt quid pro quo arrangements between candidates and special interests"); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (asserting that the campaign reform legislation reviewed in *Buckley* can be seen as an attempt to free decision makers "from imperative obligations to special interest money-providers."). One commentator has even characterized *Buckley v. Valeo* as the U.S. Supreme Court's "worst" decision ever. Sanford Levinson, *Parliamentarianism, Progressivism, and 1937: Some Reservations About Professor West's Aspirational Constitution*, 88 NW. U. L. REV. 283, 292 (1993).

124. See ROBERT PENN WARREN, *ALL THE KING'S MEN* (1946) (describing rough-and-tumble world of electoral politics in novel presenting main character similar to Louisiana governor Huey P. Long); see also EDWIN O'CONNOR, *THE LAST HURRAH* (1956) (a thinly veiled portrayal of Boston Mayor James Michael Curley).

125. See, e.g., Jessica Gall, *Living with Republican Party of Minnesota v. White: The Birth and Death of Judicial Campaign Speech Restrictions*, 13 COMM. L. & POL'Y 97 (2008) (discussing judicial canons regulating behavior of judicial candidates as a limitation on the information voters can obtain to make informed decisions); Leita Walker, *Protecting Judges from White's Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371 (2007) (indicating that *White*'s holding that Minnesota's "announce clause" was unconstitutional threatens "a comprehensive loss of public faith in the capacity of elected judges" to act fairly and impartially). The dissents in *White*, of course, also take this view. See 536 U.S. at 803 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) ("[D]isposition of this case on the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided."); *id.* at 821 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting) ("For more than three-quarters of a century, States like Minnesota have endeavored, through experiment tested by experience, to balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary. . . . [Reasonable restrictions on judicial candidate speech are] an essential component in Minnesota's accommodation of

critique of *Caperton* by invoking the Due Process Clause, which has at least as much historical pedigree and power as the First Amendment.

But, like the states' rights concern about *Caperton*, the free expression issue affects only the question of whether the Supreme Court should even become involved with review of disqualification matters. Once the Court does so (as it has for approximately 80 years), some sort of standard for intervention is required. Requiring something more than mere error below arguably reduces such intervention and correspondingly reduces the posited free expression or states' rights "harm." But there is no way of knowing whether an "unacceptable risk of bias" standard will result in significantly fewer interventions than a "reasonable question as to impartiality" standard. Certainly, a reasonable reader of U.S. Supreme Court decisions can be forgiven for being unsure of whether *Caperton*'s undue risk of bias standard is in practice much different from a simple rule that improper failure to recuse violates due process—at least if the Court finds the failure sufficiently egregious.¹²⁶

the complex and competing concerns in this sensitive area." (internal citation omitted)).

126. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 775–76 (2002) (noting the argument made by state defending limitations on judicial candidate speech and its supporters "that an impartial judge is essential to due process"). Justice Scalia, the author of *White*, then summarizes the precedents invoked as follows:

Tumey v. Ohio, 273 U.S. 510, 523, 531–534 (1927) (judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822–825 (same); *Ward v. Monroeville*, 409 U.S. 57, 58–62 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215–216 (1971) (per curiam) (judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *Bracey v. Gramley*, 520 U.S. 899, 905 (1997) (would violate due process if a judge was disposed to rule against defendants who did not bribe him in order to cover up the fact that he regularly ruled in favor of defendants who did bribe him); *In re Murchison*, 349 U.S. 133, 137–139 (1955) (judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

Id. at 776 (parallel citations and italics removed).

Reviewing this summary of the established pre-*Caperton* case law concerning recusal required on due process grounds, one is struck by the difficulty of determining whether the Court has historically imposed due process recusal

In the end, it will still be the Court's case-specific exercise of discretion that determines whether cases like *Caperton* are rare or relatively common on the Court's docket. Weighed against any possible reduction in federal intrusion that would presumably please the *Caperton* dissenters are the questions of application surrounding the probability of bias standard, which also troubled the dissenters. If the Court is to be in the due process disqualification business in any event, employment of a yardstick for review that comports with the general recusal standard promises the prospect of more consistent application, perhaps with no greater frequency of Court intervention.

3. Practical Problems of Implementation

The practical problems critique of *Caperton*, which is the focus of the Roberts dissent,¹²⁷ argues more directly that expanded due process review of disqualification decisions will substantially increase the workload of the Supreme Court and other courts, in large part because of the alleged difficulty of determining when an unacceptable risk of actual bias exists. To a degree, the practical problems criticism of *Caperton* is an argument that the Court should not police state court disqualification failures at all.¹²⁸ Like the free expression and states' rights criticisms of *Caperton*, this part of the practical problems critique is not relevant to the question of what test should be used in determining when non-disqualification violates due process. Hard-core critics of *Caperton* do not want the Court in the recusal review business at all, save perhaps only in cases of very direct personal financial interest and matters in which the judge was also effectively the accuser of a litigant.¹²⁹

because the judge's impartiality was subject to question or whether it was requiring that, beyond this, the reasonable lay viewer must also think that the judge is "probably" biased or prejudiced. If the *Caperton* dissenters (such as Justice Scalia) are correct that the due process recusal standard lacks sufficient clarity, this appears to be a problem that predates *Caperton*.

127. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267–74 (2009) (Roberts, C.J., dissenting) (arguing that due process review of disqualification will increase court caseloads); see also *supra* Part III.B, discussing Roberts's dissent.

128. See *Caperton*, 129 S. Ct. at 2274 (“[S]ometimes the cure is worse than the disease.”).

129. See *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting) (joined by Scalia, Thomas, and Alito, JJ.) (“Until today, we have recognized exactly two situations in which the Federal *Due Process Clause* requires disqualification of a

But, as with the other critiques of *Caperton*, the hard-core practicality critique appears to be fighting a rearguard action. Although pre-*Caperton* cases had not dealt specifically with campaign support in judicial elections and arguably only involved direct financial stakes, cases like *Aetna v. Lavoie*¹³⁰ and *Gibson v. Berryhill*,¹³¹ if read realistically, show that the Court has for decades been willing to set aside cases involving compromised jurists even if the judge's interest in a matter was attenuated and did not directly implicate payment of funds to the judge. Once the *Tumey* Court¹³² correctly found that doubts about a judge's neutrality implicated the Due Process Clause, there was logically no turning back and the Court has correspondingly refused to turn back (although its frequent

judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules. Today, however, the Court enlists the *Due Process Clause* to overturn a judge's failure to recuse because of a 'probability of bias.' Unlike the established grounds for disqualification, a 'probability of bias' cannot be defined in any limited way.") (italics in original); Editorial, *Judges and "Bias,"* WALL ST. J., June 9, 2009 at 18A (condemning *Caperton* decision as providing unprecedented and unwise federal oversight of state courts and representing liberal groups' agenda for seeking to eliminate elective judgeships); Bradley A. Smith & Jeff Patch, *Can Congress Regulate All Political Speech,* WALL ST. J., March 3, 2009 at 13A (contending that those seeking recusal of Justice Benjamin in *Caperton* improperly and unconstitutionally attempt to ban political participation through independent campaign expenditures). See also Editorial, *On the money: Our view—Efforts to buy justice should be thwarted,* ST. LOUIS POST-DISPATCH, June 9, 2009 at A12 (defending *Caperton* holding and accusing right-wing political forces "cheered on by the Federalist Society and The Wall Street Journal editorial page" of attempting to politicize judicial selection process).

130. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (holding that state court justice's participation in case violated due process not because he was or would be directly compensated by either litigant but because his decision could result in court precedent favorable to him in a pending insurance coverage and bad faith case presenting similar issues).

131. See *Gibson v. Berryhill*, 411 U.S. 564, 581 (1973) (due process was violated where administrative board of optometrists conducted regulatory-disciplinary hearings involving competing optometrists).

132. See *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), discussed *supra* at text accompanying notes --.

5–4 decisions on matters of judicial ethics do not place this beyond the realm of possibility).¹³³

For purposes of this article, the relevant question regarding the practical problems attack on *Caperton*, like the states' rights and free expression attacks, is the content of the standard for determining when judicial non-disqualification violates due process. Of all the criticisms of *Caperton*, the practical problems attack is most easily accommodated by this article's suggestion that it be considered a due process problem whenever a state jurist erroneously fails to recuse. The potentially broader scope of this standard (as compared to *Caperton*'s probability of bias standard) may lead to more litigation, but the litigation can be more easily resolved because the standard is clearer, easier to apply, informed by more precedent and experience, and—like the probability of bias standard—still requires the support of at least four justices before it can become a basis for overturning a state court judgment.

Consequently, whatever the merits of the arguments of *Caperton* critics on the “should the Court be doing this at all?” question, there is no reason not to use the most efficacious test for policing state court non-disqualification once the Court has entered the thicket in the first place. At least until the working five-justice majority of *Caperton* shifts or the Court abandons due process disqualification review in general, it should use the better standard of reasonable question as to a state court jurist's impartiality.

D. *The Correctness of the Caperton Holding and the Legitimacy of Concerns about It*

Notwithstanding the criticisms, *Caperton* was clearly correctly decided on the merits of the case itself. Although, as J. Paul Getty famously remarked, “a billion dollars isn't what it used to be,”¹³⁴ three million dollars (the amount West Virginia Justice Brent Benjamin received in campaign support from Massey CEO Don

133. In addition to *Caperton*, other 5–4 decisions concerning judicial ethics include *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Liteky v. United States*, 510 U.S. 540 (1994) (although there was no dissent, five justices were in the majority and four joined the concurring opinion); and *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988).

