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# PLAYING FORTY QUESTIONS: RESPONDING TO JUSTICE ROBERTS'S CONCERNS IN *CAPERTON* AND SOME TENTATIVE ANSWERS ABOUT OPERATIONALIZING JUDICIAL RECUSAL AND DUE PROCESS

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Jeffrey W. Stempel\*

## I. INTRODUCTION

The Chief Justice of the United States would probably have excelled as a negative debater in high school forensics competitions.<sup>1</sup> Good negative

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1. It appears that Justice Roberts, despite his amazing high school resume (captain of the football team, wrestler, track team member, service on the student council executive committee, editorial board of the school paper, science fair champion, participant in choir and drama) did not participate in debate competitions. See Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER, May 25, 2009, at 42, 45 (describing Justice Roberts as a "classic well-rounded star student" in high school); Oyez, *John G. Roberts, Jr.*, [http://www.oyez.org/justices/john\\_g\\_roberts\\_jr](http://www.oyez.org/justices/john_g_roberts_jr) (last visited July 13, 2009); see also I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 3 n.15 (2008) (noting that Justice Roberts appeared in drag as character Peppermint Patty in high school production of *You're a Good Man, Charlie Brown*); Matthew Continetti, *John Roberts's Other Papers*, WEEKLY STANDARD, Aug. 8, 2005, available at <http://weeklystandard.com/Content/Public/Articles/000/000/005/897apaaf.asp> (describing Justice Roberts's career as Harvard undergraduate: "Roberts certainly had the habits of an academic. He studied constantly. He liked to quote Samuel Johnson, the English lexicographer and raconteur, to those around him. He and his friends' idea of collegiate athletics was Nerf basketball played in dorm rooms. According to a roommate, he „always had a bottle or two on hand”—a bottle or two

debaters are, as my high school English teacher put it, “great point-pickers” in that they frequently challenge affirmative proposals with a series of “what if?” or “how about?” or “what would you do if?” questions designed to leave the affirmative resolution bleeding to death of a thousand cuts.<sup>2</sup>

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of Pepto Bismol. „There were no parties.’ Roberts was a nerd, in other words. But he was an extremely accomplished nerd” who entered Harvard with sophomore standing and in his first year won an outstanding essay contest.).

2. There are now several different debate or forensics argument events for high school students. “Team policy debate is the oldest, and still probably the most popular, format of debate practiced in American high schools.” See Cal. State Univ. Northridge, *Debate Formats*, <http://www.csun.edu/~dgv61315/debformats.html> (last visited July 13, 2009). When my English teacher referred to debate and the traits of a good negative debater, she meant team policy debate, which was by far the dominant form during my high school years (1968-1972), which were essentially Justice Roberts’s high school years (1969-1973). See generally GEORGE MCCOY MUSGRAVE, *COMPETITIVE DEBATE: RULES AND TECHNIQUES* (3d ed. 1957). Today, other debating formats, particularly Lincoln-Douglas debate, are also prominent. Despite format differences, the basic enterprise of affirmative and negative debaters is similar in that the affirmative argues that the status quo is sufficiently problematic to merit the proposed change while the negative tends to defend the status quo and question both the wisdom and the feasibility of the affirmative solution. See Nat’l Ass’n for Urban Debate Leagues, *Debate Introduction*, <http://www.urbandebate.org/debateintro.shtml> (last visited July 13, 2009); University Interscholastic League website, <http://www.uil.utexas.edu/academics/rules/1002.html> (last visited July 13, 2009); *Debate Formats*, *supra*; see generally National Forensic League website, <http://www.nflonline.org> (last visited July 13, 2009).

In policy debate, the affirmative team begins first espousing support for a resolution such as “Resolved: The United States Should Adopt a Single-Payer Form of National Health Insurance.” After the opening affirmative team presentation of up to eight minutes (the first affirmative “constructive” speech), the first negative team speaker takes the podium for the first negative constructive (also eight minutes), followed by the second affirmative speaker, who is in turn followed by the second negative team member. On the heels of the constructive speeches comes the first negative speaker’s rebuttal (four minutes), creating a “negative stronghold” period in which the negative team seeks to build an insurmountable rhetorical lead before the first affirmative rebuttal, after which additional rebuttal rounds ensue. See *Debate Formats*, *supra*.

A common tactic for negative teams is to raise as many questions as possible regarding the practical feasibility of the affirmative case, in particular its uncertain impact in a variety of specific situations. Much of this task typically falls to the first negative team member in both the first negative constructive speech and the first negative rebuttal, while the second negative team member is likely to focus on a one or two particularly vulnerable portions of the affirmative case or to present a counter-proposal.

Debaters and their coaches may of course differ in their relative affection for the “bombard them with feasibility questions” strategy of negative debating. My son, for example, is a reasonably accomplished high school debater (and former state champion in another forensics event) who thinks the strategy is overrated and often ineffective. I continue to think that it works because it plays upon basic human limitations in processing data which enforces the status quo bias of most listeners to a debate. Under ordinary circumstances, most people are reluctant to support change unless convinced that the proposed new course of action is feasible and will not create additional problems. See Cass R. Sunstein, *Introduction* to *BEHAVIORAL LAW AND ECONOMICS*, 1, 4 (Cass R. Sunstein ed., 2000) (“[P]eople evaluate situations largely in accordance with their relation to a certain reference point . . .”). The listener facing a barrage of the negative debater’s “what about” questions is put in the position of mentally throwing up her

Less charitable observers might call it nit-picking. After reading Chief Justice Roberts's dissenting opinion in *Caperton v. A.T. Massey Coal Co.*,<sup>3</sup> one can easily imagine him as a high school debater standing firm in opposition to some affirmative resolution not so much by opposing the well-meaning-but-naïve concepts contained in the resolution, but by raising myriad questions about the proposal's potential for practical application.<sup>4</sup> Even the best affirmative debaters will be hard pressed to effectively refute the negative debater's laundry list of concerns, particularly in the few minutes available to formulate a response. Notwithstanding the endless droning of sports announcers about "momentum," it is generally easier to play defense than offense because the side or party advocating an extension of the law or the imposition of liability or discipline must shoulder the burden of persuasion. If there is a "tie" with the pros and cons of argument

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hands and concluding that if there are so many questions about the affirmative proposal, it must be flawed or at least impractically utopian.

In formal debate competitions, the "forty questions" strategy of the Roberts dissent may also be effective because of the practice of tracking and scoring debates through use of a "flow chart" in which the respective sides' arguments are listed and tracked. For most judges, an affirmative team is hurt, potentially even fatally, by a failure to address even a weak negative team argument. Consequently, a long list of negative point-picking questions can be rhetorically effective simply because it is long and poses the risk that the affirmative side will fail to respond or respond only cursorily through oversight or lack of time. As a practical matter, it may also simply take more time to outline an affirmative proposal than to raise a negative question, exacerbating the negative advantage in "playing defense."

Ironically, Harvard constitutional law professor Laurence Tribe, perhaps Justice Roberts's ideological and jurisprudential opposite, is credited by some with inventing the flow chart methodology, or at least was one time in a Wikipedia entry on Tribe that has since been revised. See Wikipedia, *Laurence Tribe*, [http://en.wikipedia.org/wiki/Laurence\\_Tribe](http://en.wikipedia.org/wiki/Laurence_Tribe) (last visited October 7, 2009). The story appears to have grown out of what may have been Tribe's innovation of using 11 inch x 17 inch paper for flow charts. See BENJAMIN NUGENT, *AMERICAN NERD: THE STORY OF MY PEOPLE* 103-116 (2008) (recounting emergence of strategy of spreading opponents thin through use of many points delivered quickly, which became popular in 1960s for college debate and 1970s for high school debate, linking development to Tribe's membership on victorious 1961 Harvard debate team, although Tribe, in response to author's query, tended to downplay his importance and suggested that development of the spread and following flow of arguments was development in debate generally at that time); but see *RESOLVED* (Image Entertainment Films 2007) (documentary about high school debate crediting a former debater other than Tribe with inventing "the spread," a sort of flowsheet-on-steroids approach in which a debater, either affirmative or negative, attempts through both creativity and rapid speaking, or "spewing" in the language of high school debaters, to set forth as many arguments as possible in limited time, making it very difficult for the opposing side to address each argument in the time available); Wikipedia, *Resolved (film)*, [http://en.wikipedia.org/wiki/Resolved\\_\(film\)](http://en.wikipedia.org/wiki/Resolved_(film)) (last visited July 13, 2009) (describing film in more detail).

3. 129 S. Ct. 2252, 2267-74 (2009) (Roberts, C.J., dissenting).

4. See *id.* at 2267-72 ("I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such. But I fear that the Court's decision will undermine rather than promote these values.").

in equipoise, the defense or status quo is usually deemed both the logical winner and the practical winner.

In *Caperton*,<sup>5</sup> the U.S. Supreme Court narrowly adopted what to most lay observers probably seems like an inarguable proposition: a judge whose candidacy receives more than \$3 million from a litigant should not sit in judgment on a case where that litigant is attempting to avoid a \$50 million liability.<sup>6</sup> Nonetheless, the Court reached this common sense result by a slim 5-4 vote,<sup>7</sup> with the dissenters, led by Chief Justice Roberts, minimizing the danger of biased judging presented by the situation<sup>8</sup> and, more defensibly and perhaps effectively, raising concerns about the Court's authority and methodology in policing the disqualification of state court judges pursuant to the Due Process Clause.<sup>9</sup>

In particular, the dissent posed forty questions<sup>10</sup> in support 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

5. 129 S. Ct. 2252.

6. See *infra* text accompanying notes 24-72 (reviewing facts of *Caperton*).

7. See *Caperton*, 129 S. Ct. 2252 (Justice Kennedy joined by Justices Stevens, Souter, Ginsburg, and Breyer forming 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; Chief Justice Roberts joined by Justices Scalia, Thomas, and Alito voting to let the decision stand in spite of key participation by challenged state court justice).

8. 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] Justice [Brent] Benjamin and his campaign had no control over how this money was spent. . . . Moreover, Blankenship's [\$3 million in] independent expenditures do not appear 'grossly disproportionate' compared to other such expenditures in this very election."); see also *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.").

9. See *id.* at 2269-72 (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 list of specific questions regarding application of majority's standards for judicial impartiality satisfying constitutional due process); *id.* at 2275 (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."); see *infra* Part IV (outlining dissenters' concerns in greater detail and attempting to answer their operational, process-oriented concerns).

10. Forty enumerated questions, that is, with many containing subparts or follow-up questions. If one calculates the total number of questions in the Roberts's dissent as one would in reviewing litigation interrogatories, the total number of questions actually totals **eighty**—that's right, **eighty**—queries. See *Caperton*, 129 S. Ct. at 2269-72 (Roberts, C.J., dissenting).

a sustainably practical approach to policing the judicial integrity of state courts.<sup>11</sup> Judging from the early reaction of many commentators, the dissenters scored more than a few rhetorical points. Although *Caperton* was generally well received as an antidote to the perceived problems of money and judicial politics,<sup>12</sup> several commentators, echoing the arguments of the dissent, called into question the wisdom of the majority's correction of judicial outrage.<sup>13</sup> Experienced debaters and former debaters cannot help

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11. *See id.*

12. *See, e.g.*, Editorial, *Court is Right that Money Taints Judges*, DAYTON DAILY NEWS, June 15, 2009, at A10, available at [http://www.daytondailynews.com/blogs/content/shared-gen/blogs/dayton/opinion/entries/2009/06/15/editorial\\_court\\_right\\_that\\_mon.html](http://www.daytondailynews.com/blogs/content/shared-gen/blogs/dayton/opinion/entries/2009/06/15/editorial_court_right_that_mon.html); Editorial, *Honest Justice*, N.Y. TIMES, June 9, 2009, at A26 (praising *Caperton* holding for "recognition of the threat posed by outsize contributions" and its "crucial statement that judges and justice are not for sale" while finding problems raised by Roberts's 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, available at <http://www.lasvegassun.com/news/2009/jun/11/no-tolerance-bias/> ("Justice Anthony Kennedy, writing for the majority, made common sense . . . [The Court] was 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, *Raising the Bar*, L.A. TIMES, July 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").

13. *See, e.g.*, Editorial, *Courts' Recusal Stand Lacks Needed Specifics*, TAMPA TRIB., June 13, 2009, at 2; 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, available at <http://www.lvrj.com/opinion/47761632.html> ("[T]he [*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, Editorial, *The High Court Made Hash of the Bias Issue*, CHARLESTON DAILY MAIL, June 16, 2009, at A4, available at <http://www.dailymail.com/Opinion/HoppyKercheval/200906150558>; Political Cartoon, LAS VEGAS REV.-J., June 9, 2009, at 9B (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" in caption underneath picture of litigant attempting to enter courtroom but stopped at toll both by guard stating "Hey—it's now the only way the judge can rake in a few campaign bucks"); *see also* David Kihara, Editorial, *Case Affects Nevada: Court Rules on Elected Judges*, LAS VEGAS REV.-J., June 9, 2009, at 1A, available at <http://www.lvrj.com/news/47297627.html> ("Opinion: Recusals might be need to avoid appearance of bias"); *id.* at 6A (labeling the article "Dissenters see downside to ruling" on the jump page and 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 sounded the trumpeting states' rights, saying, "Recusal 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." In addition, the editorial followed the Roberts dissent script of raising concerns of unpredictability and arbitrariness in the application of *Caperton*-style recusal, stating:

but read the opinion with some admiration for its craft. The Roberts dissent embraces an almost indefensible position (that the Court should just let it go when the public could reasonably suspect that a litigant succeeded on appeal by “buying” a key judge through massive campaign support)<sup>14</sup> but

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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]. . . . 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*.

Responding to the *Journal*’s misplaced vituperation is 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 not completely unfounded. 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, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/09/AR2009060902726.html> (taking a relatively moderate and balanced view that the *Caperton* decision “raised more questions than it answered, but it should serve as a call to states to tighten judicial ethics standards and rethink judicial elections altogether”); Dahlia Lithwick, *The Great Caperton Caper*, 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 view, finding portion of the opinion “strikingly resonant with [Supreme Court nominee Judge Sonia] Sotomayor’s much-maligned Berkeley speech, about how the average judge goes about deciding a case,” (quoting *Caperton*, 129 S. Ct. at 2263), and asking whether including “empathy” in factors relevant to judicial outcomes “can be far behind?”); *Supreme Court Makes it Easier to Force Elected Judges Off Cases*, MCCLATCHY, June 8, 2009, [www.mcclatchydc.com/257/story/69665.html](http://www.mcclatchydc.com/257/story/69665.html) (last visited July 13, 2009) (providing neutral summary of decision, giving equal descriptions of majority and dissenting opinions).

14. The *New York Times* editorial also succinctly encapsulated my substantive reaction to the protests posed in the Roberts dissent.

Indeed, the only truly alarming thing about Monday’s decision was that it was not unanimous. The case drew an unusual array of friend-of-the-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.

nonetheless puts the majority on the defensive and convinces many observers that the majority's effort to right a wrong will cause more problems than it solves.<sup>15</sup>

The time-honored debate tactic of setting forth a seemingly endless list of practical problems may be effective in beating back political, social, and legal proposals. But the effectiveness is often undeserved. A considerable body of cognitive science research has established the limits of the human mind in dealing with multiple considerations.<sup>16</sup> Rather than being fully rational, humans exhibit bounded rationality and can only focus on a few details at a given time.<sup>17</sup> The average layperson, lawyer, or editorial writer may understandably look at Justice Roberts's forty questions and figuratively throw up his or her synapses in surrender, fallaciously reasoning that a majority holding that could engender so many questions

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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.

*Honest Justice*, *supra* note 12, at A26.

15. The shorter Scalia dissent attempts to achieve this as well, and succeeds to a degree but is not nearly as effective in raising operational questions and also has a more shrill, bitter, and condescending tone, perhaps explaining why no other Justice joined. *Caperton*, 129 S. Ct. at 2274-75 (Scalia, J., dissenting).

16. See CASS R. SUNSTEIN, *Introduction* to BEHAVIORAL LAW AND ECONOMICS 1, 1-7 (Cass R. Sunstein ed., 2000) (noting that reasoning errors result from "constructed preferences," biases such as "extremeness aversion," "hindsight bias," "optimistic bias," "status quo bias," as well as "availability" and "anchoring" heuristics while risk-reward calculations are often warped by loss aversion and compartmentalization of thoughts on value); see also Ellen C. Garbarino & Julie A. Edell, *Cognitive Effort, Affect, and Choice*, 24 J. CONSUMER RES. 147, 148 (1997) ("As environments require more cognitive effort to process information fully, decision makers often switch to decision strategies or heuristics that are easier to implement. . . . People are willing to forego some benefits to conserve cognitive effort."); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541-42 (1998); Barbara E. Kahn & Jonathan Baron, *An Exploratory Study of Choice Rules Favored for High-Stakes Decisions*, 4 J. CONSUMER PSYCHOL. 305, 306-07 (1995) (when decisions are more complex, decision making approach often deviates from optimally rational strategy); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625-30 (1998); Richard W. Olshavsky, *Task Complexity and Contingent Processing in Decision Making: A Replication and Extension*, 24 ORGANIZATIONAL BEHAV. AND HUM. PERFORMANCE 300, 314 (1979); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1130 (1974).

17. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206, 1217-18 (2003) (collecting literature and outlining manner in which limits on human rationality result in persons making decisions against interest without recognizing subconscious forces at work in decision-making). Regarding something as simple as shopping, two researchers concluded that "three brands and five [product] attributes [are] approximately what consumers really consider" in making buying decisions. See Denis A. Lussier & Richard W. Olshavsky, *Task Complexity and Contingent Processing in Brand Choice*, 6 J. CONSUMER RES. 154, 155 (1979); see generally ROBIN M. HOGARTH, *JUDGMENT AND CHOICE: THE PSYCHOLOGY OF DECISION* (2d ed. 1987).



must be problematic. Certainly, the Court majority and Justice Anthony Kennedy, author of its opinion, would be hard pressed to respond to all of the dissent's questions without unduly lengthening and diluting the majority opinion, perhaps at risk of holding together its five votes.

As a debating gambit, then, the Roberts dissent appears to have succeeded to a degree in making an indefensible position (that it is okay to take \$3 million from a litigant and rule on his case) seem fairly debatable. But the goal of neutral adjudication is sufficiently important to require resistance to one's initial reaction of succumbing to the negative debater's point-picking list of concerns, particularly when so many of the questions are derivative-cum-repetitive.<sup>18</sup> Of the forty questions posed in the *Caperton* dissent,<sup>19</sup> the dissenters' objections devolve to a handful of operational problems in implementing a new era in which support of a judge's election can, if sufficiently large, be a ground for disqualification.<sup>20</sup> To be sure, these core questions are serious and require reflection. But when examined with some care, they provide no brief for rejecting the commonsense notion that a judge who appears to owe his position to a litigant's campaign support should not preside over litigation substantially impacting that litigant/contributor.<sup>21</sup>

This Article, after briefly reviewing the background and holding of *Caperton*, focuses on Justice Roberts's forty questions and attempts to provide some basic, although necessarily tentative, answers. Seriatim review of the dissent's laundry list establishes that the at-first impressive array of concerns proves unpersuasive and alarmist. Despite its imperfections, *Caperton v. Massey* is a correctly decided case announcing a workable rule of law. Although the opinion is imperfect (and arguably too light-handed in policing state court bias), the decision deserves support and not the death-by-a-thousand-cuts criticism of the dissent and its supporters.

