

SELVA OSCURA: JUDICIAL CAMPAIGN CONTRIBUTIONS, DISQUALIFICATION, AND DUE PROCESS*

*Keith R. Fisher***

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** A.B. Princeton University, J.D. Georgetown University. Professor Fisher currently serves as Reporter for the ABA Commission on Ethics 20/20 and as Reporter for the Judicial Disqualification Project being conducted under the aegis of the ABA Standing Committee on Judicial Independence. The views expressed in this article are the author’s own and do not necessarily reflect either the views of the Standing Committee on Judicial Independence or the views or policies of the American Bar Association.

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I. INTRODUCTION

Imagine yourself lost in a dark forest. Through the gloom, you cannot see far beyond the end of your nose. The forest is not necessarily Dante's *selva oscura* but serves, for present purposes, a similar metaphorical function.¹ If you were an owl, your superior night vision would enable you clearly to see the way out of the forest, and also to identify the nature and locations of the many dangers and obstacles making successful egress difficult. Human eyes lack that degree of visual perception.

Human reason,² on the other hand—a sort of “inner eye”—can make up some small part of the deficit. While there is truth in Holmes's aphorism that “the life of the law has not been logic: it has been experience,”³ we benefit also from Cardozo's cogent emendation: “Holmes did not tell us that logic is to be ignored when experience is silent.”⁴ Returning then to our sylvan setting, we know, for example, that there must be at least one way out of the woods. We reasonably anticipate the likelihood of some obstacles between here and there. We do not know, because we cannot see, the disposition of those obstacles,⁵ but we intuit that they can be surmounted. Beyond that, we have to grope our way, slowly and carefully, and, with every expectation of some trial and error, some bumps in the road (and on the head), hope to win through to the end.

-
1. Nel mezzo del cammin di nostra vita
mi ritrovai per una selva oscura
ché la diritta via era smarrita.
Midway upon the journey of life
I found myself in a dark forest
For the straight path had been lost.

DANTE ALIGHIERI, *LA DIVINA COMMEDIA*, canto I, 1-3 (1306-1321). Among the *selva oscura*'s allusions are the medieval understanding of Plato's image of chaos, unformed, unnamed, as a type of primordial wood (Latin, *silva*), as well as the image of the forest at the gate to the classical underworld limned by a predecessor epic poet, Vergil (P. VERGILIUS MARO, *AENEID*, VI. 179).

2. To paraphrase John Le Carré, the reference here is to reason as logic, not reason as motive or reason as a way of life.

3. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (New York, Barnes & Noble (2004) (1881).

4. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33 (1921).

5. *Cf.* German chess (Kriegspiel), which differs from standard western chess in that each player can see only his own pieces but not his opponent's, and must therefore try to guess the opponent's moves and anticipate the likely disposition of the opponent's forces.

The foregoing is not an inapt metaphor for the accretive, common law judicial process. To escape from the forest is to arrive at a legal conclusion—or on rarer occasions an all but immutable rule of law—that will represent a triumph of reason and order over entropy and the inevitable societal chaos occasioned by less optimal results. Yet rarely will escape from the dark forest be accomplished in a single leap. The risks of missteps, unanticipated consequences, and inadequate attention to the many byways of legal and public policy are too numerous and too great. The many obstacles and uncertainties, from the unseen to the only dimly perceived, counsel considerably more caution. Going from alpha to omega will be accomplished more confidently and more safely—though naturally more slowly—through intermittent stops at beta, gamma, delta, and so forth.

The problem is compounded by the pervasiveness of legal standards couched (sensibly enough, given the foregoing risks) in vague generalities. Such generalities festoon the legal landscape. One need only think of concepts such as “good faith” and the ubiquitous “reasonable person” to appreciate the potential for wildly disparate legal conclusions among the several States⁶ resulting from discrete and diverse factual and policy underpinnings.

Perhaps the grandsire in the U.S. legal system of these necessarily imprecise legal standards is the concept, embedded in the Constitution, of “due process of law.”⁷ In drafting our Constitution, the Framers frequently used locutions that are large-scale generalities. Due process is a concept that cuts across a broad spectrum of American jurisprudence, ranging from rights provided to criminal defendants to the conduct of business by federal administrative agencies.

This article will focus on the case of *Caperton v. A.T. Massey Coal Co.*,⁸ in which the U.S. Supreme Court applied the due process clause of the Fourteenth Amendment to the refusal of a West Virginia high court judge, Brent Benjamin, to grant a motion to disqualify himself based upon receipt by his election campaign of financial support in excess of \$3 million from Massey’s Chairman and CEO, Don L. Blankenship. The Court held 5-4 that sit-

6. When capitalized, the term “State” or “States” as used herein encompasses both courts and legislatures and also encompasses U.S. territories.

7. U.S. CONST. amends. V (“nor be deprived of life, liberty, or property without due process of law”), XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

8. 129 S. Ct. 2252 (2009).

ting in judgment on the case under such extreme circumstances created a “serious, objective risk of actual bias” that was constitutionally intolerable.⁹

Caperton thus strongly signals the importance, both to the states and to public perceptions of the judiciary in general, of having rules in state judicial codes¹⁰ that can contain the mischief of excessive campaign support in judicial elections. That importance has increased exponentially in the wake of the Court’s even more recent decision in *Citizens United v. FEC*.¹¹ That case did not concern judicial elections; rather it involved restrictions on the dissemination and showing, during the presidential campaign primaries leading up to the November 2008 general election, of a documentary entitled “Hillary: The Movie.”¹² The Court held that statutory limitations on independent campaign expenditures by corporations and labor unions violated the First Amendment.

Part II of this article will describe early (and occasionally surprisingly contentious) reactions by various State Supreme Courts to the *Caperton* decision and the underlying issues of disqualification and judicial election campaigns. Part III will discuss the background of the *Caperton* case and Justice Kennedy’s majority opinion. Part IV will address Chief Justice Roberts’s imposing dissent and will critique the validity of many of those forty questions. Finally, Part V will suggest some possible revisions to the ABA Model Code of Judicial Conduct to deal explicitly with the fallout from *Caperton* and *Citizens United*.

II. EARLY REACTIONS OF STATE SUPREME COURTS IN THE WAKE OF *CAPERTON*

As a consequence of the *Citizens United* decision, corporations and labor unions will be able to make unlimited expenditures on

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

10. The Court extolled the ABA’s Model Code of Judicial Conduct and States’ adoption thereof as maintaining the integrity of the judiciary and the rule of law. *Id.* at 2266. In particular, the Court quoted with approval the 1990 version of the ABA Model Code and its objective standard enjoining judges to avoid impropriety and the appearance of impropriety. *Id.* (citing Brief for American Bar Association as Amicus Curiae in Support of Petitioners at 14, 14 n. 29, *Caperton*, 129 S. Ct. 2252 (No. 08-22)). The Court also quoted with approval the brief amicus curiae of the Conference of Chief Justices, which underscored that the state codes of judicial conduct are “the principal safeguard against judicial campaign abuses” that threaten to imperil “public confidence in the fairness and integrity of the nation’s elected judges.” *Id.* (quoting Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 4, 11, *Caperton*, 129 S. Ct. 2252 (No. 08-22)).

11. 130 S. Ct. 876 (2010).

12. *Citizens United*, 130 S. Ct. at 877.

campaign support not only in general elections but in judicial elections as well. The mere possibility that a vast influx of additional campaign money might enter the latter arena, which already in the past decade has been saturated with unprecedented campaign support,¹³ virulent attack ads,¹⁴ and concomitant diminution in public respect for state judiciaries,¹⁵ makes tighter controls over judicial disqualification imperative in cases where parties have provided significant financial support. At a minimum, judges will need to have access to more information in order to be able to make appropriate disclosures in such cases, and donors who are parties or are associated or affiliated with parties before the court (including counsel) must be required to make their own disclosures about campaign support on the record.

Yet even though, thanks in part¹⁶ to the *Caperton* decision, issues surrounding judicial disqualification have attracted considerable publicity and public interest,¹⁷ significant problems remain.

13. See, e.g., LAUREN JONES, JAMES SAMPLE & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 24 (Justice at Stake Campaign ed., 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532235.

14. For a sampling, see Video: Selected 2008 Judicial Election Ads (Justice at Stake Campaign), available at <http://mnbar.org/impartialjustice/Videos.asp>.

15. See, e.g., THE ANNENBERG PUBLIC POLICY CENTER OF THE UNIVERSITY OF PENNSYLVANIA, *PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS* (2007), available at http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf [hereinafter ANNENBERG REPORT] (finding that 69% of the public “thinks that raising money for elections affects a judge’s rulings to a moderate or great extent”); CHRISTIAN W. PECK, *ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES* 4 (2007), available at <http://www.ced.org/images/content/events/judicial/zogby07.pdf> (finding that 79% of business executives believe “campaign contributions have an impact on judges’ decisions,” and more than 80% of African-Americans express this view, including 51% believing that judicial election contributions carry a “great deal” of influence).

16. Other prominent cases within the past decade include *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and *Avery v. State Farm Mutual Auto Insurance Co.*, 835 N.E.2d 801 (Ill. 2005), cert. denied, 547 U.S. 1003 (2006). *White* struck down the “announce clause” of Minnesota’s Code of Judicial Conduct as violative of judges’ First Amendment rights and opened the way for judges to announce during election campaigns their views on certain subjects that might come before them if elected. To the extent that announcement of such views might be perceived by the public as effectively committing a judge, even implicitly, to ruling in particular ways on specific issues, their impartiality might reasonably be called into question within the meaning of Rule 2.11 of the ABA Model Code of Judicial Conduct. *Avery* was a lesser ancestor of *Caperton*, as it involved a mere \$350,000 in direct contributions by State Farm employees and other representatives to the election of Lloyd Karmeier to the Illinois Supreme Court. Karmeier, who during the campaign had aligned himself with insurance company interests by stressing the need to “fix” the “medical malpractice crisis” created by “phony lawsuits,” refused to disqualify himself from an appeal by State Farm from a \$1 billion judgment against it.

17. See, e.g., ABA Now, *Post-Caperton Issues Still Unfolding, as States Seek Solutions to “Justice for Sale,”* Aug. 1, 2009, <http://www.abanow.org/2009/08/post-caperton>; Amanda

First, although the Model Code of Judicial Conduct has, for over ten years, contained a rule expressly addressing the question of judicial disqualification in the context of campaign support,¹⁸ no state has adopted that particular rule and only two states have adopted alternative approaches to regulate that narrow area.¹⁹ Second, motions to disqualify on campaign support grounds are rarely successful.²⁰ Third, one of the few such challenges that did ultimately succeed, namely *Caperton* itself, suffers from a threat to its continued vitality arising from the strong dissenting opinion of Chief Justice Roberts, who marshaled a phalanx of forty questions about the scope and ramifications of the majority opinion and the limitations thereon.²¹ Fourth, a number of states are considering new judicial disqualification rules in the wake of the *Caperton* decision.²²

Bronstad, *Stage Set for Litigation over Judicial Recusal; Big Campaign Cash Can Compromise Litigants' Due Process Rights—But What About the First Amendment?*, NAT'L L.J., June 22, 2009; Joan C. Rogers, *Draft ABA Report Reviews Rules and Processes for Judicial Recusal, Recommends Improvements*, 77 U.S.L.W. 1782 (June 16, 2009); Opinion and Commentary, *A Black Mark for Judicial Election*, STATESMAN.COM, June 13, 2009, http://www.statesman.com/opinion/content/editorial/stories/2009/06/13/0613judges_edit.html; Editorial, *Bias on the Bench*, TOLEDO BLADE, June 12, 2009, <http://toledoblade.com/article/20090612/OPINION02/906120315>; Nathan Koppel, *Ruling on "Probable Bias" Spotlights Political Reality*, WALL ST. J., June 10, 2009, at A5; John Schwartz, *Uncertainty in Law Circles Over New Rules for Judges*, N.Y. TIMES, June 10, 2009, at A20; Jess Bravin & Kris Maher, *Justices Set New Standard for Recusals*, WALL ST. J., June 9, 2009, at A3; Adam Liptak, *Justices Issue a Rule of Recusal in Cases of Judges' Big Donors*, N.Y. TIMES, June 9, 2009, at A1; Ben Hallman, *High Court Rules Judges Who Receive "Substantial" Campaign Donations Must Step Aside; Will Chaos Follow?*, AM. LAW. LITIG. DAILY, June 8, 2009; Robert Barnes, *Justices Consider When a Judge Should Bow Out*, WASH. POST, Mar. 9, 2009, at A06; Len Boselovic, *Supreme Court Hears W. Va. Recusal Case: Should Standard be Established for Judicial Campaign Contributions?*, PITT. POST-GAZETTE, Mar. 4, 2009, at A1; Marcia Coyle, *Justices Struggle with Standard to Determine When Due Process Requires Recusal*, NAT'L L.J., Mar. 4, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202428759135&slreturn=1&hblogin=1>; Joan Biskupic, *At the Supreme Court, A Case with the Feel of a Best Seller*, U.S.A. TODAY, Feb. 16, 2009, at 1A; Sharon Male, *Can Judges Be Bought?*, PARADE, Mar. 3, 2008, <http://www.parade.com/news/intelligence-report/archive/can-judges-be-bought.html>; Sandra Day O'Connor, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A24.

18. See MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007) [hereinafter MODEL CODE], available at http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

19. ALA. CODE §§ 12-24-1 (West, Westlaw through 2010 Sess.), 2; MISS. CODE OF JUDICIAL CONDUCT Canon 3E(2) (West, Westlaw through June 2009 amendments).

20. See John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2000); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 26.6 at 776 (2d ed. 2007).

21. *Caperton*, 129 S. Ct. at 2269-72 (Roberts, C.J., with Scalia, Thomas & Alito, JJ., dissenting). As some of these questions appear to be makeweights (e.g., numbers 5, 9, 22, 24, and 30) or somewhat duplicative (e.g., numbers 8 and 10, 14 and 15) it seems that Chief Justice stretched a bit to reach a total of forty questions.

22. Approximately 10 states have proposed new judicial disqualification rules since *Caperton* was handed down. Most of these have not progressed very far, as they have en-

The latter reform efforts have met resistance, however, from judges and businesses who oppose restraints on judges' ability to raise campaign funds and on voters' rights to support favored candidates financially. In a contentious 4-3 decision that actually stands athwart the due process-based decision in *Caperton*, the Wisconsin Supreme Court amended its Rule 60.04 last fall (though only issued the order this July) to add a new paragraph (7), which provides: "A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution from an individual or entity involved in the proceeding."²³ In so doing, the court decided to adopt proposals from the chamber of commerce and the trade association of realtors and rejected those of the League of Women Voters. Andrea Kaminski, executive director of the League of Women Voters in Wisconsin, was quoted as opining that the court's decision that "contributions are not automatically grounds for recusal, no matter how much is spent" will "further erode the public's confidence in the courts"²⁴

Similarly, the Supreme Court of Nevada, by order dated December 17, 2009, amended its Code of Judicial Conduct effective January 19, 2010.²⁵ This action was not prompted by the *Caperton* decision, as the Nevada high court's order was adopting the recommendation of an antecedent Commission on the Amendment of the Nevada Code of Judicial Conduct, which recommended replacement of the predecessor Code with the new one. The Court rejected, however, two alternate proposals: "A judge would have to recuse himself when he gets campaign support of \$50,000, or when he receives 5% or more of his total campaign funding from a party or law firm in a case."²⁶ The Nevada high court thus, at least according to one commentator, "missed an opportunity to strike a blow for judicial impartiality."²⁷

countered "resistance from judges and businesses who oppose restraints on judges' ability to raise campaign funds and on voters' rights to financially support favored candidates." Nathan Koppel, *States Weigh Judicial Recusals: Some Judges, Businesses Oppose Restrictions on Cases Involving Campaign Contributors*, WALL ST. J., Jan. 26, 2010, at A8. For example, legislation in Texas and Montana proposing bright-line monetary triggers—exactly what is contemplated by the ABA Model Code's Rule 2.11(A)(4)—for recusal did not pass. *Id.*

23. In the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal, Nos. 08-16, 08-25, 09-10, and 09-11 (Wisc. Sup. Ct., July 7, 2010).

24. Koppel, *supra* note 22, at A8.

25. In re Amendment of the Nevada Code of Judicial Conduct, No. ADKT 427 (Nev. Sup. Ct., Dec. 17, 2009).

26. Koppel, *supra* note 22, at A8.

27. *Id.* (quoting Nevada law professor Jeffrey Stempel).