134. Stephanie Mansfield, *Billionaire Behavior*, ST. PETERSBURG TIMES, Nov. 8, 1992, at 5D.

Blankenship) remains a lot of money, particularly to a lawyer seeking election to statewide judicial office.¹³⁵ Fifty million dollars, the amount at stake in Massey's case, is even more money. Allowing Justice Benjamin to sit in judgment on Massey's appeal and to cast the deciding vote in favor of Massey looks too much like a bribe to be countenanced by a system that aspires to judicial impartiality. Even non-alarmist laypersons (who do not see every campaign contribution as a quid-for-future-quo) would reasonably be alarmed to see such large sums directed by an interested litigant to a single judge pivotal to the resolution of the litigant's large case. As well-put in a leading magazine, Justice Benjamin "found he was unbiased after deliberating with himself"; "[w]hat happened in West Virginia would have been unthinkable in most other countries."¹³⁶

Lawyers, even if more jaded than lay observers about the world of judicial politics, might have additional reason to question the neutrality of Justice Benjamin (and the West Virginia Court 3–2 majority in the case). The majority's legal grounds for granting victory to Massey rested on what many, if not most, observers would deem a strained view of both *res judicata* and enforcement of arbitration clauses.¹³⁷ Although the majority's legal rationale for

135. Although Brent Benjamin, Esq., appears to have been a reasonably successful private practitioner, there is nothing in his background to suggest that he had the large personal wealth that certain "superlawyers" (e.g., the late Johnnie Cochran, Mark Geragos, Joe Jamail, Fred Bartlitt, or David Boies) might bring with them to an election campaign—the type of personal wealth that could arguably place them beyond potential dependence on campaign supporters.

136. *The Caperton v. Massey case: Not for sale*, THE ECONOMIST, June 13, 2009, at 80.

137. See *supra* note and accompanying text (discussing the forum selection and *res judicata* issues in *Caperton*).

On remand, the West Virginia Court declined to decide the *res judicata* issue and focused on the forum selection argument, again holding—this time by a 4–1 vote—that the choice of forum clause in the Wellmore–Harman Mining coal sales contract, which specified Buchanan County, Virginia, as the location for trial of any contract disputes, was sufficiently broad to require that all of Caperton's West Virginia claims be brought along with Harman Mining's earlier successful action against Wellmore for breach of contract. See *Caperton v. A.T. Massey Coal. Co., Inc.*, 2009 W. Va. LEXIS 107 (W. Va., Nov. 12, 2009).

Although the Court's ruling is perhaps defensible, it is a very broad, literalist reading of a clause designed to ensure merely that all contract-related disputes between the parties be tried in a particular location. Although Wellmore's breach of the Harman Mining contract was a significant part of the Massey strategy for wresting the Harman Mine from Caperton, many would find it a stretch to label

saving Massey from a multi-million dollar adverse judgment may not have been completely laughable, neither was it clearly correct nor even within the mainstream of preclusion law or arbitration law.¹³⁸ Further, even the West Virginia Justices supporting Massey conceded that the trial record reflected predatory conduct by Massey.¹³⁹ In other words, Massey's victory was based on what a

Massey's entire campaign, including alleged bad faith and deceit and many actions apart from the breach of the Wellmore contract, to be a matter sufficiently "in connection with" the Harman coal sales contract to Wellmore that it required erasing Caperton's \$50 million victory against Massey.

Cynics might be forgiven for concluding that the Court's resolute adherence to its earlier forum selection clause ruling was perhaps motivated by defensiveness about the U.S. Supreme Court's disqualification of Justice Benjamin and implicit indictment of the West Virginia Court's recusal practices.

138. *Id.*

139. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 265 (W. Va. 2008) (Albright, J., joined by Cookman, J., dissenting) (noting that entire state supreme court appeared to agree with trial court finding that Massey engaged in illegal predatory and fraudulent behavior but bemoaning the majority's unwillingness to state this explicitly in its second decision on the merits), *rev'd*, 129 S. Ct. 2252 (2009):

This case is before the Court on rehearing granted after the five elected Justices on the Court, while disagreeing about the proper ultimate outcome of the case, unanimously agreed that defendant "**Massey's conduct warranted the type of judgment rendered [below] in this case.**"

...

Today's "new" opinion of the Court rests on the same indefensible legal grounds [regarding forum selection and *res judicata*] as the original opinion—supplemented by even more extended discussion of some of the points—but, strangely, omitting the clearly correct assertion in the original majority opinion that "**Massey's conduct warranted the type of judgment rendered [below] in this case.**" This time the majority stands silent regarding any disdain of Massey's conduct. Once again it bends the law to deny Plaintiffs the proper "**result that clearly appears to be justified.**"

For the record, we wholeheartedly embrace the determination of this Court in the original, now withdrawn, opinion that "**Massey's conduct warranted the type of judgment rendered [below] in this case.**" Likewise, we do not shrink from saying without reservation that this Court should now affirm the judgment against the Massey Defendants for the reasons outlined in this dissent. Moreover, the failure of the Court now to even acknowledge the justice of Plaintiffs' case below, as it had in the previous opinion, underlines the result-driven nature of the current majority opinion.

layperson might label a “technicality” unrelated to the merits. Observers, both legal and lay, could thus reasonably wonder whether Massey’s West Virginia victory was the product of showering so much cash upon Justice Benjamin.

But, just as hard cases can make bad law, easy cases can arguably do the same, a point stressed by the dissenters¹⁴⁰ and their allies in the media and the public.¹⁴¹ Even if one concedes that the facts of *Caperton* are sufficiently outrageous to cry out for intervention by the Court, one can credibly argue that the cure of the Court’s intervention could be worse overall than the disease of perceived judicial bias. Put another way: just because Justice Benjamin made a bad mistake does not necessarily mean that the system as a whole is awash in such ethical lapses. Permitting the Court to episodically intervene on due process grounds may thus, at a minimum, be administrative overkill, leading to unwarranted logistical burdens on the system (e.g., de rigour claims of failure to recuse, weak certiorari petitions, increased cost and delay). Beyond this, the “I know it when I see it” quality of the *Caperton* test for due process recusal may encourage unwise substantive second-guessing by the Court merely because the challenged decision reached a result disfavored by five members of the court (or at least review if four members of the Court held such concerns).

Although these criticisms of *Caperton* are justified, they are also overwrought. Although the Roberts dissent lists some forty questions largely attacking the practicality of the *Caperton* test (eighty questions if one counts subparts), this exercise in Monday

Id. (internal citations omitted).

140. As the Roberts dissent stated:

[E]xtreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: “Hard cases make bad law.”

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting).

141. See, e.g., Joshua Mayes, *Elected Judges Under Fire: New Supreme Court Case Expands Grounds for Judicial Recusal*, MONDAQ, July 20, 2009 (discussing *Caperton*’s expansion of bases for judicial recusal).

morning quarterbacking largely submits to reasonable answers.¹⁴² While the *Caperton* approach cannot be reduced to a robotic formula, most fair readers of the opinion understand what it means. Henceforth, a state judge or justice should be reluctant to sit on any case involving the litigant or a closely interested party where that person or entity has been a major campaign supporter of the jurist in question—or at least more reluctant than before *Caperton*.¹⁴³

Consequently, much of the criticism of *Caperton* based on practical application and consistency should be viewed as insufficient to undermine the decision, and certainly insufficient to suggest that it should have come out the other way. But it nonetheless should be acknowledged that *Caperton*'s standard for invoking the Due Process Clause could be clearer. By adopting a new test for due process disqualification, *Caperton* probably will spur more disqualification litigation, some of it strategic rather than valid. But the response to these fears should not be retreat from the goal of judicial neutrality. More constructively, the Court can clarify *Caperton*'s application through a few well-chosen decisions providing guidance on due process-based constitutionally required recusal as well as consistently and quickly denying certiorari petitions based on strained recusal arguments.

IV. MAKING *CAPERTON* BETTER THROUGH CLARITY AND EXPANSION RATHER THAN RETRENCHMENT

A. *The Value of Harmonizing Constitution-Based Disqualification and Recusal Based on Rule or Statute*

Rather than being criticized as too great a federal constitutional intervention in the state judiciary, observers should

142. See Stempel, *Forty Questions*, *supra* note , at text accompanying notes 75–215.

143. See *Caperton Ruling May Spur States*, *supra* note ; *The Caperton v. Massey case: Not for sale*, *supra* note (stating that *Caperton*, whatever its ambiguity, will make judges more reluctant to sit on cases affecting large campaign contributors); see also Amanda Bronstad, *Stage Set for Litigation Over Judicial Recusal*, NAT'L L.J., June 22, 2009, at 1 (same, but emphasizing uncertainty of decision, tension with Court's First Amendment precedent, and likelihood of additional litigation to test the limits of *Caperton*).

recognize that *Caperton*'s tentative and case-specific approach did not go far enough and failed to enunciate the type of more sweeping due process recusal standard necessary to restore and maintain confidence in state judiciaries. The past twenty years have witnessed a disturbing increase in expensive, highly electioneered state judicial races in which under-informed voters in low-turnout contests are subjected to misleading campaign advertisements largely financed by interest groups. Money has begun to talk in a disturbing dialect in state judicial elections.¹⁴⁴

What is needed is not a cautious or reluctant *Caperton* doctrine but one that matches well with sound prevailing attitudes on judicial recusal as expressed in the 2007 ABA Code of Judicial Conduct. Due process-based recusal should not only be available when there is an objective probability of bias in a judge, but should be available whenever the judge's impartiality may be reasonably questioned, in particular whenever the challenged judge has received inordinate campaign support from a litigant, lawyer, or entity highly interested in the outcome of a pending case.

The standards of Rule 2.11 of the Model Judicial Code and federal disqualification law set forth in 28 U.S.C. § 455(a) should be harmonized with the Constitution's mandate that state action (and adjudication is, of course, state action) accord disputants due process

144. See *The Caperton v. Massey case; Not for sale, supra* note ("Between 2000 and 2007 state Supreme Court contests raised \$168 [million], more than twice the amount raised in the 1990s."); Terry Carter, *Mud and Money: Judicial Elections Turn to Big Bucks and Nasty Tactics*, 91 A.B.A.J. 40, Feb. 2005, at 40 (noting national epidemic of expensive, shrill, and misleading judicial election campaigns but spotlighting McGraw-Benjamin race); Brad McElhinny, *State Bar May Advise End to Judicial Elections*, CHARLESTON DAILY MAIL, July 20, 2005, at PIC (describing McGraw-Benjamin race as "the most expensive and possibly the nastiest in state history."); Paul J. Nyden, *Court Race Nation's Most Negative: Two-fifths of TV Attack Ads in Battles for Bench Aired in W. Va., Study Says*, CHARLESTON GAZETTE, June 28, 2005, at 1C (reporting study by NYU Law School Brennan Center for Justice and Institute for Money in Politics finding forty-three percent of all attack ads in judicial races in America in 2004 were aired in West Virginia); Kavan Peterson, *Costs of judicial races stirs reformers*, STATELINE.ORG, Aug. 5, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=47067> (noting that West Virginia "is considering scrapping judicial elections altogether after state voters were bombarded by more than 4,000 TV attack ads in 2004 during the most expensive high court race in state history," and that the executive director of West Virginia state bar had stated that "[n]o one in West Virginia was pleased with the kind of campaigning we saw in last year's Supreme Court race").

of the law. The solution to the *Caperton* dissenters' operational concerns lies in recognizing that all recusal errors violate due process and that all such mistakes by the state bench are at least potentially subject to reversal by the U.S. Supreme Court on due process grounds.