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18. This suggests that while Justice Roberts may be an effective debater, he would not win uniform praise from debate professionals. See NAT'L ASS'N FOR URBAN DEBATE LEAGUES, LEARNING TO DEBATE: AN INTRODUCTION FOR FIRST-YEAR DEBATERS 21 (2009), <http://www.urbandebate.org/pdf/Learningtodebate.pdf> ("The negative strategy should avoid repetitive parts. For the Case arguments the negative should choose a set of responses that are not redundant. Also avoid choosing disadvantages or critiques that have similar links or impacts."). As discussed in Part IV, the many questions of the Roberts dissent essentially devolve to a single question as to whether the majority approach is sufficiently objective and concrete to be consistently applied, with perhaps a second, more substantive question as to whether any judicial favoritism stemming from campaign support falls within the constitutional protections of the Due Process Clause.

19. *Caperton*, 129 S. Ct. at 2269-72 (Roberts, C.J., dissenting).

20. *Id.*

21. *Id.*

Whatever its imperfections, *Caperton* likely has changed forever the inertia on this issue, although it will be neither the immediate dawn of a new day desired by judicial ethics reformers nor the disaster prophesized by the dissenters.<sup>22</sup> *Caperton* has extended the Court's long-standing willingness to occasionally invoke the Due Process Clause as a means of setting outer limits on a judge's ability to act when his personal interests are at stake in the litigation.<sup>23</sup> Now, that the brooding omnipresence of Due Process policing has been extended into the realm of judicial electoral politics, one might optimistically hope for a break in the historical logjam resistant to policing rough-and-tumble judicial electoral politics. Further, one can realistically hope that this change will not be unduly disruptive or logistically difficult in the manner feared by the decision's critics. *Caperton* can, if aptly construed and judiciously applied, serve as necessary impetus to judicial ethics reform as well as serve as a backstop to prevent egregious wrongdoing by judges.

## II. THE *CAPERTON V. MASSEY* IMBROGLIO

Hugh Caperton, a "lifelong coal man," purchased the Harman Mine in southwestern Virginia in 1993.<sup>24</sup> Although the mine was in poor shape at the time,

[t]he mine yielded 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. By the end of 1993, the mine's yield had increased to 1 million tons a year, quadruple its previous output. Caperton also replaced the contract workers who used to ply the precious bituminous with 150 union miners in one of the nation's poorest states.

Then along came A.T. Massey Coal Co. and its CEO, Don L. Blankenship. Massey, which has headquarters in Richmond, Va., wanted the high-grade coal too. But Caperton at first was unwilling to sell, despite what he described as warnings from Blankenship: "He basically threatened me and said, 'Don't take me to court. We spend a million dollars a month on lawyers, and we'll tie you up for years.'"

Blankenship wasn't lying. Through a series of complex, almost Byzantine transactions, including the acquisition of Harman's prime customer and

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22. *Id.* at 2267-74; *id.* at 2274-75 (Scalia, J., dissenting).

23. *See infra* text accompanying notes 79-102 (discussing Court precedent relied upon by *Caperton* majority).

24. *See* John Gibeaut, *Caperton's Coal*, A.B.A. J., Feb. 2009, at 52.

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.

Caperton finally cried uncle in early 1998 and agreed to sell. But on the day the deal was to go down, Massey got up and walked away, sending Caperton to court instead of the bank.<sup>25</sup>

The abrupt end to the planned sale left Caperton's companies—Harman Mining, Harman Development, and Sovereign Coal—with current liabilities exceeding his current assets.<sup>26</sup> They filed for Chapter 11 bankruptcy in 1998 facing \$25 million in claims.<sup>27</sup> Caperton, who had personally guaranteed \$1.9 million of his companies' debt,<sup>28</sup> sued Massey in West Virginia,<sup>29</sup> alleging fraud and tortious interference with contract,<sup>30</sup> obtaining a \$50 million jury verdict in 2002<sup>31</sup> that survived vigorous post-trial attack by Massey.<sup>32</sup> The trial court rejected Massey's new trial and

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25. *Id.*

26. See Brief of Appellee Hugh M. Caperton at 13, *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008) (No. 33350), *rev'd*, 129 S. Ct. 2252 (2009).

27. *Id.*

28. *Id.*; see also *Caperton v. A.T. Massey Coal Co.*, No. 98-C-192, 2005 WL 5679073 (W. Va. Cir. Ct. March 15, 2005) (noting Caperton's personal guarantees).

29. Other plaintiffs in the West Virginia action were Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales, Inc. 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. *Caperton*, 679 S.E.2d 223.

Harman Mining and Sovereign Coal also sued Wellmore Coal Corp., 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 a steel plant that was Wellmore's primary customer. According to Massey's counsel, Harman Mining "voluntarily withdrew" the tort claim originally pled "prior to trial in the Virginia action with assurances that [Harman] would not later assert such a claim." 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." See Appellant Brief of A.T. Massey Coal Co. at 9, *Caperton*, 679 S.E.2d 223 (No. 33350).

Caperton contests Massey's assertion that Harman's tort claim against Wellmore was withdrawn with the understanding that it or related claims could not be brought elsewhere. 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* text accompanying notes 54-61.

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

31. *Id.*

32. See, e.g., *Caperton v. A.T. Massey Coal Co.*, No. 98-C-192, 2005 WL 5679073 (W. Va. Cir. Ct. Mar. 15, 2005) (denying defendants' Rule 50(b) motion for judgment as a matter of law and Rule 50(c)/59 motion for new trial, or in the alternative, motion for remittitur), *rev'd*, 679 S.E.2d 223 (W. Va. 2008), *rev'd*, 129 S. Ct. 2252 (2009) (forty-page opinion denying Massey's motions and awarding post-judgment interest at ten percent annual rate from the date of the August 15, 2002 judgment for Caperton).

remittitur motions in June 2004.<sup>33</sup> Elections for the West Virginia Supreme Court were slated for November 2004, with Justice Warren McGraw seeking reelection.<sup>34</sup> Massey CEO Blankenship threw his support to challenger Brent Benjamin.<sup>35</sup>

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

34. *Id.*

35. The McGraw-Benjamin race for the West Virginia Supreme Court was a knock-down drag-out contest fueled by both considerable campaign expenditures and a pronounced ideological divide. It has been characterized as one of the nastiest judicial campaigns in history. See Terry Carter, *Mud and Money: Judicial Elections Turn to Big Bucks and Nasty Tactics*, A.B.A. J., Feb. 2005, at 40-42 (noting national epidemic of expensive, shrill, 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 P1C (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 P1C (reporting study by NYU Law School Brennan Center for Justice and Institute for Money in Politics finding forty percent of all attack ads in judicial races in America in 2004 involved the McGraw-Benjamin contest); Kavan Peterson, *Cost of Judicial Races Stirs Reformer*, STATELINE, Aug. 5, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=47067> (“[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.” The Executive Director of the State Bar states that “[no] one in West Virginia was pleased with the kind of campaigning we saw in last year’s Supreme Court race.”).

It appears beyond serious question that the McGraw-Benjamin race was a classic conservative-liberal, management-labor, plaintiff-defendant, business-consumer split in which, at least among those that understood the candidates and the issues, Justice McGraw, a Democrat, was supported by Democrats, liberals, labor, plaintiffs’ lawyers, and consumer advocates while candidate Benjamin, a Republican, was supported by Republicans, conservatives, management, the defense bar, and business. See Carter, *supra*; George Hohmann, *Benjamin’s Defeat of McGraw Tops Stories of 2004*, CHARLESTON DAILY MAIL, Dec. 30, 2004, at P1C (citing Benjamin win as major victory for business community and Republican party and crediting Blankenship and “And for the Sake of the Kids” with Benjamin’s success); McElhinny, *supra*; Nyden, *supra*; Peterson, *supra*.

The nastiness of the campaign occurred primarily through the use of negative attack ads, of which those directed at Justice McGraw were particularly harsh and viewed as misleading by many. The ads were sufficiently biting that he retained former state supreme court chief justice Richard Neely as counsel and sued for libel. See Toby Coleman, *McGraw Files Attack-Ad Libel Suit*, CHARLESTON GAZETTE, Dec. 3, 2004, at P1C.

In particular, the ads produced by “And for the Sake of the Kids,” discussed below, portrayed Justice McGraw as someone soft on crime, particularly soft on child molestation. The basis for this attack was McGraw’s joining in a 3-2 court opinion vacating the sentence of Tony Arbaugh. See McElhinny, *supra* (“Independent groups of business and coal interests repeatedly blasted incumbent Justice Warren McGraw as a ‘radical’ who is soft on crime. They spotlighted his role in reversing a 15-to-35-year sentence for a sex offender.”). Arbaugh was proved to be the Willie Horton of the McGraw-Benjamin campaign.

At age 15, Arbaugh was convicted in 1997 of sexually assaulting his half brother. He was sentenced to 35 year in prison, but the state Supreme Court, in an unsigned opinion, returned the case to a Pendleton County Circuit judge, who then released Arbaugh on probation.

Blankenship contributed the statutory maximum of \$1000 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.<sup>36</sup> In addition, Blankenship spent more than \$500,000 independently on television and newspaper advertisements favoring Justice Benjamin as well

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Backers of Supreme Court Republican candidate Brent Benjamin used the Arbaugh case in several attack ads against incumbent Democratic Justice Warren McGraw last year, in one of the nastiest and most expensive judicial campaigns in the country.

See *Figure in Court Election Ads Faces Charges*, CHARLESTON GAZETTE, Mar. 1, 2005, at 3A (also reporting the then-twenty-three-year-old Arbaugh's recent arrest for misdemeanor domestic battery (this time on his girlfriend) as well as drugs and weapons charges; police reportedly apprehended him with marijuana, methamphetamine, and a loaded .357 Magnum handgun).

The attacks on Justice McGraw appear to have been well-calculated to resonant with voters who, if adequately informed of the salient issues in the campaign, might well have voted for McGraw by diverting attention away from consumer rights, plaintiffs' rights, and civil rights, and focusing instead on McGraw's alleged tolerance for dangerous deviants. See Carter, *supra* ("The Charleston Daily Mail called [the attack ads] „West Virginia's version of Swift Boat Veterans for the Truth.'").

Democrats and liberals seem to play the mudslinging "soft on crime/weak on sex offenders" card with as much zeal as Republicans and conservatives. In the 2003 Illinois Supreme Court race, an Illinois Democratic Party ad accused Republican candidate Lloyd Karmeier "of giving probation to kidnappers who tortured and nearly beat a ninety-two-year-old grandmother to death, and another that accused him of giving probation to a man who molested a young girl and her brothers." *Id.* at 43. Not to be outgunned, "[a] tort reform group hit back with an ad claiming that [Democratic candidate Gordon] Maag voted to turn loose a man convicted of sexually molesting a six-year-old-girl." *Id.* Such spectacles have not been confined to Illinois and West Virginia. See Toby Coleman, *Court Attack Ads Part of a Trend, Crime Cases are Common Target in National Efforts to Unseat Justices*, CHARLESTON GAZETTE, Oct. 3, 2004, at P1A (focusing, however, on Arbaugh ads in McGraw-Benjamin race).

36. An avowed purpose of "And for the Sake of the Kids" was to deny reelection to incumbent West Virginia Justice Warren McGraw, a liberal disliked by West Virginia conservatives and much of the business community. See Marcia Coyle, *High Court Review Sought on Judicial Recusals*, NAT'L L.J., Aug. 4, 2008, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202423489061>. Because Justice McGraw had ruled in favor of the legal rights of some defendants accused of crimes against children, the anti-McGraw forces apparently chose to fight him on the basis that he was purportedly soft on crime and insufficiently protective of children who could be targets of criminal activity, particularly sex-based crimes, which, to borrow from the opening lines of *Law & Order SVU*, are "considered particularly heinous."

On its website, which appears not to have been updated in some time (e.g., its most recent posted press releases date from 2006), "And for the Sake of the Kids" portrays itself as one promoting traditional family values but also strikes a liberal tone, lamenting that West Virginia ranks low in education and other measures of social well-being. The website also strikes a populist cord, advocating a repeal of sales tax levies on food. See <http://www.andforthesakeofthekids.org>. No significant attention is paid to the pro-business aspects of the group's agenda such as tort reform and greater judicial support for employers in workers compensation cases. However, the group does not hide its ties to Blankenship, who prominently featured on the site and is identified as the CEO of a large coal company. See *id.*

as for fundraising on behalf of Justice Benjamin.<sup>37</sup> 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.<sup>38</sup>

Perhaps unsurprisingly in the modern era where "money is the mother's milk of politics,"<sup>39</sup> Justice Benjamin won with slightly more than fifty-three percent of the more than 700,000 votes cast.<sup>40</sup> In other words, Blankenship was spending \$4 for each vote cast and \$8 for each vote supporting the Benjamin candidacy.<sup>41</sup> A swing of 25,000 votes would have changed the election outcome. Although Justice McGraw appears to have had some significant electoral baggage that may have more than offset the advantage incumbents traditionally possess,<sup>42</sup> the consensus of observers

37. The advertisements produced and aired by "And for the Sake of the Kids" portrayed Justice McGraw and the Albaugh majority as callously releasing a sex offender into a school janitor job where he would have access to easy prey. See, e.g., *Tired—Revised* (And for the Sake of the Kids Oct. 26, 2004), <http://www.andforthesakeofthekids.org>.

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

39. See Editorial, *An Important Step for Local Election Reform*, MARIN INDEP. J., June 9, 2009 (crediting the aphorism to state representative Jesse Unruh, speaker of the California House of Representatives in the 1960s, although the saying is widely used without attribution to any particular person).

40. See *Caperton*, 129 S. Ct. at 2257 ("Benjamin won. He received 382,036 votes (53.3%) and McGraw received 334,301 votes (46.7%).").

41. The Blankenship financial support for Justice Benjamin also works out to approximately \$1.66 for every person in West Virginia. See Amanda Frost, "One Dollar for Every West Virginian": The Crazy Judicial Corruption Case the Supreme Court Should Hear, SLATE, Oct. 10, 2008, <http://www.slate.com/id/2201960> (stating facts of *Caperton* are "startling, to put it mildly" and the case is for many "the poster child for scrapping judicial elections;" however, "acknowledging that [just because] judicial elections are here to stay does not mean we have to accept spectacularly dysfunctional electoral systems like the one on display in West Virginia").

42. 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.

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

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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.

*Caperton*, 129 S. Ct. at 2274 (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting) (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 plays a particularly pivotal role in such races. See DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004* (Jesse Rutledge ed., 2005) (describing modern trend of expensive, hard-hitting judicial campaigns with focus frequently on matters having little to do with actual job performance of judges); Carter, *supra* note 35, at 40–42; Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 509–12 (2007) (detailing expensive and hard-fought 2004 campaign for the Illinois Supreme Court); Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 337 (2003); Tony Mauro, *Can Money Obstruct Justice?*, USA TODAY, Feb. 26, 2009, at 9A, available at <http://blogs.usatoday.com/oped/2009/02/can-money-obstr.html> (stating that modern judicial races “have been infected with high-priced campaigning and misleading television commercials and questionnaires”). Mauro, *USA Today’s* Supreme Court reporter and a veteran observer of judicial activity, noted that

[i]n a poll released this week by Justice at Stake, a fair-courts advocacy group, more than two-thirds of those surveyed doubted that a judge could be impartial in a case in which one side had donated \$50,000 to his or her campaign, and 85% said the judges should step aside, or recuse. In a USA TODAY survey this month, 89% said the influence of campaign money on judges is a problem.

*Id.* Perhaps it is Justice Roberts who is failing to give due credit to the insights of the electorate. Adding an anecdote, Mauro noted that

[a]fter Illinois Supreme Court Justice Lloyd Karmeier and his opponent raised about \$9 million for their 2004 contest—one of the costliest judicial elections in history—Karmeier said, “Basically, that’s obscene for a judicial race. How can people have faith in the system?” (Karmeier didn’t exactly restore faith when, after winning, he refused to recuse in a high-stakes case involving one of his major benefactors.)

*Id.*; see also Goldberg et al., *The Best Defense*, *supra*, at 510 (noting that Justice Karmeier received more than \$350,000 from State Farm-affiliated sources and cast deciding vote in *Avery v. State Farm*, reversing a \$1 billion judgment against the insurer; he also received more than \$2 million from the Chamber of Commerce). Full disclosure: I was an expert witness on State Farm’s behalf in a case similar to *Avery* and have been a State Farm policyholder for more than a decade. I have also been critical of the insurer’s claims handling and defense practices. See JEFFREY W. STEMPEL, *LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM* (2008) (addressing case that resulted in \$145 million punitive damages award against insurer, later reversed by U.S. Supreme Court and ultimately becoming \$9 million punitive award; concluding that insurer’s conduct and policies warranted large punitive damages judgment against it).

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 Carter, *supra* note 35, at 40 (stating that Blankenship’s contributions “paid off” and his “attack ads and automated phone calls are credited with tipping, or pushing the election to Republican challenger Brent Benjamin”); see also *supra* note 35. Further, West Virginia’s partisan politics are sufficiently evenly divided that neither candidate had a substantial advantage based on party registration. See Paul J. Nyden, *Red State, Blue State: W. Va.’s Future Political Leanings Not that Easy to Call, Experts Say*, CHARLESTON GAZETTE, Oct. 30, 2005, at P1B (noting even or see-sawing party fortunes and unpredictability of state’s elections).

appears to be that Blankenship's heavy financial support was a key factor in Justice Benjamin's election.<sup>43</sup>

After the election and adjudication of post-trial motions in *Caperton v. Massey*, Massey sought review of the \$50 million judgment.<sup>44</sup> Even prior to the filing of Massey's petition for appeal, Caperton sought Justice Benjamin's recusal, which Benjamin denied in April 2006.<sup>45</sup> 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 which comprise this litigation, or that this Justice will be anything but fair and impartial.<sup>46</sup>

In addition to suggesting that perhaps one ought to be wary of judges who speak of themselves in the "royal" third person,<sup>47</sup> Justice Benjamin's opinion, like that of the *Caperton* dissenters, is rather remarkable in so firmly refusing to step aside by applying the wrong standard—or at least an incomplete and misleading standard—for determining judicial disqualification.<sup>48</sup> The test for determining disqualification is not only whether a judge is actually biased or prejudiced but whether the judge's

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43. The likely effectiveness of the Blankenship-financed media campaign is supported by McGraw's one-point lead only two weeks before the election, a lead that evaporated with Benjamin winning fifty-seven percent to forty-three percent. As of mid-October, McGraw was ahead thirty percent to twenty-nine percent. See Brad McElhinny, *Contest for Court is Close: Recent Polling Shows 30 Percent for McGraw, 29 Percent for Benjamin, and 41 Percent Unsure*, CHARLESTON DAILY MAIL, Oct. 19, 2004, at P1A. Obviously, forty-one percent undecided is a huge uncommitted vote so close to an election that had been so heavily publicized. With so many voters apparently lacking an ideological, jurisprudential, or partisan anchor for deciding the contest, it seems likely that the Blankenship-funded anti-McGraw attack ads were a significant factor in Benjamin's victory. See also Dave Peyton, *The Benjamin Plan was Simply Brilliant; Here's to a Court Where the Outcome Can't be Predicted*, CHARLESTON DAILY MAIL, Nov. 11, 2004, at P4A (praising Benjamin campaign and media strategy and finding it effective in securing victory, particularly Blankenship-funded efforts); *supra* note 42.