Michigan's Supreme Court reacted positively to the *Caperton* decision, by amending paragraph (C)(1) of their Rule 2.003 (which, like Model Rule 2.11(A)(4), propounds a non-exclusive list of examples where disqualification would be required) to include a new subparagraph (b), which provides: "The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey*, ___ US ___, 129 S Ct 2222, 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."²⁸ An exception was created in that a judge "is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action."²⁹ Another addition to the Rule is a procedural one affecting the state high court:

[I]f a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reason for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.³⁰

28. Amendment of Rule 2.003 of the Michigan Court Rules, ADM File No. 2009-04 at 1-2 (Mich. Sup. Ct., Nov. 25, 2009) (adding new Mich. Ct. R. 2.003(C)(1)(b) (West, Westlaw through Dec. 2009 amendments)).

29. *Id.* at 3 (adding new Mich. Ct. R. 2.003 (C)(2)(b)). This second exception to disqualification adds to the pre-existing one, now codified at Rule 2.003(C)(2)(a), which provides that "a judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge."

30. *Id.* at 3-4 (adding Mich. Ct. R. 2.003 (D)(3)(b)). This procedure is extremely valuable in two respects. First, it requires that the determination be in writing, which is not the norm at present either in the states or in the federal system. *Cf.* Schurz Communications,

These amendments have not been without dissension either, however. Michigan Justices Robert P. Young, Jr. and Maura D. Corrigan, who joined a brief *amicus curiae* in *Caperton* arguing that there should be no due process limits on the amount a judge could receive in campaign support from a party without having to recuse,³¹ voted against the amendment to Rule 2.003. More re-

Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992) (Posner, J.) (“I have decided to publish my ruling on the motion [to disqualify] because of the press publicity surrounding the motion for disqualification, and the public attention that the panel decision received.”) Nonetheless, providing a reasoned explanation of a disqualification determination—more so in the case of a denial than of a grant—is important for the development of law in the area and concomitant guidance in the future to judges who have to apply disqualification principles to novel factual settings and to lawyers wrestling with the question of whether disqualification is warranted. It also provides greater transparency, which is useful in terms of public perception of judicial fairness. Second, the procedure provides for review, whereas in most states (as it was previously in Michigan, *see* Amendment of Rule 2.003 of the Michigan Court Rules, ADM File No. 2009-04 at 5 (Kelly, C.J., concurring) and at the U.S. Supreme Court) the challenged justice has the first and last word on the subject. *See, e.g.*, *In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994), *cert. denied sub nom. Bernard v. Coyne*, 514 U.S. 1065 (1995); *Schurz*, 982 F.2d at 1059; *Commonwealth v. Hammer*, 494 A.2d 1054 (Pa. 1985), *overruled in part on a different point by Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002); *Giuliano v. Wainwright*, 416 So.2d 1180, 1181 (Fla. Dist. Ct. App. 1982). The amended Michigan approach is beneficial in providing the possibility of full court review of what (at the high court level, at least) are often high-profile situations where decision solely by the challenged judge can give rise to public outcry and criticism. *See, e.g.*, Justice (then Associate Justice) Rehnquist’s refusal to disqualify himself in *Laird v. Tatum*, 408 U.S. 1 (1972), *Laird v. Tatum*, 409 U.S. 824 (1972) (Memorandum of Mr. Justice Rehnquist); Chief Justice Rehnquist’s refusal to refuse himself in a case in which his son was representing a party before the Court in a different matter, *Microsoft Corp. v. United States*, 530 U.S. 1301 (2000) (mem.) (Rehnquist, C.J.); Justice Scalia’s refusal to disqualify himself in connection with the Cheney duck hunting trip, *see Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 915-916 (2004) (mem.) (Scalia, J.) (denying recusal motion); and West Virginia Justice Brent Benjamin’s refusal to disqualify himself in *Caperton*. *See also* Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513 (2005). For further discussion of this subject, *see generally* Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181 (2005); Debra Lyn Basset, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657 (2005); Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia’s Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229 (2004); Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 47 RUTGERS L. REV. 107 (2004); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987). *See also* William H. Rehnquist, *Let Individual Justice Make Call on Recusal*, ATLANTA J.-CONST., Jan. 29, 2004, at 15A.

31. The argument was well made but sidestepped the appearance of impropriety/impartiality and public perception issues at the heart of the case (as had West Virginia Justice Benjamin’s opinion in support of his denial of the motion to disqualify):

[S]tates with judicial elections have chosen the accountability method, which allows the public greater control over individual judges and judicial philosophy. Recently, many interest groups have discovered that judicial philosophy is an important factor in determining whether judges are amenable to, or hostile to, public policies enacted by legislatures. This has led to increased spending in judicial elections. In essence, the question presented here is whether the increased spending in judicial races should overcome the historical presumption of judicial integrity.

cently, they refused to participate in a proceeding to determine whether individual justices should be disqualified from hearing a case and claimed that the rule as amended is unconstitutional.³²

These various squabbles are but an echo of the controversy that animated the *Caperton* case itself. That controversy will be fleshed out in Parts III and IV.

III. JUDICIAL DISQUALIFICATION AND THE ROAD TO *CAPERTON*

On November 14, 2008, the Supreme Court agreed, somewhat surprisingly,³³ to decide whether an elected judge's prior acceptance of a donor's multi-million dollar campaign contribution, which exceed all the judge's other campaign contributions combined, requires, as a matter of due process, his recusal³⁴ from any

Brief of Ten Current and Former Chief Justices and Justices as Amici Curiae in Support of Respondents at 2, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 298467. Both Corrigan and Young have served on the Michigan Supreme Court since 1999, and Corrigan was Chief Justice from 2001 to 2005. *Id.* at 1.

32. See generally Eartha Jane Melzer, *Young and Corrigan argued on behalf of Massey Energy*, MICH. MESSENGER, May 26, 2010, <http://michiganmessenger.com/38236/young-and-corrigan-argued-on-behalf-of-massey-energy>; Ed Brayton, *More Trouble on Justice Recusal Rules*, MICH. MESSENGER, April 1, 2010, <http://michiganmessenger.com/36332/more-trouble-on-justice-recusal-rules>.

33. The granting of the writ was unexpected, because in cases where judges had refused to recuse themselves in the face of large campaign contributions, the Supreme Court had previously denied certiorari three times. See *Avery*, 835 N.E.2d 801, *cert. denied*, 547 U.S. 1003 (2006); *Wightman v. Consol. Rail Corp.*, 715 N.E.2d 546 (Ohio 1999), *cert. denied*, 529 U.S. 1012 (2000); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988). In fact, the docket shows that the case was distributed for conference no less than five times before certiorari was granted. See Supreme Court of the United States Docket, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-22.htm> (last visited Aug. 12, 2010).

In the interest of full disclosure, the author was the principal draftsman of the American Bar Association's amicus briefs, one at the certiorari stage and one at the merits stage, filed in the *Caperton* case.

34. Strictly speaking, "recusal" traditionally refers to a judge's withdrawal from a case sua sponte, while "disqualification" refers to the motion of a litigant asking the judge to step down. See, e.g., *Forrest v. State*, 904 So.2d 629, 629 n.1 (Fla. App. 2005) ("Recusal is the process by which a trial court voluntarily removes itself, while disqualification is the process by which a party seeks to remove a judge from the case."). See also Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829, 830 n.3 (1984) (noting that the term "recusal," though often used as a synonym for disqualification, "technically refers to a voluntary decision of the judge to step down"); Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 460 (2004) (distinguishing the two terms). In many jurisdictions, however, this distinction has not been observed or the two terms have been conflated. See, e.g., *Hendrix v. Sec'y, Fla. Dept of Corr.*, 527 F.3d 1149, 1152 (11th Cir. 2008) (using the terms interchangeably); *Advocacy Org. v. Motor Club Ins. Ass'n*, 693 N.W.2d 358, 360 (Mich. 2005) (Weaver J., concurring) (observing that recusal is the "process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a [case]" (quoting BLACKS LAW DICTIONARY 1277 (Centennial 6th ed. 1991)). Cf. John P. Frank, *Disqualification of Judges: In Support of the*

case involving the donor.³⁵ As noted above, *Caperton* involved the denial (actually two denials!)³⁶ of a motion to disqualify Justice Brent Benjamin,³⁷ the recipient of over \$3 million in direct and indirect campaign support from Don L. Blankenship,³⁸ Massey's Chairman and CEO³⁹ to Benjamin's election campaign.⁴⁰ This

Bayh Bill, 35 LAW & CONTEMP. PROBS. 43, 45 n.7 (1970) (observing that amendments to the federal disqualification statute, 28 U.S.C. § 455, have rendered the term "recusal" obsolete). The ABA's 1972 Code of Judicial Conduct and subsequent versions have used the term "disqualification" to mean *both* withdrawal sua sponte and upon motion of a party. Likewise in this article, no distinction shall be drawn between the two terms.

35. The actual question presented was somewhat less elegant:

Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the \$50 million verdict in this case, even though the CEO of the lead defendant spent \$3 million supporting his campaign for a seat on the court—more than 60% of the *total* amount spent to support Justice Benjamin's campaign—while preparing to appeal the verdict against his company. After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 overturning that verdict. The question presented is whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.

Petition for a Writ of Certiorari at *i*, *Caperton*, 129 S. Ct. 2252 (No. 08-22) (filed July 2, 2008).

36. *Caperton*, 129 S. Ct. at 2257-58.

37. For background on Benjamin as candidate for the West Virginia high court, see, e.g., Cheryl Caswell, *A Rookie with a Mission: Benjamin Hopes To Unseat McGraw, Alter Balance on High Court*, CHARLESTON GAZETTE, Oct. 18, 2004, at 1A; Toby Coleman, *Brent Benjamin, Political Unknown Runs Against McGraw's Record*, CHARLESTON GAZETTE, Oct. 23, 2004, at 8A.

38. Reportedly, the money was "a pittance" for Blankenship. "[T]hat fall alone, he cashed in \$17.6 million in Massey stock options—notably more than the \$13.9 million the company earned in profits that year. (Massey Energy is a publicly traded company, but Blankenship has a friendly board, which he dominates.)" Michael Shnayerson, *The Rape of Appalachia*, VANITY FAIR, May 2006, available at <http://www.vanityfair.com/politics/features/2006/05/appalachia200605> [hereinafter *Appalachia*]. See also MICHAEL SHNAYERSON, *COAL RIVER* 35 (2008) [hereinafter *COAL RIVER*] (noting that Massey "lost \$30 million in 2002 and \$40.2 million in 2003 even as Don [Blankenship] earned at least \$10 million each year in salary, stock, and perks."); *id.* at 265 (reporting dismal \$3.2 million in net earnings for Massey in the second quarter of 2006 while Blankenship "pocket[ed] more than twice the company's net earnings for the quarter in personal income and benefits").

39. As this article was being written, Massey and Blankenship found themselves in the center of yet another firestorm, this one involving unsafe workplace conditions that resulted in the deaths in early April of 23 West Virginia miners in "the worst coal mine disaster in 40 years." Matthew L. Wald, *Mine Executive Favors Outside Inquiry into Deaths*, N.Y. TIMES, May 21, 2010, at A16. In March, federal mine inspectors had found dangerous coal dust accumulations during two separate inspections of the mine, and throughout the preceding year, the mine had been cited for failing to conduct inspections that would have spotted such accumulations and other unsafe conditions. Massey appealed at least 37 of the 50 citations it received during that month alone. Gardiner Harris & Erik Eckholm, *Mines Fight Strict Laws By Filing More Appeals*, N.Y. TIMES, Apr. 7, 2010, at A20. "Violations are unfortunately a normal part of the mining process," Mr. Blankenship said in a radio interview. *Id.* "Last year, the number of citations issued against the mine more than doubled, to over 500, from 2008, and the penalties proposed against the mine more than tripled, to \$897,325." Ian Urbina & Michael Cooper, *Deaths at West Virginia Mine Raise*

amount exceeded all other support for both candidates in the campaign combined.⁴¹ In the public mind, these sorts of scenarios add to the already widespread public perception that justice is for sale and that only the wealthy can expect to receive it.⁴²

To place the significance of the case in historical perspective requires a brief rehearsal of the evolution of judicial disqualification law from its common law antecedents to the present.

Issues About Safety, N.Y. TIMES, Apr. 7, 2010, at A1. This is not the first disaster at a Massey site in recent years. In April 2009, a Massey affiliate, Aracoma Coal Company, pleaded guilty to several counts of willfully violating mine safety standards and agreed to pay \$4.2 million in criminal fines and civil penalties, described by the Justice Department as “the largest financial settlement in the coal industry’s history.” Dan Barry, Ian Urbina & Clifford Krauss, *2 Mines Show How Safety Practices Vary Widely*, N.Y. TIMES, Apr. 23, 2010, at A1.

Blankenship, who has been characterized as “a man who . . . ha[s] caused more misery to more people in Appalachia than anyone else,” COAL RIVER, *supra* note 38, at 31-32 (quoting United Mine Workers of America president Cecil E. Roberts), made his reputation as a union buster, particularly as CEO of Massey Energy when the company was acquiring rival mines throughout the 1990’s. “Once, every mine in the Coal River Valley was a union operation. Now, thanks to Blankenship, hardly a union mine remains.” Appalachia, *supra* note 38.

Another incident is revealing:

The federal surface-mining act of 1977 prohibits coal companies from building within 300 feet of a school, but Massey had an answer for that: its prep plant on Marsh Fork Creek had been operating since 1975, making it exempt from the law. So confident was Massey that it went ahead and built the foundation for the 168-foot silo while the permit was still pending. . . .

This time, though, a reporter from *The Charleston Gazette* upset Massey’s plans. Ken Ward Jr. Has covered mountaintop-removal mining for nearly a decade When Massey declared that its silos were exempt from the 1977 law, Ward started studying the site’s permit applications over the years. What he found was extraordinary. Neither of the silo sites was entirely within the originally permitted area, but on subsequent Massey survey maps the property lines had *migrated*. They’d moved toward the Marsh Fork Elementary School, just far enough to accommodate the first, and now the second, silo. Ward’s revelation startled the [West Virginia Division of Environmental Protection], which had just granted a permit for the new silo on the basis of Massey’s own maps. And it galvanized the governor. Now, when the agency looked again, it did something no one could remember it ever having done before, it rescinded the permit.

Blankenship was furious. The governor, he declared, was simply taking revenge for the coal baron’s campaign against [a bond issue proposed by the governor to shore up pension funds for state workers]. And so, by this logic, Blankenship sued the governor for violating his right to free speech. . . .

Id. See also COAL RIVER, *supra* note 38, at 132, 144 (on the silos), 137-38 (on the bond issue), 145 (on the suit against Governor Manchin).

Notably, a large percentage of children at Marsh Fork Creek Elementary reported chronic symptoms: headaches, respiratory problems, stomachaches, and diarrhea. *Id.* at 57, 129-30, 133. These symptoms disappeared after they graduated and moved on to another school. *Id.*

40. *Caperton v. A. T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008), *cert. granted*, 129 S. Ct. 593 (2008).

41. See Petition for a Writ of Certiorari at 2-3, App. at 148a-159a, *Caperton*, 129 S. Ct. 2252 (No. 08-22).

42. See *infra* note 106 and accompanying text.

A. The Evolution of Judicial Disqualification in America

I do believe,
Induced by potent circumstances, that
You are mine enemy, and make my challenge.
You shall not be my judge: for it is you
Have blown this coal betwixt my lord and me;
Which God's dew quench! Wherefore I say again,
I utterly abhor, yea, from my soul
Refuse you for my judge; whom, yet once more,
I hold my most malicious foe, and think not
At all a friend to truth.⁴³

In this declamation of Catherine of Aragon, Henry VIII's first wife, the Bard faithfully references the standard for disqualification under Canon law and the civil law in Spain. These, in turn, were descended from Roman law, where judges "under suspicion" were subject to disqualification.⁴⁴

At common law, however, things were different, predicated on a kind of logical idealism. Blackstone referred to "civil and canon laws" pursuant to which "a judge might be refused on any suspicion of partiality," but asserted that the law was otherwise in England; "[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends on that presumption and idea."⁴⁵ Blackstone conceded the possibility that some judges might succumb to bias in isolated cases but concluded nevertheless that recusal was unnecessary as "such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct."⁴⁶

43. WILLIAM SHAKESPEARE, HENRY THE EIGHTH act 2, sc. 4.

44. It is the clearest right under general provisions laid down from thy exalted seat that before hearings litigants may recuse judges. Although a judge has been appointed by imperial power, yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him who thinks the judge under suspicion to recuse him before issue be joined, so that the cause go to another; the right to recuse having been held out to him
Codex of Justinian, lib. III, title 1, No. 16. See generally Harrington Putnam, *Recusation*, 9 CORNELL L.Q. 1, 5-7 (1923-1924).