At first glance, this proposition may seem excessive. The *Caperton* majority took pains to state that it regarded the Due Process Clause as having less expansive reach than federal and state law regarding judicial disqualification.¹⁴⁵ As outlined by the majority, Congress and the states are free to require recusal even where failure to require disqualification would not rise to the level of a due process violation.¹⁴⁶ To illustrate, 28 U.S.C. § 455(a) and Rule 2.11 of the Model Judicial Code both require a judge to step aside if his or her impartiality "might be reasonably questioned."¹⁴⁷ However, under *Caperton*, a judge's failure to properly apply this standard does not rise to the level of a due process violation unless there is not only a reasonable question as to the judge's impartiality but also a probability or unacceptable risk that the non-recusing judge is also in fact biased or prejudiced.

The *Caperton* standard is thus too skittish about interfering in state judicial miscarriages of justice because it fails to acknowledge an essential truth: when a party's claim is heard by a judge who improperly failed to recuse, that party has been denied due process even if the erring judge's participation does not create the probability of actual bias. It is enough that the erring judge's impartiality was subject to reasonable question and yet the judge continued to participate in the case. Now that the "no reasonable question regarding impartiality" standard has governed disqualification for more than thirty-five years, the *Caperton* majority is incorrect to suggest that failure to meet this standard could somehow satisfy due process. To talk of a lower bar set by the Constitution as compared to essentially uniform national law (via state adoption of the Model

145. See *supra* Part III.A.

146. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (noting that states may choose to adopt disqualification standards "more rigorous than due process requires" (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., dissenting)) and that the Due Process Clause "demarcates only the outer boundaries of judicial disqualification" (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986))).

147. 28 U.S.C. § 455(a) (2008); ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

Judicial Code) seems inapt and incorrect when the question is about judicial neutrality rather than amount of public benefits or length of a limitations period.

The U.S. Supreme Court's due process jurisprudence, although nuanced and reasonably complex, essentially devolves to the position that in order to satisfy due process, a litigant's claim or defense must be adjudicated by a neutral decision maker following uniform procedure even-handedly applied to the litigants.¹⁴⁸ The modern concept of a neutral decision maker is one whose impartiality is not subject to reasonable question. Where the judge's impartiality is subject to reasonable question, Section 455(a) and Rule 2.11 have been violated. When this occurs, the proceeding is by definition one lacking a neutral decision maker and the litigant has been denied a basic pillar of due process.

In any case involving a judge lacking neutrality as defined by the modern norm, due process is absent. Although the precise contours between procedural due process and substantive due process are often blurred, it seems inarguable that adjudication by a judge that erred in failing to disqualify violates procedural due process in that the aggrieved litigant did not receive the type of neutral tribunal guaranteed by the Constitution. A logical extension of this assessment therefore recognizes that there is a due process violation every time a disqualified judge nonetheless presides in a case.

B. *Fear Not the Floodgates*

Whether the Supreme Court wishes to intervene in every such case is yet another question. As a practical matter, there will always be strong de facto limits on *Caperton*-style review of judicial

148. See BARBARA ALLEN BABCOCK & TONI M. MASSARO, CIVIL PROCEDURE: CASES AND PROBLEMS 48–53 (2d ed. 2001) (exploring implication of having a neutral and passive decision maker); NOWAK & ROTUNDA, *supra* note , at chs. 10–11 (discussing constitutional issues regarding individual liberties and substantive due process); see, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“[A]n impartial decision maker is essential.”); *Matthews v. Eldridge*, 424 U.S. 319, 325 n.4 (1976) (citing *Goldberg*'s discussion of an impartial decision maker); see also STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 21–58 (2d ed. 2004) (reproducing and summarizing cases with illustrative commentary taking similar view regarding necessity of neutral decision maker to satisfy due process).

recusal decisions. The Court decides fewer than 100 cases a year¹⁴⁹ and has nearly complete control over its docket.¹⁵⁰ Only if four justices find non-recusal sufficiently outrageous will the Court grant certiorari and review the matter.¹⁵¹ As the *Caperton* dissents reveal, four current justices would prefer that the Court never review such cases. Realistically, the Court will in the foreseeable future review only very suspicious, seemingly outrageous failures to recuse. Fairly debatable decisions declining disqualification are effectively immune from U.S. Supreme Court review.

Although this may disappoint those who see the system as too lax regarding recusal, it is almost a complete refutation of the dissenters' lament that *Caperton* will usher in a flood of certiorari petitions alleging failure to recuse sufficient to violate due process. Although there will indeed probably be an uptick in the number of such certiorari arguments, this creates at most a somewhat greater logistical burden on the Court, which is a small price to pay for making the Court and the Constitution available to police judicial impartiality in important or outrageous cases. Further, because the Court already has moved away from individual-Justice assessment of certiorari petitions through use of a "cert pool" in which all Justices but Justice Stevens participate,¹⁵² the additional screening work per Justice or per chamber would seem minimal.

Consequently, moving from a "probability of bias or prejudice" or "unacceptable risk of bias" test for due process

149. See Supreme Court of the United States, Opinions, <http://www.supremecourtus.gov/opinions/opinions.html> (last visited Oct. 18, 2009) (providing, among other things, links to 2006–2009 opinions of the court, which when followed list 83 decisions in the OT 08 Term, 74 in the OT 07 Term, and 75 in the OT 06 Term).

150. See STERN ET AL., *supra* note 116, at 220–21; LexisNexis.com, Landmark Supreme Court Cases, http://wiki.lexisnexis.com/academic/index.php?title=Landmark_Supreme_Court_Cases (last visited Oct. 18, 2009) (stating that the court has discretionary review over all but a small number of cases where it has original jurisdiction).

151. See Jonathan Remy Nash, *The Majority that Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 846–47 (2009) (“[A]t least four Justices must concur before the Court may hear most cases.”).

152. David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 953 (2007); Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 630–31 (2009).

disqualification to a test asking whether the court erroneously applied applicable federal or state disqualification law is unlikely to unleash any greater number of recusal-based requests for certiorari because the *Caperton* test is not all that different from the “erroneous failure to recuse” test I advocate. To the extent there is no great difference in court workload under either standard, adoption of this article’s suggested broader test can bring the benefits of consistency (the general recusal standard and the due process recusal standard would be the same) and greater predictability (there are many general recusal cases by which litigation outcomes can be predicted but comparatively few due process disqualification cases, making predictability problematic under that standard). Most important, however, shifting from the *Caperton* probability of bias standard to the error-in-recusal standard would signal greater systemic commitment to judicial neutrality. Even if, as a practical matter, only the most egregious failures to recuse will be heard by the high court, the possibility sets a standard requiring greater care throughout the judicial system.

If the legal system wants to give more than lip service to the idea of judicial neutrality, it should acknowledge that every erroneous recusal decision denies due process. A due process violation occurs when the judge presides over a case under circumstances where his or her impartiality is subject to reasonable question. The additional *Caperton* requirement of the “probability” of actual bias is unnecessary.

C. *Procedural and Substantive Due Process Regarding Disqualification*

Adjudication involving a judge who should have been disqualified from presiding violates both procedural and substantive due process. At a minimum, a disputant appearing before a disqualified judge has not had fair procedural process. These circumstances also violate substantive due process in that a litigant not only has the procedural right to a neutral forum but also that judicial neutrality is itself a substantive right of which litigants should not be divested.

I realize this is perhaps a radical assertion, one that if accepted poses some danger of expansive substantive due process review that might actually lead to some of the negative implications

outlined in the Roberts and Scalia dissents to the *Caperton* holding.¹⁵³ However, unless the Court is willing to repudiate its punitive damages precedents, my logic seems unassailable. The Court has now repeatedly stated that substantive due process permits the Court to overturn punitive damage awards that are the product of full and procedurally fair adjudication under applicable state law.¹⁵⁴ The Court has not been this blunt about the substantive due process basis for its punitive damages policing,¹⁵⁵ and one can argue that the punitive damages awards suffered from procedural irregularities are sufficient to justify the Court's intervention.¹⁵⁶ Fairly read, however,

153. See *supra* Part III.B.

154. See *supra* note and accompanying text.

155. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (majority only mentioning that there are "procedural and substantive constitutional limitations" on punitive damages awards states can give); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court . . .").

156. For example, in the 2003 *Campbell* decision, discussed in notes and *supra*, the Court vacated the \$145 million punitive award against the insurer in part because the state courts had permitted plaintiffs to introduce evidence of defendant's wrongdoing in other states involving other types of insurance policies. See 538 U.S. at 422 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."). This troubling assessment restricting the scope of judicial inquiry into defendant wrongdoing is arguably a procedural due process analysis and arguably could have been enough to support the Court's eradication of the punitive award. However, the *Campbell* opinion centers on setting forth a substantive template for due process review of punitive damages awards, most infamously the Court's admonishment that punitive assessments exceeding nine times the compensatory award were usually constitutionally infirm. See *id.* at 425 ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."); see also STEMPER, *supra* note , at ch. 22 (summarizing and criticizing Court's analysis of procedural and substantive issues). As a whole, *Campbell* thus seems clearly to be a substantive due process opinion.

Other Supreme Court opinions striking down punitive damages on due process grounds also often have some procedural aspect as well. For example, the 2007 *Philip Morris v. Williams* decision directed substantial focus to the jury instructions used in the case. 549 U.S. 346, 352, 357 (2007); see also *supra* note . But *Williams* also contained substantial discussion of substantive due process

the Court's punitive damage due process cases appear to stand for the proposition that a state court litigation outcome violates due process if the end result is sufficiently unfair. This is a substantive due process argument (and pretty clear judicial activism), no matter how reluctant the Justices may be to admit it.