As one long-time observer of state politics noted, candidate Benjamin's victory over incumbent Justice McGraw demonstrated that "[t]he old age of retail politics is gone . . . . Now, you can beat somebody [Warren McGraw] with nobody [Brent Benjamin]." See Nyden, *supra* note 42 (quoting West Virginia Wesleyan College political scientist Robert Rupp). Prior to running for the high court, Brent Benjamin was an apparently respected but concededly obscure defense lawyer in Charleston. It seems highly unlikely that he could have unseated an incumbent (in a state that swings between supporting Republicans and Democrats) without Blankenship's massive financial support.

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

45. See *Caperton*, 129 S. Ct. at 2257.

46. See *id.* at 2258; see also *Caperton*, 679 S.E.2d at 285-309 (full Benjamin opinion refusing disqualification).

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

48. *Caperton*, 679 S.E.2d at 285-309 (Benjamin, J., concurring).



impartiality could be reasonably questioned by a neutral, adequately informed observer.<sup>49</sup> Justice Benjamin persisted in asking the wrong question and then answering it to his satisfaction, conduct that might suggest more than a little unhealthy eagerness on his part to hear and decide the *Caperton v. Massey* controversy.<sup>50</sup>

The Benjamin refusal to recuse, however, also tacitly but indirectly addresses the actual operative standard for judicial recusal (whether the jurist's impartiality might be reasonably questioned)<sup>51</sup> and embraces the view that no reasonable lay observer could question the impartiality of a jurist about to hear a \$3 million campaign contributor's appeal of a \$50 million adverse judgment.<sup>52</sup> This is a little like saying that a company's major supplier receiving \$3 million in payments can be the neutral adjudicator of the company's appeal of a consumer's \$50 million verdict. Notwithstanding that Justice Benjamin's implicit perception of the objectively reasonable observer strains credulity, he forged ahead, apparently without shame, in participating in *Caperton v. Massey*.<sup>53</sup>

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.<sup>54</sup> The dissents found the majority's pro-Massey opinion, based on a forum selection clause and *res judicata*, to be "new law" at odds with prior court precedent, a convenient instance of law reform to assist Justice Benjamin's major benefactor.<sup>55</sup> The plot continued to thicken:

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49. See *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858-61 (1988) (addressing federal law which is congruent with ABA Model Judicial Code and state versions of ABA Code); accord *Liteky v. United States*, 510 U.S. 540, 543-46 (1994).

50. *Caperton*, 679 S.E.2d at 285-309 (Benjamin, J., concurring).

51. See 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT § 2.11 (2008). At the time Justice Benjamin wrote the opinion, West Virginia had in place a predecessor version of the ABA Model Judicial Code but one that used the same now-familiar "reasonable question as to impartiality" standard for determining disqualification.

52. *Caperton*, 679 S.E.2d at 292-309 (Benjamin, J., concurring) (addressing disqualification and due process).

53. *Id.* at 285-309.

54. The West Virginia high court's November 2007 decision was subsequently withdrawn and the state court's decision on the merits was *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, which has since been vacated by the U.S. Supreme Court.

55. The West Virginia court's rationale was first, 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." See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2258 (2009).

Caperton sought rehearing, and the parties moved for disqualification of three of the five justices who decided the appeal. 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. He noted that "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court."<sup>56</sup>

Justice Benjamin again refused to recuse and also rejected a third Caperton motion for disqualification.<sup>57</sup> In his capacity as acting chief justice, he was not only free to participate in rehearing but also replaced the recused justices.<sup>58</sup> In April 2008, the West Virginia Court again ruled 3-2 in Massey's favor, with Justice Benjamin again in the slim majority.<sup>59</sup> The two justices appointed to the case by Justice Benjamin split their votes.<sup>60</sup> Again, the two-justice dissent was strong, raising serious questions about the majority's rulings on the substantive law<sup>61</sup> and complaints about Justice

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56. *Id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See Caperton*, 129 S. Ct. at 2258-59 (noting dissent concerns); *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 284 (W. Va. 2008) (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."), *rev'd*, 129 S. Ct. 2252.

What distressed Justices Albright and Cookman was the Benjamin majority's ruling that the Caperton West Virginia claims were barred because of the prior Harman Mining litigation in Virginia against Wellmore. *See supra* note 29. 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 v. Massey* was argued, the controlling Virginia precedent on *res judicata* (which was applicable to a claim of preclusion based on prior Virginia litigation) purported to follow the same-law-facts-evidence test rather than the logical relationship test. *See, e.g.,* *Flora, Flora & Montague, Inc. v. Saunders*, 367 S.E.2d 493, 495-96 (Va. 1988); *Brown v. Haley*, 355 S.E.2d 563, 567 (Va. 1987); *Wright v. Castles*, 349 S.E.2d 125, 129 (Va. 1986); *Mowry v. City of Virginia Beach*, 93 S.E.2d 323 (Va. 1956); *see also* *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593-96 (7th Cir. 1989) (applying federal common law and using broad "same facts" and "same transaction" test; finding second lawsuit barred because it merely asserted different legal bases in lieu of legal arguments that had failed in first lawsuit); *RESTATEMENT (SECOND) OF JUDGMENTS* §§ 17-24 (1977); *STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT* 883-942 (2d ed. 2000).

Benjamin's refusal to recuse under West Virginia Judicial Code of Conduct Canon 3A and the Due Process Clause.<sup>62</sup>

Caperton successfully sought certiorari.<sup>63</sup> By this time, the case had become widely discussed in the media.<sup>64</sup> It was thoroughly briefed,<sup>65</sup> including amicus briefs from the American Bar Association (which

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Although one might take the broad approach of *Car Carriers* and similar cases and argue that the Caperton plaintiffs should be subject to res judicata because they had simply used two different legal theories to attack the same Massey conduct, first in Virginia and then in West Virginia, this seems to me an incorrect characterization. In the Virginia action, Harman Mining (not Hugh Caperton the individual) successfully proved breach of contract when Wellmore Coal failed to purchase promised quantities of Harman Mining's output. In the West Virginia action, Caperton and his companies (including Harman Mining) successfully demonstrated that Massey had done much more than merely arrange for a subsidiary to breach a contract with Harman Mining and had mounted a concerted fraudulent and illegal effort to drive the Caperton companies out of business or to force their sale to Massey or both. Most reasonable, unbiased courts would probably reject the res judicata approach that proved to be a winner for Massey with compromised Justice Benjamin casting the deciding vote.

The other successful ground in Massey's challenge to the \$50 million verdict was the assertion that an arbitration clause in a Wellmore-Harman Mining contract controlled and that Massey, which was not a party to that contract, had standing to successfully compel arbitration and that, even though this was a break from prior state law, the court's ruling deserved retroactive effect to vacate Caperton's victory. *See Caperton*, 679 S.E.2d at 252.

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 suggest that the West Virginia decision favoring Massey is problematic and open to criticism. This was 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.

62. *See Caperton*, 129 S. Ct. at 2259; *see also Caperton*, 679 S.E.2d at 280-81 (Albright & Cookman, JJ., dissenting) (mounting persuasive criticism of majority holding regarding forum selection).

63. *See Caperton*, 129 S. Ct. 2252, *cert. granted*, 77 U.S.L.W. 3292 (U.S. Nov. 1, 2008) (No. 08-22).

64. *See, e.g.*, Marcia Coyle, *High Court Review Sought on Judicial Recusals*, NAT'L L.J., Aug. 4, 2008, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202423489061>; 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>; Paul J. Nyden, *ABA, Groups Urge High Court to Grant Harman Appeal*, CHARLESTON GAZETTE, Aug. 5, 2008, at P1A, available at <http://sundaygazette.com/News/200808040628>; Editorial, *Too Generous*, N.Y. TIMES, Sept. 7, 2008, at 8, available at [http://www.nytimes.com/2008/09/07/opinion/07sun3.html?\\_r=1&or](http://www.nytimes.com/2008/09/07/opinion/07sun3.html?_r=1&or).

65. *See generally* Brief for Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (authored by counsel at prominent firms Berthold, Tiano & O'Dell (Charleston, W. Va.), Buchanan Ingersoll & Rooney, PC (Pittsburgh), Reed Smith LLP (Pittsburgh), and Gibson Dun & Crutcher LLP (Washington) (most notably former U.S. Solicitor General Theodore B. Olson)); Brief for Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (authored by counsel at prominent firms Offutt Nord, PLLC (Huntington, W. Va.), Hunton & Williams LLP (including Lewis F. Powell III), Mayer Brown LLP (most notably veteran Supreme Court advocates Andrew L. Frey and Evan M. Tager) as well as UCLA law professor Eugene Volokh).

supported Caperton)<sup>66</sup> and the National 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)<sup>67</sup> as well as fifteen other amici.<sup>68</sup> Although the Chief Justices'

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66. See Brief for American Bar Association as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252. (No. 08-22).

67. See Brief for Conference of Chief Justices as Amicus Curiae Supporting Neither Party at 4-5, *Caperton*, 129 S. Ct. 2252 (No. 08-22). The Chief Justices took that position that a judge may be constitutionally disqualified from presiding over a particular matter for reason other than actual bias or a financial interest in the outcome. These two categories alone are simply not broad enough 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.* (alterations in original) (footnotes omitted) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273, U.S. 510, 532 (1927)).

In particular, the Conference of Chief Justices suggested that the Court consider the following "[c]riteria 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 the supporter's prior political activities; nature of the supporter's pre-existing relationship with the judge; and relationship between the supporter and the litigant. *Id.* at 24-29.

The ABA amicus brief supported a similar use of similar factors. See ABA Brief, *supra* note 66, at 19-20 (including contribution size, importance, timing, and relationship of judge and supporter as factors). In addition, the ABA Brief noted former Justice Sandra Day O'Connor's strong concern over the issue. See *id.* at 6-7 (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.

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

68. Of the seventeen amicus briefs, ten expressly supported Caperton while five expressly supported Massey, with the Chief Justices' amicus brief not taking a position but articulating concerns and an approach that favored Caperton. The Louisiana Supreme Court brief supported neither party. See Brief for 27 Former Chief Justices and Justices as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (former Chief Justices C.C. Torbert (Ala.); David Newbern (Ark.); Norman Fletcher (Ga.); Charles McDevitt (Idaho); Byron Johnson (Idaho); Harry T. Lemon (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 for American Academy of Appellate Lawyers as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for American Association for Justice as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for American Bar Association as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for Center for Competitive Politics as Amicus Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research as Amici Curiae Supporting Petitioners,

brief stopped short of endorsing reversal,<sup>69</sup> it connotatively favored Caperton in that it listed as an important factor the magnitude of collective campaign support for a challenged judge.<sup>70</sup> Caperton's case was argued by former U.S. Solicitor General Theodore Olson<sup>71</sup> while Massey retained prominent Supreme Court advocate Andrew Frey.<sup>72</sup>

### III. THE SUPREME COURT: MASSIVE CAMPAIGN CONTRIBUTIONS IMPLICATE DUE PROCESS

In June 2009, the Court by a 5-4 majority sided with Caperton and vacated the West Virginia Supreme Court decision.<sup>73</sup> The U.S. Supreme 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

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*Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for Committee for Economic Development as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (Intel Corp.; Lockheed Martin Corp.; Pepsico; Wall-Mart Stores, Inc.; Defense Trial Counsel of Indiana; Illinois Ass'n of Defense Counsel; Transparency Int'l-USA); Brief for James Madison Center for Free Speech as Amicus Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for Justice at Stake et al. as Amici Curiae Supporting Petitioner, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for Law Professors Ronald R. Rotunda and Michael R. Dimino as Amici Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for National Association of Criminal Defense Lawyers as Amicus Curie Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for Public Citizen Litigation Group as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for Ten Current and Former Chief Justices as Amici Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (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.); Lundberg Stratton (Ohio); Craig T. Enoch (Tex.); Richard B. Sanders (Wash.)); Brief for the Brennan Center for Justice at NYU School of Law et al. as Amici Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah as Amici Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief for the Washington Appellate Lawyers Association as Amicus Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22); Brief of the Conference of Chief Justices, *supra* note 67 (supporting neither party but implicitly favoring Caperton).

69. See Brief of the Conference of Chief Justices, *supra* note 67, at 15-23.

70. See *supra* note 67.

71. See *supra* note 65.

72. See *supra* note 65.

73. See *Caperton*, 129 S. Ct. at 2267.

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.<sup>74</sup>

The Blankenship-Benjamin situation violated the Due Process Clause, according to the majority,<sup>75</sup> 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 implicating the finances of his sponsor Blankenship.<sup>76</sup> Reviewing the Court's due process-disqualification precedents,<sup>77</sup> 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.<sup>78</sup>

The majority reviewed the key precedents and concluded they supported recusal in *Caperton*.<sup>79</sup> It divided past Court precedent on due process disqualification into essentially three categories:

- (1) 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."<sup>80</sup> 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.<sup>81</sup>
- (2) Where the judge "had a financial interest in the outcome of a case, although the interest was less than what would have been considered

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74. See *id.* at 2263-64.

75. *Id.* at 2264.

76. *Id.* at 2264-65.

77. See *id.* at 2259-64.

78. See *id.* at 2264-65.

79. See *Caperton*, 129 S. Ct. at 2259-64 (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 Institute*, 333 U.S. 683 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927)).

80. See *id.*, 129 S. Ct. at 2259 (quoting THE FEDERALIST No. 10, at 59 (James Madison) (J. Cooke ed. 1961) and citing John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611-12 (1947)).

81. See *Tumey*, 273 U.S. at 525-35.

personal or direct at common law.”<sup>82</sup> This ground for due process disqualification has been quite firmly established since *Tumey v. Ohio*.<sup>83</sup>

(3) “[W]here a judge had no pecuniary interest in the case” but was challenged because of a conflict arising from his participation in an earlier proceeding.<sup>84</sup> This approach has been recognized since *In re Murchison* in 1955.<sup>85</sup>

Although the Court had not previously found due process to require recusal due to election campaign support,<sup>86</sup> the *Caperton* result is quite consistent with the first and second categories above, although the majority focused its attention on only the second category, finding campaign financial support not to be the type of direct pecuniary interest that made a jurist a “judge in his own case.”<sup>87</sup>

Regardless, the majority found that the Benjamin nonrecusal fell easily within the second category of recognized reasons for requiring recusal on due process grounds.<sup>88</sup> That is, “[t]he proper constitutional inquiry [was] „whether sitting on the case then before the [court] would offer a possible

82. See *Caperton*, 129 S. Ct. at 2259-60 (citing *Tumey* 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. The *Tumey* Court concluded that this presented the mayor with an unconstitutional conflict of interest. *Tumey*, 273 U.S. at 520.

83. See *id.* at 525-35.

84. See *Caperton*, 129 S. Ct. at 2261 (citing *In re Murchison*, 349 U.S. 133, and *Mayberry v. Pennsylvania*, 400 U.S. 455, as examples).

85. See *Murchison*, 349 U.S. at 137-38.

86. See *Caperton*, 129 S. Ct. at 2262.

87. Arguably, however, Justice Benjamin’s nonrecusal did violate this norm. Judges who are not reelected 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 reelection campaign if displeased with his protégée’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.

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 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. And for former government lawyers, ascension to the bench may be a net gain in compensation, especially if pension benefits and health insurance are considered.

88. See *Caperton*, 129 S. Ct. at 2263-64.

temptation to the average judge to . . . lead him not to hold the balance nice, clear, and true.”<sup>89</sup> 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 (\$3 million) benefactor would, of course, be tempted to be biased in favor of the benefactor and prejudiced against his litigation opponent.<sup>90</sup>

For similar reasons, Justice Benjamin was clearly disqualified under Canon 3(E) (1) of the West Virginia and ABA Codes of Judicial Conduct in that his impartiality was subject to reasonable question.<sup>91</sup> 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.<sup>92</sup>

Under the Judicial Code and § 455(a), the reviewing court asks whether the judge’s impartiality may be reasonably questioned.<sup>93</sup> 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.<sup>94</sup> At least this appears to be the *Caperton* majority’s approach.<sup>95</sup>

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 prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”<sup>96</sup>

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 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

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89. See *id.* at 2261 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Ward v. Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

90. *Id.* at 2264.

91. *Id.* at 2266.

92. *Id.* at 2267.

93. *Id.* at 2266.

94. See *Caperton*, 129 S. Ct. at 2263.

95. See *id.*

96. *Id.* (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 Institute*, 333 U.S. 683 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927)).



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.<sup>97</sup>

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 effect<sup>98</sup> and emphasized the particularities of the instant case:<sup>99</sup>

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 contributions that presents a potential for bias comparable to the circumstances in this case.<sup>100</sup>

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.<sup>101</sup> 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

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97. See *id.* at 2263-64.

98. The Court stated:

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 [*Ward v. ] Monroeville* [409 U.S. 57 (1972)] or [*In re*] *Murchison* [349 U.S. 133 (1955)] 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.

*Id.* at 2266; see also *id.* (noting that the trend in state judicial reforms has strengthened disqualification law, citing West Virginia Code of Judicial Conduct Canon 3E(1) and 28 U.S.C. § 455(a) (2008) as examples).

99. *Caperton*, 129 S. Ct. at 2265.

100. See *id.*

101. *Id.*

facts of the cases before it from those interests that would not rise to a constitutional level.”<sup>102</sup>

Despite the controversy it has appeared to generate, the majority’s decision is restrained in light of the amazing facts of the case. The majority labors to avoid labeling Justice Benjamin as biased or unethical,<sup>103</sup> although a reasonable person might find his unwillingness to step aside more than a little sinister.<sup>104</sup> He resisted recusal as a parent might protect a child.<sup>105</sup> At some point, one has the right to ask why. It would have been comparatively easy to appoint a substitute temporary justice in Justice Benjamin’s stead with no ties to either Caperton, Massey, or Blankenship. Even if there was a shortage of Cardozo and Brandeis-like judges in West Virginia or a shortage of judges viewed by Justice Benjamin as his equal, better to have the matter adjudicated by a Brand X average judge than by a tainted judge, no matter how brilliant and important Justice Benjamin may have regarded himself.<sup>106</sup>

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102. See *id.* at 2265-66 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-26 (1986); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971), *In re Murchison*, 349 U.S. 133, 137 (1955)).

103. See *id.* at 2259 (noting Justice Benjamin’s concurrence defending his conduct and decisions and quoting concurrence about purported evils of adopting a standard for disqualification based on appearances); *id.* at 2264 (noting Justice Benjamin’s observation in his concurrence that factors other than Blankenship support played role in 2004 state supreme court election); see *id.* at 2265 (noting that “Justice Benjamin did undertake an extensive search for actual bias” but correctly noting that such inquiry “is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be proved”); see also *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 292-99 (W. Va. 2008) (Benjamin, J., concurring) (defending his decision to participate in the case and state supreme court’s decision on the merits), *rev’d*, 129 S. Ct. 2252.