45. 3 WILLIAM BLACKSTONE, COMMENTARIES 361.

46. *Id.*

There was only one exception, announced by Lord Coke in a celebrated case:⁴⁷ *Nemo iudex in causa propria sua debet esse* (“no man should be a judge in his own cause”). This maxim has been discussed by James Madison in *The Federalist Papers*⁴⁸ and adverted to by the U.S. Supreme Court.⁴⁹ Simply put, a judge could not have an “interest” in a case over which he presided.⁵⁰ If, contrary to fact (and Holmes’s aphorism), the life of the law were logic, then one might expect the great English common law judges to have extended this principle to situations in which a relative of the judge had an interest in the case, or indeed to a situation where the judge was related to a party before the court. They did not, however.⁵¹ Nor was the principle broad enough to permit disqualification for bias or prejudice.⁵²

In short, as of the time the American colonies received the common law from the mother country, disqualification was a very circumscribed practice. “Judges were disqualified for financial interest. No other disqualifications were permitted, and bias . . . was rejected entirely.”⁵³ A presumption of judicial impartiality characterized American common law, and prevailed in the states long past the Civil War into the latter part of the nineteenth century.⁵⁴

47. Dr. Bonham’s Case, (1609) 77 Eng. Rep. 646 (K.B.). In that case, a judge was disqualified where he would personally receive the fines he assessed. See also *Between the Parishes of Great Charte & Kennington*, (1742) 93 Eng. Rep. 1107 (K.B.).

48. See THE FEDERALIST No. 10, at 59 (J. Madison) (J. Cooke, ed., 1961) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”).

49. See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 524 (1927); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986).

50. In addition to a direct financial interest, illustrated by Dr. Bonham’s case and its progeny, the English courts applied the principle in ejection actions where the judge was the landlord. See, e.g., *Earl of Derby’s Case*, (1613) 77 Eng. Rep. 1390 (K.B.); *Anonymous*, (1700) 91 Eng. Rep. 343 (K.B.).

51. See, e.g., *Brooke v. Rivers*, (1679) 145 Eng. Rep. 569 (K.B.).

52. See *Lavoie*, 475 U.S. at 820. See also *Liteky v. United States*, 510 U.S. 540, 543 (1994) (“Required judicial recusal for bias did not exist in England at the time of Blackstone.”)

53. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611-12 (1947). FLAMM, *supra* note 20, § 1.2, at 6. Indeed, even with regard to financial interest, Parliament in the 1740’s enacted a progenitor of what has become known as the “rule of necessity,” which provides that when no other judge who is untainted is available to hear a case (as, for example, in a tax case, which affected all subjects of the Crown, or in a case involving judicial pay, which clearly would affect all judges), judges who under ordinary circumstances would be disqualified should nonetheless sit. *Id.* at 611 (citing 16 Geo. II c. 18, § 1 (1743)). For a contemporary U.S. example of this exception at work, see *United States v. Will*, 449 U.S. 200 (1980).

54. See, e.g., *Board of Justices v. Fennimore*, 1 N.J.L. 190 (1793); *Pearce v. Atwood*, 13 Mass. 324 (1816); *Bates v. Thompson*, 2 D. Chip. 96 (Vt. 1824); *Gregory v. Cleveland, Co-*

All the same, after the Revolution the law of judicial disqualification began to evolve more rapidly on this side of the pond, at least with respect to the federal judiciary. Beginning in 1792, Congress enacted laws that added as grounds for disqualification (i) having served as counsel for a party,⁵⁵ (ii) relationship to a party,⁵⁶ (iii) sitting as an appellate judge on review of a case the same judge had previously tried,⁵⁷ (iv) being a material witness in the case,⁵⁸ and (v) having a personal bias or prejudice against a party.⁵⁹

By the twentieth century, state law developments of codes of judicial conduct that were either enacted by the legislature or judicial rules-based began to proliferate. The American Bar Association took a leadership role in this effort, starting with the promulgation in 1924 of the original *Canons of Judicial Ethics*.⁶⁰ The principles articulated therein were gradually expanded as the document was transformed into the *Code of Judicial Conduct*⁶¹ and, several amendments later, into the *Model Code of Judicial Conduct*.⁶² All fifty states, the United States Judicial Conference,

lumbus & Cincinnati R.R. Co., 4 Ohio St. 675 (1855); *Wetsel v. State ex rel. Holland*, 23 S.W. 825 (Tx. Comm'n App. 1893).

55. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 178-79 (1792) (codified in 28 U.S.C. § 455(b)(2)).

56. Act of March 3 1821, ch. 51, 3 Stat. 643 (1821) (codified in 28 U.S.C. § 455(b)(5)(i)).

57. Act of March 3, 1891, ch. 517, § 6, 26 Stat. 827 (1891) (codified at 28 U.S.C. § 47).

58. Act of March 3, 1911, ch. 231, § 21, 36 Stat. 1090 (1911) (codified in 28 U.S.C. § 455(b)(2)).

59. *Id.* (codified in 28 U.S.C. § 144). *See also* 28 U.S.C. § 455(b)(1) (2006). In the states, however, bias largely remained an inadequate basis for disqualification, even though it was sometimes so blatant that it occasioned public comment. *See, e.g.*, *Boswell v. Flockheart*, 35 Va. (8 Leigh) 364, 364 (1837) (no disqualification though "great hostility had existed on the part of the judge towards [the party]"); *McCauley v. Weller*, 12 Cal. 500, 523 (1859) (no disqualification though judge had "expressed himself so strongly in favor of plaintiff's right to recover as to occasion remonstrance from bystanders"); *Loving v. Lamson*, 50 Me. 334, 334 (1863) (no disqualification though judge "had been the friend and legal adviser of the [party] in the matter"); *Jones v. State*, 32 S.W. 81, 83 (Ark. 1895) (no disqualification though judge admitted that "he had a fixed opinion as to the guilt or innocence of the defendant"); *Bryan v. State*, 26 So. 1022, 1026 (Fla. 1899) (no disqualification though "the[re] existe[d] . . . extreme bitter feeling and animosity between the judge and the defendant, [which] had become so notorious as to attract the attention of the people generally").

60. CANONS OF JUDICIAL ETHICS (1924).

61. CODE OF JUDICIAL CONDUCT (1972). Major revisions took place in 1990 and 1999, before the transformation into the current 2007 version. As this article was being written, certain proposed amendments to the Model Code were being prepared for submission to the ABA House of Delegates at the August 2010 Annual Meeting. These amendments do not deal with the subject matter of this article but focus instead on the Application section of the Model Code (i.e., the section establishing when the various rules apply to a judge or judicial candidate), rules applicable to retired judges subject to recall, and rules dealing with part-time judges.

62. MODEL CODE.

and the District of Columbia have adopted codes of judicial conduct based on (but not necessarily identical to) the 1972, 1990, and 2007 versions of the ABA's Code.⁶³

During that same period, the Supreme Court began cautiously to explore the impact on disqualification of judges (and persons exercising similar adjudicatory functions of the Due Process Clause of the Fourteenth Amendment. Early steps out of the dark forest were taken in two generic categories where "experience teaches that the *probability of actual bias* on the part of the judge . . . is too high to be constitutionally tolerable"⁶⁴: (A) where the judge (or someone acting in a judicial capacity) has, directly or indirectly, a financial interest in the outcome of the case, even though less than an interest that would have been considered personal or direct at common law;⁶⁵ and (B) where there is a possibility that personal animus may affect the judge.

Jurisprudence in the financial interest category dates back to 1927 and *Tumey v. Ohio*,⁶⁶ which held that a mayor's presiding over a criminal proceeding violated due process under circumstances where (1) the mayor received compensation for his services only if the defendant was convicted and (2) the village received a share of any fine that was levied against the defendant.⁶⁷ While acknowledging that "[t]here are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it," the Court found that "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."⁶⁸ In the Court's view, the appearance that justice was being done was dispositive.

63. Cf. Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1246 n.4 (2004). This footnote in Gray's article specified only 49 states and indicated that Montana was the only holdout. Her article was published after Montana had established a Commission (June 2003) on the Code of Judicial Conduct to study and consider adoption of the ABA Code of Judicial Conduct but well before the decision to adopt it was made in 2008. (The process was delayed a bit while the ABA considered what ultimately became the 2007 amendments to the Model Code). See *In the Matter of the 2008 Montana Code of Judicial Conduct*, No. AF 08-0203, (Sup. Ct. of Montana, filed Dec. 12, 2008) (approving and adopting 2008 Code of Judicial Conduct), available at http://courts.mt.gov/supreme/new_rules/default.mcp (follow AF 08-0203 hyperlink).

64. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (emphasis added).

65. This principle traces its lineage back to Dr. Bonham's Case. See text accompanying notes 47-50, *supra*.

66. 273 U.S. 510 (1927).

67. *Tumey*, 273 U.S. at 535.

68. *Id.* at 532.

Thus it didn't matter whether or not the mayor was actually biased against the defendant.⁶⁹ Instead, the Court observed, "Every procedure which would offer a *possible* temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which *might* lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."⁷⁰ Application of this reasoning in a similar set of circumstances took place in *Ward v. Village of Monroeville*,⁷¹ in which the problematic aspect of a mayor's adjudicating traffic fines was the fact that fines collected contributed to the village's finances, which were dependent in large part upon the fines levied in such proceedings.⁷²

The most recent Supreme Court application of these financial interest principles was *Aetna Life Ins. Co v. Lavoie*.⁷³ There, a justice of the Alabama Supreme Court, presiding over a case which created a novel state law cause of action against Aetna, declined to recuse himself even though he was a plaintiff in a case involving a similar claim against another insurer. The U.S. Supreme Court concluded that the state justice's participation in the case violated due process. The test was not whether the state justice was actually influenced, but whether sitting on the case would run afoul of the "nice, clear and true" standard.⁷⁴

The personal animus situations have been addressed in the context of the contempt power. A clear example of an appearance problem is where the same judge who had held in contempt a defendant who reviled him also presided over the contempt proceeding.⁷⁵ Similarly, in *In re Murchison*,⁷⁶ the Court held that due process required disqualification where a judge who presided over a "one-man grand jury" also presided over related contempt proceedings.

69. *Cf.* *North v. Russell*, 427 U.S. 328, 337 (1976) ("Financial interest in the fines was thought to risk a *possible* bias in finding guilt and fixing the amount of fines, and the Court [in *Tumey*] found that *potential* for bias impermissible." (emphasis added)).

70. *North*, 427 U.S. at 337 (emphasis added).

71. 409 U.S. 57 (1972).

72. *Ward*, 409 U.S. at 60. *Cf.* *Gibson v. Berryhill*, 411 U.S. 564 (1973) (holding that administrative board of optometrists had pecuniary interest in the outcome of hearings against optometrists with whom they were in competition).

73. 475 U.S. 813 (1986).

74. *Lavoie*, 475 U.S. at 825 ("would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true" (quoting *Ward*, 409 U.S. at 60, which in turn was quoting *Tumey*, 273 U.S. at 532)).

75. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

76. 349 U.S. 133 (1955).

Onto the path cloven by these sometimes tentative, sometimes bold steps through the dark forest, was shone a brief glimmer in the form of a rule that, had it been widely adopted, would (at least in the judicial campaign finance branch of the path) have gone beyond what due process requires and thus pretermitted due process-based review. This was Rule 2.11(A)(4), which was added to the *Model Code* by a 1999 amendment. That rule is a gloss on the default principle of Rule 2.11(A), which is that disqualification is mandated in any proceeding in which the judge's impartiality might reasonably be questioned:⁷⁷

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality*⁷⁸ might reasonably be questioned, including but not limited to the following circumstances:

.....

- (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge's campaign in an amount that [is greater than \$ [insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].⁷⁹

This rule takes a "fill in the blanks" approach intended to give the States the flexibility either to choose specific dollar floors for campaign support or to opt for a more descriptive, case-by-case approach. Unfortunately, as already noted, none of the States has seen fit to adopt this rule.

Now we "fast forward" to *Caperton*. With the grant of certiorari, the Court finds itself at a potential divergence in the forest path-

77. This is the default standard in the Model Code, in state codes of judicial conduct that have followed it, and in the federal statute governing recusal for federal judges, 28 U.S.C. § 455. The appropriate point of view is not that of the judge, nor even of a member of the bar, but of the ordinary citizen. See, e.g., *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980); *United States v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982). See generally JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 4.01 *et seq* (4th ed. 2007); FLAMM, *supra* note 20, §§ 5.6.3, 5.7.

78. Asterisks in the Model Code denote terms expressly defined in the Terminology section thereof.

79. MODEL CODE R. 2.11(A)(4).

way. Should the due process clause of the Fourteenth Amendment impose limitations on what, in the absence of a state restriction like Model Rule 2.11(A)(4), is otherwise the largely unbridled discretion of judges to deny disqualification motions in the campaign contribution context? Admittedly, the *Caperton* facts present an extreme case. The uncertainty—the heart of the *selva oscura*—is whether imposing such a limitation will help to counter public perceptions of unfairness and partiality in state courts or will instead open the floodgates to a torrent of disqualification motions that would, perversely, exacerbate those negative perceptions of the judiciary.⁸⁰

B. *Caperton's "Extraordinary" Facts*

On June 8, 2009, the Court held 5-4 that in the special—perhaps unique—factual setting of the case, West Virginia Justice Benjamin's refusal to recuse or grant the disqualification motion was incompatible with the demands of due process.⁸¹ The majority opinion, authored by Justice Kennedy, concluded—based on, limited by, and subject to *Caperton's* rather “extreme facts”—that Benjamin's refusal to grant a motion to disqualify in the face of financial support for his campaign in excess of \$3 million from the CEO of a party created a “serious, objective risk of actual bias” that was constitutionally intolerable.⁸² Noting that “the due process clause demarks only the outer boundaries of judicial disqualifications,” the Court observed that “States may choose to ‘adopt standards more rigorous than due process requires.’”⁸³

What were these extraordinary—indeed “extreme”—facts that underlay the majority opinion? The facts receiving that characterization in Justice Kennedy's opinion were limited to those involving the campaign support from Blankenship for Justice Benjamin's election and the latter's subsequent denials of disqualification motions. Yet the facts of the entire dispute, the factual prelude to the appeal to the West Virginia high court and Benjamin's involvement, are just as extraordinary.

80. / This question, which animates the dialogue between the majority and dissenting opinions in the Supreme Court's decision, may account for the apparent difficulty experienced by the justices in deciding whether to grant certiorari in the first place. See *supra* note 33.

81. *Caperton*, 129 S. Ct. 2252.

82. *Id.* at 2265.

83. *Id.* at 2267 (quoting *White*, 536 U.S. at 794 (Kennedy, J., concurring); citing *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (distinguishing the “constitutional floor” from the ceiling set “by common law, statute, or the professional standards of the bench and bar”).

One of the nation's ten largest mining companies, Massey had been endeavoring for some time to obtain the business of LTV Steel,⁸⁴ which was one of the principal purchasers of coal from Harman Mining and Sovereign. LTV wasn't interested in buying Massey's coal, however, because LTV preferred the quality of Harman's coal.

Massey then decided to play hardball. It identified as a target and then proceeded to acquire the parent company of Wellmore Coal Corporation. Wellmore was the middleman between Harman and LTV and had an output contract with Harman for its coal needs. Massey's plan was to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV. LTV, however, refused to accept the substitution of Massey coal for Harman coal and severed its business relationship with Wellmore. Perhaps LTV's reaction was precisely what Massey had anticipated. Regardless, Massey had planned one move farther ahead.

As Wellmore's new controlling shareholder, Massey directed Wellmore to invoke—improperly and without justification—the *force majeure* clause in its coal supply agreement with Sovereign Coal and Harman Mining in order drastically to reduce the amount of coal that Wellmore had agreed to purchase. Massey foresaw that this course of conduct would put Harman and Sovereign Coal out of business. Indeed, Massey exacerbated the situation by deliberately delaying Wellmore's termination of the contract until late in the year, when it would be virtually impossible for Harman and Sovereign to find alternate buyers for the coal.

Compounding this egregious conduct, Massey itself entered into negotiations to purchase the Harman Mine and then used the confidential information obtained during negotiations to take further actions—such as purchasing a narrow band of coal reserves surrounding the entire Harman Mine—to make the Harman Mine unattractive to others and thereby decrease its standalone value. Massey then “delayed” consummation of its agreement to purchase the Harman Mine and ultimately walked away from the deal in a manner calculated to force Harman, bereft of any purchaser for either its mine or its coal, into bankruptcy.