Procedural due process is fairness in the process by which a case is adjudicated.¹⁵⁷ If a statute or rule is under procedural due process review, the question is whether the law does not provide adequately fair process to a litigant.¹⁵⁸ Substantive due process means that the case outcome or legal regime affecting a litigant was substantively unfair, as the name implies.¹⁵⁹

limitations on the size of punitive damages awards. *Id.* at 361 (Stevens, J., dissenting) (“[T]he Court should be ‘reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.’” (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992))). In addition, *BMW*, the case that started the Court down the road of punitive damages review, appears not to have been based on any procedural deficiencies below but only on the Court's perceived unfairness of awarding a doctor \$4 million because the paint on his BMW had been retouched. *See BMW*, 517 U.S. at 575–76 (stating that “elementary notions of fairness” indicate that the punitive damages award was “grossly excessive”); *see also supra* note .

157. *See* JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW* 197–99 (6th ed. 2003) (outlining the tests for whether a violation of procedural due process has occurred, and defining key terms); NOWAK & ROTUNDA, *supra* note , § 10.6(a) (comparing procedural due process and substantive review); Mark T. Fennell, Note, *Preserving Process in the Wake of Policy: The Need for Appointed Counsel in Immigration Removal Proceedings*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261, 269 (2009) (discussing the need for procedural reform in immigration representation because of currently unfair procedures).

158. NOWAK & ROTUNDA, *supra* note , § 10.6(a); *see* *Kelly v. Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968) (“[W]e hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result.”); Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 258–59 (2008) (noting that a procedural due process violation can create an Article III case or controversy even without a showing of separate concrete harm to the plaintiff); Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 HARV. J. ON LEGIS. 59, 73 (2008) (comparing the tests for procedural due process and equal protection).

159. NOWAK & ROTUNDA, *supra* note , § 10.6(a); *see* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 519 (2008) (defining substantive due process and discussing how federal courts can use substantive due process review as a layer of appeal over state courts).

Advocates of limited federal constitutional intrusion into state matters may resist any sort of procedural due process review but are generally more concerned about case-specific review, as this puts the Supreme Court in the position of acting as another layer of appeal over state courts, while due process review of the face of a statute is a more generalized, arguably less intrusive, form of due process scrutiny.¹⁶⁰ Generally, advocates of constitutional restraint are more troubled by the use of substantive due process than of procedural due process.¹⁶¹ The latter inquiry is less intrusive in that it only insists that states operate a procedurally fair system, without becoming involved in the outcomes that emerge from that procedurally fair system. By contrast, a substantive due process inquiry asks not only whether a litigant received a fair process but also evaluates the case result and sets it aside if it is deemed sufficiently substantively unfair.

Substantive due process review of state law received a particularly bad name because of its use in the late nineteenth and early twentieth century to strike down progressive social legislation on the ground that this violated the substantive constitutional rights of the regulated, including the “right” of workers to toil for endless hours under unsafe conditions for low pay.¹⁶² The apogee of this use of substantive due process is generally seen as *Lochner v. New York*, a case in which the Court used substantive due process to strike down a labor law modestly protective of workers.¹⁶³ Within a few

160. NOWAK & ROTUNDA, *supra* note , § 10.6.

161. NOWAK & ROTUNDA, *supra* note , §10.6; see ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE 101 643 (1988) (noting that substantive due process has a “somewhat negative connotation”); William Ray Huhn, *In Defense of the Roosevelt Court*, 2 FLA. A & M U. L. REV. 1, 25 n.136 (2007) (calling substantive due process “an oxymoron of the law”); Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at ‘Substantive Due Process,’* 44 S. CAL. L. REV. 490, 490 (1971) (“That ‘substantive due process’ is a dirty phrase is well recognized by lawyers and law students.”).

162. See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (holding unconstitutional a state law prohibiting railroad employees from becoming union members); *Adair v. United States*, 208 U.S. 161, 166, 180 (1908) (holding unconstitutional a similar federal law); *Lochner v. New York*, 198 U.S. 45, 62–64 (1905) (holding that the state abused its police power when it enacted a law limiting the number of hours a bakery employee could work per week because such a regulation violated due process rights by depriving citizens of their liberty to contract with employers for their livelihood).

163. 198 U.S. at 62–64.

years, the Court was moving away from this perspective, arguably rejecting it altogether by the New Deal era.¹⁶⁴ However, more recent case law is often characterized as sounding uncomfortable with notions of substantive due process. For example, *Roe v. Wade*, which struck down state abortion regulation,¹⁶⁵ is often characterized as a problematic substantive due process decision of the left akin to *Lochner*'s use of substantive due process by the right.¹⁶⁶ Other decisions upholding individual rights against state regulation, such as *Griswold v. Connecticut*, suggest that substantive due process did not disappear when *Lochner* fell from favor.¹⁶⁷

Despite controversy over its use and a certain whose-ox-is-getting-gored quality to the debate over its use, judicial review on substantive due process grounds remains part of the constitutional fabric. But it is almost uniformly regarded as more problematic than judicial review based only on procedural due process grounds.¹⁶⁸

164. See David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 226 (2009) (stating that the New Deal "transformed substantive due process"); Stephen O'Hanlon, *Justice Kennedy's Short-Lived Libertarian Revolution: A Brief History of Supreme Court Libertarian Ideology*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 22 (2008) (noting that the New Deal era ended the precedent of using substantive due process to guarantee freedom of contract); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 859 (2009) (noting difference between the last 40 years of substantive due process decisions and pre-New Deal decisions).

165. *Roe v. Wade*, 410 U.S. 113, 166 (1973).

166. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 212 n.57 (1980) [hereinafter ELY, *DEMOCRACY AND DISTRUST*] (criticizing *Roe* on these grounds); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 944-45 (1973) (using the term "Lochnering" to describe the Court's decision in *Roe v. Wade* as "ramming its personal preferences down the country's throat"); V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 974 (2009) (referring to the *Lochner* and *Roe v. Wade* decisions as twins).

167. See *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (striking down Connecticut law banning use of contraceptives, even by married persons); BARRON & DIENES, *supra* note , at 195-234 (providing additional examples of use of substantive due process reasoning in support of individual rights in conflict with government regulation).

168. See ELY, *DEMOCRACY AND DISTRUST*, *supra* note , at 18 (referring to substantive due process as a "contradiction in terms"); John F. Basiak, Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861, 902 (2007) (arguing against substantive due process as judicial overreaching and lacking historical

The prevailing sentiment in the legal community is that judicial intervention to ensure fair procedure is necessary for a functional legal system but that, beyond this, the U.S. Supreme Court should be reluctant to second-guess the substantive outcomes that emerge from a procedurally adequate state legal system.¹⁶⁹

The aversion to constitutional supervision of particular state court outcomes is part of the Roberts dissent¹⁷⁰ in *Caperton* and forms the focus of the Scalia dissent.¹⁷¹ The vehemence of the Scalia dissent in particular suggests that he saw the *Caperton* majority as engaging in substantive due process review. One reasonable response to this concern is a judicial preference for making procedural due process the primary focus of review of disqualification decisions, using substantive due process only in extreme cases (such as *Caperton*). Better yet, as described below, *Caperton* could have been decided solely on procedural due process grounds in that the challenged jurist had unfettered, absolute, and final authority to evaluate his own impartiality,¹⁷² a judge-as-king system that violates procedural due process.

1. Primarily a Problem of Procedure

Characterizing the right to a neutral magistrate as primarily one of procedural due process provides a means of placing de jure limits on *Caperton*-style review by the U.S. Supreme Court. If the right to a neutral judge is one of procedural due process, the constitutional requirement would seem to be satisfied whenever the disqualification decision in question is subject to sufficiently

foundation); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 121 (2005) (stating that the Supreme Court's use of substantive due process to overrule punitive damages awards "appears to be textually untethered").

169. See generally NOWAK & ROTUNDA, *supra* note , § 10.6 (providing an overview of procedural and substantive due process review); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 833–34 (2003) (noting that even the Supreme Court does not seem completely comfortable with the notion of substantive due process); Zipursky, *supra* note , at 120 (discussing Justice Scalia's constitutional theory and his reproach of substantive due process cases).

170. See *supra* text accompanying notes – (summarizing Roberts dissent).

171. See *supra* text accompanying notes – (summarizing Scalia dissent).

172. See *supra* Parts II.B & II.C (discussing case history and Justice Benjamin's sole authority over the issue of his participation in the case).

disinterested review. To the extent states provide this, they would effectively insulate their disqualification decisions from review on procedural due process grounds.

Consider, for example, the typical disqualification case in which a litigant challenges a trial judge's impartiality. Although the trial judge himself makes the initial decision as to whether he will sit, that decision is subject to review through appeal, usually to both an intermediate appellate court and the state supreme court.¹⁷³ Although appellate review of the trial judge's decision normally must await final resolution of the case at the trial court level, an aggrieved litigant may also make an interlocutory challenge to the non-recusing judge through a writ of mandamus or prohibition.¹⁷⁴

Increasingly, states also provide that the trial judge's decision refusing recusal will be examined by the chief judge of the district or by another disinterested judge in the district.¹⁷⁵ Thus, trial court recusal decisions, although heavily influenced by the target judge's own views as to his or her impartiality, are not in the final instance decided by the judge whose neutrality is at issue. It would thus seem that the litigant always receives procedural due process in such cases, even if the reviewing tribunal perpetuates a target judge's error in failing to order recusal. However, if the right to a neutral adjudicator is one of substantive due process, one can argue that even after layers of review, it is possible that the participation of a tainted judge violates the Due Process Clause.

173. See FLAMM, *supra* note , at 823–906 (providing state-by-state summary of disqualification for cause); Stempel, *supra* note , at 645–46 (discussing disqualification procedure as applied to trial judges and finding it acceptable).