104. See *Caperton*, 129 S. Ct. at 2258.

105. See *Caperton*, 679 S.E.2d at 292-95 (Benjamin, J., concurring) (defending decision not to disqualify in defensive tone; failing to apply proper standard; displaying umbrage that Caperton has moved for recusal); see, e.g., *id.* at 292-93 (“Indeed, neither the Dissenting opinion nor the Appellees herein point to any actual conduct or activity on my part which could be termed ‘improper.’ Rather, both the Dissenting opinion and the Appellees focus on appearances—some generated by the media, some generated by a recused member of this Court with a history of verbal discourtesies toward Appellant Massey, and some generated herein by Appellees, themselves.”); *id.* 293-94 (regarding “actual justice” as the “measure of fairness” and seemingly ignoring longstanding jurisprudence counseling that judicial proceedings must also have appearance of fairness and justice); *id.* at 296-97 (invoking “duty to sit” doctrine that was removed from ABA Model Judicial Code in 1972 and from federal recusal statute in 1974); see also Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 KAN. L. REV. 531, 545-550 (2005); Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 835-51, 863-68 (2009); Jeffrey W. Stempel, *Rehnquist, Recusal & Reform*, 53 BROOK. L. REV. 589, 604-32 (1987).

106. See *Caperton*, 679 S.E.2d at 306 (Benjamin, J., concurring).

In many cases, including this one, publicity adverse to the judge or justice is a virtual certainty no matter what decision he or she makes. In such cases, judges insufficiently attuned to their judicial responsibilities might readily welcome a baseless request for

In addition, the 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:<sup>107</sup>

“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.<sup>108</sup>

Further, in announcing its campaign supporting the recusal position, the Court greatly emphasized whether a case was “pending” or “imminent” at the time an interested party supported the judge under scrutiny.<sup>109</sup> It appears, for example, that Justice Benjamin’s recusal might not have been

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disqualification as an escape from a difficult case—particularly in a state which selects its judges in partisan elections. The public is legitimately entitled to more—they are entitled to judicial integrity and courage. To surrender to such recusal temptations would justly expose the judiciary to public contempt. It is the obligation of officers of the court system to ensure that professionalism, not partisanship, guides their actions and that cases are decided on the basis of the law, not in spite of it.

*Id.*

Justice Benjamin’s supposed victimhood and self-imposed martyrdom would be comical were it not such a threat to judicial neutrality and fair adjudication. Instead of admitting that his receipt of \$3 million of assistance from a litigant raises serious questions regarding his ability to sit on a case, he casts himself as a supposed profile in courage resisting unfair attacks so that he can provide “judicial integrity.” Justice Benjamin is a man of unbridled ego (and limited legal acumen; he consistently misstates basic state recusal law in his concurrence) or one far too eager to make sure he casts a vote in a matter important to heavy campaign contributor Don Blankenship.

107. See *Caperton*, 129 S. Ct. at 2267.

108. *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)). 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 non-constitutional disqualification motions also 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. A full airing of the distinctions and the *Caperton* majority’s articulation of them lies beyond the scope of this Article. But see Jeffrey W. Stempel, Clarifying Common Sense: *Caperton v. Massey* and the Right Standard for Constitutional Judicial Recusal (unpublished manuscript, on file with the author) (arguing that the Court should clearly embrace reasonable question as to impartiality as touchstone for due process inquiry and avoid “floodgates” problem prophesized by Roberts’s dissent through judicious restraint in granting certiorari in failure-to-recuse cases).

109. See *Caperton*, 129 S. Ct. at 2264-65.

required had *Caperton* commenced after his election,<sup>110</sup> 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.<sup>111</sup> Further, Blankenship would have had just as much potential to extract vengeance had he become displeased with Justice Benjamin. A benefactor wealthy enough to provide \$3 million presumably has the power to provide a similar support to a future opponent thought more hospitable to his or her company's interests.

#### IV. OPERATIONALIZING JUDICIAL IMPARTIALITY: TENTATIVE ANSWERS TO JUSTICE ROBERTS'S FORTY QUESTIONS

Notwithstanding its rather restrained approach to the problem of when failures of judicial disqualification violate due process,<sup>112</sup> the *Caperton* holding divided the Court, engendering dissents by Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito).<sup>113</sup> As noted above, the dissenters appear to have a dramatically different view of human nature and the risk that a judge will be influenced by massive political and economic support by a litigant appearing before the judge.<sup>114</sup> Largely, however, the Roberts dissent attacks the majority approach as too indeterminant and unpredictable, which the dissent contends to be a sufficient problem to auger in favor of refusing to intervene in state court disqualification decisions of this type, no matter how bad it may look to the reasonable observer.<sup>115</sup>

In his dissent, Chief Justice Roberts outlines a long series of particular questions.<sup>116</sup> Notwithstanding the important line-drawing point at the center of the dissent, it appears that all of these forty questions can be adequately addressed. Although precise lines cannot be drawn in the absence of concrete cases, a series of presumptive guidelines suggest themselves for application of due process disqualification. Future courts are unlikely to be excessively burdened by the *Caperton* inquiry, just as the justice system was never unduly disrupted by prior judicial disqualification

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110. *Id.*

111. *Id.*

112. *Id.* at 2265-66.

113. *Id.* at 2267.

114. *Id.*

115. *Caperton*, 129 S. Ct. at 2267, 2269.

116. *Id.* at 2269-72.

and due process precedents.<sup>117</sup> Following is a question-by-question assessment of Justice Roberts's concerns.

1. How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"?<sup>118</sup>

In general, the question of how much money is too much money is a relative one that depends on the proportion of a judicial candidate's economic support that is provided by a litigant (or in some cases a lawyer). For example, \$50,000 spent distributing supportive campaign literature is probably, in the absence of other factors, insufficient to require recusal when the judge's campaign raised or received \$3 million. But if the collective tab for the judge's campaign was \$250,000, then \$50,000 of support has to be disqualifying under any common sense notion of human nature. As both the ABA and Conference of Chief Justices amicus briefs observed, proportionality matters.<sup>119</sup> Where a particular person, entity, or alliance provides more than five to ten percent or more of campaign spending, reasonable people get concerned.<sup>120</sup>

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117. In its entire history, the U.S. Supreme Court appears to have issued, by my count, seven opinions dealing at any length with disqualification of a judge on due process grounds, beginning with *Tumey v. Ohio*, 273 U.S. 510 (1927). Although other readers may have a broader view of what constitutes a "due process recusal" opinion, a fair observer would have trouble finding more than a dozen or so such opinions since *Tumey*. Thus, in the nearly sixty years that the Court has been dealing with judicial disqualification and due process, it had decided and average or one or perhaps two such cases per decade, hardly a crushing contribution to the Court's workload.

In addition, judicial recusal cases based on perceived lack of impartiality under 28 U.S.C. §455(a) are relatively rare at the federal appellate level. For example, in the Ninth Circuit during 2008, there appear to have been only five such cases responsive to the LexisNexis search "date is 2008 and court (ninth circuit) and reasonabl! w/9 question! or concern w/9 impartial!" In the Fourth Circuit (home of perhaps ethically challenged West Virginia), there were four such cases in 2008. A five-year look at the Ninth Circuit (2004-2008), the nation's largest circuit, produced only twenty-eight cases, or fewer than six per year on average. By any reasonable estimation, it does not appear that judicial disqualification cases—even those involving the lower statutory standard rather than *Caperton*'s "probability of bias" standard—are a significant burden on the courts.

118. *Caperton*, 129 S. Ct. at 2269. Each question presented in this Article's seriatim list is directly quoted from the Roberts dissent.

119. See *supra* note 67 (discussing ABA and Conference of Chief Justices amicus briefs).

120. A standards tenant of law firm economics and that of other businesses is that it is dangerous to have more than ten percent of the firm billings come from a single client or client family. See Ed Poll, *LawBiz Coach's Corner*, MICH. LAW. WKLY., Dec. 29, 2008 ("When any one client represents more than 10 percent of business, the firm is at risk."); Patricia Sabatini, *New Buchanan CEO Fights Rumors: Former COO Vankirk Says Law Firm Not in Turmoil But Strong and Intent on Growth*, PITTSBURGH POST-GAZETTE, Oct. 1, 2003, at C-1 (head of prominent large firm Buchanan Ingersoll, one of the law firms representing *Caperton*, taking pride that no one client of the firm "represents more than 5 to 6 percent of our total overall business. So the loss of any one client is not detrimental to the firm in any significant way."); see also Christine Hurt,

Although the how-much-is-too-much inquiry is primarily a relative one, at some point really huge financial support logically becomes disqualifying no matter how large the arena of the judicial electoral battle. For example, a judge should not be able to decide a case involving a litigant who gave \$1 million in campaign support even if the judge's total campaign budget was \$20 million. One million dollars is simply too large an amount of money to fail to cloud the mind of the beneficiary.<sup>121</sup> More practically, and with reference to the law of recusal, a judge's participation where he has received \$1 million will look horrible to the general public no matter how expensive the campaign was as a whole.<sup>122</sup>

In addressing the how-much-is-too-much question, the judicial system must also face the question of determining which acts of campaign support will be considered to be the work of a single donor or supporter. Logically, allied individuals or entities must be considered as a whole if they are simultaneously interested in pending litigation. For example, all contributions of a law firm should be aggregated, as should the contributions of affiliated corporate companies or those with common economic ownership. Although more controversial, it would be wise to consider trade groups or political associations as subject to the same rule. For example, when several liberal political groups give an aggregate of \$100,000, the receiving judge should in most cases probably not sit on a case involving an issue on which these groups have a position.

In addition, individual and associational giving must be assessed together. For example, if an advocacy group that spends \$300,000 on a

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*Counselor, Gatekeeper, Shareholder, Thief: Why Attorney's Should Not Invest in Clients*, 64 OHIO ST. L.J. 897, 897 (2003) (arguing that where attorneys are compensated through any equity interest in clients, independent professional judgment is compromised). Firms dependent on any single client or cohesive group of clients risk losing considerable business at once, with immediate negative consequences that are hard to combat. By contrast, if the firm is not so dependent, clients may come and go without severe economic impact. A well-diversified firm is thought consequently less likely to bend to unreasonable client or customer pressures. For example, in some of the shocking business collapses of the recent past, the law firms or accounting firms serving the businesses that violated the law and failed were unduly dependent (at least at the regional office or billing partner level), which may have made the outside professionals less vigilant in policing their clients. See generally JOHN C. COFFEE, JR., GATEKEEPER: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006); ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapaport & Bala G. Dharan eds., 2004); BARBARA LEE TOFFLER & JENNIFER REINGOLD, FINAL ACCOUNTING: AMBITION, GREED AND THE FALL OF ARTHUR ANDERSEN (2003) (former Arthur Andersen executive discussing firm's undue dependence on Enron and culture of maximizing profits that impeded professional judgment).

121. See Mauro, *supra* note 42 (noting public opinion survey in which majority of respondents had concerns over impartiality of judge receiving \$50,000 campaign support from a litigant or affiliated party).

122. See 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007) (general standard for recusal is whether judge's impartiality can be reasonably questioned).

judicial campaign receives eighty percent of these funds from an interested lawyer or business owner, the judge benefited should not preside over cases involving the lawyer or business owner.

Further, no distinction should be drawn between campaign contributions to a judge's official campaign and financial support for advocacy groups aiding the judge's campaign. As *Caperton* itself shows, money need not go directly to the judge's official campaign to have a powerful impact on the campaign.<sup>123</sup>

In addition, non-monetary contributions to a judicial campaign must be viewed in the same manner as monetary support.<sup>124</sup> For example, if a labor union provides 1000 election workers to a judicial candidate, the rough fair market value of this support must be calculated and applied in determining whether the judge should recuse in cases involving the labor union or closely implicating its fortunes.<sup>125</sup>

2. How do we determine whether a given expenditure is "disproportionate"? Disproportionate to *what*?<sup>126</sup>

The answer again is normally a relativistic inquiry<sup>127</sup>—but the standard is the now-familiar one of whether a judge's impartiality can be reasonably questioned due to receipt of campaign support.<sup>128</sup> Support to the judicial candidate is disproportionate where it comprises a high enough percentage of total support that it would, to a reasonable lay observer, appear that the judge benefiting from such an amount of financial support, cannot be neutral regarding the benefactor.<sup>129</sup>

123. See *Caperton*, 129 S. Ct. at 2257 (explaining that of the \$3 million dollars injected into the supreme court election by Don Blankenship, only \$1000 (.0001%) went directly to the Benjamin campaign but other funds were effectively used to support Benjamin's candidacy through independent expenditures and contributions to "And for the Sake of the Kids," a group focused on defeating Benjamin's opponent).

124. See 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4).

125. The ABA Model Code appears to recognize this by defining "aggregate" contributions within the meaning of Rule 2.11 (the disqualification provision) as "not only contributions in case or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent." A contribution is defined as "both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure." See MODEL CODE OF JUDICIAL CONDUCT Terminology.

126. *Caperton*, 129 S. Ct. at 2269.

127. *Id.* at 2263-64.

128. See 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4).

129. The test flows logically from 28 U.S.C. §455(a) and ABA Model Code of Judicial Conduct Rule 2.11, both of which provide for disqualification when laypersons might have reasonable question as to a judge's impartiality. Applied to campaign spending, this means that if

3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?<sup>130</sup>

Yes and yes. In modern electoral politics, judicial or otherwise, so-called "independent" expenditures assisting candidates may be as important as direct campaign contributions, sometimes more important.<sup>131</sup> Without the "Swift Boat Veterans" advertisements attacking John Kerry at a key juncture of the 2004 presidential campaign, there might have been no second George W. Bush term.<sup>132</sup> Financial assistance so significant could logically create gratitude toward a group that supported the winning judge as well as fear that the judge may face retaliation in the future if she strays from the group's preferences.

4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?<sup>133</sup>

Generally no. Whether the benefactor/litigant has curried favor with other judges is irrelevant to the instant recusal question,<sup>134</sup> which should ask whether a benefactor contributed enough electoral support to a particular candidate to create a probability of bias from the perspective of the

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a reasonable layperson finds a particular campaign contribution to threaten impartiality, acceptance of the contribution requires disqualification.

130. *Caperton*, 129 S. Ct. at 2269.

131. See, e.g., Maxwell Glen, *How to Get Around The Campaign Spending Limits*, 11 NAT'L J. 1044, 1044 (1979); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1632, nn. 28-29 (1999); Joshua L. Shapiro, *Corporate Media Power, Corruption, and the Media Exemption*, 55 EMORY L.J. 161, 169 n.45 (2006); Linda Greenhouse, *Unlimited Independent Spending in Politics Passes High Court Test*, N.Y. TIMES, Jan. 20, 1982, at A1; Morton Mintz, *Defeat of PAC Restraints Could Cost Democrats the House in 1982*, WASH. POST, Dec. 25, 1980, at A2 (noting potential importance of expenditures from sources other than candidate-operated official campaign). The ABA Model Code appears to recognize this with its broad definitions of "contribution" and "aggregate." See *supra* note 125.

132. See Albert L. May, *Swift Boat Vets in 2004: Press Coverage of an Independent Campaign*, 4 FIRST AMENDMENT L. REV. 66, 66-68 (2005); Jay S. Goodman, *No Excuses: Confessions of a Serial Campaigner*, By Robert Shrum, 56 R.I. B. J. 37, 39-40 (2008) (book review) (discussing the Kerry-Edwards campaign, political science professor and attorney notes importance of Swift Boat attack ads and fact that Kerry and his campaign manager, Bob Shrum, were "most criticized" for slow, ineffective response that many saw as permitting George W. Bush to gain upper hand in 2004 contest).

133. *Caperton*, 129 S. Ct. at 2269.

134. See 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007).



reasonable outside observer.<sup>135</sup> In other words, a judge should ask whether campaign assistance that has been received suggests a sufficient risk of unfairness to violate due process.<sup>136</sup>

In answering this question, a donor's support to other judges is irrelevant. A reasonable member of the lay public is unlikely to view \$3 million in Blankenship support for Justice Benjamin<sup>137</sup> as the harmless activity of a rich eccentric interested in the courts simply because "Blankenship dumps tons of money on all the judges."<sup>138</sup> More likely, the lay public will be concerned that Blankenship is a calculating businessperson seeking to curry inordinate favor with all judges, including Justice Benjamin.

5. Does the amount at issue in the case matter? What if this case were an employment dispute with only \$10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?<sup>139</sup>

Where the case at bar is highly unlikely to be of great significance to a contributor/litigant, this augers in favor of less concern but does not automatically counsel rejection of a recusal motion.<sup>140</sup> Recusal would not seem to be required, for example, in a small workers' compensation claim where the contributor/litigant's insurance will cover any resulting liability for claimants' workplace injury and the litigants' future premium payments are unlikely to increase significantly due to an adverse decision.<sup>141</sup> Unless the case presents important legal issues likely to have ramifications in a significant number of future matters that cumulatively have importance to the contributor/litigant, recusal would not appear to be required (e.g., whether to restrict the intentional misconduct defense to coverage, a defense available to employers in most states).<sup>142</sup>

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135. See 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4).

136. *Caperton*, 129 S. Ct. at 2260.

137. See *id.* at 2257 (describing Blankenship's financial aid to Justice Benjamin).

138. *Id.* at 2274.

139. *Id.* at 2269.

140. See 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4).

141. In most states, workers compensation coverage is required and the employer purchases insurance that provides 100% coverage of disputing costs and payments due injured workers. Although the employer of course pays a premium for this coverage (or puts aside self-insurance contributions), this has ordinarily been done well before a claim arises. See JACK A. HOOD ET AL., *WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS* 26 (3d ed. 1999); JOSEPH W. LITTLE ET AL., *CASES AND MATERIALS ON WORKERS' COMPENSATION* 56 (5th ed. 2004). A small case is therefore unlikely to have much impact on the company's financial health.

142. See HOOD ET AL., *supra* note 141, at 70; LITTLE ET AL., *supra* note 141, at 212.

A similar analysis applies to equitable relief such as an injunction. If the relief sought is limited in scope and unlikely to have precedential effect, recusal should ordinarily not be required.<sup>143</sup> For example, the relief sought may be reinstatement of a fired janitor or injured worker.<sup>144</sup> But where the injunction compliance would be expensive or significantly impinge upon the prerogatives of the contributor/litigant (such as an injunction to change workplace policies on hiring and firing), recusal would seem required.<sup>145</sup>

6. Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?<sup>146</sup>

No. Judges at all levels need to be held to the same standard of neutrality.<sup>147</sup> The availability of appellate review is an important quality control mechanism but it does not support lowered standards of judicial impartiality for lower courts.<sup>148</sup> Similarly, the smaller number of high court judges does not justify a lax attitude toward judicial neutrality,<sup>149</sup> although

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143. In cases where the case is relatively inconsequential both as to precedential value and the scope of relief, a reasonable lay observer is less likely to view the presiding judge's decision as animated by efforts to please a campaign contributor. However, if such cases occur with some frequency, they may cumulatively have the importance to a benefactor that would raise reasonable questions about the judge's impartiality, particularly if the judge consistently favors the litigant with ties to a campaign benefactor.

144. See MACK A. PLAYER ET AL., *EMPLOYMENT DISCRIMINATION LAW* 743-44 (2d ed. 1995) (discussing remedies for job discrimination); MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 658 (5th ed. 2000) (discussing job discrimination remedies).

145. For example, an employment discrimination suit could see dramatic change in a company's hiring, promotion, or payment practices. See HAROLD R. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* §§ 2.30-2.34 (2001); ZIMMER ET AL., *supra* note 144, at 658; see, e.g., *Ricci v. DeStano*, 129 S. Ct. 2658, 2681 (2009) (accepting certain employees' challenge to defendant's decision to cease use of testing with racially disparate impact in high profile case reviewing Second Circuit decision that included Supreme Court nominee Judge Sonia Sotomayor on the panel; case outcome determines testing and promotion practices of fire department).

146. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2269 (2009).