84. Except where otherwise indicated, the following factual summary is derived from the factual findings in the trial court. See generally Joint Appendix at 63a-65a, 490a-496a., *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5784213, 2008 WL 5422892. See also John Gibeaut, *Caperton's Coal*, A.B.A. J., Feb. 2009, at 52, available at http://www.abajournal.com/magazine/article/capertons_coal.

A lawsuit against Massey⁸⁵ was brought in West Virginia by Petitioners Hugh Caperton, Harman Mining Corporation, and related companies,⁸⁶ who alleged a course of conduct by Massey that, in other circumstances, might have been characterized as a conspiracy in restraint of trade in violation of the federal antitrust laws. Here, however, only state causes of action were pursued, including breach of contract, tortious interference with existing contractual relations, fraudulent misrepresentation, and fraudulent concealment. The net result was that a jury found that Massey had intentionally and fraudulently driven Harman Mining out of business and awarded damages accordingly, including \$50 million in punitive damages.⁸⁷

Due to delay generated by Massey's numerous post-trial motions (including a challenge to the accuracy of the trial transcript),⁸⁸ Massey did not file a petition for review of the trial court's August 2002 \$50 million fraud judgment in the West Virginia Supreme Court of Appeals until October 24, 2006, over four years later.⁸⁹ In the interim, Massey's Chairman, CEO, and President, Don L. Blankenship, alleged to have been the principal architect of the scheme to destroy Harman, spent (directly and indirectly), and apparently out of his own pocket, at least \$3 million⁹⁰ supporting the 2004 campaign of Brent D. Benjamin for a seat on

85. Harman Mining Corporation and Sovereign Coal Sales, Inc. filed a lawsuit against Wellmore in Buchanan County, Virginia. A jury returned a \$6 million verdict in their favor on their breach of contract claim. (They had originally included a tort claim but withdrew it before trial). The suit against Massey brought by Caperton, Harman Mining, Harman Development Corporation, and Sovereign Coal sounded principally in tort and was filed shortly after the Virginia action and before the jury verdict. Massey moved to dismiss the West Virginia action on the ground that it was precluded by a forum selection clause (specifying Virginia) in the plaintiffs' contract with Wellmore. After the Virginia jury verdict, Massey moved for summary judgment on grounds of *res judicata*. The West Virginia trial judge denied both motions, and it was ultimately on the basis of those two legal claims that the West Virginia Supreme Court of Appeals reversed the jury verdict in plaintiff's favor.

86. To wit: Harman Development Corporation and Sovereign Coal Sales, Inc.

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

88. Joint Appendix, *supra* note 84, at 340a.

89. *Id.*

90. Some press accounts reported higher amounts for the support. *See, e.g.*, Potpourri, CHARLESTON GAZETTE, July 7, 2008, at 4A ("Massey Energy's president spent \$3.5 million for 'attack ads' that enabled . . . Benjamin to win a seat on the state supreme court. . . ."); Justin D. Anderson, *Court Race Ad Sparks Controversy; French Riviera Photos Resurface in Campaign Spot*, CHARLESTON GAZETTE, May 5, 2008, at 1A ("[Massey CEO] Blankenship spent about \$3.5 million for advertisements, helping to get Justice Brent Benjamin elected."); Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash "in the Courtroom,"* N.Y. TIMES, Apr. 15, 2008, at A22 (reporting that Benjamin, who cast the deciding vote, declined to recuse himself despite owing his election to "more than \$3 million" spent by Blankenship).

the Supreme Court of Appeals of West Virginia, the very court that would hear the appeal.⁹¹ This extraordinary sum represented more than 60% of the total money spent on Justice Benjamin's campaign.⁹² Blankenship also wined and dined then-West Virginia Chief Justice Elliot E. "Spike" Maynard on the French Riviera and Monaco.⁹³

Aided by this campaign support and the extraordinarily bitter "attack ad" campaign they funded, Benjamin narrowly defeated incumbent Justice Warren McGraw in the November 2004 election.⁹⁴ After taking his seat on the state high court, Justice Benjamin denied (without any explanatory opinion, at least at that juncture) Petitioners' motion that he recuse himself and then proceeded to vote, along with Chief Justice Maynard, to overturn the verdict against Massey as part of a 3-2 majority.⁹⁵ The ruling was controversial and highly criticized as a distortion of West Virginia precedent.⁹⁶

After this ruling, photographs of Maynard's Mediterranean junket with Blankenship appeared in the newspapers, and Maynard belatedly recused himself from the case.⁹⁷ In the ensuing public firestorm Maynard lost his seat on the court when he came in third in the primary and thus could not stand for reelection.⁹⁸ Before leaving, however, Maynard participated in what has been characterized as an unprecedented departure from the Court's seniority-based practice by choosing Benjamin as Acting Chief Justice.⁹⁹

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

92. *Id.*

93. Anderson, *supra* note 90, at 1A.

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

95. *Id.* at 2257-58.

96. Joint Appendix, *supra* note 84, at 340a.

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

98. Lawrence Messina, *Vacation Photos End Maynard's Re-Election Bid*, CHARLESTON GAZETTE, May 15, 2008, at 1A.

99. *Cf.* Joint Appendix, *supra* note 84, 454a, 456a-457a (statement of Starcher, J., recusing himself from rehearing):

[W]hen certain photographs were recently revealed as an attachment to a disqualification motion in this case, the public learned that Mr. Blankenship has enjoyed a longstanding and close relationship with a justice of this Court. The two vacationed in Europe together at the very time that this case was pending before the Court, and who knows what else? The details of that relationship and that vacation have still not been fully disclosed or independently investigated—and they should be. Having never before acknowledged this close relationship, even when cases involving Mr. Blankenship's companies were before this Court, that justice did recently step aside in this case, but only after a second request and the release of the photos. . . .

The case was reargued. Justice Larry Starcher, one of the dissenters in the first decision,¹⁰⁰ recused himself from the case based on concern that the strength of his rhetoric condemning Maynard and Benjamin for failing to recuse themselves at the outset might cause his impartiality reasonably to be questioned.¹⁰¹ Again petitioners sought Benjamin's recusal, again he denied them,¹⁰² and

Moreover, that justice recently voted to remove two justices from the Chief Justice rotation order, materially affecting the appointment of replacement judges in cases involving Mr. Blankenship's companies.

100. Starcher's opinion was indeed of the "no holds barred" variety:

The majority's opinion is morally wrong because it steals more than \$60 million from a man who was the victim of a deliberate, illegal scheme to destroy his business. . . . Make no mistake—a West Virginia jury heard from all the witnesses from both sides, and decided that Mr. Don Blankenship directed an illegal scheme to break up Mr. Hugh Caperton's business. . . . Let's not forget why the jury verdict was justified: the jurors looked Mr. Blankenship in the eye and concluded he was lying, and that Mr. Caperton was telling the truth. The majority opinion says, "That doesn't matter"—it should have been handled in Virginia. To which argument, one must respond: "Horse pockey!"

Joint Appendix, *supra* note 84, at 420a-421a (Starcher J., dissenting).

101. *Caperton*, 129 S. Ct. at 2258. In his statement recusing himself from participating in the rehearing of the case, Starcher continued his "no holds barred" rhetoric:

The simple fact of the matter is that the pernicious effects of Mr. Blankenship's bestowal of his personal wealth, political tactics, and "friendship" have created a cancer in the affairs of this Court.

I was born a poor boy in an old farm house in West Virginia. I was the first in my family to graduate from high school and then college; I was fortunate enough to receive a good education. I came to the practice of the law and the judiciary with an idealism rooted in the belief that big money should never be permitted to buy, or be seen to buy, justice. That idealism is the sole reason I have spoken out against Mr. Blankenship's views and practices, as they relate to our State's judiciary.

Those distorted views and practices allow Mr. Blankenship to cavort on the Riviera with a justice of this Court, while he had a \$60,000,000 case pending before the Court – and see nothing improper. Those views and practices allow him to claim no appearance of impropriety in presenting his case to a justice whose election he supported with something around \$4,000,000. And those views and practices allow him to complain that the only "partiality" problems he has with this Court are *my* statements criticizing *those* very views and practices.

. . . Fortunately, the public can see through this kind of transparent foolishness, just as a West Virginia jury saw through his lies in court.

Joint Appendix, *supra* note 84, at 460a-461a. When Starcher refused, notwithstanding his public position against Blankenship and Massey, to recuse himself in a subsequent case involving Massey, Massey sought (essentially simultaneously with the *Caperton* petition) due process review in the U.S. Supreme Court. The Court denied review. *See* *Central West Virginia Energy Co. & Massey Energy Co. v. Wheeling Pittsburgh Steel Corp.*, No. 05-C-85, 2007 WL 4959806 (Cir. Ct. W. Va. 2007), *cert. denied*, 129 S. Ct. 626 (2008).

102. On neither occasion did Justice Benjamin give any reasons for his denial of the disqualification motion. It was not until July 28, 2008, over four months after the opinion of the West Virginia Supreme Court of Appeals was filed in the case (and just in time to be quoted in Massey's Opposition to the Petition for Certiorari), that he belatedly issued a 58-page opinion defending his decision. *See Caperton v. Massey*, 679 S.E.2d 223, 285 (W.Va. 2008) (Benjamin, Acting C.J., concurring) (filed July 28, 2008) [hereinafter *Benjamin Concurring Opinion*] (citing *U.S. Steel Mining Co. v. Helton*, 631 S.E. 2d 559 (W. Va. 2005); *Helton v. Reed*, 638 S.E. 2d 160 (W. Va. 2006); *Massey Energy v. Wheeling-Pittsburgh Steel*

again the judgment against Massey was overturned by a 3-2 vote (with the vacancies on the court having been filled by Benjamin as Acting Chief Justice).¹⁰³

The dissenting West Virginia justices, in addition to their disagreement on the merits, were critical of Justice Benjamin's failure to recuse himself and opined that serious federal due process issues were presented under the circumstances of the case but had not been addressed.¹⁰⁴

C. *The Road to the Decision*

Both the majority and the dissenters in *Caperton* earnestly grappled with questions about the impact of applying the due process clause of the Fourteenth Amendment to judicial disqualification motions predicated upon a litigant's large monetary support for the election campaign of a judge hearing the case.¹⁰⁵ In the face of well-documented public mistrust of judges continuing to sit and hear cases in such circumstances,¹⁰⁶ as part of more wide-

Corp., No. 080182 (W. Va. May 22, 2008)). For trenchant criticism of Justice Benjamin's conduct, see Jeffrey W. Stempel, *Impeach Brent Benjamin Now!? Giving Adequate Attention to Failings of Judicial Impartiality*, 43 SAN DIEGO L. REV. 1, 34-80 (2010).

103. *Caperton*, 679 S.E.2d 223, *rev'd*, 129 S. Ct. 2252 (2009). West Virginia allows justices on the Supreme Court of Appeal to be replaced by lower court judges in cases where the former are disqualified. This distinguishes that Court from the U.S. Supreme Court, where any recusal diminishes the number of Justices sitting and voting on the case, as Justice Scalia explained in his denial of a motion to disqualify him from hearing a case involving former Vice President Cheney, who was part of a large duck-hunting party that included Scalia. See *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 915-916 (2004) (mem.) (Scalia, J.) (denying recusal motion).

There is, incidentally, no hint of any impropriety in Acting Chief Justice Benjamin's selection of the two replacements in the *Caperton* case. As a matter of fact, after rehearing one voted with the majority and the other joined the dissent.

104. *Caperton*, 129 S. Ct. at 2258-59. See Joint Appendix, *supra* note 84, 581a, 633a n.16 (on rehearing) (Albright, J., with Cookman, J., dissenting).

105. *Caperton*, 129 S. Ct. at 2257-59.

106. Judicial elections are no longer "low-key affairs, conducted with civility and dignity," Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002), but involve highly reported, politicized campaigns marked by million-dollar budgets and heated competition. A substantial majority of the public—often 80% or higher—believes that monetary campaign support influences judicial decisions, according to a variety of surveys conducted at both the national and state levels. ANNENBERG REPORT, *supra* note 15 (finding that 69% of the public "thinks that raising money for elections affects a judge's rulings to a moderate or great extent"); PECK, *supra* note 15 (finding that 79% of business executives believe "campaign contributions have an impact on judges' decisions, and more than 80% of African-Americans express this view, including 51% believing that judicial election contributions carry a "great deal" of influence); STATE BAR OF TEX. & TEX. OFFICE OF CT. ADMIN., THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE: A SURVEY OF JUDGES, COURT PERSONNEL, AND ATTORNEYS (1999), available at <http://www.courts.state.tx.us/pubs/publictrust/> (finding that 83% of Texans believe money has an impact on judicial decisions); TEXANS FOR PUBLIC JUSTICE,

spread public concerns about the fairness and impartiality of our courts, would applying due process limitations allay those concerns or exacerbate them?

The Supreme Court's 5-4 decision holding that Benjamin's refusal to step down in the face of such enormous financial support, tied with the pendency of a case reasonably certain to come before him, created a "serious, objective risk of actual bias"¹⁰⁷ that is constitutionally intolerable, is an enormously significant step. It has broad implications for judicial independence, judicial disqualification, judicial campaign finance reform, and judicial ethics. Arriving at this milestone required the selfless and nonpartisan labor of many people, including retired Justice Sandra Day O'Connor¹⁰⁸ and countless others for whom the health, and indeed the survival, of an independent judiciary—the bulwark erected by the Founders against self-aggrandizement and abuse of power by the political branches¹⁰⁹—is of paramount importance to the welfare of our democracy. That health, and that survival, are being challenged by a significant diminution in public trust and confidence in the judiciary,¹¹⁰ particularly at the state level. That diminu-

PAY TO PLAY: HOW BIG MONEY BUYS ACCESS TO THE TEXAS SUPREME COURT (2001), *available at* <http://info.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf> (finding Texas Supreme Court 750% more likely to grant discretionary petitions for review filed by contributors of at least \$100,000 than by non-contributors, and 1,000% more likely to grant them for contributors of \$250,000 or more); LAKE SOSIN SNELL PERRY & ASSOCIATES, BANNERS FROM A SURVEY OF 500 REGISTERED VOTERS IN THE STATE OF PENNSYLVANIA (1998), *available at* <http://www.aopc.org/NR/rdonlyres/75F3607E-B0B4-4B9B-9554-63B281279EC6/0/appenda.pdf> (finding that 90% of voters believe judicial decisions were influenced by large campaign support); T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, CLEVELAND PLAIN DEALER, Feb. 15, 2000, at 1A (reporting 1995 Ohio survey where 90% of respondents believed campaign support influenced judicial decisions).

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

108. *See, e.g.*, Sandra Day O'Connor, *Fair and Independent Courts*, 137 DAEDALUS, Fall 2008, at 8; O'Connor, *supra* note 17.

109. *See, e.g.*, THE FEDERALIST NO. 78, at 433-434, 437-439 (Alexander Hamilton) (Clinton Rossiter, ed. 1961, rev. Charles R. Kesler, 1999); THE FEDERALIST NO. 81 (Alexander Hamilton), *supra*, at 451-452.

110. Public trust in our court system is of preeminent concern. *See generally* HOWARD JAMES, *CRISIS IN THE COURTS* (1967); HERBERT JACOB, *JUSTICE IN AMERICA* (1965). "[T]he judiciary is, at least in some measure, dependent on the public's acceptance of its legitimacy." Stephen Breyer, *Serving America's Best Interests*, 137 DAEDALUS, Fall 2008, at 139. As a recent ABA Report succinctly put it, "[P]ublic confidence in our judicial system is an end in itself." AMERICAN BAR ASSOCIATION, *JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 10* (2003). *Cf.* BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS 112* (1921) ("One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness.").

tion, in turn, is occasioned in no small part by the excesses of judicial election campaigns in recent years.¹¹¹

Our courts are not simply just another policymaking branch of government but perform the indispensable duty of assuring the rule of law. Protecting the decisional independence of the judiciary from undue influence of special interests and interest groups is thus of central importance to the concept of due process of law. The signal achievement of the *Caperton* majority was the application of due process considerations to the fallout from judicial campaign finance.¹¹² Judges and contributors alike are now aware that saying "Open Sesame" to the overflowing coffers of corporate campaign expenditures can have consequences with a constitutional dimension.