174. See FLAMM, *supra* note , at 823–906 (providing review of state substantive recusal law); *Id.* at 959–82 (discussing appellate remedies, including extraordinary writs such as mandamus); ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, FUNDAMENTALS OF PRETRIAL LITIGATION § 11.5.2 (7th ed. 2008) (discussing motions for the disqualification of a judge); Stempel, *supra* note , at 634 (“Ordinarily . . . the unsuccessful recusal movant must wait until the conclusion of trial court proceedings and use the judge's recusal decision as a point for appeal from a loss on the merits. . . . [But] recusal denial can become a proper interlocutory appeal in three ways . . .”).

175. See Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 516–25 (2007) (stating that elected courts need to restore public trust by enacting recusal reform). This is, for example, the procedure in Nevada courts. See note 205, *infra*.

At the intermediate appellate level, a similar situation occurs. In most states, it appears that a challenge to an appellate judge's impartiality is first decided by the challenged judge and the decision is then reviewed by at least another judge or panel of the court if not the full court.¹⁷⁶ Beyond this, any state supreme court review of the case will necessarily include review of the disqualification determination if it reviews the case at all.¹⁷⁷ Because the challenged appellate judge does not have the final say concerning participation in the case, it would appear that procedural due process has been satisfied, even in cases where the challenged judge and the initially reviewing court have erred.

At the state supreme court level, recusal practice is more problematic. Many courts, perhaps a majority, appear to follow the U.S. Supreme Court's defective model of allowing the challenged judge to be the first and last word on impartiality.¹⁷⁸ Motions to recuse in such states are, as with the U.S. Supreme Court, addressed to the individual challenged justice, with no right to demand review before the entire court or even another justice or panel of the court.

176. See FLAMM, *supra* note , at 823–906 (outlining individual state requirements for judicial disqualification); Goldberg et al., *supra* note , at 516–25 (“Some courts require the challenged judge to transfer these motions immediately to a colleague . . .”).

177. See, e.g., *In re Anderson*, 814 P.2d 773, 776 (Ariz. 1991) (finding that judge should not preside over cases involving a hospital because judge sat on hospital's board); *Gillum v. United States*, 613 A.2d 366, 369–70 (D.C. Cir. 1992) (per curiam) (requiring recusal of judge after a “heated” exchange between the judge and counsel during the trial); *In re Blake*, 912 So. 2d 907, 917–18 (Miss. 2005) (holding that a trial judge was so obviously biased against an attorney that she must disqualify herself from all seven cases on her docket involving the attorney); *Commonwealth v. Stevenson*, 393 A.2d 386, 394 (Pa. 1978) (finding that where record reveals ongoing bitter controversy between judge and defendant, recusal was required in summary contempt proceedings).

178. See Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 692 n.172 (2005) (“The problem is that, whether a justice is right or wrong, ultimately he or she is right by definition. Once a justice decides that he or she is fit to hear a case, there is no process for challenging that conclusion and it becomes the law . . .”); Stempel, *supra* note , at 868–73 (explaining that though the “duty to sit” doctrine, which pushes judges to “resolve close disqualification issues against recusal,” was eliminated in 1974, “a surprising number of relatively recent federal cases . . . treat the duty to sit as a continually viable concept.”); Stempel, *supra* note , at 642 (“[E]ach Justice is an island, an autonomous final decisionmaker on questions of his or her own fitness to decide a matter impartially.”).

In these situations, it would seem that the litigant moving for disqualification is always denied procedural due process due to error in recusal because the final determination is not made by a neutral magistrate, panel, or entity.

The problem is well-illustrated in *Caperton v. Massey* itself. As the Massey challenge to Caperton's \$50 million lower court award made its way to the state supreme court, Caperton made at least three requests for recusal to Justice Benjamin.¹⁷⁹ All were denied—by Justice Benjamin himself—who also wrote at length to defend his non-recusal,¹⁸⁰ a response that tended to give credence to the challenge as Justice Benjamin “protested too much” and seemed excessively eager to continue to participate in an important case affecting his largest campaign benefactor.

Given the history of the *Caperton* litigation and the judicial politics of West Virginia, one can never be sure, but it seems a safe bet that Justice Benjamin would have been off the case had the full state supreme court (minus Justice Benjamin, of course) been permitted to rule on the question of the Benjamin disqualification. Even if the four other members of the West Virginia court had erred and denied the recusal motion, one can make a strong case that Caperton would have then at least received adequate procedural due process. His motion to recuse would have been evaluated by a group of four “neutral” state supreme court justices. Moral of the story: state supreme courts can largely eliminate the threat of *Caperton*-style U.S. Supreme Court interference in state court proceedings by simply providing a reasonably fair mechanism for deciding recusal motions, one in which the target justice is excluded from being a judge in his own disqualification case.

2. The Practical Problems of a Purely Procedural Approach

Although it is clearly better to have the full state supreme court decide a recusal question than to leave it exclusively in the hands of the challenged justice, one can make a convincing argument that the full court is not a completely disinterested body unaffected by bias or prejudice. One powerful influence on any state supreme

179. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2258 (2009).

180. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008), *rev'd*, 129 S. Ct. 2252 (2009).

court is collegiality. The justices are disinclined even to appear to question one another's judicial propriety.¹⁸¹ Consequently, where a challenged justice is slow to grant credence to a recusal motion or opposes it altogether, this puts the other state justices in a most uncomfortable position. Should they disagree with the challenged justice, they are in the position of at least being perceived as having besmirched the integrity of a colleague. In any small organization working in close quarters, members will be disinclined to create these sorts of inter-court frictions.¹⁸² As a result, full court review of a single justice's refusal to recuse may be a relatively weak check on the challenged justice's self-interest and self-perception.

One disturbing (to me, at least) example of such collegiality is the U.S. Supreme Court's implicit attitude to a high profile disqualification error made by then-Justice William Rehnquist. Justice Rehnquist refused to recuse himself in *Laird v. Tatum*, an action challenging Defense Department surveillance of civilians suspected of opposing the Vietnam War.¹⁸³ Prior to joining the Court, Justice Rehnquist had, as head of the Justice Department's Office of Legal Counsel ("OLC") in the Nixon Administration, been involved in assessing and approving the surveillance program's legality and had supported the program, both as OLC head and in testimony at his confirmation hearings.¹⁸⁴ Nonetheless, he refused to remove himself from the case when it reached the Supreme Court, casting a deciding vote that effectively ended the legal challenge to the surveillance program.¹⁸⁵

181. See Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575, 592 n.122 (2006) (arguing that putting recusal decisions to a vote among court members might "destroy the necessary collegiality of [the] small group"); R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1835 (2005) ("En banc determination also risks inserting artificial animosity into a collegial and respectful environment by asking Justices to rule on the propriety of a colleague's conduct.").

182. See *supra* note .

183. See *Laird v. Tatum*, 408 U.S. 1 (1972) (decision on the merits dismissing claim on justiciability grounds); *Laird v. Tatum*, 409 U.S. 824 (1972) (mem.) (Justice Rehnquist explaining and defending his decision not to recuse in case).

184. Stempel, *supra* note , at 851–52.

185. *Id.*; Stempel, *supra* note , at 589–604.

In the aftermath of the case and criticism of his role, Justice Rehnquist drafted a memorandum attempting to defend his decision and sought comment from Chief Justice Warren Burger and Justices Byron White and Potter Stewart.¹⁸⁶ Although they varied in their advice about the wisdom of revisiting the issue in a written memorandum, all appeared to support Justice Rehnquist's decision to sit on the case.¹⁸⁷ After publication of the Rehnquist memorandum, Justice Powell sent a note of congratulatory approval.¹⁸⁸

Unfortunately, however, Justice Rehnquist's participation in *Laird v. Tatum* was erroneous and indefensible, and his explanatory memorandum was misleading and unpersuasive.¹⁸⁹ Nonetheless, it

186. Stempel, *supra* note , at 858 n.126.

187. *See id.* at 813 (describing hand-written note from Justice Potter Stewart to "Bill" stating that he agreed with [Justice] "Byron" [White] that "publication of the [Rehnquist] memo [explaining and defending his decision not to recuse] would be basically healthy—it is informative, thoughtful, persuasive, and educational" although it will not "satisfy the *N.Y. Times*, *Washington Post*, or other critics" of Rehnquist's decision to participate in *Laird v. Tatum*). With all due respect to the well-regarded Justice Stewart, his assessment of the Rehnquist memorandum is clearly incorrect. The vast bulk of scholarly opinion has concluded that the Rehnquist participation in *Laird v. Tatum* was completely unjustified, primarily because of his involvement in the very conduct under review. *See* Stempel, *supra* note , at 851–63 (collecting assessments, including those of noted judicial ethics experts Stephen Gillers and Geoffrey Hazard); Stempel, *supra* note , at 589–632 (same plus finding additional flaws in Rehnquist memorandum). That Justice Stewart, even in a personal note, was not more willing to take issue with Justice Rehnquist's mistakes illustrates the difficulty of an isolated court reviewing the disqualification decisions of colleagues.

Worse, the Court continues to cite the Rehnquist memorandum in seeming obliviousness to its flaws and tainted history. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 777–78 (2002) (favorable citation to Rehnquist memorandum in majority opinion). In fairness to the Court and Justice Scalia, author of the *White* opinion, I note that the portion of the Rehnquist memorandum cited focused on a judge's general judicial philosophy, correctly concluding that it ordinarily was not a basis for disqualification. Not every word of the Rehnquist memorandum is wrong. But it remains to me odd and disturbing that the Court would continue to look for guidance in the largely disgraced work product of a single Justice making a very incorrect decision regarding recusal.

188. *See* Stempel, *supra* note , at 858 n.126 (describing hand-written note from Justice Lewis Powell that stated "your splendid memorandum on 'disqualification' constitutes a conclusive answer to the motion.").

189. *See id.* at 851–63 (discussing Justice Rehnquist's decision not to recuse in detail); Stempel, *supra* note , at 589–604 (first discussing and then criticizing that decision in detail).

received the de facto support of four justices, suggesting that even a very bad decision not to disqualify could have been rubber stamped had the Rehnquist recusal been reviewed by the full court.