147. See 28 U.S.C. § 455(a) (2006) (specifically speaking of justices as well as judges, regarding recusal as applicable to judges at all levels of the judicial hierarchy); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007).

148. Even Justice Benjamin, whose attitude towards judicial recusal is problematic, appeared to operate from the premise that the rules of recusal are the same for judges at all levels. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 294-309 (W. Va. 2008), *rev'd*, 129 S. Ct. 2252 (2009).

149. If anything, the relative prominence of the Justices as a small group of famous jurists counsels in favor of holding them to heightened standards of judicial impartiality. In addition, the small size of the group makes policing of disqualification issues and motions relatively easier than it would be with larger judicial bodies.

it can be argued that there should be more reluctance to recuse at the supreme court level, particularly for an elected bench, on the ground that some voters may make their candidate choices based on the overall makeup of the court. U.S. Supreme Court Justices have themselves made the slow-to-recuse-due-to-scarcity argument because of the absence of a mechanism for replacing a disqualified Justice.<sup>150</sup> The argument is not particularly convincing.<sup>151</sup> Further, many state supreme courts are considerably more advanced on this point and have a methodology for appointing a replacement for any disqualified justice.<sup>152</sup>

7. How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?<sup>153</sup>

A reasonable but rebuttable presumption is that once established, lack of impartiality toward a contributor/litigant lasts at least through a winning judicial candidate's term of office, regardless of whether the judge plans to seek reelection. The notion that bias or prejudice has a short shelf life is, insofar as I can determine, without empirical support. Although tempers may cool, real allegiance or opposition to a litigant or counsel is likely to be long-lived. However, the entry of a new election cycle may change political and personal allegiance. For example, if Justice Benjamin had ruled for Caperton in the West Virginia action, Blankenship might throw his support to Benjamin's opponent in the next election. Although this eliminates the problem of Benjamin being in Blankenship's pocket, it could easily create a countervailing ground for recusal based on judicial prejudice against a key political opponent.

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150. See Press Release, U.S. Supreme Court, Statement of Recusal Policy (Nov. 1, 1993) (signed by Chief Justice Rehnquist and Justices Stevens, Scalia, Thomas, O'Connor, Kennedy and Ginsburg), reprinted in STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 724-25 (2009).

151. See Stempel, *Chief William's Ghost*, *supra* note 105, and text accompanying notes 276-84.

152. But not enough, according to knowledgeable commentators. See Goldberg et al., *The Best Defense*, *supra* note 42, at 503; see also RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION §§ 28.1-28.52 (2d ed. 2007) (reviewing state practices in this and other regards).

153. *Caperton*, 129 S. Ct. at 2269.

8. What if the “disproportionately” large expenditure is made by an industry association, trade union, physicians’ group, or the plaintiffs’ bar? Must the judge recuse in all cases that affect the association’s interest? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?<sup>154</sup>

Here, the reasonable but rebuttable presumption is that the recusal rules should be, insofar as possible, the same for interest groups and individuals.<sup>155</sup> In most cases, this will mean that where interest group electoral support is sufficient to reach the recusal threshold that would obtain for an individual person or entity, recusal is apt in cases that sufficiently directly implicate the interest group’s legal agenda.<sup>156</sup>

For example, if a “Medical Malpractice Tort Reform” group of physicians or insurers accounted for twenty percent of a judge’s electoral support, the judge should not be involved in cases concerning the constitutionality of damage caps or other medical malpractice legislation. A closer, more fact-dependent question would involve the judge sitting on a case in which a doctor, hospital, or insurer argues that a plaintiff’s award was excessive or unconstitutionally large.

There would, however, ordinarily be no problem if the judge participated in a case where the issue was whether malpractice had occurred and whether the damages awarded or sought were within the acceptable

154. *Id.*

155. See 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007).

156. The ABA Model Judicial Code appears not to go this far. Rule 2.11(A)(4) provides for recusal where

[t]he 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].

MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4). The term aggregate is defined as “not only contributions in case or in kind made directly to a candidate’s campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate’s opponent.” *Id.* Terminology.

A contribution is defined as “both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure.” *Id.* R. 2.11(A)(4).

The Model Code provision appears to be flawed in that it focuses only on lawyers or parties in an instant case rather than larger political forces that might unduly influence or corrupt a judge, although its definitions cast a wide net in defining campaign support as both direct monetary contributions and indirect aid, including non-monetary assistance in kind. The ABA Model Code also appears unduly receptive to the notion that the passage of time alone may erase what were once biasing behaviors of those supporting a judicial candidate or judge.

range for such cases. The judge's perceived interest in medical malpractice tort reform does not, without more, translate into hostility toward each individual malpractice claim. If a case does not involve the issue that animated interest group support for the judge, participation in the case would appear to be appropriate.

9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received "disproportionate" support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are "tough on crime," must the judge recuse in all criminal cases?<sup>157</sup>

The obvious answer to the ridiculous "tough on crime" question is no. A judge who vows to give vigorous enforcement to the criminal law, including severe sentences within the bounds of the law, has not embraced the view that the prosecution is always right or that all defendants are guilty. The "tough on crime" judge can sit on criminal cases unless she has made statements suggesting she cannot be impartial in individual cases.<sup>158</sup> But disqualification here would not be because of campaign support.

In addition, because professing to be tough on crime has become de rigour in judicial campaigns, disqualification on this basis would risk breaching the "rule of necessity," which holds that where all judges are subject to the asserted ground for recusal, the judge cannot be disqualified on a ground that would effectively make the case non-justiciable due to an absence of non-recused judges capable of hearing the matter.<sup>159</sup> For example, a judge is not disqualified from presiding over a tax dispute due to the judge's status as a taxpayer (at least we hope all judges pay their taxes).<sup>160</sup>

The abortion rights interest group question is tougher but soluble. A judge with a sufficiently large, recusal-triggering amount of electoral support from either a pro-choice or pro-life group should not sit on cases involving the legality of abortion laws or the conduct of abortion providers or activists. There is too much risk that interest group support of such magnitude strips the court of the appearance of impartiality.

In contrast to the tough-on-crime judge, the abortion judge presumably receives support because the respective interest groups effectively know

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157. *Caperton*, 129 S. Ct. at 2269.

158. See FLAMM, *supra* note 152, § 16.10.

159. See *id.* § 20.2.

160. See *id.*

how that judge will vote on the issue. Even if the judge's abortion views were formed prior to receiving support, the fact that the judge's views are sufficiently well-known that interest groups view it as a pre-commitment to a particular result should require recusal where the interest group support is of sufficient magnitude.<sup>161</sup>

At the risk of exposing myself to the dissenters' indeterminacy critique, the issue of what magnitude of interest group aid requires recusal should be decided based on the amount and proportionality criteria outlined above.<sup>162</sup> Although this is to a large extent a totality of the circumstances test to be assessed on a case-by-case basis, this can be done without sinking courts into a logistical morass.<sup>163</sup> In most cases, it will be clear whether the judge under review owes too much to an interest group. Proportionately modest support from an interest group ordinarily poses no danger of probable bias.<sup>164</sup> But where a judge receives substantial funding or in-kind assistance from such a group, reasonable observers would presume bias (or at least greatly fear it), a situation that should require disqualification.<sup>165</sup>

10. What if the candidate draws "disproportionate" support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?<sup>166</sup>

The answer here should turn to a large degree on whether the support is *de facto* or *de jure*. Where Judge X merely enjoyed substantial support from members of a given racial group, Judge X is not disqualified from hearing cases important to the group. Where, however, Judge X received a triggering amount of electoral support from an organized racial, religious,

161. See 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(5).

162. See *supra* text accompanying note 118-29 (discussing basic recusal criteria focusing on absolutely large amount of campaign support and relative proportionality of a litigant's campaign support in relation to campaign as a whole).

163. A substantial body of scholarship supports "judicial minimalism" and cautions against sweeping decisions, pronouncements, and broad rulings separated from specific case facts. See CASS R. SUNSTEIN, JUDICIAL MINIMALISM ON THE SUPREME COURT ix-x, 3-4, 262-63 (1990); Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 7, 101 (1996).

164. This is the implicit rationale of campaign spending regulations in general. Federal and state laws regulating campaign spending set an absolute ceiling on individual contributions to a campaign out a fear that larger contributions may be corrupting or at least impair public confidence. However, any contribution below the ceiling is considered proper and legal without the need to inquire whether a particular judge could be swayed by the contribution. By operating in this manner, campaign spending laws implicitly accept the view that small contributions are insufficiently corrupting but that at some point, larger expenditures and campaign support likely undermine a recipient's ability to be impartial.

165. See *supra* note 120 and accompanying text.

166. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2269 (2009).

or ethnic interest group, Judge X should not preside over cases implicating serious concerns of the group. For example, where Judge X received twenty-five percent of his overall campaign support from "Hispanics for Workers Rights," he probably should not sit on a job discrimination case brought by a Latina plaintiff.

11. What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court's analysis apply if the supporter "chooses the judge" not in *his* case, but in someone else's?<sup>167</sup>

Where the case is sufficiently linked to the interests of an electoral supporter on whose cases the judge could not preside under *Caperton*,<sup>168</sup> neither should the judge preside over the related or potentially influential case. The same reasoning logically applies to clever indirect judge-buying efforts that wealthy litigants may pursue in the wake of *Caperton*. For example, just as the Blankenship sponsorship of Justice Benjamin required recusal in *Caperton*,<sup>169</sup> neither should the Blankenships of the world be able to procure a compliant judge in a case that is likely to set a controlling precedent on a case directly implicating Blankenship interests.<sup>170</sup>

12. What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome (e.g., a facial challenge to an agency rulemaking or a suit seeking to limit an agency's jurisdiction)?<sup>171</sup>

In this situation, recusal on *Caperton* grounds would appear required.<sup>172</sup> For example, instead of challenging Hugh Caperton's judgment against Massey Coal Co., Don Blankenship could have been heavily funding a judge whom he expected to rule favorably concerning an administrative determination that would effectively undo the *Caperton*

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167. *Id.* at 2270.

168. *Id.* at 2264.

169. *Id.* at 2265.

170. The Supreme Court has itself essentially taken this view in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986), when it found a due process violation when an Alabama justice participated in a case that could set useful precedent for his own bad faith lawsuit against an insurer.

171. *Caperton*, 129 S. Ct. at 2270 (italics omitted).

172. See *supra* text accompanying notes 139-45 (discussing required recusal where a case seeks injunctive relief that could have an important impact on an entity that has given substantial campaign support to a judge).

judgment. Recusal would be apt even in this less direct context because the same concerns about judicial impartiality and public perception would remain.

13. Must the judge's vote be outcome determinative in order for his non-recusal to constitute a due process violation?<sup>173</sup>

No. The mere participation of a tainted judge requires vacating the decision, even if the decision was not a cliffhanger.<sup>174</sup> There is no way of unwinding whatever prejudice may have been introduced to the deliberative process by a judge improperly favoring a litigant.<sup>175</sup> Similarly, if the term "outcome determinative" refers to the dispositive or non-dispositive decisions by the challenged judge, the answer remains no.<sup>176</sup>

173. *Caperton*, 129 S. Ct. at 2270.

174. When it was discovered that Second Circuit judge Martin Manton had taken bribes, all decisions in which Manton had participated were re-examined but not vacated. According to one well-known law professor, Manton's opinions, at least in the cases where he had not taken a bribe, were well crafted. See Alan Dershowitz, *Legal Ethics and the Constitution*, 34 HOFSTRA L. REV. 747, 761 (2006). Nonetheless, the entire Court was properly embarrassed by the Manton episode, so much so that Judge Learned Hand purportedly told his law clerks never to cite an opinion where Manton had provided the deciding vote as precedent. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 513 (1994); Mark V. Tushnet, *Book Review, Clarence Thomas: The Constitutional Problems*, 63 GEO. WASH. L. REV. 466, 477 (1995) (stating that "[i]t is part of the lore of the Second Circuit that one should not cite cases in which Manton's was the deciding vote" and contending that U.S. Supreme Court decisions where Justice Clarence Thomas provides the deciding vote are not legitimate precedent because Thomas purportedly committed perjury during confirmation hearings).

Manton's conviction was affirmed by a panel of judges who had never served with Manton: Supreme Court Justices Harlan Fiske Stone (former dean of Columbia Law School) and George Sutherland, along with new Second Circuit judge and former Yale Law School dean Charles Clark. See *United States v. Manton*, 107 F.2d 834, 843-44 (2d Cir. 1939); see also JOSEPH BORKIN, *THE CORRUPT JUDGE* 53-79 (1962) (detailing the Manton saga).

Perhaps in retrospect, a more aggressive approach should have been taken regarding the disgraced Manton's footprint on cases. But this would have been a massive undertaking and it was clear that he accepted bribes on only a relatively small number of cases (although his sentence of a \$10,000 fine and two years in prison was disgustingly light in relation to his crime). By contrast, where a judge fails to recuse himself due to substantial campaign support from an interested party, this presumably will implicate only one or at most a few cases. Adjudicating these cases anew will not pose anything like the problem presented by the Manton scandal.

175. This is the approach taken by the courts when it is discovered that a juror has tainted the deliberation process. Ordinarily, a new trial is required even in those situations where the jury vote was lopsided. W. Dudley McCarter, *The Right to a Fair Jury Trial—Not a Perfect One*, 53 J. MO. B. 170, 171 n.21 (1997). The rationale for this approach is that the actions of the tainted or improperly acting juror may have been so effective that the jury vote was not close. A fiction portrayal of this type of situation is found in John Grisham's *The Runaway Jury* (1996) and the movie made of Grisham's book. The biased juror (John Cusack in the movie) was so effective that the jury rendered a unanimous decision in favor of the juror's preferred party in the lawsuit.

176. See *infra* text accompanying notes 229-32.



14. Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law?<sup>177</sup>

Just as it is hard to put the metaphorical genie back in the bottle or to un-ring a bell, it is extremely difficult to determine whether a case presided over by a tainted judge would have had the same outcome if there had been a neutral judge at the helm. As a general rule, the improper involvement of a disqualified judge should require adjudication on a clean slate.<sup>178</sup> However, in comparatively rare cases where the litigation is expensive or lengthy and the record confidently suggests that the outcome would have been the same with a neutral judge, a court hearing a *Caperton* due process challenge should be able to invoke the doctrine of harmless error.<sup>179</sup>

15. What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no “debt of gratitude” to the supporter? Does that “moot” the due process claim?<sup>180</sup>

For the same reasons as stated in response to Question 14, affirmance on the merits by a “clean” panel will generally not prevent a successful *Caperton* challenge.<sup>181</sup> A trial judge’s potential influence on a case’s outcome is enormous and often so subtle as to escape meaningful appellate review.<sup>182</sup> If the trial judge should have been disqualified, it is usually too difficult to be confident that notwithstanding his or her taint, the judge clearly reached the right result. An untainted appellate panel will always be influenced by the record below, which is the product of the tainted trial judge.

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177. *Caperton*, 129 S. Ct. at 2270.

178. See *supra* text accompanying notes 174-76 (noting that recusal is required even where the tainted judge was not the deciding vote).

179. See FED. R. CIV. P. 61 (stating that no error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice; the court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties).

180. *Caperton*, 129 S. Ct. at 2270.

181. See *supra* text accompanying notes 178-79.

182. See *supra* text accompanying notes 174-76.

16. What if the judge voted against the supporter in many other cases?<sup>183</sup>

This factor, if present, might suggest that the *Caperton* due process recusal inquiry more expressly embraces the recusal standard set forth in the ABA Model Code of Judicial Conduct and federal disqualification law, which requires recusal where the judge's impartiality can be reasonably questioned.<sup>184</sup> If that standard is met, it does not logically matter whether the judge has on other occasions opposed a campaign benefactor. What matters is that in the instant case a reasonably informed lay observer could harbor reasonable question as to the judge's impartiality.<sup>185</sup> When this is present, recusal should be required. Period. Perhaps a judge's adverse rulings in other cases will lead a reasonable lay observer to have fewer concerns which, if demonstrated, would simply be a factor weighing against disqualification.

Further, the instant case may, as a practical matter, be more important to the campaign benefactor than were the other cases in which the judge voted against the benefactor's interests. For example, in *Caperton*, Don Blankenship was extremely interested in the outcome of the \$50 million case.<sup>186</sup> It would hardly comfort observers to know that a tainted Justice Benjamin had ruled against Blankenship or Massey in a dozen small-dollar workers' compensation cases or modest OSHA regulation matters in the past.

17. What if the judge disagrees with the supporter's message or tactics? What if the judge expressly *disclaims* the support of this person?<sup>187</sup>

Because due process requires not only justice but the "appearance of justice,"<sup>188</sup> recusal will almost always be required even if the judge receiving a triggering level of electoral support has spurned the benefactor.<sup>189</sup> To the reasonable lay observer, it will continue to look like the judge is not impartial. Also, a tainted judge may, as a practical matter, be publicly distancing himself from the benefactor's message, tactics, or

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183. *Caperton*, 129 S. Ct. at 2270.

184. See 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

185. See 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT R. 2.11.

186. See *Caperton*, 129 S. Ct. at 2257-58 (discussing Blankenship's status as Massey's CEO and his support of Justice Benjamin).

187. *Id.* at 2270.

188. See *Turney v. Ohio*, 273 U.S. 510, 532 (1927); JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 240 (1974).

189. *Caperton*, 129 S. Ct. at 2263-64.

support, but feel indebted to the benefactor or fearful of incurring retaliatory wrath from the benefactor. Such feelings may be at the subconscious level, even though at the conscious level the judge has a good faith belief in his own neutrality.

18. Should we assume that elected judges feel a “debt of hostility” towards major *opponents* of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?<sup>190</sup>

Although a “debt of hostility” need not be assumed, reasonable concerns about a judge’s animosity toward election opponents logically creates a reasonable question as to impartiality that requires recusal. For the same reasons supporting the *Caperton* result, due process and sound recusal practice logically require that judges not preside over cases involving mortal political enemies just as they should not hear and decide cases involving their important electoral friends.<sup>191</sup> Once again, the test will be a case-by-case assessment focusing on the amount and proportion of support for the judge’s opponent or against the judge.<sup>192</sup> In addition, a reviewing court may wish to consider the tone of the campaign and whether the judge in question was the target of verbal or personal attacks that could create sufficient animosity to undermine impartiality. Judges, like other human beings, will in certain circumstances hold a grudge against electoral opponents<sup>193</sup> and should recuse themselves from cases involving these political enemies.

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190. *Id.* at 2270.

191. *Id.* at 2263-64.

192. *Id.*

193. See Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 21 (1931) (arguing that judges are indeed human and susceptible to the same petty emotions and errors of thinking that can affect laypersons); Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 421 (2007) (contending that judges “possess three sets of ‘blindness’: informational blindness, cognitive blindness, and attitudinal blindness” that create error in adjudication); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001) (presenting judges with hypothetical problems for decision-making and finding that judges exhibit the same cognitive biases as laypersons); Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1282 (2008) (explaining that when presented with arguably ambiguous contract language, judges tend to believe they know what the language clearly means and erroneously estimate that the vast majority of others reading the language will agree with them; in reality, respondents divide sharply regarding the meaning of the hypothetical contract language); see also Symposium, *Measuring Judges and Justice*, 58 DUKE L.J. 1173, 1173-90 (2009) (presenting articles and responses concerning judicial performance); Symposium, *Misjudging*, 7 NEV. L.J. 420, 420-547 (2007) (presenting Guthrie’s *Misjudging* article and seven responses from scholars and sitting judges).