The forty questions in the Chief Justice's dissent do, however, pose a threat to the continued vitality of the decision by encouraging second-guessing of its rationale and possibly laying the groundwork for eventual reconsideration or overruling.¹¹³ In saying this, no impure motives are ascribed to the Chief Justice, who, along with the other dissenters, harbors genuine misgivings about the wisdom of this extension of the Court's due process jurisprudence. The validity of his forty questions and their ability to withstand analysis are fair game, however.¹¹⁴

111. ¹ See, e.g., Harold See, *Judicial Selection and Decisional Independence*, 61 LAW & CONTEMP. PROBS. 141 (1998). See also Roy A. Schotland, *Elective Judges' Campaign Financing*, 2 J.L. & POL. 57, 90 (1985). For polling data, see notes 15 and 106, *infra*.

Although discussion of *Citizens United* is outside the scope of this article, the possibility that a vast influx of additional campaign money might enter the latter arena, which already in the past decade has been saturated with unprecedented campaign support, virulent attack ads, and concomitant diminution in public respect for state judiciaries, makes tighter controls over disqualification imperative in cases where parties have provided significant financial support. At a minimum, judges will need to have access to more information in order to be able to make appropriate disclosures in such cases, and donors who are parties or are associated or affiliated with parties before the court (including counsel) must be required to make their own disclosures on the record. The Judicial Disqualification Project being conducted by the ABA Standing Committee on Judicial Independence, for which the author serves as Reporter, is endeavoring to address these issues.

112. See *Caperton*, 129 S. Ct. at 2256-57.

113. See *id.* at 2272-73. The overruling of *United States v. Halper*, 490 U.S. 435 (1989) eight years later by *Hudson v. United States*, 522 U.S. 93 (1997), which the Chief Justice discusses at some length, must be especially vivid for him, as, early in his career, he was appointed by former Chief Justice Rehnquist (for whom he had clerked) to file a brief amicus curiae in *Halper* in support of the judgment below and argue the case, and, against all odds, he won it spectacularly (9-0 in favor of Halper).

114. See Part IV, *infra*.

The United States Supreme Court granted certiorari,¹¹⁵ though not before the case materials were distributed for five conferences;¹¹⁶ apparently, therefore, getting four votes to hear the case was a close call, though of course the inside politics will forever be cloaked in secrecy. The oral argument was spirited and furthered the impression that the case was too close to call, with both sides looking for a fifth vote.¹¹⁷ So it turned out: the Court handed down a 5-4 decision with an extremely narrow holding. That result does, however, seem entirely appropriate from a doctrinal point of view, particularly given the federalism concerns that lurk where, as here, state election procedures, the conduct of state courts, and the independence of state judiciaries are all implicated in a single case.

D. *The Majority Opinion*

The majority opinion, authored by Justice Kennedy,¹¹⁸ holds little more than that the due process clause of the Fourteenth Amendment does have applicability—albeit only in extreme cases—to disqualification and recusal decisions by a state court judge in cases where a litigant has contributed very substantial sums of money in support of the judge's election.¹¹⁹ After briefly reviewing the cramped, somewhat unimaginative common law approach to judicial disqualification,¹²⁰ the Court traced the evolution of its due process jurisprudence in two generic areas where “experience teaches that the *probability of actual bias* on the part of the judge

115. 129 S. Ct. 593 (2008). Notwithstanding the rather extreme facts of the case, the grant of certiorari was by no means an odds-on favorite, since “most matters relating to judicial disqualification [do] not rise to a constitutional level.” *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). Indeed, the Court had previously denied certiorari on three previous occasions in cases where judges had refused to recuse themselves in the face of large campaign support. See *Avery*, 835 N.E.2d 801, *cert. denied*, 547 U.S. 1003 (2006); *Wightman*, 715 N.E.2d 546, *cert. denied*, 529 U.S. 1012 (2000); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988).

116. See Marcia Coyle, *Hot Recusal Case Debated: Justices Will Decide What Standard Due Process Requires*, NAT'L L.J., <http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202428674548>. See also Linda Greenhouse, *The Supreme Court Breakfast Table: Do Female Judges Have to Quit Their All-Women Book Groups?*, SLATE, June 24, 2009, <http://www.slate.com/id/2220927/entry/2221229> (“The real fight in this case was evidently in conference, in a closed-door debate that went on for weeks over whether to grant [the petition].”)

117. See generally Transcript of Oral Argument, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 527723 [hereinafter “Argument Transcript”].

118. *Caperton*, 129 S. Ct. at 2256-67.

119. *Id.* at 2265.

120. See notes 45-54, *supra*, and accompanying text.

. . . is too high to be constitutionally tolerable”.¹²¹ (1) where a judge had a financial interest in the outcome of the case, even though less than an interest that would have been considered personal or direct at common law;¹²² and (2) where the judge’s interest in the case involves his adjudicating a criminal contempt in which the judge himself had been reviled by the defendant or had previously served as a “one-man grand jury” in indicting the defendant.¹²³

Applying these teachings to the context of campaign support in judicial elections, the Court properly acknowledges that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires recusal” but equally correctly observes that this is “an exceptional case.”¹²⁴ The inquiry will perforce be fact-sensitive and will be based on objective standards, not the judge’s subjective assessment of whether or not he is biased.¹²⁵

“We conclude,” the Court said, “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.”¹²⁶ The extraordinary facts of the *Caperton* case, which the majority identified as being important to their decision, included:

- the relative size of the support in comparison to the total amount of money contributed to the campaign;¹²⁷
- the total amount spent in the election;¹²⁸

121. *Withrow*, 421 U.S. at 47 (1975) (emphasis added).

122. *E.g.*, *Tumey*, 273 U.S. 510 (judge’s assessment of civil fines went into his pocket); *Village of Monroeville*, 409 U.S. 57 (mayor’s adjudication of traffic fines affected his salary and contributed to city finances); *Berryhill*, 411 U.S. 564 (administrative board of optometrists had pecuniary interest in the outcome of hearings against optometrists with whom they were in competition); *Lavoie*, 475 U.S. 813 (high court judge voting for novel state cause of action against insurer had similar claim against an insurance company pending in lower court).

123. *Mayberry*, 400 U.S. 455 (judge reviled by defendant also presided over his contempt trial); *Murchison*, 349 U.S. 133 (judge who presided over a “one-man grand jury” on contempt charges also presided over resulting contempt proceeding).

124. *Caperton*, 129 S. Ct. at 2263.

125. *Id.*

126. *Id.* at 2263-64.

127. *Id.* at 2264.

128. *Id.*

- the apparent effect of the support on the outcome of the election;¹²⁹ and
- the temporal relationship between the support, the judge's election, and the pendency of litigation before the judge that involves the contributor.¹³⁰

As to the first three points, the Court concluded that Blankenship's direct and indirect campaign support "had a significant and disproportionate influence in placing Justice Benjamin on the case. [They] eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee."¹³¹ In the aggregate, these factors "offer[ed] a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true."¹³²

In an election decided by fewer than 50,000 votes (382,036 to 334,301), . . . Blankenship's campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."¹³³

On the fourth and final point, the Court found it "reasonably foreseeable" that the appeal of the jury verdict would be before Justice Benjamin.¹³⁴

The \$50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company \$50 million. Although there is no allegation of

129. *Caperton*, 129 S. Ct. at 2264.

130. *Id.*

131. *Id.* The Court also noted Petitioners' claim that Blankenship's total support exceeded by more than \$1 million the total amount of support to the campaigns of *both* candidates for the seat on the West Virginia high court. *Id.* (citing Brief for Petitioners at 28, *Caperton*, 129 S. Ct. 2252 (No. 08-22)).

132. *Id.*, (citing *Tumey*, 273 U.S. at 532).

133. *Id.* (quoting *Withrow*, 421 U.S. at 47) (other citation omitted).

134. *Caperton*, 129 S. Ct. at 2264-65.

a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when-without the consent of the other parties-a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a *serious, objective risk of actual bias* that required Justice Benjamin's recusal.¹³⁵

Finally, the majority's rejoinder to the dissenters' floodgates argument¹³⁶ asserts that the Constitution will require recusal only in truly extraordinary situations, that the *Caperton* facts comprise just such an extraordinary situation and are, in fact, "extreme by any measure," and then goes on to observe that the Court's previous due process recusal cases (to wit: *Lavoie*, *Berryhill*, *Mayberry*, *Monroeville*, *Murchison*, and *Tumey*) did not lead to a torrent of due process-based disqualification motions.¹³⁷ Furthermore, the Court noted the importance of ongoing judicial reform efforts by the American Bar Association and the states to "eliminate even the appearance of partiality,"¹³⁸

IV. CHIEF JUSTICE ROBERTS'S DISSENT¹³⁹

The dissenting opinion of Chief Justice Roberts is remarkable for its enumeration of forty questions that he believes are raised by the absence from the majority opinion of any standard for unfolding the "probability of bias" test.¹⁴⁰ In essence, the dissenters

135. *Id.* at 2265 (emphasis added).

136. *See infra* note 141 and accompanying text.

137. *Id.* at 2265-2266.

138. *Id.* at 2266 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004); Brief of the American Bar Association as Amicus Curiae in Support of Petitioners (merits stage) at 14 & n.29, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45978.

139. Justice Scalia also filed a brief dissenting opinion, criticizing the majority's opinion as reinforcing the public perception that he deems most corrosive—at least in the 39 states that have some form of judicial elections—to public confidence in the judicial system, i.e., that "litigation is just a game, that the party with the most resourceful lawyer can play it to win, [and] that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice." *Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting). Justice Scalia amplified on this with a quote from the Talmud, leading one online journalist to quip, "Scalia is clearly teaching Bar Mitzvah classes somewhere this year." Dahlia Lithwick, *The Great Caperton Caper: The Supreme Court Talks About Judicial Bias*, *Kinda.*, SLATE, June 8, 2009, <http://www.slate.com/id/2220031/pagenum/all>.

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

fear that the Court's decision will open the floodgates for due process-based disqualification motions, most of them frivolous, that will inundate the courts and perversely undermine that public confidence that the majority opinion seeks to promote.¹⁴¹

The forty questions themselves are somewhat disjointed, and a few of them seem little more than filler. Nonetheless, the cumulative effect of such an enumeration creates a strong impression that much about the due process implications of judicial disqualification remains to be discussed and debated and casts doubt on the wisdom of applying those principles to monetary support for judicial election campaigns.¹⁴² Even less than a full forty would have served the same purpose, since any number of questions in excess of twenty would be sufficiently ample to generate the same reaction.

For the sake of facilitating that discussion and debate, the forty questions have been rearranged into six broad categories. The categories are (1) Support Levels, (2) What Campaign Support Counts?, (3) Characteristics of the Case, (4) Characteristics of the Judge, (5) Characteristics of the Decision, and (6) Procedural Issues. The questions themselves have sometimes been paraphrased below to make them more concise or more accurate.¹⁴³ Many of the questions seem to have readily apparent answers; others are more thought-provoking and admit of no ready answers. Commentary on (and, where appropriate, suggested answers to) most of the individual questions follows each question (as paraphrased). To some of the questions no commentary has been appended, but nothing of substantive import should be inferred from the absence of comment to any particular question.

A. *Support Levels*

1. *How much is "too much" such that it gives rise to a "probability of bias"?*

This is not a question that any one court can (or should) decide *a priori*. The answer will differ from one state to the next and

141. See *id.* at 2272. In that regard, the dissent appears exaggerated. How many times, after all, did Justice Kennedy, writing for the majority, use for describing the facts of this case such adjectives as "extreme" or "extraordinary"?

142. *Id.* at 229-72.

143. The number appearing beside each question corresponds exactly to the numbering of the questions in Chief Justice Roberts's dissenting opinion in *Caperton*, 129 S. Ct. at 2269-2272 (2009) (Roberts, C.J., with Scalia, Thomas & Alito, JJ., dissenting). The categories and decisions as to categorization are the author's.

may depend upon idiosyncratic electoral circumstances.¹⁴⁴ Would \$3 million, a lot of money in West Virginia, raise eyebrows in California or Texas? In Alabama, for example, multi-million dollar Supreme Court races have become commonplace.¹⁴⁵ For these very reasons the ABA, in its amicus briefs in *Caperton*, argued that the Court need not prescribe any particular dollar amount as the constitutional “floor” in order to determine (as the majority did) that due process concerns were raised by the extraordinary facts of the case.¹⁴⁶

2. *Meaning of “disproportionate”?*

A short but snappy answer to this question is itself a question: How many individuals do you know who contribute over \$3 million of *their own funds*—not corporate funds—to a state judicial election campaign? Another short answer was offered by Justice Stevens at oral argument, by recalling Justice Potter Stewart’s famous definition of pornography (to wit: “I know it when I see it.”)¹⁴⁷

4. *Does it matter whether litigant has supported other candidates or donated large monetary support in connection with other elections?*

We must assume, for present purposes, that when the Chief Justice used the word “large” he meant both (A) an order of magnitude of constitutional moment and (B) a sum that would be “disproportionate” within the contemplation of the majority opinion. The answer to this question is, however, a resounding “No.” The public has become accustomed to seeing “large” contributors to elections in the two political branches receive some kind of quid

144. *Cf.* *Randall v. Sorrell*, 548 U.S. 230, 252-256 (2006) (taking into account local practice in assessing constitutionality of campaign regulation in Vermont).

145. *See, e.g.*, Robert Barnes, *Judicial Races Now Rife with Politics; Corporate Funds Help Fuel Change*, WASH. POST, Oct. 28, 2007, at A01 (reporting that candidates for Chief Justice of the Alabama Supreme Court in 2006 raised a total of \$8.2 million); David G. Savage, *Big Money Finds a Way Into Judicial Elections; Campaign Spending by Interested Parties Takes Off in Many States; Rivals Spent \$8 Million on Media over One Ohio Seat*, L.A. TIMES, Feb. 14, 2002, at A23 (“The corporations can just write a check. They figure they can buy a state supreme court justice for \$2 million in Alabama or Ohio” (quoting Executive Director of Ohio Academy of Trial Lawyers)).

146. *See, e.g.*, Brief of the American Bar Association as Amicus Curiae in Support of Petitioners (certiorari stage) at 14, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 3199726.

147. Argument Transcript, *supra* note 117, at 29-30 (comment of Stevens, J.). *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

pro quo, e.g., a cabinet position or an ambassadorship, in the case of the President of the United States (recall Pamela Harriman's appointment by President Clinton as Ambassador to France), or some kind of legislative reward in the case of members of Congress. Likewise, governors and state legislatures are capable of distributing the spoils of victory as largesse to their most significant supporters. Public expectations for the judicial branch are quite different, however, and demand both the reality and the appearance of fairness and impartiality. Thus the spectacle of large expenditures to support judicial election campaigns creates a spectre of partiality and impropriety that is profoundly injurious to public perception of the judiciary. That is true regardless of whether the source provides significant support to one candidate or many. Indeed, a multiplicity of such expenditures may only enhance the perception that the person making them believes that judges can be bought.

23. *Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?*

This seems almost a silly question, unworthy of the Chief Justice's intellect. Obviously the due process line in the sand will vary from state to state. Support may be high by relative standards though not by absolute standards; thus, as noted above in connection with Question 1,¹⁴⁸ campaign support in the millions of dollars might be unusual in West Virginia but not in Texas, Illinois, New York, or California. Judicial elections and judicial campaign support in the normal course do not violate due process. Model Code Rule 2.11(A)(4) leaves it to the individual states to determine what size "aggregate contributions"¹⁴⁹ from a party or lawyer involved in a case mandates recusal of the presiding judge. Implicit in the Rule is that, at *some* support level, fundamental fairness concerns of actual or apparent bias are triggered. These are the very considerations that underlie the Due Process Clause's

148. See notes 144-46, *supra*, and accompanying text.

149. As used in the *Model Code*, both words are terms of art. "Contribution" is defined to encompass "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." MODEL CODE Terminology. "Aggregate," when used "in relation to contributions for a candidate, means not only contributions in cash 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 a candidate's opponent." *Id.*

insistence on the appearance, as well as the reality, of judicial impartiality.