Even in the *Caperton* opinion itself, one can see the impact of judicial collegiality. Justice Kennedy's majority opinion, despite its disapproval of what happened below, takes pains to dispel any notion that it is accusing Justice Benjamin of wrongdoing.¹⁹⁰ In particular, the majority tries to make clear that it does not see Justice Benjamin as having taken a bribe or having become embroiled in a quid-pro-quo arrangement with benefactor Blankenship.¹⁹¹ Readers might conclude that this is merely good manners on Justice Kennedy's part and an aversion to kicking Justice Benjamin when he is down. But the *Caperton* majority opinion nonetheless suggests that jurists are very slow to make negative conclusions about one another. The dissenters, of course, essentially thought Justice Benjamin did nothing wrong,¹⁹² another illustration of the practical reluctance judges have toward finding error or wrongdoing in another judge's disqualification.¹⁹³

190. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263–64 (2009) (“Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. . . . [B]ased on the facts presented by *Caperton*, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.”); see also *id.* at 2265 (“Justice Benjamin did undertake an extensive search for actual bias.”).

191. See *id.* at 2262 (“Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”).

192. See *supra* Part III.B .

193. The same problem was manifested in *Liljeberg v. Health Services Acquisition Corp.*, in which the Court narrowly (5–4) found disqualification required pursuant to 28 U.S.C. § 455 of a judge whose behavior as jurist and trustee of a university with a land deal at stake in litigation was eyebrow-raising to many, although not to the dissenting justices. 486 U.S. 847 (1988). Several years later, the trial judge in question was convicted of “bribery, conspiracy, and obstruction of justice in connection with his judicial duties” and sentenced to almost seven years imprisonment. STEPHEN GILLERS, REGULATION OF LAWYERS 602 (8th ed. 2009). *Liljeberg*, like *Caperton*, suggests that the Court is slow to think anything but the best about a judge under challenge.

The majority acknowledges, as would any reasonable observer, that \$3 million is a lot of money.¹⁹⁴ But rather than blaming Benjamin for failing to see how receipt of such large sums made his participation in *Caperton* problematic, the *Caperton* majority blames Blankenship for injecting the specter of influence peddling into judicial elections.¹⁹⁵ “It takes two to tango” is a cliché, but one with some bite in this situation. Although Justice Benjamin could not prevent Blankenship individually or Blankenship-funded special interest groups from supporting the Benjamin candidacy, Justice Benjamin could have easily refused to assist Blankenship in overturning a \$50 million liability.

Justice Benjamin deserves more than a little scorn. Instead, even the majority that found his participation to violate due process treated him with kid gloves. Worse yet, four members of the Court (Justices Roberts, Scalia, Thomas, and Alito) defended Justice Benjamin’s grotesquely bad error in judgment. Although the U.S. Supreme Court’s practice of giving each justice unfettered control over his or her participation in a case is close to disgraceful, the brutal, sad truth is that full Court review over the Court’s own recusal matters might not change things much. If the Justices are this reluctant to criticize a state court judge they have never met, how likely are they to effectively police one another?

Likewise, although full state supreme court review of disqualification motions affecting individual justices would be an improvement over West Virginia’s system, it should not be viewed as a panacea. Once again, evidence of the limits of this approach is right under our figurative noses. In *Caperton* itself, the West Virginia high court divided 3–2, with Justice Benjamin in the majority and the dissenters criticizing his decision to participate.¹⁹⁶ Consequently, the seemingly likely result of full state supreme court review in *Caperton* itself would have been a 2–2 deadlock concerning Justice Benjamin’s participation, a result that would

194. See *Caperton*, 129 S. Ct. at 2257 (“To provide some perspective, Blankenship’s \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own committee.”).

195. *Id.* at 2256–59 (directing most implicit criticism for problematic nature of case and 2004 West Virginia Supreme Court election at Blankenship as contributor and activist rather than at Justice Benjamin for failing to recuse).

196. *Id.* at 2258–59.

leave Justice Benjamin on the case notwithstanding the extreme facts supporting disqualification.

Moreover, in some cases, full state supreme court review of disqualification may produce the other extreme. Some members of the full court could have substantially different judicial views than the challenged justice and may wish to use the recusal motion as an opportunity to remove the challenged justice from the case for strategic reasons. Although the default cultural norm in courts and similar small organizations (e.g., law firms, faculties, legislatures, or city councils) is one of getting along and going along, the dynamic may occasionally shift to one of intense partisanship or personal dislike that creates the opposite effect. Instead of bending over backwards not to imply any ethical lapse in a colleague, some justices may grope to find reasons to support even a weak recusal motion.

For example, the Texas Supreme Court decisions of the 1990s produced a number of decisions reflecting sharp ideological splits.¹⁹⁷ Although a solid conservative working majority dominated court decisions of the decade, there was a vocal minority of liberals usually in dissent. The apparent leaders of the warring factions were Republican John Cornyn, a former state attorney general and current U.S. Senator generally regarded as one of the body's most conservative members,¹⁹⁸ and Democrat Lloyd Doggett, currently a U.S. Representative as liberal as Cornyn is conservative.¹⁹⁹ Their

197. See cases cited *infra* note .

198. Senator Cornyn attended St. Mary's School of Law in San Antonio, Texas, and received a Masters of Law from the University of Virginia Law School. United States Senator John Cornyn, Biography, <http://cornyn.senate.gov/public/index.cfm?FuseAction=AboutSenatorCornyn.Biography> (last visited Oct. 18, 2009). He served as a Texas District Court Judge as well as state attorney general and Texas Supreme Court Justice. *Id.* As a political figure, Cornyn has been a supporter of the OPEN Government Act, a reform of the Freedom of Information Act. *Id.* In his second year in the Senate, he served on the Deputy Whip team. *Id.* In the Senate, Cornyn has served as the Vice Chairman of the Senate Republican Conference as well as the Chairman of the National Republican Senatorial Committee. *Id.* Cornyn now serves on the Budget, Senate Finance, and Judiciary Committees. *Id.* The National Journal recently ranked Cornyn as the 17th most conservative member of the Senate. *Senate Ratings*, NAT'L J. MAG., Feb. 28, 2009, available at http://www.nationaljournal.com/njmagazine/cs_20090228_4726.php.

199. Congressman Doggett graduated from the University of Texas School of Law. Congressman Lloyd Doggett, About Lloyd Doggett, <http://doggett.house>.

opinions provide some sharp exchanges from which a neutral observer would rather quickly note their opposing world views.²⁰⁰ Without implying that either man is particularly Machiavellian,²⁰¹ one can easily imagine that justices of such opposing views would be tempted to vote strategically on recusal matters in hopes of having a resulting court makeup more likely to render decisions to their liking. One could reasonably assume that a Cornyn-like judge would want to see a Doggett-like judge disqualified and vice versa, at least

gov/index.php?option=com_content&view=article&id=43&Itemid=54 (last visited Oct. 18, 2009). Afterwards, beginning at the age of twenty-six, Doggett served in the Texas Senate for 11 years. *Id.* While there, he helped to create the Texas Commission on Human Rights. *Id.* Doggett began serving on the Texas Supreme Court in 1988 and was elected to the House of Representatives in 1994. *Id.* He serves as a member of the House Budget Committee as well as a senior member of the House Ways and Means Committee. *Id.* On the Ways and Means Committee, Doggett fought the privatization of Social Security. *Id.* Doggett has been referred to as the “Lone Star antithesis of [GOP member Tom] DeLay.” John Nichols, *Hammered*, NATION, Nov. 22, 2004, at 8.

200. *See, e.g.*, *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 286 (Tex. 1994) (Cornyn, J., dissenting in part) (Cornyn calling Doggett’s majority opinion “just plain wrong” in a case involving a bad faith insurance dispute); *Natividad v. Alexsis Inc.*, 875 S.W.2d 695 (Tex. 1994) (Doggett joining dissent from Cornyn’s majority opinion holding that contractual privity is required for the duty of good faith and fair dealing to extend to an insurance company’s adjuster); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Dominguez*, 873 S.W.2d 373, 377 (Tex. 1994) (Doggett, J., dissenting) (Doggett dissenting from Cornyn’s majority holding that there was no evidence of bad faith denial on the part of the insurer and stating that “[t]his decision merely represents a predetermined result in search of a rationale”).

201. Niccolo Machiavelli was a political adviser in Renaissance Italy who is generally viewed as amoral, unemotional, rational, and ruthless in part because he was thought willing to use most any means to achieve desired ends. *See* Peter R. Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. DISP. RESOL. (forthcoming 2009) (summary description of Machiavelli and his perceived legacy); *Niccolo Machiavelli Biography*, <http://people.brandeis.edu/~teuber/machiavellibio.html> (last visited Oct. 18, 2009) (providing biography and commentary of Machiavelli’s life and works); *see also* NICCOLO MACHIAVELLI, *THE PRINCE* (Leo Paul S. de Alvarez trans., 1981) (1532) (providing guidance on how a prince can acquire a throne or retain power and advocating that the greatest moral good comes from having a stable state, even if cruel means must be used to achieve necessary ends). Arguably, Machiavelli has received an unduly negative reputation in that his views can be characterized more charitably. Nonetheless, the term “Machiavellian” has come to signify ruthless and calculating commitment to advancing one’s personal agenda.

if a case was close and possessed at least some ideological dimension.

The 1990s also provided an example of a less ideological or political, but more personal, conflict. The Nevada Supreme Court was involved in an intense internal battle rooted in part in personality clashes and overtly launched when trial judge Jerry Carr Whitehead was accused of judicial improprieties.²⁰² To oversimplify, two members of the five-member Court sympathized with Judge Whitehead's plight, tended to believe he was innocent, and wished to limit public reporting of the investigation surrounding him, while two and sometimes three other justices viewed Judge Whitehead less favorably and sought greater public access of his and other judicial discipline proceedings.²⁰³ The result was several years of backbiting among the justices, including battles over recusal that many saw as proxies reflecting the larger battle rather than dispassionate analysis of disqualification matters.²⁰⁴

202. See Mark Hansen, *Nevada Supreme Court Investigated: Ethics experts criticize its decision to stay disciplinary probe of Reno judge*, 80 A.B.A. J. 26, 26 (June 1994) (describing "legal battle" in Whitehead matter as "bitter"); Paul M. Barrett, *Discipline Case Divides Nevada's Supreme Court*, WALL ST. J., Jan. 22, 1996, at B1, col. 3 (noting throughout the article intense personal clashes of justices); sources cited in note 204, *infra*. In a footnote to history, Judge Whitehead also briefly achieved some notoriety as the trial judge in a well-publicized case in which claims against the rock group Judas Priest for allegedly causing the suicide of two fans was rejected by Whitehead and upheld by the Nevada Supreme Court. See *Court Ruling on Judas Priest Upheld*, BILLBOARD, June 12, 1993, at 81; *Rock band cleared in suicide*, DAILY VARIETY, June 1, 1993 at 6 (after four-week trial, Whitehead found that subliminal messages existed on group's "Stained Class" album but were unintentional and did not create liability for suicides). Judge Whitehead subsequently resigned from the bench and practiced as a successful mediator but continues on occasion to attract controversy. See, e.g., A.D. Hopkins, *Ousted judge not forgotten*, LAS VEGAS REV.-J., Dec. 11, 2006, at 1B (seminar room named in honor of Whitehead at UNLV's Boyd School of Law at donor's request criticized by former Nevada Supreme Court Justice Robert Rose, who while on Court was part of anti-Whitehead faction of the Court).