19. If there is independent review of a judge's recusal decision, e.g., by a panel of other judges, does this completely foreclose a due process claim?<sup>194</sup>

No, but it makes a successful *Caperton* challenge highly unlikely. As a practical matter, the blessing of a neutral reviewing panel makes it far less likely that an egregious, due process-implicating error has occurred.<sup>195</sup> A neutral panel of reviewing judges is a valuable procedural check on judicial error in recusal cases,<sup>196</sup> although it is not an inevitably-correct panel. If a reviewing judge, panel or court affirms an erroneous failure to recuse, a litigant can still be denied due process.<sup>197</sup> Consequently, affirmance of a

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One study found that

[a]lthough the judges in our study appeared somewhat less susceptible to two of these illusions (framing effects and the representativeness heuristic) than lay decision makers, we found that each of the five illusions we tested [anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases] had a significant impact on judicial decision making. Judges, it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systematic errors in judgment.

Guthrie et al., *supra*, at 778 (emphasis omitted).

194. *Caperton*, 129 S. Ct. at 2270 (italics omitted).

195. A preliminary variant of this sort of review can take place if recusal motions at the trial level are decided in first instance by a trial judge other than the one being challenged. This can occur either in 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 are in first instance decided by the challenged judge. If any litigant wishes, the challenged judge's decision is then reviewed by the chief judge of the judicial district. The possibility of appellate review before the full state supreme court also exists. In addition, Nevada provides for each side in a civil action a right of preemptory challenge to the original assigned judge. NEV. SUP. CT. R. 48.1(3); FLAMM, *supra* note 152, §§ 27.11, 28.30; *see also* NEV. REV. STAT. ANN. § 1.225(5) (LexisNexis 2008) (stating that when a 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").

196. Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 230 (2004) (displaying strong criticism of Justice Scalia's refusal to disqualify in a case implicating the vice-president in the wake of well-publicized Scalia-Cheney hunting trip); Goldberg et al., *The Best Defense*, *supra* note 42, at 530 (strongly advocating "independent adjudication of disqualifying motions" and noting that frequently permitting challenged judges to decide their own impartiality is "one of the most heavily criticized features of United States disqualification law"); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 109 (2004) (criticizing traditional U.S. Supreme Court practice of having each Justice be the sole arbiter of his or her disqualification); *see also Not for Sale*, ECONOMIST, June 13, 2009, at 36 (describing the *Caperton* situation as "unthinkable" in most countries other than the United States); *see, e.g.*, NEV. REV. STAT. ANN. § 1.235(5)(b)(1) (LexisNexis 2008) (providing that where a judge contests the party challenging the judge for bias, the matter shall be decided by a different judge as agreed by the parties or decided by the chief judge of the district or by the state supreme court in districts with only one trial judge).

197. At a minimum, the litigant has been victimized by judicial error. Under *Caperton*, the aggrieved litigant has, however, not necessarily been denied due process of law unless there was also a reasonable probability of bias rather than merely a reasonable question as to the unrecused

judge's potentially erroneous failure to recuse should not be beyond further review simply because a panel erroneously affirmed the failure to recuse.

The potentially beneficial impact of outsider review is muted somewhat by the occasionally cozy and clubbish nature of the bench.<sup>198</sup> Judges at both the trial and appellate level work in relative isolation from one another and, although cordial to one another, need not be close friends and need not work together in the aftermath of passing judgment on one another's disqualification decisions. Appellate judges, however, must collaborate regularly, making collegiality and cooperation important values. As a consequence, appellate judges may be insufficiently tough-minded in reviewing a colleague's disqualification decisions.<sup>199</sup>

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judge's impartiality. See *supra* text accompanying notes 79-85 (discussing the *Caperton* standard for due process judicial recusal).

198. See John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467 (1988) (discussing how judges form informal bonds working together); Goldberg et al., *The Best Defense*, *supra* note 42, at 525 ("[R]esearch on social psychology shows that much bias is unconscious and that people tend to underestimate and undercorrect for their own biases and conflicts of interest."); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1606 n.1 (1995) (noting that courts often work on a "team model" of decision making); Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L REV. L. & ECON. 169, 170 (1992) (discussing the importance of collegiality and civility for most courts).

As put astutely by a student commentator eighty years ago, "[a] biased mind rarely realizes its own imperfection." Note, *Disqualification of Judges on the Ground of Bias*, 41 HARV. L. REV. 78, 81 (1927). Just as logically, friends or close colleagues of a possibly biased judge are unlikely to realize their inability to judge the question of bias fairly.

Judges are also often seen as too cozy with favored counsel or frequent litigants. See, e.g., Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND. L. REV. 231, 259-65 (2001) (regarding Delaware courts as too cozy with favored counsel and litigants); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 14 (1993) (noting closeness of bench and barristers in England); Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54, 61 (2009) (noting perception of judicial favoritism for familiar attorneys or entities). But see David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309, 310-11 (2001) (acknowledging perceptions of favoritism regarding Delaware courts and other courts, but contesting LoPucki & Kalin's thesis). If it is correct that judges get too close to lawyers and litigants at the cost of losing perspective, it must surely be true that judges are often too close to colleagues to rigorously assess their failure to recuse.

199. For example, when Justice William Rehnquist erroneously refused to recuse himself from a case, fellow Justices White, Burger, Stewart, and Powell all expressed support rather than criticism. See Stempel, *Chief William's Ghost*, *supra* note 105, at 858 n.126 (Justice Powell refers to Rehnquist's memorandum as "splendid" and constituting "a conclusive answer" on the issue). Perhaps they were just being polite because, under long-standing Supreme Court practice, they were not ruling on the matter but simply viewing Justice Rehnquist's memorandum explaining his non-recusal. It is also possible that these other Justices were too credulous in accepting the Rehnquist view of the facts, which arguably misstated and at least soft-pedaled the degree of his

In other cases, clear court division on the merits of the case or interpersonal conflicts among the judges or justices<sup>200</sup> may impede detached, impartial review of a colleague's disqualification decisions. For example, in *Caperton v. Massey*, the West Virginia Supreme Court, in the absence of Justice Benjamin, was deadlocked 2-2 on the merits.<sup>201</sup> If the justices felt strongly about the correctness of their views on the merits, it would logically be difficult for them to divorce their opinions from a decision on Justice Benjamin's participation. Those wishing to upend the \$50 million *Caperton* verdict would find it hard to bounce Justice Benjamin, an ally on the merits, from the case. Those rejecting the Massey challenge based on *res judicata* and forum selection arguments would be inclined to remove Justice Benjamin, who was not receptive to those arguments.<sup>202</sup>

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personal involvement in the case. *Laird v. Tatum*, 408 U.S. 1, 2-8 (1972); *Laird v. Tatum*, 409 U.S. 824, 824 (1972) (Rehnquist, J., mem.) (explaining and defending Justice's nonrecusal).

Nonetheless, it is disturbing to see this sort of figurative "attaboy" backslapping of a Justice whose error in failing to recuse appears quite blatant. See Stempel, *Chief William's Ghost*, *supra* note 105, at 863 (explaining the pronounced error in Rehnquist's decision to participate in *Laird v. Tatum*); Stempel, *Rehnquist, Recusal and Reform*, *supra* note 105, at 597-621 (detailing a more extensive analysis of Rehnquist's error and degree to which the *Laird v. Tatum* memorandum articulates an incorrect picture of judicial disqualification ethics); see also *id.* at 590, n.5 (observing that noted legal ethics experts and professors Geoffrey C. Hazard, Jr. and Stephen Gillers each concluded that Justice Rehnquist had erred in failing to recuse); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 246-47 (1987) (noting that Justice Rehnquist was a notable exception to the modern trend of greater concern for judicial impartiality). But see Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 737 (1973) (finding Rehnquist memorandum and participation inconsistent with ABA Model Code but consistent with existing case precedent); Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106, 121 (1973) (noting inconsistencies in Rehnquist memorandum, but concluding that it fell within the zone of acceptable decisions regarding recusal).

200. For example, during the 1990s, interpersonal friction on the Nevada Supreme Court became so pronounced that it received national attention. See, e.g., Paul M. Barrett, *Discipline Case Divides Nevada's Supreme Court*, WALL ST. J., Jan. 22, 1996, at B1; Stephen Magagnini, *Nevada's Top Court Hogtied by Feud*, SACRAMENTO BEE, Mar. 17, 1996, at A1. See also *Whitehead v. Nev. Comm'n on Judicial Discipline*, 893 P.2d 866, 995 (Nev. 1995), *superseded by statute*, NEV. CONST. art. 6, § 21 (2007); *Whitehead v. Nev. Comm'n on Judicial Discipline*, 869 P.2d 795 (Nev. 1994); Stempel, *Chief William's Ghost*, *supra* note 105, at 924 (describing tension and its surfacing in Nevada supreme court recusal decisions).

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

202. A possible procedural improvement that would mitigate against this problem is having recusal determined by a separate group of judges, or perhaps even a commission, that is not involved in hearing the merits of a case and presumably will not know enough about the case to have its views colored by opinions on the merits. However, this solution presents some separation of powers concerns (if non-judges are involved) and judicial independence/judicial legitimacy concerns in that high court membership (and potentially case outcomes) are decided by persons outside the high court.

20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?<sup>203</sup>

As previously discussed,<sup>204</sup> crucial and triggering electoral support by interest groups should ordinarily be treated in the same manner as that of individuals.<sup>205</sup> Consequently, non-monetary but relatively crucial electoral support can be a basis for disqualification where it is of sufficient magnitude. In the usually low-visibility judicial election, newspaper endorsements can be critical.<sup>206</sup>

Logically, where the newspaper appeals from a large libel judgment, judges endorsed by the paper should recuse and their failure to do so would be a due process violation absent the limited, fact-specific exceptions discussed elsewhere in this Article. For example, it may be the case that the trial judge clearly erred in failing to give a *New York Times v. Sullivan* instruction or failed to grant a meritorious statute of limitations motion. But of course, if the error is clear, the court will hardly miss the participation of a recused justice.

Because all judges in a judicial elections state will have been supported or opposed by relevant newspapers, requiring recusal in such cases does raise “rule of necessity” concerns.<sup>207</sup> However, in all but the smallest and

In addition, a high-profile case like *Caperton* may already be widely known to any group that would review recusal decisions, prompting members of the group to have at least some opinions on the subject. For example, *Caperton* and its \$50 million trial result was widely known in West Virginia prior to the state supreme court decision. Many lawyers and judges presumably had at least a rough opinion favoring one side or the other on the merits, particularly in such a relatively small state.

However, the relative imperfections of alternative methods of reviewing recusal decisions does not necessarily mean that the alternative methods would not be an improvement on a status quo of individual justices or a closely-knit court calling its own balls and strikes.

203. *Caperton*, 129 S. Ct. at 2270.

204. Even for a skilled negative debater in the Justice Roberts’s mode, it is difficult to list forty questions (actually eighty in *Caperton*) without being at least moderately repetitive. In turn, some of my responses to similar questions will be similar.

205. See *supra* note 156 (discussing ABA definitions and need to consider in-kind contributions, activist group support, and independent expenditures in determining degree of campaign support judge has received from litigant or party interested in case outcome).

206. See Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellweather State*, 39 WILLAMETTE L. REV. 1357, 1374 (2003) (stating that positive media support is important in judicial elections); Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies From Wisconsin*, 85 MARQ. L. REV. 593, 603 (2002) (noting that newspaper support is important but not all-powerful); Kenneth Reich, *Consulting Firm Paves Judges’ Road to Courthouse*, L.A. TIMES, May 24, 1988, Part II, at 3.

207. The rule of necessity provides that if disqualification on the grounds presented in the instant case would disable the entire judicial machinery, disqualification should be denied. For

most geographically concentrated states (e.g., Rhode Island), it would seem relatively easy to have newspaper litigant cases heard by a court with no judges endorsed by the paper. For example, a panel of judges from another region of the state could sit in lieu of the state supreme court in cases involving the newspaper that has endorsed or opposed all of the state's supreme court justices.

As an alternative, disqualification related to newspaper support could be limited to only those judges elected within the past two years or facing election within the next two years. In addition, newspaper support disqualification may not be necessary where the case is of minor consequence to the newspaper or its affiliated entities. For example, if the defamation judgment is small, recusal could perhaps be avoided (provided that the case will not set important precedential value). Similarly, a modest workers' compensation or tort liability claim covered by insurance probably does not require recusal based solely on a media defendant's electoral support.<sup>208</sup>

21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?<sup>209</sup>

Not inevitably. However, close personal friendship can certainly create a reasonable question as to a judge's impartiality when the judge is hearing a case argued by a close attorney-friend.<sup>210</sup> Nonetheless, under *Caperton*, there would need to be more than reasonable question.<sup>211</sup> The reasonable lay observer would also need to be justified in thinking that judicial bias was probable because of the friendship in light of the stakes of the case.<sup>212</sup>

As with good recusal practice generally, some degree of fact-sensitivity, realism, and distinction-making is required. For example, one should be reasonable in defining what constitutes a "close" lawyer-friend of the judge. Mere acquaintance through bar associations or other civic

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example, no judge is disqualified from hearing tax cases because all judges are taxpayers. See FLAMM, *supra* note 152, § 20.2. However, a judge might be disqualified if she is in litigation with the IRS over a matter similar to that presented in a pending case. Goldberg et al., *The Best Defense*, *supra* note 42, at 519.

208. See *supra* text accompanying notes 139-45 (discussing magnitude of case, impact on person or party supporting judge, and implications for recusal).

209. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2270 (2009).

210. See *id.* at 2258.

211. See *id.* at 2265.

212. See *supra* text accompanying notes 79-102 (discussing *Caperton* holding and majority's "probability of bias" test as contrasted to "appearance of impropriety" test).



attorney would ordinarily not be enough. But where the judge and the lawyer frequently socialize, disqualification may well be apt.<sup>213</sup>

Another consideration in line drawing may be the stakes of the instant case to the lawyer-friend. If the lawyer is working on a contingency fee and defending a large verdict on appeal, recusal would seem required as a matter of basic law and probably constitutional law as well.<sup>214</sup> For example, in the famous *Pennzoil Co. v. Texaco, Inc.* litigation,<sup>215</sup> Pennzoil counsel Joe Jamail reportedly received a contingent fee based on the billion-dollar judgment.<sup>216</sup> With so much at stake to the attorney (albeit one who was already wealthy),<sup>217</sup> any judge with close personal ties to Jamail should not have participated in adjudicating a decision that held so much financial importance to the attorney-friend. By contrast, if an attorney-friend is working on an hourly fee basis in a relatively typical case (i.e., not one likely to make or break counsel's reputation), recusal based on friendship may be overkill in that the attorney-friend still presumably gets paid regardless of win or loss.

The possibility of friendship-driven recusal of course holds true for appointed judges as well as elected judges, perhaps more so in that the appointed judge is generally more isolated from society than the elected judge, who is forced to have human contact as a condition of attaining or retaining the office. Where a judge is quite personally close to a litigant or lawyer, a sufficient possibility of bias in favor of the lawyer can arise and implicate not only ordinary recusal but also constitutionally based due process disqualification.

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213. Distressingly, West Virginia Supreme Court justice Maynard initially did not recuse himself in *Caperton* but did so after “[p]hotos had surfaced of Justice Maynard vacationing with [Massey CEO Don] Blankenship in the French Riviera while the case was pending.” See *Caperton*, 129 S. Ct. at 2258. If such vacationing (with a party or counsel, at any time, not merely when a case is pending) is the result of friendship, a judge or justice should have enough sensitivity to recuse himself without being asked. Normal people do not go on vacations with anyone who is not a rather close friend. If the vacation was a gift of sorts, recusal would be required on what might be termed a de facto anti-bribery principle or the general notion that a judge or other public official should not accept an improper gratuity.

214. See *id.* at 2254.

215. 481 U.S. 1 (1987).

216. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 436 (8th ed. 2009) (noting Jamail's contingent fee in *Pennzoil*, which resulted in a \$3 billion settlement); THOMAS PETZINGER, JR., OIL AND HONOR: THE TEXACO-PENNZOIL WARS 265 (1987).

217. Jamail was a very successful Houston attorney prior to the *Pennzoil* litigation. See GILLERS, *supra* note 216, at 436 (referring to “famed Texas lawyer Joe Jamail” and noting in aftermath of dust-up between Jamail and the Delaware Bar that “[i]f Jamail appears rather independent, recall that he was the lawyer who got a \$10 billion judgment against Texaco for his client Pennzoil and ultimately settled for \$3 billion” in a contingency fee case).

22. Does it matter whether the campaign expenditures come from a party or the party's attorney? If from a lawyer, must the judge recuse in every case involving that attorney?<sup>218</sup>

Attorney contributions, if of triggering magnitude, should be treated the same way as litigant contributions.<sup>219</sup> If they are proportionately large enough to curry undue favor, the judge should not hear cases involving the lawyer. A reasonable law observer would objectively question the judge's ability to be impartial. Where the amount of contributions or other campaign support is sufficiently high, the situation would appear to create the probability of bias that makes erroneous failure to recuse a violation of due process as well.

23. Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?<sup>220</sup>

Some variance is likely, not because of inconsistency in the law but because the size and makeup of states likely has a material effect on its electoral realities, which in turn affects the apt analysis over judicial disqualification. For example, \$100,000 in campaign support will likely go farther in a small state like Rhode Island, Vermont, or Nevada,<sup>221</sup> than in a

218. *Caperton*, 129 S. Ct. at 2270.

219. See *supra* note 125 (discussing ABA's broad definition of contributions and broad reach of Model Code Rule 2.11 and supporting rationale).

220. *Caperton*, 129 S. Ct. at 2270.

221. "Small" can be a function of either population, geographic size, or both. For example, in a geographically small state, funds spent on advertising may have more impact because of the state's compactness. A television advertisement with a Providence, Rhode Island station presumably blankets the entire state, even for viewers without cable service.

In a geographically large but demographically small state like Nevada, media purchases may be less efficient but funds spent to successfully gain even a few votes can be decisive. For example, the most recent contested state supreme court race for an open seat in Nevada resulted in 312,529 votes (forty-two percent) for winner Kris Pickering, a prominent Las Vegas attorney, and 293,243 votes (thirty-nine percent) for Deborah Schumacher, a well-regarded Reno judge, with nineteen percent of the electorate selecting the "none of these candidates" option. *General Election Results 2008*, LAS VEGAS REV.-J., Nov. 5, 2008, at B5.

The vote totals are not a pretty picture. The election presented the voters with two smart, competent, experienced candidates (I have worked with both professionally), with Republican Pickering clearly more conservative and pro-business than Democrat Schumacher, although neither ran as an extremist or ideologue. Elections are non-partisan but informed voters could easily attain the party preferences of the candidates; somewhat controversially (at least in my view), Justice Pickering's appearance at a John McCain campaign event was widely noted (and criticized by some). These party preferences, attitudes, and traits of the candidates were not a secret. Thus, voters could have attained enough information to have a clear choice among strong candidates—but a fifth of the electorate, which had already dragged itself to the polls for the Obama-McCain showdown, could not manage to make a choice.

large jurisdiction like California, New York, or Texas. This is hardly a problem. It simply requires some situation-specific inquiry and analysis. State variance should in particular not be a problem for the *Caperton* dissenters, who ordinarily purport to support federalism.<sup>222</sup>

24. Under the majority's "objective" test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?<sup>223</sup>

We analyze through the lens of the reasonable, adequately-informed layperson. This is the standard for non-constitutional judicial recusal under the ABA Model Code and federal law<sup>224</sup> and there is no reason not to apply it to questions of due process disqualification as well. Ratcheting up the inquiry to one of constitutional dimension should not change the frame of reference.