25. *Causal link between amount of the support and the judge's victory in the election? Did the judge win in a landslide? What if the victory is attributable to the opponent's mistakes?*

This adds nothing to the due process analysis. *Errare humanum est*: All candidates make mistakes during a campaign. Some of them may be fatal to the candidacy. Indeed, such an argument was made by Respondents in *Caperton*,¹⁵⁰ and similar arguments were raised in Justice Benjamin's lengthy (albeit belated) concurring opinion seeking to justify his denial of the disqualification motion.¹⁵¹ All were rightly rejected by the majority.¹⁵² Attributing victory or defeat to which side made more (or more serious) mistakes is likely to be a path laden with pitfalls; the law has enough experience with causation to know it is a tricky business. For example, can one say with confidence that a candidate's missteps inevitably led to defeat in the absence of substantial funding for the opponent's attack ads? Furthermore, no amount of errors made by an unsuccessful candidate for judicial office can entirely dispel the taint in public perception that would inevitably attend denial of a disqualification motion by the victorious candidate who subsequently sits in judgment on a case involving a party who provided extraordinary campaign support.

150. See Brief for Respondents at 5, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165 ("On Labor Day 2004, Justice McGraw delivered a widely discussed speech in which he made a number of bizarre claims, including that this Court had 'approved gay marriage'"); see *id.* at 54 ("Justice Benjamin's opponent cost himself the election. Justice McGraw was already a polarizing figure in West Virginia politics . . . ; his refusal to give interviews or debate Justice Benjamin before the election raised eyebrows . . . ; and a bizarre speech, in which McGraw accused Benjamin of trying to 'destroy democracy' and claimed that this Court had 'approved gay marriage,' may well have tipped the balance.").

151. See, e.g., *Caperton*, 129 S. Ct. at 2264 (quoting from Justice Benjamin's belatedly filed concurrence).

152. "Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias." *Id.*

B. Which Support Counts?

3. *Independent, non-coordinated vs. direct support? Indirect donations to outside groups that support a candidate?*

These are not distinctions of constitutional moment. They all count.

8. *Disproportionately large support from trade union, industry association, plaintiffs' bar, etc.? Recusal in all cases affecting association's interests? A member's?*

This is an excellent question, extremely thought-provoking, and one that, unlike most of the other forty questions, was actually asked by the Chief Justice during oral argument. The advocates had difficulty answering this question, and so it remains one of the dissenters' most legitimate concerns. In fact, at argument this question came up several times.¹⁵³

This is a factual matter that would be part of the total mix of factors to be considered in a particular disqualification setting. At one end of the spectrum, campaign support from a national trade association, like the American Bankers Association or the Securities Industry Association, would be unlikely to create an appearance problem merely because an individual bank or individual securities firm was a party in litigation before the judge. Similarly, it would be ludicrous to suggest that a large level of support from the plaintiffs' bar would mandate disqualification in every case. Apart from the practical absurdity of such a result, one can point to the extraordinarily attenuated linkage between monetary support from the practicing bar and a particular law firm or member of the bar. Most of the time, campaign support is "too remote and insubstantial"¹⁵⁴ to create the requisite appearance problem. At the other end of the spectrum, extremely large campaign support by an ad hoc association of a handful of large manufacturers sharing common concerns about punitive damage awards in products liability cases in a particular jurisdiction might raise due process concerns.

Here again we see the importance of the states stepping up to the regulatory plate, as a level of support within limits set by a

153. See Argument Transcript, *supra* note 117, at 8-10, 13-15 (colloquy between Roberts, C.J. and Petitioners' counsel); see also *id.* at 28-29 (colloquy between Stevens, J. and Respondents' counsel).

154. *Lavoie*, 475 U.S. at 825-26.

state statute or rule would not likely be offensive to due process. Yet, even there, the ramifications can be complex. Suppose, for example, that every lawyer in a large law firm were to contribute the maximum permissible dollar amount so that, as a result of the firm's size, the aggregate support amounted to 75% of a judicial candidate's campaign funds. Depending on the magnitude of total support,¹⁵⁵ a due process argument might be made that that judge should be disqualified from hearing any cases involving that law firm. Knowing this, and knowing therefore that the level of their support might be, in a sense, self-defeating, such firms would be careful to limit the scope of their attorneys' support. That seems an appropriate result. Nothing is perfect, however, because the scenario just described leaves open the possibility of the law firm engaging in strategic behavior—giving maximal campaign support to a judicial candidate for which it (or its clients) have great antipathy, in order to lay the groundwork for future disqualification motions in the event that candidate should be successful in the election.

The timing of the support is also relevant to the analysis. In *Caperton*, for example, the timing was suspect.¹⁵⁶ Less compelling (witness the denial of certiorari¹⁵⁷), though still problematic, was an Ohio case in which two justices of the state high court (one of whom ended up authoring the opinion for the court) had received significant support from the plaintiff's lawyer and the lawyer's relatives only three weeks before voting whether to hear a case in

155. If this hypothetical 75% support amounted to only \$10,000, for example, it's unlikely that due process concerns would arise. If, instead, it amounted to \$300,000, that would likely raise due process eyebrows.

156. See *Caperton*, 129 S. Ct. at 2264-2265.

The \$50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company \$50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause.

Id. at 2265.

157. For other prominent instances in which due process-based review was denied, see *Avery*, 835 N.E.2d 801 (state high court judge allegedly received over \$1 million in direct and indirect campaign contributions from insurance company and its supporters while case was pending), *cert. denied*, 547 U.S. 1003 (2006); *Texaco Inc.*, 729 S.W.2d at 842-845 (\$10,000 contribution by attorney to trial judge's campaign fund after filing of billion-dollar lawsuit and service by that lawyer on judge's steering committee), *cert. denied*, 485 U.S. 994 (1988).

which the lawyer had a multi-million dollar contingency fee at stake.¹⁵⁸ There, however, the size of the support amounted to less than 5% of each justice's campaign funds,¹⁵⁹ which underscores how extraordinary the facts are in *Caperton*, where Blankenship's support amounted to approximately two-thirds of Justice Benjamin's campaign funds.

Another pertinent factor is the linkage between the supporter and the litigant. In *Caperton*, that linkage was all too obvious: Blankenship was Chairman and CEO of Massey. What about the hypothetical ad hoc manufacturers' association mentioned above? Is the linkage sufficient with only a handful of members but diminishing to insufficiency as membership increases? Large membership in itself is not, of course, a guarantee of attenuation, as the Chief Justice's question about the United Mine Workers illustrates.¹⁶⁰

At the end of the day, however, this question, compelling and difficult though it may be, simply serves to highlight the simple truth that law—especially constitutional law—is not a science. There is no formula that will unerringly calculate when due process of law has been violated, just as there is no formula for probable cause determinations under the Fourth Amendment.¹⁶¹

“[D]ue process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescap-

158. Petition for a Writ of Certiorari at 2-3, *Consol. Rail Corp. v. Wightman*, No. 99-950 (Dec. 6, 1999), *cert. denied*, 529 U.S. 1012 (2000). Notably, the Supreme Court of Ohio never even ruled on the disqualification motion.

159. *Id.* at 7.

160. See Argument Transcript, *supra* note 117, at 13-15.

161. *Id.* at 42-43 (colloquy between Stevens, J., and Respondents' Counsel).

ably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.¹⁶²

That constitutional adjudication is often difficult is not a reason to avoid it. As Chief Justice Marshall famously enjoined, “It is emphatically the province and duty” of the courts “to say what the law is.”¹⁶³

8. *Depend on how much the litigant contributed to the association?*

Even though law is not a science, the States can easily enough create guidelines for this precise issue. For example, one could propose a statute or rule under which campaign support by an association would be attributed to a member only where that member is deemed to exercise a controlling influence over the association; controlling influence in turn could be defined as a percentage of voting power, *e.g.*, 25%, 10%, and could be defined differently in each state adopting such an approach.

10. *Candidate draws “disproportionate” support from a particular racial, religious, or other group and case involves an issue of importance to that group?*

To a certain extent, this question is duplicative of what has already been addressed in connection with Question 8, though Question 10 focuses more squarely on issue advocacy and not on mere financial interest. On the whole, the answer depends on public perception, as approximated through the lens of that ubiquitous legal construct, the reasonable person. If a reasonable person would believe that a judge is unlikely to be impartial on the issue in question, then the judge should be disqualified. That is just as true whether the grounds for the disqualification motion are the judge’s personal philosophy or the end result of “disproportionate” campaign support from a particular group.

20. *Does a “debt of gratitude” for endorsements by newspapers, interest groups, politicians, or celebrities also give*

162. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring). The author is indebted to Roy Schotland for this quote. Justice Frankfurter also cautioned against “charg[ing] those who secured the adoption of this Amendment with meretricious redundancy by indifference to a phrase—‘due process of law’—which was one of the great instruments in the . . . arsenal of constitutional freedom. . . .” *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring).

163. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

*rise to a constitutionally unacceptable probability of bias?
How to measure whether such support is “disproportionate”?*

An unfortunate, somewhat sloppy aspect of the majority opinion is the “debt of gratitude” notion. It sweeps so broadly as to be virtually meaningless. That, perhaps, is why Justice Scalia harped on it so much during oral argument.¹⁶⁴ The sort of support outlined in this question is unlikely to rise to a level that would create an appearance of partiality or unfairness were the judge to sit on a case involving, say, a newspaper, a politician, or a celebrity that had endorsed his candidacy.¹⁶⁵ It is, of course, possible for such non-monetary support to have been so extreme that disqualification would be proper; the converse is equally true, where, for example, a newspaper or politician or celebrity extraordinarily strident in opposition to the judge’s candidacy ends up as a litigant before him. As the majority in *Caperton* recognized, the facts would have to be extraordinary for a refusal to recuse to constitute a denial of due process. In general, one hopes that judges would have enough common sense to recuse themselves voluntarily even in cases that, while not posing a due process threat, nonetheless forebode diminished public confidence in the judiciary’s fairness and objectivity. As for interest groups, that duplicates issues already considered in connection with Questions 8 and 10.

22. *Make a difference whether campaign support comes from the party or the party’s attorney? If the latter, must the judge recuse in every case involving that attorney?*

This is a makeweight question. Either the expenditure rises to the level where it becomes a due process concern or it does not. There is no difference from a due process perspective whether the money comes from the party or from counsel. If from counsel, then such an extraordinary amount of support for the judge by a repeat player may well demand the judge’s disqualification from

164. See Argument Transcript, *supra* note 117, at 5-7, 43-45.

165. This is not to suggest that newspaper endorsements are insignificant in judicial elections. Compare Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellweather State*, 39 WILLAMETTE L. REV. 1357, 1374 (2003) (asserting that positive media support is important in judicial elections) with 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 dispositive).

any case in which that lawyer appears, unless, of course, all opposing parties are willing to waive the matter.¹⁶⁶

11. *Supporter is not a party but his interests will be affected by the decision?*

A similar factual situation was already resolved in *Aetna Life Ins. Co. v. Lavoie*,¹⁶⁷ in which the Court held that participation by a justice of the Alabama Supreme Court in ruling on the validity of a punitive damages award against an insurance company violated due process when the justice was himself in other cases a litigant arguing that insurance companies' failure to pay claims constituted bad faith and entitled the claimants to punitive damages.

12. *Case involves a regulatory issue of importance to a supporter not a party before the court.*

This scenario is not problematic. First, it offers no appearance of partiality, unfairness, or impropriety vis-a-vis any party or attorney before the court. Second, a great many judicial decisions may have persuasive—and occasionally precedential—value to persons not before the court, some of whom may well have been substantial supporters of various judicial election campaigns. Uncritically to impose some limitation—due process-based or otherwise—on recipients of such funds presiding over such cases would bring the judicial system to a grinding halt. One would require considerably more to make a showing that disqualification was required, such as evidence of *actual* bias or prejudice by the judge for or against a particular interpretation of a statute or regulatory position.

18. *Make a difference if, instead of support, the litigant spent money to oppose the judge's candidacy?*

This question, flipping the “debt of gratitude” coin, is sometimes referred to as the “debt of hostility.” Preliminarily, of course, there is the question how the judge would know about campaign support for an opponent unless it had been in the form of virulent attack ads with attribution (*e.g.*, “Paid for by the United Mine Workers”) or state law required disclosures that were made avail-

166. See MODEL CODE R. 2.11(C).

167. 475 U.S. 813 (1986).

able to the candidates.¹⁶⁸ Even if the judge does know, the amount of the support would have to be truly “disproportionate” in order to create an appearance problem.

Assuming these preconditions were satisfied, then the answer to the Chief Justice’s question is “No.” Conceptually due process would logically require disqualification for disproportionate campaign opposition just as with disproportionate campaign support. The existence of this negative corollary does not, however, undermine the *ratio decidendi*.

It also bears mention that if the opposition is not merely financial but is such as to create some direct animosity or prejudice¹⁶⁹ on the part of the judge, there is precedent to suggest that disqualification is necessary.¹⁷⁰

29. *Any imputation rules, e.g., campaign support from a corporation imputed to its executives, or vice-versa, or by one family member to other family members?*

The comments on Question 8 suggested that States could enact or promulgate attribution rules in connection with corporate members of associations. There is no *a priori* reason that rules of the sort suggested in this question could not also be created, and it would seem sensible to do so. Indeed, the ABA’s Model Code already applies such an approach in Rule 2.11 in the disqualification context to judges themselves, sweeping into the Rule’s net “the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person”¹⁷¹ Of course, if such a rule is im-

168. In West Virginia, for example, Blankenship had to fill out a financial disclosure form on which it says “Expenditures made to Support or Oppose”; Blankenship underlined the word “Support” and typed in the words “Brent Benjamin.” Argument Transcript, *supra* note 117, at 8; Joint Appendix, *supra* note 84, at 188a.

169. That judges are just as susceptible to these feelings as any other human being has long been acknowledged, *see* Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931), and in fact is now part of a growing literature on cognitive bias. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Symposium, *Measuring Judges and Justice*, 58 DUKE L.J. 1173 (2009); Symposium, *Misjudging*, 7 NEV. L.J. 420 (2007).

170. *See, e.g.*, *Mayberry*, 400 U.S. 455 (requiring disqualification where judge reviled by defendant also presided over his contempt trial). *Cf.* *In re Murchison*, 349 U.S. 133 (1955) (requiring disqualification where judge who presided over “one man grand jury” also presided over contempt proceedings related thereto).

171. MODEL CODE R. 2.11(A)(2), or, in another part of the rule, “the judge’s spouse, domestic partner, parent, or child, or any other member of the judge’s family residing in the judge’s household” *Id.* R. 2.11(A)(3). *See also id.*, Terminology (defining, *inter alia*, the terms “domestic partner” and “third degree of relationship”).

posed in a particular State, then recourse to due process would be unnecessary. Whether in the absence of such a rule, *par contre*, due process would mandate such attribution, at least in the sorts of extraordinary cases where due process concerns are implicated, is a provocative (if somewhat technical) question but is not one that suggests a compelling argument (floodgates or otherwise) against the application of due process principles in the campaign support context.

31. *Does monetary support to fund or promote voter registration count?*

It is difficult to see how, in the majority of situations, these sorts of expenditures could give rise to the kinds of public perceptions of unfairness or partiality that lie at the heart of the due process concern. Political parties seek routinely to “get out the vote.” There may, however, be exceptional situations, such as where the success of a particular judicial candidate depends upon mobilizing a particular, identifiable group of voters (e.g., particular minorities).

32. *Make a difference if it's a primary or a general election? If the campaign support was given to a different candidate in the primary?*

With all due respect, these are distinctions without a difference.

C. *Characteristics of the Case*

5. *Amount at stake relevant? What if only non-monetary relief is sought?*

This creates no distinction pertinent to the fundamental appearance problem. Where the likelihood of bias exists, neither the size of the amount in controversy nor the equitable nature of the relief requested changes the analysis.

9. *What if the case involves a social or ideological, rather than a financial, issue?*

To Gertrude Stein's oft-quoted aphorism, “A rose is a rose is a rose,”¹⁷² the following homage is offered: Impartiality is impartial-

172. Gertrude Stein, *Sacred Emily*, in GERTRUDE STEIN, GEOGRAPHY AND PLAYS 187, 187 (1922).

ity is impartiality, and fairness is fairness is fairness. It makes no difference whether the case involves financial, social, or ideological issues, or any combination of these. The appearance of impartiality and fairness applies with equal force in all instances.

28. *Must the case be pending at the time of the election or reasonably certain to be brought? Make a difference if the case were unanticipated?*

Certainly, the temporal relationship between the case before the court and the conduct giving rise to an appearance problem is one of the important factors. Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."¹⁷³ That was true also in *Lavoie*, where an Alabama Supreme Court Justice voted to uphold a punitive damages award against an insurer while he was the lead plaintiff in a nearly identical lawsuit pending in the lower courts.