203. See Barrett, *supra* note 202 and other sources cited in note 202 and *infra* note 204. See also Sean Whaley, *Springer ready to leave court*, LAS VEGAS REV.-J., Jan. 2, 1999, at 1B (retiring Justice Charles Springer, a member of the pro-Whitehead characterizes as "unfair and counterproductive" some reporting about the case, which article notes "split the court and gave its public image a black eye from which it has yet to fully recover.").

204. See, e.g., *Whitehead v. Nev. Comm'n on Judicial Discipline*, 920 P.2d 491, 508 (Nev. 1996) (concluding that "the opinion and writ of prohibition issued by the three justices . . . are void and of no legal force or effect whatsoever"),

D. *Continuing Concern over Substantive Due Process and Disqualification*

Faced with the realistic limits of full state supreme court review of recusal matters, one can make a strong case that procedural due process requires that a neutral judicial body other than the state supreme court itself decide whether recusal is required. For example, the state supreme court could appoint a panel of judges to hear such motions. A state might also create a judicial disqualification commission that would hear such motions directed at supreme court justices. Although these mechanisms could pose state constitutional problems (particularly separation of powers if a non-judicial group is involved), they are well worth exploring as an alternative to allowing a usually tight-knit group of colleagues to sit in back-scratching judgment of one another.

But, despite the practical concerns surrounding recusal at the state supreme court level, it appears that with modest tweaking, the state judicial systems can largely avoid the *Caperton* problem—even if *Caperton* disqualification is made congruent with recusal under the ABA Judicial Code—simply by putting in place better mechanisms for reviewing the self-interested decision making of

stricken as void by Del Papa v. Steffen, 920 P.2d 489 (Nev. 1996); Whitehead v. Nev. Comm'n on Judicial Discipline, 893 P.2d 866, 946 (Nev. 1995) (“When a newspaper was asked to correct public misstatements, the request for journalistic fairness, quite remarkably, was used by the commission as a basis for trying to disqualify two members of this panel), *superseded by constitutional amendment*, NEV. CONST. art. VI, § 21(amended 1998), *as stated in* Mosley v. Nev. Comm'n on Judicial Discipline, 22 P.3d 655 (Nev. 2001); *see also* Stephen Magagnini, *Nevada's Top Court Hogtied by Feud: Justices Tangle Over Probe of Reno Judge*, SACRAMENTO BEE, Mar. 17, 1996, at A1 (“The court is split 3–2 over the judicial discipline case of Jerry Carr Whitehead, a Reno judge accused of bullying lawyers who wanted him removed from cases.”); Ed Vogel, *High Court Rejects Attorney's Request*, LAS VEGAS REV.-J., Oct. 2, 1997, at 3B (“Fitzsimmons wanted [Justice Bob] Rose booted off a city of Las Vegas condemnation case involving her client, Whiteacre Investment Co. . . . [B]ut Justice Cliff Young, writing for the majority said the court ‘simply cannot afford to further dissipate its limited resources on these disqualification matters.’”); Todd Woody, *Nevada's No-Holds-Barred Politics and Casino Culture has Made Serving on the State's Supreme Court a Dickey Proposition*, RECORDER (SAN FRANCISCO), Oct. 6, 1997, at 1 (“[H]erself deeply involved in the judicial jihads that have roiled Nevada's small legal community, Fitzsimmons currently is engaged in a running battle to disqualify Rose from the cases she represents due to his alleged “extreme animus” toward her.”).

justices facing recusal motions.²⁰⁵ Coupled with the generally good supervision of disqualification decisions made by lower court judges, this suggests that a broader form of constitutional due process disqualification consistent with Model Judicial Code recusal would rarely require *Caperton*-style intervention by the U.S. Supreme Court. Consequently, one can, with little effort, imagine a world where state courts treat judicial disqualification more seriously, with relatively little instance of U.S. Supreme Court supervision.

There still would remain the nagging problem of occasional miscarriages of justice in which a state supreme court (or a body

205. See Goldberg et al., *supra* note , at 526–32 (outlining procedural devices by which state courts can minimize the risk of error in denial of disqualification). A preliminary variant of this sort of review can take place if recusal motions at the trial level are decided in the first instance by a trial judge other than that under challenge. This can occur either in the first instance or as an intermediate check on the challenged judge’s decision prior to any eventual appellate review. For example, in Nevada state court, recusal motions based exclusively on Canon 3(E) are in the first instance decided by the challenged judge while motions based on the disqualification statute (NEV. REV. STAT. §1.230, which differs from the “reasonable question as to impartiality” standard of the Judicial Code and requires “actual bias or prejudice” as well as covering the financial or family connections set forth in the Code) require an affidavit and are heard “by another judge agreed upon by the parties or, if they are unable to agree, by a judge appointed” by the district’s chief judge, the chief judge, or the most senior judge of the district (where the chief judge is disqualified). NEV. REV. STAT. § 1.235(5)(b). Where there is only one judge in the district, a possibility in rural areas, the Supreme Court may hear statutorily based disqualification motions. NEV. REV. STAT. § 1.235(5)(b). Although judges hearing recusal motions under the Code based on reasonable question as to impartiality may of course simply recuse, where the judge refuses to recuse, the challenged judge’s decision is then reviewed by the chief judge of the judicial district in a manner similar to that for statutory disqualification. See STATE BAR OF NEVADA, NEVADA CIVIL PRACTICE MANUAL § 2.09 (5th ed. 2001 & Supp. 2008) (Sal Gugino, Esq., Chapter author). Thereafter, of course, an alleged error in failing to recuse may be the subject of an appeal after final judgment or interlocutory review via a petition for mandamus. See, e.g., *People for the Ethical Treatment of Animals v. Bobby Berolini, Ltd.*, 894 P.2d 337 (Nev. 1995). See generally NEVADA CIVIL PRACTICE MANUAL, *supra*, §§ 2.08, 2.09. In addition, Nevada provides each side in a civil action a right of peremptory challenge to the original assigned judge. See NEV. S. CT. R. 48.1(3) (regulating the procedure for a change of a judge by peremptory challenge); FLAMM, *supra* note , §§ 27.11, 28.30 (providing peremptory disqualification provisions for Nevada); see also NEV. REV. STAT. § 1.225(5) (2008) (stating that where state supreme court justice is disqualified, “a district judge shall be designated to sit in his place as provided in Section 4 of Article 6 of the Constitution of the State of Nevada”).

reviewing the court's recusal decisions) refuses to disqualify a judge or justice who clearly had no business participating in a particular case. In these cases, it would appear that the disappointed litigant seeking recusal received full procedural due process but nonetheless was denied the fundamental right to have only impartial jurists involved in deciding the merits of the litigant's case. In these situations, one might reasonably view the litigant as having been denied substantive due process.

The question remains, however, whether the U.S. Supreme Court should reach such situations through *Caperton*-style invocation of the Due Process Clause. My view is that due process can properly be invoked to support such Supreme Court policing of the state courts. Where a state judicial system's disqualification determination, despite procedural review that seems fair *ex ante*, produces grotesquely wrong recusal decisions, the litigant has been denied a fundamental constitutional guarantee and U.S. Supreme Court intervention and correction is in order.²⁰⁶

As discussed above, there is certainly similarity between Supreme Court policing of state court punitive damages awards and policing of state court decisions involving participation of a judge who should have been disqualified.²⁰⁷ More importantly, participation of a tainted jurist goes right to the heart of the legal system's aspiration for fair adjudication in which outcomes are not determined by the status of a litigant or lawyer. By contrast, a large damages award, even if unfair, remains the product of the system's normal and "fair" operation, provided that the defendant received adequate procedural due process. But when a tainted judge participates, the litigant has suffered a *per se* denial of fair adjudication, regardless of the outcome. In such cases, the entire adjudication becomes infirm and a reviewing court is left wondering the degree to which the tainted judge's participation may have made a difference.

206. See *supra* Part IV.C (outlining rationale for viewing disqualification error as denial of due process).

207. *Id.*

E. *Guidelines for Invoking Substantive Due Process Disqualification*

1. In Campaign Support Cases

To be sure, intervention in state proceedings due to allegedly erroneous recusal should occur only sparingly. In determining whether to review such situations stemming from campaign support, the Court can continue to be guided by the factors set forth in *Caperton* and amplified in the Chief Justices' amicus brief, which sets forth the following "Criteria for evaluating whether due process requires recusal for campaign spending in a particular case:"

- Size of the Expenditure;
- Nature of the Support;
- Timing of the Support;
- Effectiveness of the Support;
- Nature of Supporter's Prior Political Activities;
- Nature of Supporter's Pre-existing Relationship with the Judge; and
- Relationship Between the Supporter and the Litigant.²⁰⁸

Fleshing out the former chief justices' list of considerations logically requires considering both the absolute and relative size of not only the cash outlays but also other, "in kind" campaign support such as signs, literature, volunteer workers, mailing or registration lists, phone banks, office space, and the like.

208. See Brief of the Conference of Chief Justices, *supra* note , at 24–29. The Brief for the American Bar Association supported a similar use of similar factors. See Brief for the American Bar Association, *supra* note , at 19–20 (including factors such as contribution size, importance, timing, and relationship of judge and supporter).