25. What role does causation play in this analysis? The Court sends conflicting signals on this point. The majority asserts that "[w]hether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry." But elsewhere in the opinion, the majority considers "the apparent effect such contribution had on the outcome of the election," and whether the litigant has been able to "choos[e] the judge in his own cause." If causation is a pertinent factor, how do we know whether the contribution or expenditure had any effect on the outcome of the election? What if the judge

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In addition, the low-profile election was close enough that a shift in fewer than 10,000 votes would have changed the outcome. Similarly, Judge Schumacher would have won if 20,000 more voters had come to the polls, a goal that would undoubtedly have been aided by additional campaign financing. See also Frost, *supra* note 41 (noting that Massey CEO Blankenship's support of Justice Benjamin amounted to \$1.66 per vote).

222. See *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429-30 (2003) (Scalia & Thomas, JJ., dissenting) (opposing constitutional review of punitive damages awards as impermissible federal court interference with the state judicial system); Richard G. Wilkins et al., *Supreme Court Voting Behavior 2005 Term*, 34 HASTINGS CONST. L.Q. 505, 558 (2007) (noting federalist leanings of these judges); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 43 (2006) (noting wide perception of federalist tendencies of these Justices but questioning the degree of their zeal for state government prerogatives).

223. *Caperton*, 129 S. Ct. at 2270.

224. See 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007); *Liljeberg v. Health Servs. Acquisitions Corp.*, 486 U.S. 847, 859-61 (1988).

won in a landslide? What if the judge won primarily because of his opponent's missteps?<sup>225</sup>

Actual causation should be irrelevant to the recusal inquiry. What matters is whether a reasonable lay observer could objectively raise sufficient questions regarding the judge's ability to be impartial toward a sufficiently supportive litigant or lawyer.<sup>226</sup> Reasonable observers may debate whether a \$1 million contribution would suffice to propel a judicial candidate into office, but would have to agree that a contribution of this magnitude raises sufficiently serious questions about judicial impartiality and probability of bias. Again, a case-specific inquiry is necessary, applying the factors suggested in the ABA and Conference of Chief Justices amicus briefs.<sup>227</sup>

26. Is the due process analysis less probing for incumbent judges—who typically have a great advantage in elections—than for challengers?<sup>228</sup>

No. A judge is a judge is a judge. If there is a probability of bias due to the campaign support received by the judge, it should not matter whether the judge was the incumbent or a challenger when receiving the disqualifying support. Due process has been violated, regardless of the judge's status as incumbent or challenger.

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225. *Caperton*, 129 S. Ct. at 2270-71 (citations omitted).

226. See *supra* text accompanying notes 79-102 (discussing the *Caperton* majority's probability of bias standard for due process disqualification). The Roberts dissent has a point, however, in noting that the majority standard requires a more fine-tuned estimation of public sentiment than either the basic reasonable-question-as-to-impartiality recusal standard or the dissent's preferred standard requiring recusal only if the case outcome has a direct financial impact on the judge. Rather than using the problems of the majority standard as a means of excusing the type of egregious behavior that took place in *Caperton*, my preferred solution is to treat all erroneous failures to recuse as due process violations that can, in apt circumstances, lead to U.S. Supreme Court review. See Stempel, *Clarifying Common Sense*, *supra* note 108.

227. See *supra* notes 66-68 and accompanying text (discussing the ABA's and National Conference of Chief Justices' briefs and standards).

228. *Caperton*, 129 S. Ct. at 2271.

27. How final must the pending case be with respect to the contributor's interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability?<sup>229</sup>

Yes. Sometimes procedural rulings are key to the outcome of a dispute.<sup>230</sup> Class action certification is often considered particularly important to whether a case succeeds or fails.<sup>231</sup> For example, a judge's decision on a discovery matter may determine whether a litigant gains sufficient information to prove the elements of a claim or defense.<sup>232</sup> Judicial bias or prejudice in such matters is just as devastating in these contexts as in determinations on the merits.

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229. *Id.*

230. See SUBRIN ET AL., *supra* note 61, at 980-81 (noting important implications of class action certification to the outcome of a case); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 141-43 (1974) (noting importance of aggregating small claims if "one-shot players" such as consumers are to be able to pursue certain causes of action); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 10 (1971) (pointing out that class device has important ramifications for prosecution of substantive antitrust claims). The ramifications may be negative or positive. For forty years, class action defendants have been complaining that the class device forces them to settle or face potentially company-crippling adverse judgments. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Judge Richard Posner appearing to accept this argument in rejecting class certification in litigation claiming pharmaceutical company liability for tainted blood); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973) (referring to some class action settlements as "blackmail settlements"); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1403 (2000); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429 (2003) (discounting defendant's view as overstated).

231. See Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U. L.Q. 1127, 1132-33 (2005) (arguing that class treatment is underutilized to the detriment of meritorious claims); see, e.g., *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978) (noting that failure to obtain class certification is often the "death knell" of a case; although the Court did not accept this as a basis for considering denials of certification to be a final, appealable order, the Court, like lower federal courts, acknowledged this practical litigation reality); see also Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 83-84 (2000) (noting importance of class action status for consumer actions and effective gutting of such actions if class certification is precluded due to presence of arbitration clauses in consumer contracts).

232. See ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY PRACTICE* § 1.01 (4th ed. 2008) (noting means by which effective discovery can improve case outcomes); ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* 205-06 (7th ed. 2008); FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* § 5.2 (5th ed. 2001) (noting importance of discovery).

28. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?<sup>233</sup>

The question of recusal cannot logically turn on the time of a case's origination. If, at whatever juncture a case arrives for consideration, a judge has received sufficiently great electoral support from a litigant or lawyer to create a probability of bias, due process is lacking,<sup>234</sup> and recusal is required.

29. When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members?<sup>235</sup>

The answer to this question will turn on case-specific facts. For example, one branch of a wealthy family may favor Democrats while another inclines toward Republicans. Imputation in such cases would seem inapt. But where members of a litigant's family within the third degree of consanguinity (the standard used for nonconstitutional recusal based on financial ties to the judge)<sup>236</sup> are sufficiently heavy campaign contributors and all support the judicial candidate, the resulting judge should not sit on a case of substantial interest to a family member.

For corporate entity-corporate constituent imputation, the question is whether the constituent is a litigant in a matter of concern to the corporate entity.<sup>237</sup> If so, imputation would seem in order. If not, imputation would appear to be overkill. For example, Mel Manager may be a wrongful death defendant as a result of his drunk driving. The presiding judge would ordinarily not be disqualified on the basis of even massive campaign contributions by Mel's corporate employer. However, if Mel were, like Don Blankenship of Massey, the CEO who effectively steered these contributions to the judge,<sup>238</sup> recusal would seem apt. In this type of situation, the CEO looks to be the alter ego of the corporation in terms of

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233. *Caperton*, 129 S. Ct. at 2271.

234. *See id.* at 2263.

235. *Id.* at 2271.

236. *See* U.S.C. § 455(b) (2006); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007); FLAMM, *supra* note 152, § 7.2.

237. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2009) (noting distinction between entity and individuals working as constituent employees of entity).

238. *See Caperton*, 129 S. Ct. at 2257-58 (summarizing Blankenship's support of Justice Benjamin).

electoral support for the judge in question and in terms of the corporation's deep interest in the face of such a particularly prominent, important, and powerful employee.

30. What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent?<sup>239</sup>

The form of election should not affect either a due process recusal or regular disqualification analysis. Valid concerns about impartiality are not negated simply by invoking a talismanic, feel-good term like "nonpartisan" or "retention election." One can make a strong case that nonpartisan elections present greater dangers because voters are deprived of the normally valuable cues of party designation, making the electoral support of powerful individuals, companies, or interest groups even more important than it would be in regular elections.<sup>240</sup> Similarly, it is hard to see how a judge compromised by electoral support is any less compromised because she is an incumbent.

31. What type of support is disqualifying? What if the supporter's expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?<sup>241</sup>

Electoral support is electoral support is electoral support. The *Caperton* majority correctly realized that contributions through an advocacy group (West Virginia's now-infamous "And for the Sake of the Kids")<sup>242</sup> are as germane as direct contributions for assessing recusal.<sup>243</sup> For the majority, substance took precedence over form.<sup>244</sup> The same logically holds true for support that aids a judicial candidate in sufficiently important, but indirect ways.<sup>245</sup>

For example, a judicial candidate favored by poorer voters or minority voters will usually derive more benefit from a general voter registration

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239. *Id.* at 2271.

240. One can also make a strong cases that after *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), which invalidated certain state restrictions on campaign speech of judicial candidates, any prohibition of candidates running as Democrats or Republicans is on thin constitutional ice. See Tuan Samahon, *The End of Nevada's Ban on Partisan Judicial Campaign Speeches*, NEV. LAW., Feb. 2007, at 22, 25.

241. *Caperton*, 129 S. Ct. at 2271.

242. See *supra* notes 35-36 and accompanying text (discussing "And for the Sake of the Kids," as well as Justice Benjamin's election and participation in *Caperton*).

243. *Caperton*, 129 S. Ct. at 2263-64.

244. *Id.* at 2264.

245. See also sources cited *supra* note 156 (discussing the ABA Model Code's suggested broad approach).

drive than a candidate favored by wealthy white voters because, as a general rule, poorer voters have lower turnout at the polls.<sup>246</sup> Voter registration support of sufficient magnitude could undermine a winning judicial candidate's impartiality (or, more important, the reasonable lay observer's view of the judge's impartiality) just as much as would a large cash contribution.

Voter registration drives, which in general simply seek to register a larger number of voters, must be distinguished from get-out-the-vote efforts. The former merely try to increase overall voter registration while the latter specifically attempt to identify supportive voters and to get them to the polls. Get-out-the-vote drives as so defined are always partisan and attempt to support a particular candidate or slate of candidates.<sup>247</sup> Where a judicial candidate has had substantial support of this kind, recusal would ordinarily be required in cases of import to the persons or entities who provided the voter mobilization favoring the judge.<sup>248</sup>

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246. See M. MARGARET CONWAY, *POLITICAL PARTICIPATION IN THE UNITED STATES* 25-27 (2d ed. 1991); RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* 80 (1980); Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615, 1630-31 (1987); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 651 (2007).

Having once been active in Republican politics, I can attest that these general norms are widely known to any candidate for elective office. Consequently, a Republican judicial candidate will realize that a civic organization's general effort to increase voter registration and turnout will aid Democrats. If the consequences of the voter registration drive are of sufficient magnitude, the judge's ability to be impartial toward the civic group could be subject to reasonable question after a close election.

247. The major political parties and political activists both realize this and seek to gain as much demographic knowledge about the electorate as possible. See Tim Craig & Michael D. Shear, *Allen, Webb Camps Shift Focus to Turnout*, WASH. POST, Oct. 31, 2006, at B5 (explaining that Democratic senate candidates' aides have "computer people who are totally geeked out to get things done" and who "can drill down by precinct, by age, by area, by congressional district"); Todd S. Purdum, *Karl Rove's Split Personality*, VANITY FAIR, Dec. 2006, at 202 (noting that Rove is "armed with a vast new database" and "has carved America into ever narrower slices, sharpening conflicts that drive voters his way"); Peter Wallsten & Tom Hamburger, Editorial, *The GOP Knows You Don't Like Anchovies*, L.A. TIMES, June 25, 2006, at M1; Peter Wallsten & Tom Hamburger, *Two Parties Far Apart in Turnout Tactics Too*, L.A. TIMES, Nov. 6, 2006, at A1 (describing how Republican Congressman E. Clay Shaw, Jr. is fighting to keep his seat through use of "databases and search tools used to identify sympathetic voters and move them to the polls").

248. Consequently, a judge whose election was substantially aided by something like a labor union's get out the vote drive may well be required to recuse himself under ordinary standards and perhaps the higher constitutional standard of *Caperton* as well.



32. Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude?<sup>249</sup>

Even the best of nit-picking negative debaters eventually starts straining for additions to his list of concerns. So, too, with Justice Roberts.<sup>250</sup> Where a triggering amount of electoral support has been given by Mr. X to Judge Y, the judge's ability to be fair is subject to serious question and may in some circumstances create a probability of bias no matter what Mr. X did or did not do in support of the judge's primary opponents.

33. What procedures must be followed to challenge a state judge's failure to recuse? May *Caperton* claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U.S.C. § 1983, which allows a person deprived of a federal right by a state official to sue for damages? If § 1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?<sup>251</sup>

Nag. Nag. Nag. Again, Justice Roberts is straining and his dissent now takes on the tone of objecting to the majority holding because it did not provide an advisory opinion on the procedural handling of every conceivable future disqualification controversy.<sup>252</sup> If § 1983 claims are permitted (a topic well beyond the scope of this Article), the judge, the court, and the clerk are probably all proper defendants. The challenged judge who fails to recuse logically deprives the plaintiff of due process rights. Where the court allows the challenged judge to be the sole arbiter of her impartiality or where the court affirms an improper failure to recuse, it logically also is a proper defendant. The clerk as nominal representative of the court would also seem a proper defendant.<sup>253</sup>

The significant issue, of course, is whether to permit a § 1983 suit making a collateral attack on a case outcome due to a judge's failure to recuse or whether to limit federal court involvement in *Caperton* claims to

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249. *Caperton*, 129 S. Ct. at 2271.

250. *See, e.g., id.*

251. *Id.*

252. *Id.* at 2272.

253. *See* LEWIS & NORMAN, *supra* note 145, § 5.3 (discussing § 1983 litigation); JAMES ET AL., *supra* note 232, §§ 3.3-4.9 (discussing pleading, jurisdiction, and designation of parties in civil litigation).

cases where the issue was preserved in state court and the aggrieved party seeks certiorari. The latter approach is recommended, particularly if one is concerned about the dissenters' "floodgates" argument that federal courts might drown in a sea of tactically-made, weak, or even frivolous *Caperton* motions.<sup>254</sup>

However, where a litigant has exhausted its state remedies in attacking nonrecusal that allegedly violates due process, the litigant should be permitted a § 1983 claim if it can otherwise satisfy the criteria for prosecuting such a claim. Restricting review of biased judging to only the certiorari process, where only one percent of petitions are granted,<sup>255</sup> makes it too likely that meritorious *Caperton* claims will not be heard in a sufficiently neutral tribunal. There is too much risk that state courts will either defer to a judge who should have recused, or will themselves be beholden to the same interests allegedly affecting the judge who refuses to recuse.<sup>256</sup> Therefore, it is unlikely that collateral attacks will be entirely banned even though, as a practical matter, the federal courts will be resistant to such claims absent egregious circumstances such as those of *Caperton*.<sup>257</sup>

Further, federal trial judges should be able to weigh and screen such claims relatively quickly and can dismiss weak or frivolous claims as a matter of law. If anything, the track record of the federal trial courts suggests that they are resistant to § 1983 claims<sup>258</sup> and will assess *Caperton* actions with a sufficiently cynical eye so that only the egregious cases receive substantial federal court consideration.

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254. See *Caperton*, 129 S. Ct. at 2267, 2272 (predicting large upsurge in recusal litigation and certiorari petitions based on due process disqualification as a result of *Caperton*).

255. *Id.* at 2272 (stating that "the success rate for certiorari petitions before this Court is approximately 1.1%," but noting that more than 8000 were filed in the previous term).

256. See *id.*

257. *Id.* at 2257, 2263-64 (majority opinion), 2272 (Roberts, C.J., dissenting) (identifying, as the *Caperton* majority stresses and the Roberts dissent emphasizes in critique, the *Caperton* situation as remarkable due to the absolute and relative amount of money spent and the blatant manner in which Blankenship sought to manipulate the state judiciary). In the future, comparatively few other such instances will arise. If an aggrieved litigant can show only that perhaps a state judicial system failed to reach the right recusal result, it will have difficulty demonstrating the probability of bias required under *Caperton*. Even if due process recusal were revised to be congruent with the ordinary reasonable-question-as-to-impartiality standard, an isolated error would appear not to support relief via a § 1983 action or other collateral attack. As a practical matter, the Supreme Court would be highly unlikely to ever grant review in such a case.

258. See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prison Cases*, 77 GEO. L.J. 1567, 1569, 1578-79 (1989); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 665-67 (1987).

34. What about state-court cases that are already closed? Can the losing parties in those cases now seek collateral relief in federal district court under § 1983? What statutes of limitation should be applied to such suits?<sup>259</sup>

For the same reasons given in response to Question 33 above,<sup>260</sup> it would appear prudent to permit litigants who have preserved *Caperton* claims and exhausted state court review to seek federal review through a § 1983 action. American history has ample examples of when federal intervention or supervision was required to right wrongs emanating from state provincialism, favoritism, or tradition-bound blindness: school desegregation; voting rights; job discrimination; disability discrimination; and so on.<sup>261</sup> Because state courts can become insular and insufficiently sensitive to judicial fairness, the Constitution provides a reasonable amount of federal power to correct situations where states become rotten boroughs.<sup>262</sup> Because of the exhaustion requirement, which should include seeking certiorari review of an adverse state decision in which a judge or justice wrongfully failed to recuse, few *Caperton* claims are likely to merit significant federal trial court attention pursuant to § 1983 unless there exist egregious circumstances.

35. What is the proper remedy? After a successful *Caperton* motion, must the parties start from scratch before the lower court? Is any part of the lower court judgment retained?<sup>263</sup>

As discussed above,<sup>264</sup> the participation of a single tainted judge can adversely affect the outcome of a case. However, determining whether the tainted judge made a difference is an epistemologically impossible task. The only fair solution is to re-adjudicate the matter *de novo*. Although *de novo* review may make for some wasted motions, because a case may in fact have come out the same regardless of judicial bias, at least the courts will be more sensitive to the issues surrounding recusal. The courts'

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259. *Caperton*, 129 S. Ct. at 2271.

260. See *supra* text accompanying notes 252-58.

261. See JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 347-49, 367-68, 398-403, 544-45, 632-34, 1055-56, 1307, 1311 (6th ed. 2000) (discussing federal regulation of state authority, federal court intervention to protect individual liberties, substantive due process, procedural due process, equal protection, freedom of speech, and freedom of religion); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 401-02, 560-65, 587-88, 629-32, 769-72, 785-86 (3d ed. 2000) (noting instances of justified federal court intervention in state matters).

262. See sources cited *supra* note 261.

263. *Caperton*, 129 S. Ct. at 2271.

264. See *supra* text accompanying notes 173-76.

interest in avoiding duplicative judicial work alone might make courts more sensitive to their own recusal decisions.

36. Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge's action or vote suggests a probability of bias?"<sup>265</sup>

Waiver, be it express or constructive, should apply to *Caperton* claims. In order to prevail on a judicial recusal motion, the movant must raise it in a timely fashion and prosecute it properly and expeditiously. Litigants should not be able to take the "heads I win, tails you lose" approach of waiting to see which way a judge rules before invoking judicial ethics rules and the Due Process Clause.