In the *Caperton* situation, Blankenship's campaign support, though admittedly enormous and "disproportionate," became even more likely to create the appearance problem—a probability or likelihood of bias in the public eye—if the case were pending or about to be pending before the very court on which the candidate (Benjamin) sat. The connection in *Caperton* was even more direct than a situation in which the supporter was planning to initiate litigation in the lower courts that might ultimately find its way up to the state high court. As the majority held: "We conclude 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."¹⁷⁴ The majority opinion went on to observe:

[T]he pendency of the case is also critical, for it was reasonably foreseeable that the pending case would be before the newly elected justice. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary support took place at a time when he had a

173. *Tumey*, 273 U.S. at 532.

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

vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.¹⁷⁵

On the other hand, if (1) at the time of the campaign support, the facts underlying the case have not yet arisen, (2) in the case of a lower court judge, cases are assigned by random selection, or (3) in the case of an appellate judge, the term of the elected judge is not sufficiently long (in West Virginia, state high court judges serve for a 12-year term, but in some states it is less) that there can be any assurance that the case will come before that particular judge, the temporal factor may militate against the conclusion that due process requires disqualification.

Regarding the anticipation point, it would certainly make a difference if the non-pending case were “unanticipated” in the truest sense of that word. Given the sophistication of strategic and long-range planning on corporate boards and committees and among senior management, both with and without the assistance of sophisticated lawyers, investment bankers, and myriad consultants, mere temporal separation would not alone suffice. Normally, one might be inclined to regard litigation brought against the party who made the campaign expenditures years earlier as unanticipated. That need not be so, however. Without meaning to sound unduly Machiavellian or conspiracy theory smitten, it would not be so in *Caperton*, as the factual underpinnings of the case¹⁷⁶ amply illustrate. There, not only did Massey and Blankenship engage in a course of conduct that was certain to lead to litigation, they also engaged in delaying tactics over more than four years in order to put off the appeal date until after a more favorable jurist, Justice Brent Benjamin, was elected (with massive financial support from Blankenship) to the state high court.

As for litigation actually *brought* by the party who gave the campaign support, there would likely have to be some unexpected, supervening event giving rise to the need for such litigation before one could say, with any degree of confidence, that it was truly “unanticipated.”

175. *Id.* at 2264-65.

176. See text accompanying notes 85-96, *supra*.

*D. Characteristics of the Judge*6. *Make a difference if the judge sits on a trial court, intermediate appellate court, or state high court?*

From a due process point of view, the level at which the judge sits makes little difference. The question does, however, highlight the issue whether one even reaches the due process issue in the first place. Refusals to recuse by lower court judges can often be subject to appellate review, where a reversal would moot the constitutional question. Where the recusal decision is vouchsafed to the sole discretion of a state high court judge, however, due process concerns are heightened. To alleviate such problems, state supreme courts may wish to consider adopting procedures for the review of disqualification motions that relieve the subject justice of sole authority to decide such motions. One possibility would be to subject a decision of the challenged justice denying a disqualification motion to review by the rest of the court, as Michigan has done.¹⁷⁷ Another would be to assign review of the motion (or perhaps even assign the motion itself in the first instance) to a special panel of retired judges or justices.¹⁷⁸

16. *Make a difference if judge voted against the litigant in other cases?*

This was an argument advanced by Justice Benjamin in his belatedly filed opinion justifying his denial of Caperton's disqualification motion.¹⁷⁹ The point is essentially irrelevant. The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"¹⁸⁰

177. See note 30, *supra*, and accompanying text.

178. Objections usually interposed against such proposals—both for intermediate appellate courts and courts of last resort—is that they impose significant costs in terms of diversion of scarce judicial resources and putting a strain on the collegiality of an appellate body. Assuming *arguendo* the validity of these objections, the stakes have become ever higher in recent years, and those costs must be balanced against the benefits to public confidence that would accrue by avoiding the perception that the fox is guarding the henhouse when an allegedly self-interested justice possesses the exclusive authority to rule on whether his or her self-interest is disqualifying.

179. *Benjamin Concurring Opinion*, *supra* note 102, at 36 & n.29.

180. *Lavoie*, 475 U.S. at 824 (quoting *Murchison*, 349 U.S. at 136).

17. *What if the judge disclaims the support?*

This is a fascinating and difficult question. Politics makes strange bedfellows and is often a seedy, if not downright ugly, process. Surely a person running for judicial office might involuntarily find support from a person or organization that he or she finds personally repugnant or that represents a point of view with which he or she disagrees. The judge could refuse the support, or direct his committee to return it, but what if, as in *Caperton* itself, the support (or a large part of it) is given to a third party, or by the supporter's spending directly, for television or print media ads supporting the judge's candidacy? The appearance problem persists. Surely the litigant seeking disqualification would argue that if, as in *Caperton*, the support is pivotal to getting the judge elected, the judge, notwithstanding the disclaimer, would nevertheless feel a "debt of gratitude" to the supporter. Yet to rule automatically against the judge opens the door to strategic support by interest groups (including possibly lawyers or groups of lawyers) who do not, in fact, support the judge but who are hedging against the possibility of his victory and creating for themselves a paper record that would support future disqualification motions.

This spectre of abusive "*Caperton* motions" haunts the decision and validates many of the dissenters' concerns. It is for that reason (among others) that reevaluation by the States of their disqualification standards and procedures has taken on such importance.

21. *Does close personal friendship between a judge and a party or lawyer give rise to a "probability of bias"?*

This is a nagging question that long antedates the *Caperton* decision. As the author noted in an article several years ago,¹⁸¹ former Canon 3E (now recast as Rule 2.11 in the current version) of the Model Code provides, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." The Rule then lists some specific instances where recusal or disqualification is mandated, *i.e.*, whenever:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding;

181. See Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J. L. REFORM 1017, 1118-1119, n.395 (2004).

(2) The judge that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding;

....

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association . . .

. . .¹⁸²

While the provision and the commentary explicate that this enumeration is not intended to be exclusive, the very specificity of the black letter language suggests myriad hues of gray. For example, what if a lawyer with whom the judge previously practiced law represents the party *now*,¹⁸³ as opposed to "during such association"? What about a lawyer with whom the judge did not practice law but who has been a longstanding personal and professional friend? What if the lawyer is the spouse of such a friend? What if the lawyer is an officer of the bar association and has had occa-

182. MODEL CODE R. 2.11(A)(1)-(3), (6)(a).

183. Cf. *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 897 (1945) (separate opinion of Jackson, J., criticizing Justice Black for sitting on a case argued by his former law partner of 20 years before). For a roughly contemporaneous, and sympathetic, discussion of Black's participation in the case by one of his former law clerks, see generally John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947). See also Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 208 (1988).

sion, in that capacity, to present awards or other honors to the judge? The complete list of “what if” variations on this theme would obviously be quite long. On the other hand, making allegations of negative appearances is quite easy, so evaluation of these situations will of necessity be quite fact-specific.¹⁸⁴

26. *Is due process analysis less probing for a victorious incumbent, who typically has an advantage in elections?*

No. Money is money, and it’s all about the appearance. Moreover, to ask this question is unduly to dismiss the majority’s point that due process analysis will not be the norm but the *rara avis*. The decision in *Caperton* underscores the need for the States to fill this gap by statute, by adoption of Model Rule 2.11(A)(4) or some similar mechanism, or by some other method or combination of methods that will obviate the need for due process challenges. One alternative (alas, imperfect)¹⁸⁵ to mandating disqualification dollar amounts for very large private sector support is to provide for public campaign financing of judicial elections, though this approach also must overcome First Amendment hurdles.¹⁸⁶

30. *Make a difference if it’s a retention election or a nonpartisan election?*

This seems another makeweight question. From a due process vantage point, the character of the election should make little or no difference. To understand why, ask yourself if, on the facts about the campaign support in *Caperton*, the outcome would (or should) have been different had the election been partisan or had it been a retention election.

184. For a general discussion, see Leslie W. Abramson, *Appearances of Impropriety: Deciding When a Judge’s Impartiality May Reasonably Be Questioned*, 14 GEO. J. LEGAL ETHICS 55 (2000).

185. Imperfect in the sense that public finance not only may not be feasible in states like Wisconsin or in the larger states but also will not deter independent spending in judicial elections and may even increase it. Thanks once again to Roy Schotland for this observation.

186. See, e.g., N. Carolina Right to Life Comm. Fund for Ind. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008), *cert. denied sub nom.*, Duke v. Leake, 129 S. Ct. 490 (2008).

*E. Characteristics of the Decision*13. *Must the judge's vote (on the merits)¹⁸⁷ be outcome determinative?*

Obviously, a trial judge's decision on the merits—at least in a non-jury matter—is “outcome determinative” in a sense, though subject to appellate review. At the other extreme, the decision of a high court judge sitting as part of a collegial body cannot really be meaningfully described as “outcome determinative.” In *Caperton*, Petitioners and their allies argued that Justice Benjamin cast the “deciding vote,” but was that necessarily the case? After all, in a 3-2 decision, any of the three judges in the majority can be said to have cast the “deciding vote.”

14. *Make a difference whether the decision is clearly correct/incorrect on the merits?*

A dubious question, and one that harkens to Justice Benjamin's belatedly filed, 58-page *apologia*. Both miss the essential point. No matter how sedulous Justice Benjamin's lucubrations may have been, no matter whether the decision on the merits was right on the mark, nothing would shake the public perception that justice in West Virginia was for sale.

15. *Make a difference if the judge's decision on the merits is affirmed by an appellate court with no “debt of gratitude” to the supporter.*

This is simply a variation on the theme of Question 14. Affirmance by an appellate court with no “debt of gratitude” merely suggests that the decision by the judge who was the target of a disqualification motion was correct on the merits. So what? Even a biased judge can render a correct decision. Doing so, however, diminishes public confidence not only in the correctness of that particular decision but in the legitimacy of judicial decisionmaking in general. The dissent misses the essential point, as did Justice Benjamin. With so many fine legal minds misunderstanding the overriding importance of public perceptions of fairness and impar-

187. The question makes sense only with this parenthetical gloss. Of course the judge's vote on the motion to disqualify will frequently be outcome determinative, unless it is subject to appeal. No appeal was possible in *Caperton*, as Justice Benjamin's denial of the disqualification motion was not reviewable other than by the exceptional avenue of an extraordinary writ from the U.S. Supreme Court (as occurred in this remarkable case).

tiality to the legitimacy of the judiciary itself, it is small wonder that recusal and disqualification law is in such disarray.

19. *Make a difference if the judge's denial of disqualification motion is subject to independent review, e.g., by a panel of other judges?*

A related question would be whether it matters if the judge's decision on disqualification is appealable (e.g., as a collateral order or on a writ of mandamus)¹⁸⁸ and affirmed on appeal. Some of the issues raised here have already been considered in connection with Questions 14 and 15. In the case of independent review by a panel of judges, a lot will depend on the standard of review. If it is *de novo*, then the possibility that there could ever be a denial of due process begins to approach zero.¹⁸⁹ The same result would obtain where the judge whose disqualification is sought simply reviews the motion for facial validity and, assuming it passes that low threshold, passes it on for decision by another judge in the

188. Denials of disqualification motions are not final orders but interlocutory in nature and therefore are not readily appealable, save by resort to various exceptions to the final order rule. One exception is the collateral order doctrine. *See, e.g.,* Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 712 (7th Cir. 1986). *But see* Cooper v. United States, No.2:03-cv-479, 2007 WL 1655518, *1 (S.D. Ohio June 4, 2007) (holding that denial of disqualification is not an appealable order); Krieg v. Krieg, 743 A.2d 509, 511, 511 n.4 (Pa. Super. 1999) (holding denial of disqualification not a collateral order); State v. Forte, 654, 553 A.2d 564, 565 (Vt. 1988) (*simile*). Another way to obtain interlocutory review is through the use of an extraordinary writ. *See, e.g.,* Jackson v. Bailey, 605 A.2d 1350, 1351 (Conn. 1992) (writ of error); Reg'l Sales Agency, Inc. v. Reichert, 830 P.2d 252, 253 (Utah 1992) (writ of certiorari); State v. Yeagher, 399 N.W.2d 648 (Minn. Ct. App. 1987) (writ of prohibition); In re City of Detroit, 828 F.2d 1160, 1166 (6th Cir. 1987) (writ of mandamus). As far as the latter are concerned, the writ of mandamus is, according to one expert, the most frequently resorted-to mechanism for appealing denials of disqualification motions. FLAMM, *supra* note 20, § 32.6, at 967 ("Of the many mechanisms that exist for attempting to obtain expedited appellate review of a judicial disqualification decision, the writ of mandamus is the one that has been the most frequently resorted to, and the one that has met with the greatest success." (citing Legal Aid Soc'y v. Herlands, 399 F.2d 830, 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 922 (1969)). *See, e.g.,* Nichols v. Alley, 71 F.3d 347 (10th Cir. 1995); Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162-63 (3d Cir. 1993). Indeed, in some jurisdictions—such as California and the U.S. Court of Appeals for the Seventh Circuit—mandamus is the *only* basis for obtaining such appellate review. *See, e.g.,* CAL. CIV. PROC. CODE §170.3(d). (determination of a question of judicial disqualification reviewable only by writ of mandate); Swift v. Super. Ct., 91 Cal. Rptr. 3d 504 (Cal. Ct. App. 2009); Roth v. Parker, 67 Cal. Rptr. 2d 250 (Cal. Ct. App. 1997); United States v. Horton, 98 F.3d 313, 316-17 (7th Cir. 1996); United States v. Balastieri, 779 F.2d 1191, 1205 (7th Cir. 1985). However, as even the Seventh Circuit candidly acknowledges, this is decidedly a minority position. United States v. Ruzzano, 247 F.3d 668, 694 (7th Cir. 2001).

189. That is not to say that another judge is incapable of being mistaken, merely that the process accorded—susceptible to error though it may be, as is all human endeavor—would be seen to be fair.

same court.¹⁹⁰ If, however, the first judge's denial of the disqualification motion is "on the merits" of that motion and the independent review is under a deferential standard such as "arbitrary and capricious" or "abuse of discretion," then the review is largely illusory and due process concerns may even be heightened. It is doubtful, as a practical matter, that too many judges would be comfortable ruling that a colleague had abused his discretion in denying a disqualification motion.

In any event, in the wake of the *Caperton* decision, the ball is now firmly in the courts of the 39 states that have some form of contestable judicial elections to implement prompt and non-illusory review measures so as to obviate the possibility of due process challenges. That is obviously what the majority in *Caperton* anticipates.¹⁹¹

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?*

Too cute by half, this is another question unworthy of the Chief Justice. One begins to wonder whether some makeweight questions were included in order to yield the magic total of forty. In any event, it is self-evident that what animates the due process concern, at least in part, is the problem of appearances—appearance of impartiality and appearance of impropriety.

Almost every State – West Virginia included – has adopted the American Bar Association's objective standard: "A judge shall avoid impropriety and the appearance of impropriety." . . . The ABA Model Code's test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Canon 2A, Commentary; see also W. Va. Code of

190. Georgia is an example of a jurisdiction that follows this procedure. See, e.g., GA. UNIF. SUPER. CT. RULE 25.3 (West, Westlaw through June 2010 amendments). See, e.g., *Birt v. State*, 350 S.E.2d 241, 241-42 (Ga. 1986); *Johnson v. State*, 579 S.E.2d 809, 816 (Ga. Ct. App. 2003).

191. See *Caperton*, 129 S. Ct. at 2266-2267 (discussing the ABA Model Code standards for disqualification, state adoption of such rules, their importance in maintaining the integrity of the judiciary and the rule of law, and inviting the states to adopt standards more rigorous than due process requires).

Judicial Conduct, Canon 2A, and Commentary (2009) (same).¹⁹²

The underlying concern in each instance is the legitimacy of the judiciary in the eyes of the public.¹⁹³ Even assuming the unstated premise of the question—namely that a reasonable person could reach a different conclusion than a reasonable lawyer or a reasonable judge, something the majority would be unlikely to concede—it seems sensible to use the perspective of the reasonable person.

27. *Finality of pending case—recusal required only if the issue is ultimate liability? What if the issue is only class certification?*

If whatever the judge is called upon to decide—whether final or interlocutory—is important enough for a litigant and counsel to risk filing a motion for disqualification, it is unlikely that the appearance of fairness and impartiality issue would be any less compelling. Class certification, the example given in the question, is by no means an inconsequential decision.¹⁹⁴ Presumably, if the issue were not all that important, no disqualification would be sought.