2. In General

In addition, the Court should consider the following factors relevant to the questions of (a) whether a litigant has been denied the fundamental right of adjudication before a neutral tribunal and (b) whether the denial of due process merits expenditure of the Court's limited judicial resources:

- egregiousness of the error in refusing disqualification;
- importance of the underlying case (financially, socially, or politically);
- defensibility of the outcome in the underlying case;
- degree to which poor recusal decisions are part of a pattern in the particular state or court; and
- presence or absence of state-based corrective measures such as impeachment, revision of state judicial ethics codes, or removal of the offending judge or judges through election, retirement, or other means.

Using these templates to help determine the existence and magnitude of the failure to recuse as a denial of substantive due process, the Court can act as an important backstop protecting litigant rights without unnecessarily entangling itself in state court disqualification practice. Applied to *Caperton*, these factors augur in favor of the result reached by Justice Kennedy and the majority.

The first factor for filtering disqualification cases for the Court should be the apparent egregiousness of the error in refusing disqualification. In *Caperton*, the error was enormous.²⁰⁹ Even if

209. In addition to his due process error, Justice Benjamin's opinion is remarkable in that it never grapples with the most salient legal issue regarding his participation—whether he was, pursuant to Canon 3(E) of the West Virginia Judicial Code of Conduct, a judge whose impartiality could be reasonably

Justice Benjamin's clearly incorrect defense of his continued participation had been subject to fairer procedures such as full court review, it should not have been allowed to stand. A *New York Times* editorial succinctly encapsulated my substantive reaction to the protests of the four *Caperton* dissenters:

Indeed, the only truly alarming thing about [the *Caperton*] decision was that it was not unanimous. The case drew an unusual array of friend-of-court briefs from across the political spectrum, and such an extreme case about an ethical matter that should transcend ideology should have united all nine justices.

Chief Justice Roberts is fond of likening a judge's role to that of a baseball umpire. It is hard to imagine that professional baseball or its fans would trust the fairness of an umpire who accepted \$3 million from one of the teams.²¹⁰

Applying the standard of 28 U.S.C. § 455(a) and Rule 2.11 of the Model Judicial Code, it seems inarguable that a reasonable lay observer would reasonably question Justice Benjamin's ability to be impartial in an important case involving a company headed by his seven-figure campaign contributor.

Next, if one considers the financial, social, and political importance of the underlying case, *Caperton's* intervention seems justified. The underlying fraud and tortious interference litigation obviously involved a good deal of money, resulting in a \$50 million judgment. It also involved a leading business in the state (coal mining) and at least one large and economically important litigant (Massey). It further attracted the attention of the state's most important labor union, the United Mine Workers, which weighed in on *Caperton's* side²¹¹ (*Caperton* had operated the Harman Mine as a

questioned. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 286–309 (W. Va. 2008) (Benjamin, J., concurring) (never dealing with the issue), *rev'd*, 129 S. Ct. 2252 (2009).

210. *Honest Justice*, *supra* note .

211. See Brief of Amicus Curiae Filed on Behalf of the United Mine Workers of America, *Caperton*, 679 S.E.2d 223 (W. Va. 2008) (No. 33350), 2008 WL 793475 (Supporting *Caperton* in the West Virginia Supreme Court).

union mine; when Massey wrested control, union jobs were lost).²¹² Further, the underlying case had significant implications for the manner in which business is conducted in the state. A victory for Massey logically would have, at least at the margins, encouraged sharper practices in the Blankenship mold.

Beyond this, the West Virginia Supreme Court's acceptance of Massey's *res judicata* and forum selection arguments on appeal created the possibility of rather substantial changes in state procedural doctrine with attendant impact on future litigation. The West Virginia high court's determination on these issues, at least until set aside by the U.S. Supreme Court, clearly expanded both the potential application of preclusion doctrine and the interpretative scope given to forum selection clauses.

A third filtering factor is the substantive outcome in this case involving participation by a tainted jurist whose partiality is subject to substantial question. Applied to *Caperton*, this factor supports the majority's decision to intervene on due process grounds. Recall that in two decisions, the West Virginia court did not question the substantive outcome on the merits.²¹³ Particularly in the first of its two decisions, the court essentially acknowledged that Massey had engaged in wrongful conduct toward Caperton. But on the basis of a technical legal defense problematically applied, the West Virginia Supreme Court threw out a sizeable judgment against an apparently conceded wrongdoer. In addition, in *Caperton*, the tainted jurist cast the deciding vote.

The fourth filtering factor—the degree to which poor recusal decisions are part of a pattern in the particular state or court—is less clear. However, there seems to be at least some significant evidence suggesting that West Virginia has not been particularly vigilant in ensuring that jurists do not participate in cases raising questions as to their impartiality. Without doubt, the state has been a hotbed of judicial politics that raise concerns about whether the judiciary has become excessively politicized.²¹⁴

212. See Gibeaut, *supra* note , at 52 (describing how Caperton had replaced contract workers with 150 union miners, only to later succumb to bankruptcy due to Massey's actions).

213. *Caperton*, 679 S.E.2d at 265 (Albright, J. and Cookman, J., sitting on special assignment for disqualified justice, dissenting).

214. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257–58 (2009) (noting substantial campaign expenditures and politicized race for state high court); Opinion, *Politics v. Justice*, CLEVELAND PLAIN DEALER, June 29,

The fifth factor is presence or absence of state-based corrective measures such as impeachment, revision of state judicial ethics codes, or removal of the offending judge or judges through election, retirement, or other means. As of June 2009, Justice Benjamin was, unsurprisingly, still on the West Virginia high court, with his term running through 2016.²¹⁵ There appears to have been no serious talk of his impeachment or retirement. Neither has there been suggested any amendment to the state's judicial code to ensure that future jurists in his position must recuse.²¹⁶

In sum, the five suggested factors for guiding Supreme Court invocation of substantive due process recusal point quite overwhelmingly in the direction of ejecting Justice Benjamin from the case, even if his participation had been permitted after full state supreme court review. In addition, since the grounds for the Benjamin disqualification are campaign-related, consideration of the chief justices' factors (i.e. amount of contribution, impact, recency, and relation to the case) also strongly supports Justice Benjamin's disqualification.

When facing future certiorari petitions involving due process disqualification, the Court can apply these factors (as well as those of the chief justices' amicus brief in cases involving campaign support) to determine which cases, if any, present sufficiently serious disqualification problems to justify Supreme Court intervention in state judicial outcomes. Armed with these considerations, the Court need not accept an inordinate number of such cases. The Court would then be free to move from *Caperton's* potentially problematic "probability of bias" standard to one mirroring the general norm: a

2009, at A9 ("The U.S. Supreme Court's ruling that a West Virginia Supreme Court judge should have recused himself from a case involving a big campaign contributor raises a caution sign for many states."); Editorial, *Virtues of an Appointed Judiciary*, 196 N.J.L.J. 898, 898 (2009) ("The trumpet of judges raising money from eventual litigants, delivering speeches to special interest groups, airing campaign commercials and generally worrying about whether they enjoy sufficient popularity to remain in office is, happily an anathema to [New Jersey]. Not so in states like West Virginia . . ."); sources cited *supra* note .

215. West Virginia Supreme Court of Appeals, Justices and Staff, <http://www.state.wv.us/wvsca/Justices.htm> (last visited Oct. 18, 2009).

216. In fact, West Virginia has not even put together a committee to review the American Bar Association's 2007 revisions to the Judicial Code of Conduct. Status of State Review of ABA Model Code of Judicial Conduct (2007), AMERICAN BAR ASSOCIATION, Oct. 7, 2009, available at http://www.abanet.org/cpr/jclr/jud_status_chart.pdf.

litigant is denied due process when a state has insufficient procedural guarantees of correct disqualification decisions or when, despite procedural protections, a clearly disqualified judge participates in a matter.

V. CONCLUSION

Although its critics see *Caperton* as an unwise intrusion into state elections and state disqualification practice, *Caperton*'s biggest problem is that it did not go far enough and make due process congruent with prevailing state and federal disqualification standards. In particular, the Court should recognize that any error in failing to recuse deprives the affected litigant of a fundamental constitutional right—the right to have the case heard by a neutral magistrate. Consequently, any rejection of a request to recuse is at least technically one of constitutional dimension that should be potentially subject to U.S. Supreme Court review and correction.

Although there are good reasons to hesitate in creating or recognizing rights of substantive due process, the impartiality of the bench lies at the core of our notions of law and justice. When a case is heard by a judge who should have recused, this deprives the litigants of the very essence of fair adjudication and constitutes a type of error greater in kind and magnitude than other judicial mistakes. If the Court is to make any forays into the field of substantive due process, the case for such intervention is greater here than in perhaps any other area of law.

Adopting the more straightforward reasonable-question-as-to-impartiality standard in lieu of the more problematic probability of bias standard should not strain judicial resources. The Court need not become mired in the flood of disqualification cases predicted by the dissenting doomsayers in *Caperton*. Insistence upon review of disqualification decisions by a neutral body of judges will largely ensure that litigants receive sufficient procedural due process. Where erroneous recusal decisions occur in spite of such safeguards, U.S. Supreme Court review should be available as necessary to vindicate the strong constitutional interest in neutral courts and fair adjudication, an interest sounding in substantive due process.

In making its assessments regarding whether review of non-disqualification is required, the Court should consider the five factors

set forth in this article and the considerations outlined in the *Caperton* amicus brief submitted by the Conference of Chief Justices. Using these yardsticks, the Court can, as necessary, make infrequent forays into judicial disqualification matters without unduly burdening the court or creating either uncertainty or paranoia among state judges and justices.

Even if one accepts the implicit assertion of the *Caperton* dissenters that the decision was something like using a “nuclear option,” both the constitutional interest in fair courts and the facts of the case justified this heavy artillery. So deployed, *Caperton* seems likely to have a positive effect in deterring poor disqualification decisions by state courts. Better still, the Court in *Caperton* could have harmonized the disqualification standards required by the Constitution with those required under federal and state law modeled on the ABA Model Judicial Code. As shown in this article, unifying the constitutional and nonconstitutional standards for judicial disqualification is feasible and can improve future Court supervision of recusal.