The time for bringing a *Caperton* motion should begin to run when the litigant has sufficient ground to conclude that the judge's impartiality is subject to reasonable question. In some cases, a litigant may not reasonably be aware of a recusal ground until after adjudication. For example, if a litigant disguises contributions made through a so-called independent organization, the time for bringing a *Caperton* motion may not begin to run until the adversely-affected litigant, in the exercise of reasonable diligence, should have known it had grounds for the motion. This approach, which is consistent with the approach to statutes of limitation<sup>266</sup> and motion practice generally,<sup>267</sup> will encourage litigants to perform adequate investigation of judicial ties to lawyers and litigants and will adequately protect the system from litigants and judges who fail to be forthcoming about their ties.

37. Are the parties entitled to discovery with respect to the judge's recusal decision?"<sup>268</sup>

Generally, publicly available information would likely help determine whether facts support a *Caperton* motion. However, where a state has insufficient election transparency, a party with reasonable grounds should be able to obtain appropriately calibrated discovery so that it may assess whether it has reasonable ground for seeking recusal. A blanket denial of

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265. *Caperton*, 129 S. Ct. at 2271.

266. See DAN B. DOBBS, *THE LAW OF TORTS* §§ 550-51, 553-54 (2000).

267. See HAYDOCK & HERR, *supra* note 232, § 11.2.7 (explaining that motions have deadlines but generally the time period for making motions does not begin to run until there are grounds for the motion); accord DAVID F. HERR, ROGER S. HAYDOCK & JEFFREY W. STEMPEL, *MOTION PRACTICE* 1-1, 2-5 (5th ed. 2009).

268. *Caperton*, 129 S. Ct. at 2271.

discovery would only encourage and reward subterfuge by those seeking to bias the judicial process.

38. If a judge erroneously fails to recuse, do we apply harmless-error review?<sup>269</sup>

As discussed above,<sup>270</sup> the general rule should be one in which participation by a tainted judge requires *de novo* adjudication due to the grave difficulty or impossibility of assessing the impact of the tainted judge's participation. However, in a limited number of cases where fact and law are sufficiently clear, the Supreme Court in operating its certiorari docket, or federal courts hearing collateral attacks on *Caperton* grounds, should be able to invoke the harmless error doctrine.<sup>271</sup> A harmless error assessment may be particularly appropriate in cases that are clearly and correctly decided on the merits, or are particularly resource-consuming, or the judge's failure to recuse himself can be explained by innocent mistake, or when extenuating circumstances—such as a clear lack of knowledge of the situation—explains failure to recuse, or a litigant fails to raise the issue in a timely fashion.

39. Does the *judge* get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?<sup>272</sup>

The judge always, as a practical matter, has the opportunity to respond to an allegation of bias through issuing an opinion,<sup>273</sup> submitting a brief on review,<sup>274</sup> or issuing a public statement.<sup>275</sup> However, a judge may not

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269. *Id.* at 2272.

270. See *supra* text accompanying note 264.

271. See FED. R. CIV. P. 61; *supra* text accompanying note 179 (noting applicability of harmless error concept to judicial recusal and citing Rule 61).

272. *Caperton*, 129 S. Ct. at 2272.

273. Indeed, Justice Benjamin in *Caperton* issues a lengthy concurring opinion defending his vote on the merits and his decision not to disqualify himself. See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 299-303 (W. Va. 2008) (Benjamin, J., concurring), *rev'd*, 129 S. Ct. 2252 (2009).

274. Reportedly, the trial judge under challenge in the lengthy IBM antitrust litigation did just that, unsuccessfully (although he did not appear at oral argument and his written submission is not reflected in the reported opinion). See *In re IBM*, 687 F.2d 591, 596, 597 (2d Cir. 1982) (removing Judge David Edelstein from case for refusal to cease proceedings in aftermath of federal government's settlement of antitrust claims against computer company). As a practical matter, this is a difficult tactic for sitting judges, who lack the resources of a practicing law office for generating such briefs and likely lack the ability to pay significant legal fees. Although a law firm may be willing to take on the case as a pro bono matter, this then raises the collateral problem

“make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”<sup>276</sup> Consequently, a judge’s defense of a decision not to disqualify would be judicial speech about a pending matter. But a judge’s defense of his or her actions is unlikely to impair the fairness of review of the recusal decision once the matter is in the hands of a neutral reviewing tribunal.

Perhaps an eloquent statement by the judge could “affect the outcome” of recusal review, but this also seems farfetched. The judge is unlikely to raise arguments not already briefed and argued by the parties. Similarly, the judge is unlikely to say anything more persuasive than what can be said in a written decision on a recusal motion or in a concurring opinion to a judicial decision.

Although a judge’s public defense of nonrecusal can raise issues regarding the permissible limits of judicial speech, there is, as a practical matter, little risk that this will come about. In any reasonably close case, one of the parties to the litigation will have ample incentive to defend the challenged judge’s continued participation in the case.<sup>277</sup> In an adversary system, this should be sufficient.

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of whether the firm will be disqualified in future cases involving the judge it helped to defend against a charge of wrongful recusal.

275. Although the ABA Model Code places limits on a judge’s public statements, there appears to be no bar to a judge providing a reasonable public explanation of a decision not to recuse. See MODEL CODE OF JUDICIAL CONDUCT R. 3.2 (2008) (stating that a judge may testify at public hearings concerning core judicial matters); *id.* R. 3.3 (stating that a judge may not testify as character witness); *id.* R. 3.5 (stating that a judge shall not intentionally disclose nonpublic information acquired through judicial duties); *id.* R. 3.7 (stating that a judge may participate in civic organizations); *id.* R.3. 10 (stating that a judge may not practice law); *id.* R. 3.11 (stating that a judge is limited in his business activities except for those involving family); *id.* R. 4.1 (stating that a judge is limited in what may be said in campaigning for office, although some of the prohibitions are perhaps questionable after *Republican Party of Minnesota v. White*, 536 U.S. 765, 781-82, 785 (2002)).

276. See MODEL CODE OF JUDICIAL CONDUCT R. 4.1(12). The Code’s Terminology section defines a “pending” matter as one that “has commenced.” Further, “[a] matter continues to be pending through any appellate process until final disposition.” An “impending matter” is “a matter that is imminent or expected to occur in the near future.” *Id.* Terminology.

277. This was lacking in *In re IBM*, 687 F.2d at 594-96, because both the government and IBM wanted to settle the matter and hence both opposed the judge’s refusal to cease presiding over a case they regarded as settled. Absent these types of situations, there will ordinarily be an interested party defending a judge’s failure to recuse.

40. What if the parties settle a *Caperton* claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation?<sup>278</sup>

The dissent should perhaps spend more time worrying about the integrity of the judicial system and less time worrying about the sensibility of judges. A judge who is unduly sensitive to criticism needs to find another line of work. In an adversary system, parties constantly make motions or take appeals challenging the correctness of judicial action. The legal profession and the public generally do not regard it as problematic that judges are constantly being accused of error, abuse of discretion, etc. A judge's feelings about an occasional mistaken failure to recuse is hardly something that should cause great concern.

Admittedly, it is a bit more annoying to be accused of being ethically insensitive, which is often part of the subtext of a recusal motion. But this, too, is an occupational hazard. In elected judiciary states, a judge may on occasion worry that a disqualification motion could be played in the popular press by her political opponents. Again, however, this is hardly something different from whatever other factors may be used against the incumbent judge seeking reelection.

When the judge in question must run for election, the concerns of the Roberts dissent become more troubling.<sup>279</sup> Unpersuasive or even baseless attacks on a judge's failure to recuse could damage the judge's image sufficiently and contribute to electoral defeat. But at this juncture, there is relatively little data to suggest that the fine points of disqualification law are salient to the average voter. Only if the failure to recuse is egregious, as in *Caperton*,<sup>280</sup> is the electorate likely to become outraged. Even then, this may have minimal impact. For example, Justice Benjamin, who so badly erred in *Caperton*, remains on the bench until 2016 unless removed.<sup>281</sup> Despite his rather outrageous failure to step aside in *Caperton*, there appears to be no serious risk that he will be impeached or even disciplined. Should he run for reelection in eight years, it is not likely that he will be harmed at all by the *Caperton* episode.

Judicial elections already can turn on so many irrelevant or misleading factors that it becomes difficult to seriously worry that a judicial career will be destroyed by a disqualification controversy. Too many red herrings

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278. *Caperton*, 129 S. Ct. at 2272.

279. *Id.*

280. *Id.* at 2257-59 (stating the extraordinary facts of the case).

281. See W. VA. CONST. art. VIII, § 2 (stating that justices serve twelve year terms); Marcia Coyle, *Review Sought on Judicial Recusals*, NAT'L L.J., Aug. 4, 2008, at 17 (stating Justice Benjamin was elected in 2004).

already seem to dominate the judicial electoral process.<sup>282</sup> In one close-to-home example, I was disappointed to see that the prevailing challenger (who is now a competent, well-regarded judge) used photos while campaigning that showed the incumbent judge in a T-shirt outside his house, which gave the incumbent judge an unkept and unjudicial look.<sup>283</sup> In my view, the photo, which graced much of the challenger's campaign literature and was used on television, hurt the incumbent's candidacy.<sup>284</sup> In addition, the press (rightfully in my view but regrettably in that it did not appear to actually reflect on the incumbent's overall performance on the bench) gave attention to a story told by attorneys that on at least one occasion the incumbent had, in what appeared to be an ill-considered joke, asked counsel why they had not yet contributed to his campaign.<sup>285</sup>

Where judicial politics is this raw, it is unlikely that the occasionally publicized recusal motion poses any more threat than those already faced by the elected judge, who it seems now cannot dare pick up the morning paper in a bathrobe for fear of being captured on tape by an electoral opponent.<sup>286</sup> Individual case determinations are not usually publicized and when publicized are usually not salient to the voters unless the facts are egregious or the matter has been seized upon by political opponents.

It appears that political opponents of incumbent judges did a sufficient amount of mudslinging at incumbents prior to *Caperton*,<sup>287</sup> and the new availability of *Caperton*-based recusal will not inflict any detectable injury on incumbents. Further, even if a case is settled, it would appear that a

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282. See Symposium, *Judicial Selection and Evaluation*, 4 NEV. L.J. 61, 87 (2003); Stempel, *Malignant Democracy*, *supra* note 42, at 46; Glenn Puit, *Candidates Take Off the Gloves in Judgeship Race*, LAS VEGAS REV.-J., Oct. 21, 2002, at 1B.

283. The incumbent, now deceased, was well-regarded by many local lawyers but was also overweight, with a protruding stomach that was not flattered by the T-shirt and sported a scruffy beard, making him look a little bit like Karl Marx on the way to the grocery store for a quart of commune-produced milk.

284. See *Judicial Selection and Evaluation*, *supra* note 282, at 87 (quoting comments of John Curtas, Esq. regarding this judicial contest, attributing challenger's victory to greater spending on media); Stempel, *Malignant Democracy*, *supra* note 42, at 46 (referring to negative campaigning); Puit, *supra* note 282, at 1B (referring to the T-shirt ads).

285. See Steve Sebelius, *It's Obvious: Appoint*, LAS VEGAS REV.-J., Dec. 12, 2002, at 9B (referring to campaign contribution conversational gaffe); see also sources cited *supra* note 282.

286. In the non-judicial context, this type of photo opportunity proved important in the unsuccessful reelection campaign of a city councilperson who was photographed in a bathrobe retrieving the morning paper—at a home outside her electoral district which she admitted owning but claimed was not her residence. See Jane Ann Morrison, *Little Matter of Boggs' Residency was Signal of Big Problem*, LAS VEGAS REV.-J., Jan. 15, 2009, at 1B; Erin Neff, *The Power of Video*, LAS VEGAS REV.-J., June 7, 2007, at 9B.

287. See Carter, *Mud and Money*, *supra* note 35, at 40, 42; Goldberg et al., *The Best Defense*, *supra* note 42, at 509-10; Stempel, *Malignant Democracy*, *supra* note 42 (describing nasty judicial campaigns).



judge always has the option of issuing an opinion clarifying her position on recusal and circulating it to the media. In essence, this is what Justice Benjamin did in *Caperton* itself.<sup>288</sup> It was not necessary that the case remain pending for him to clarify his position and defend his refusal to disqualify.

This last question, like many of the others in the dissent's list, seems to proceed from the unspoken position that it is somehow unseemly to even discuss judicial favoritism to any degree. Concluding his dissent, 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 diminish the confidence of the American people in the fairness and integrity of their courts."<sup>289</sup> This part of the Roberts dissent comes disturbingly close to suggesting that non-judges simply should not have the temerity to challenge judges, who omnisciently know best.

In his separate, lone dissent, Justice Scalia was more strident.<sup>290</sup> He rejected the majority's contention that the tainted Massey victory should be set aside—the same victory in which Blankenship's \$3 million-dollar-judge played a key role—and argued that the majority's decision did not preserve confidence in the judicial system:

The decision will have the opposite effect. What 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. The Court's opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim. 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 nonrecusal decisions through every available means.

. . . The relevant question . . . is whether we do more good than harm by seeking to correct this imperfection through expansion of our

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288. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 299-303 (W. Va. 2008) (Benjamin, J., concurring) (explaining the decision to reject *Caperton*'s motion for disqualification), *rev'd*, 129 S. Ct. 2252 (2009).

289. *Caperton*, 129 S. Ct. at 2274.

290. *Id.* at 2274-75 (Scalia, J., dissenting).

constitutional mandate in a manner ungoverned by any discernable rule.  
The answer is obvious.<sup>291</sup>

Like Chief Justice Roberts, Justice Scalia shows the skills of a polished negative debater. Justice Roberts picks points and provides a list of seemingly interminable concerns to suggest the inevitable unworkability of policing judicial disqualification under the Due Process Clause.<sup>292</sup> Justice Scalia engages in a different favorite tactic of the negative debater: attacking the majority as naive do-gooders and suggesting that even making modest use of the affirmative proposal (i.e., setting aside the judgment where the deciding justice had received \$3 million from an interested party) opens the door to grave unintended consequences by opportunists.<sup>293</sup>

Justice Louis Brandeis also had more than a few debating skills.<sup>294</sup> But his approach was more that of the scholar and elder statesman,<sup>295</sup> it was one of reflection rather than a counterattack or diversion. Among his many famous insights is that “[s]unlight is said to be the best disinfectant,”<sup>296</sup> a polestar the dissenters lost sight of in their fixation on resisting any constitutional supervision of even egregious state court misconduct that deprives a litigant of an impartial bench. Put another way, no matter how much one wants to avoid casting aspersions on the bench and no matter how difficult or time-consuming due process recusal review may be in application, what could undermine public confidence more than allowing the West Virginia judgment favoring Massey to stand?

## V. CONCLUSION

The Roberts dissent in *Caperton* seeks to overwhelm the reader with questions, but on closer examination, the questions submit to at least

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291. *Id.*

292. *Id.* at 2269-72 (Roberts, C.J. dissenting).

293. *See id.* at 2274 (Scalia, J., dissenting).

294. G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, N.Y.U. L. REV. 576, 607-08 (1995).

295. *See* ANTHONY T. KRONMAN, *THE LOST LAWYER* 23 (1993) (characterizing Brandeis as meeting Kronman’s ideal of a lawyer-statesman); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 164, 172 (1995); Paul Simon, *Ethics in Law and Politics*, 28 LOY. U. CHI. L.J. 221, 227 (1996) (identifying Brandeis as a lawyer-statesman); White, *supra* note 294, at 610.

Of course, even heroes have blemishes. *See* BRUCE ALAN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITY OF TWO SUPREME COURT JUSTICES* 78-89 (1982) (arguing that Frankfurter and Brandeis engaged at time in inappropriate contact and manipulation in order to achieve what they regarded as better case outcomes and public policy).

296. *See* LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY* 92 (1914).

adequate, if not comprehensive and inarguable answers. Although there are legitimate grounds for concern in the dissenting opinions, the dissenters use concern to score rhetorical points rather than to seriously explore new methods of implementing principles of judicial fairness. Although states' rights are an important component of the American system, deference to state courts cannot be so great that it permits decision-making by judges who reasonably appear to lack neutrality.

Just as some federal oversight under the Fourteenth Amendment was necessary to police state improprieties regarding civil rights,<sup>297</sup> federal oversight (at least in the limited doses envisioned in *Caperton*) is necessary to prevent biased adjudication. The proof is in *Caperton* itself. Had the Court not acted, a very suspicious decision would stand, one in which a state supreme court narrowly favored a justice's largest campaign supporter, with the tainted justice casting the crucial vote,<sup>298</sup> in an opinion that is at a minimum controversial on the merits if not wrongly decided.<sup>299</sup>

The *Caperton* majority's approach is more than sufficiently practical and unlikely to result in the negative consequences prophesied by the dissenters. Like many a negative debater, Justice Roberts appears to have become lost in his thicket of point-picking questions and abandoned perspective, embracing the trees so closely that his view of the forest was lost. As one debate veteran described the process with candor:

Team policy debate is focused on evidence gathering and organizational ability. Persuasiveness is not considered important—or at least, not as important as covering ground and reading plenty of evidence. The best teams have huge fileboxes packed to the gills . . . . If you ever walk into a high-level team debate round, expect to see debaters talking at extremely high speeds, reading out of the contents of page after page of evidence, gasping for breath between points, and using lots of jargon . . . . There is very little discussion of values such as freedom, justice, equality, etc. . . . [I]f you want to learn how to speak *persuasively*, this form of debate is not for you.<sup>300</sup>

When the whirring of the dissent's rapid-fire questioning dies down, ultimately it fails to persuade. In a world where nearly eighty percent of the

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297. See *supra* note 261 and accompanying text.

298. See *Caperton*, 129 S. Ct. at 2256-59 (recapping the astonishing facts of the case).

299. See *supra* text accompanying notes 55-61 (addressing West Virginia Supreme Court's decision regarding res judicata and forum selection arguments proffered by Massey and finding them problematic).

300. Cal. State Univ. Northridge, *Debate Formats*, <http://www.csun.edu/~dgdw61315/debformats.html> (last visited July 13, 2009).

states elect judges in some form,<sup>301</sup> often in highly contested cases where big money and extreme electioneering are part of the process,<sup>302</sup> the danger to judicial impartiality is high, particularly when—to use the Chief Justice’s own umpire analogy he deployed to his benefit during his confirmation hearings<sup>303</sup>—the local culture grants challenged justices a wide berth in calling their own balls and strikes regarding their impartiality. By playing an incomplete game of forty questions (writing but not attempting to resolve them), the *Caperton* dissenters are the ones turning litigation into a game akin to high school debate. Fortunately, Justice Kennedy and the *Caperton* majority comported themselves like jurists and treated the case as one of law and public policy rather than a matter of debating rhetoric.

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301. Currently, well over half the states have some form of judicial elections. See *Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting) (stating that thirty-nine states “elect their judges”); FLAMM, *supra* note 152, § 9.4 (characterizing thirty-three states as having form of contested elections as of 2003).

302. See Carter, *Mud and Money*, *supra* note 35; Goldberg et al., *The Best Defense*, *supra* note 42, at 503-512; Stempel, *Malignant Democracy*, *supra* note 42, at 44-53.

303. Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 701 (2007).

During his confirmation hearings, Chief Justice Roberts captured the public’s imagination when he offered an interpretation of the role that judges lay in our society when interpreting the Constitution. “Judges and Justices are servants of the law, not the other way around,” he said. “Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see an umpire.”

*Id.* (citing *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.)); see also Frank Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 187 (2008) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)) (quoting Judge Posner’s suggestion that neither Justice Roberts “nor any other knowledgeable person actually believed or believes” the umpire analogy in the Roberts confirmation testimony); Posner, *supra* note 198, at 2-3, 35-37.