F. *Procedural Issues*

33. *Caperton claims raisable only on direct review? In an action in federal district court under 42 U.S.C. § 1983 for deprivation of civil rights under color of state law? If the latter, who would be the defendant(s)?*

34. *What about issues of repose? Is collateral relief available in federal court under § 1983? What statute of limitations should apply?*

The prospect of federal district court review of a state judge's denial of a disqualification motion is so wrong-headed and so incompatible with well-known, and fundamental, principles of comi-

192. *Id.* at 2266.

193. “The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.” *Id.* at 2266-67 (citing *White*, 536 U.S. at 793).

194. *See, e.g.,* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978) (observing that failure to obtain class certification can be fatal to the case).

ty, federalism, and judicial immunity from suit that the notion can be dismissed as not merely remote but, in effect, a red herring.

Normally, a denial of a disqualification motion that rises to the level of a denial of due process should be reviewable under procedures available under the laws of the particular state. An exception might be where the judge who is the target of the motion is a state high court judge and (as in *Caperton*) the high court in question does not provide for review of the denial by the other members of the court. No *a priori* claim for injunctive or declaratory relief, much less for damages, would be possible, because each motion for disqualification is *sui generis*, based on particularized facts and circumstances, and there is no way to establish in advance that the motion will be denied. As far as claims for monetary damages are concerned, judges enjoy absolute immunity as long as they do no act in the clear absence of jurisdiction.¹⁹⁵

Furthermore, using § 1983 as a substitute for appeal at the trial or intermediate appellate court level, would likely run afoul of various doctrines of federal judicial abstention,¹⁹⁶ which would cause a federal court to dismiss the claim.

35. *What is the appropriate remedy? Vacate lower court decision in its entirety? Retain any of it?*

195. See, e.g., *Mireles v. Waco*, 502 U.S. 9 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978). This is so even where the judges' actions are unlawful, in excess of their jurisdiction, or are alleged to have been done maliciously or corruptly. *Sparkman*, 435 U.S. at 356 (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)). Such judicial immunity is designed to allow judges to act upon their own convictions, without apprehension of personal consequences to themselves. *Id.* at 355 (citing *Fisher*, 80 U.S. (13 Wall.) at 347).

196. See, e.g., *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 476, 482 (1983) (holding that federal district courts are without jurisdiction to review final determinations of a state high court—as distinct from, for example, state court rules, such as bar admission rules—which can only be reviewed by the U.S. Supreme Court pursuant to 28 U.S.C. § 1257); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (holding that where constitutional questions in a federal court complaint arose in state court, it was the “province and duty of the state courts to decide them,” that “[u]nder the legislation of Congress no court of the United States other than this court could entertain a proceeding to reverse or modify the [state court] judgment” for legal error, and that “[t]o do so would be an exercise of appellate jurisdiction [whereas the] jurisdiction possessed by the [federal] District Courts is strictly original” (citations omitted)). Furthermore, to seek review of a state lower court judge’s denial of a disqualification motion while state appellate avenues are open would run afoul of the abstention doctrine originally announced in *Younger v. Harris*, 401 U.S. 37 (1971), pursuant to which a federal court must, in the interests of comity and federalism, abstain from exercising jurisdiction where doing so would interfere with a pending state proceeding that implicates an important state interest and in which the state provides an adequate forum to adjudicate the claim.

Unless there is a way to segregate parts of the decision that are untainted by the appearance of partiality, unfairness, or impropriety,¹⁹⁷ the entire decision must be vacated.

36. *Can the due process claim be waived if a litigant who knows of it waits until after the decision to raise it? Or does ripeness depend upon the judge's action suggesting a probability of bias?*

To allow parties or their counsel to engage in strategic or opportunistic behavior does little to promote public respect for the judiciary or the judicial system. So litigants who sit on their rights should be estopped from raising disqualification where the basis therefore was known prior to the decision on the merits.¹⁹⁸

On the other hand, using the classic definition of constitutionally cognizable waiver as the voluntary relinquishment of a known right or privilege, there is no reason why a claim arising from the rare sort of circumstances present in *Caperton* cannot be waived by the parties. Indeed, the Model Code specifically contemplates the possibility of waiver.¹⁹⁹

37. *Parties entitled to discovery with respect to the judge's disqualification decision?*

Allowing discovery would not only be unduly disruptive but would also unduly prolong the case. Litigants are entitled to have disqualification questions resolved promptly and meaningfully. The best practice would be for denials of disqualification motions, and decisions on appeal from such denials, to be in writing or otherwise on the record and to contain an explanation for the result reached.

38. *Standard of review? Can it be harmless error?*

197. In some jurisdictions, for example, several judges sitting in rotation might have occasion to issue pretrial rulings in a particular case. Rulings by judges not subject to disqualification challenge might be preserved in such circumstances.

198. Many courts impose a timeliness requirement for disqualification motions to receive consideration on the merits. This is the case in the federal system. See, e.g., *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 503 F. Supp. 368, 379 (N.D. Ohio), *mandamus denied sub nom.*, *City of Cleveland v. Krupansky*, 619 F.2d 576 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980).

199. See MODEL CODE R. 2.11(C).

Some observations on the standard of review have already been offered in connection with Question 19.²⁰⁰ As the injury for which redress is warranted is not merely to a party before the court but to the judicial system as a whole, harmless error analysis seems inappropriate.

39. *Can the judge respond to allegations of bias, or must decision be based solely on parties' pleadings?*

There can be no categorical, *a priori* statement that a judge whose disqualification is sought has no right to be heard in the matter. That can certainly be part of the totality of facts and circumstances to be weighed in determining whether disqualification is warranted in the usual case or, in the “extreme” or “extraordinary” case, mandated by the due process clause. Where there is an unwillingness voluntarily to recuse without explanation (which is also the judge’s right and an easy way to preserve the judge’s own privacy), the most appropriate way for the judge to air his views is to write a reasoned opinion justifying his decision on the disqualification motion.

Hopefully, that decision will be more on point than was Justice Benjamin’s—when he finally got around to issuing it.²⁰¹ Benjamin’s opinion not only went out on a limb but proceeded to saw it off after him. Therein he contended—at odds with traditional principles of judicial ethics found in Supreme Court precedent, decisions of myriad other courts,²⁰² the ABA Model

Code, and all state avatars thereof²⁰³—that due process could never require recusal based on appearances and that only actual bias counts.

200. See notes 188-91, *supra*, and accompanying text.

201. Nothing judgmental is intended or intimated by rehearsing the simple facts: The decision of the West Virginia Supreme Court of Appeal was rendered April 3, 2008; Benjamin’s concurring opinion was issued four months later, after the petition for certiorari had been filed but before the due date for Massey’s Brief in Opposition to the petition.

202. In fairness, it should be noted that Justice Benjamin did cite some federal appellate decisions in support of his contention that “no [federal] decision ‘has held or clearly established that an appearance of bias on the part of the judge, without more, violates the Due Process Clause.’” *Benjamin Concurring Opinion*, 679 S.E.2d at 28 (citing *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004), *cert. denied*, 544 U.S. 924 (2005)); *Callahan v. Campbell*, 427 F.3d 897, 928-929 (11th Cir. 2005); *Del Vecchio v. Ill. Dept. of Corrections*, 31 F.3d 1363, 1371-82 (7th Cir. 1994) (en banc).

203. *Cf. Peters v. Kiff*, 407 U.S. 493, 502 (1972) (observing “even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias.”); *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968) (“any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias”); MODEL CODE R. 1.2

40. *If Caperton claims are settled as part of overall settlement, does the judge have an opportunity to salvage his reputation?*

The underlying presumption in this question is itself questionable, namely that a judge's reputation will perforce be sullied by either a motion to disqualify or a petition seeking review—on whatever ground—of that judge's denial of a disqualification motion. For one thing, the motion may have been completely frivolous, such as a motion seeking disqualification based on the judge's race, ethnicity, or religion where these have nothing to do with the issues in the case.

Even sticking with the Chief Justice's predicate of so-called *Caperton* claims, however, and assuming *arguendo* that the underlying facts go well beyond a *de minimis* level of support so that the motion is not patently frivolous,²⁰⁴ why assume that the judge's reputation is necessarily besmirched? The judge may not, after all, have previously known that his election campaign had received financial support from a particular party or counsel or had information about the level of that support. Politics, after all, makes strange bedfellows, and judges have (and under the First

("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"); *id.* R. 2.11(A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . .").

204. Federal judges are not, of course, elected, so *Caperton's* narrow holding does not have any immediate impact on the federal judiciary. While it is possible that an "extreme case" might someday arise in which denial by a federal judge of a disqualification motion might implicate the Due Process Clause of the Fifth Amendment, the existence of 28 U.S.C. §§ 144 (dealing with disqualification for actual bias) and 455(a) (dealing with disqualification based on the appearance of partiality and other, more specific categories) renders that prospect remote.

Although federal judges are not elected, the idea of disqualification for *any* financial interest is enshrined in 28 U.S.C. § 455. Thus, while the *Model Code's* "Terminology" section defines "economic interest" as "ownership of more than a de minimis legal or equitable interest," the federal standard defines "financial interest" in 28 U.S.C. § 455(d)(4) to include "ownership of a legal or equitable interest, *however small*" (emphasis supplied). The federal approach has its pros and cons. On the pro side, the standard establishes a bright line test and eliminates any need to construe the meaning of "*de minimis*." Of course, one can just as easily legislate a bright line other than zero (*e.g.*, by defining "financial interest" to include ownership of a legal or equitable interest having a fair market value of more than \$1,000). The con side is that the absence of any sort of *de minimis* exception in the federal rule unduly restrictive and compels disqualification in situations where the public would not believe any appearance of impropriety (or probability of bias) exists. Arguably, such disqualification creates additional, needless delay in litigation already overly protracted and unnecessarily increases costs in a system where they are already excessive. Neither consequence is likely to do anything other than diminish public respect for, and confidence in, our judicial system.

Amendment can have) no control over what individuals and entities may decide to furnish campaign support.²⁰⁵ Indeed, now that the Court in *Citizens United* has unshackled independent expenditures by corporations and labor unions from statutory restraints, judges in the future will frequently have even less of an idea than at present whence their support has come.²⁰⁶ That will only attenuate further any linkage between the identity of a campaign supporter and the judge's reputation.

It is rather by stubborn insistence on presiding over a case where, as in *Caperton*, a reasonable person cannot but perceive that the judge's impartiality has been called into question, that damage to the judge's reputation can most reliably be assured.

V. TOWARD AMENDMENT OF MODEL CODE RULE 2.11

The landscape of campaign support in judicial elections (some form of which take place in 39 of the 50 states) has dramatically changed in the wake of the *Caperton* and *Citizens United* decisions. That transmogrification, especially when conjoined with the enormous additional influx of campaign support in judicial elections during the past decade, has considerably raised the stakes for state judiciaries in terms of judicial independence and public perception of the integrity, impartiality, fairness—and, indeed, the legitimacy—of the judicial branch of government.

What follows are some suggested revisions to Rule 2.11 of the Model Code and, where applicable, the Comments accompanying the Rule. To effect those changes without undue prolixity in the black-letter language of the Rule, additional terms of art are being proposed for the Terminology section of the Model Code. The format employed throughout uses traditional legislative draft style, with additions underlined and deletions struck through. Following the text of the Rule and Comments (as amended) will be additional explanatory text that will summarize the rationale behind the proposed revisions.

* * * *

205. In the event a supporter is so unsavory that the judge would prefer not to have the support, the most that can be done is for the judge's campaign committee to disseminate an advertisement of its own to disassociate the campaign from the person or entity in question. That tactic, of course, will be rarely employed, inasmuch as such advertising is not only costly but may well turn out counterproductive if it should end up drawing more public attention to the unsavory support than would otherwise have been the case.

206. For that reason the author recommends adoption of court rules mandating disclosure of campaign support by litigants and their lawyers.

Terminology

Amendments to Text

“Affiliate” and “affiliated” means any person, domestic or foreign, that controls, is controlled by, or is under common control with any other person.

“Associate” and “associated” means any person who employs, is employed by, or is jointly employed by a common employer with another person; any person who acts in cooperation, consultation, or concert with, or at the request of, another person; and any spouse, domestic partner, or person within the third degree of relationship of any of the foregoing.

“Control” and “controlled” each refers to the power of one person to exercise, directly or indirectly or through one or more persons, a dominating, governing, or controlling influence over another person, whether by contractual relationship (including without limitation a debtor-creditor relationship), by family relationship, by ownership, dominion over, or power to vote any category or voting interest (including without limitation shares of common stock, shares of voting preferred stock, and partnership interests), or by exercising (or wielding the power to exercise) in any manner dominion over a majority of directors, partners, trustees, or other persons performing similar functions.

“Person” means any natural or juridical person, including without limitation any corporation, limited liability company, partnership, trust, union or other labor organization; any branch, division, department or local unit of any of the foregoing; any political committee, party, or organization; or any other organization or group of persons.

Amendments to Commentary

Not applicable.

Explanation of Proposed Changes

Two new terms, “Affiliate”/“affiliated” and “Associate”/“associated,” are proposed in order to give the broadest reach possible to the description in Rule 2.11 of those who provide campaign support in judicial elections. The purpose of these definitions is to prevent such supporters from avoiding or evading the potential judicial disqualification consequences of their support by

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resort to such simple expedients as the use of various types of business associations and affiliated persons to disguise or conceal the identity of the supporter or the purpose of the campaign support. Definitions of two additional, ancillary terms, “Control”/“controlled” and “Person,” were added in order to explicate and flesh out the content of the first two terms in a manner that would avoid making any of these definitions overly cumbersome.

Rule 2.11 Disqualification

Amendments to Text

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality* might reasonably be questioned, including but not limited to the following circumstances:
- (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or has personal knowledge* of facts that are in dispute in the proceeding.
 - (2) The judge knows* that the judge, the judge’s spouse or domestic partner,* ~~or~~ a person within the third degree of relationship* to either of them, ~~or~~ the spouse or domestic partner of such a person, or a person in association with whom the judge was engaged in the private practice of law within the preceding three years [states are free to vary this time period and to make exceptions for judges who practiced in small firms, or in rural areas, or both], is:
 - (a) a party to the proceeding or an officer, director, general partner, managing member, or trustee of a party;
 - (b) acting as a lawyer in the proceeding;
 - (c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or
 - (d) likely to be a material witness in the proceeding.

- (3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or is a party to the proceeding.
- (4) The judge knows or learns by means of disclosures mandated by law* or 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[, or to the campaign of an opponent whom the judge defeated in the election,] 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] have been made by, or by donors associated* or affiliated* with, a party or counsel appearing before the court, unless a waiver is agreed to by all other parties in accordance with the provisions of this Rule.

VARIANT 1: The judge knows or learns by means of disclosures mandated by law* or a timely motion that aggregate* contributions* to the judge's campaign[, or to the campaign of an opponent whom the judge defeated in the election,] in an amount greater than \$25,000 [individual states are free to vary this dollar amount] have been made by, or by donors associated* or affiliated* with, a party or counsel appearing before the court, unless a waiver is agreed to by all other parties in accordance with the provisions of this Rule. In determining whether the contributions* raise a question about the judge's ability to be impartial such that disqualification (with or without motion) is appropriate under this paragraph, the factors to be considered should include, *inter alia*:

- (a) The level of support given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's [or opponent's] campaign and to the total amount spent by all candidates for that judgeship;

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- (b) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
- (c) The timing of the support in relation to the case for which disqualification is sought;
- (d) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate [or opponent], and (iv) the total support received by the judicial candidate [or opponent] and the total support received by all candidates for that judgeship.

VARIANT 2: The judge knows or learns by means of disclosures mandated by law* or a timely motion that aggregate* contributions* to the judge's campaign[, or to the campaign of an opponent whom the judge defeated in the election,] in an amount greater than

Option 1: ___ percent [individual states are free to specify this percentage] of all such contributions to the judge's [or opponent's] campaign; or

Option 2: ___ percent [individual states are free to specify this percentage] of all contributions to all candidates for that judicial position during the campaign; or

Option 3: ___ percent [individual states are free to specify this percentage] of all such contributions to the judge's [or opponent's] campaign, and ___ percent [individual states are free to specify this percentage] of all contributions to all candidates for that judicial position during the campaign have been made by, or by donors associated* or affiliated* with, a party or counsel appearing before the court, unless a waiver is agreed to by all other parties in accordance with the provisions of this Rule. In determining whether the contributions* raise a question about the judge's ability to be impartial such that disqualification (with or without motion) is appropriate under this paragraph, the factors to be considered should include, *inter alia*:

- (a) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
 - (b) The timing of the support in relation to the case for which disqualification is sought;
 - (c) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, and (iii) the judicial candidate [or opponent], and (iv) the total support received by the judicial candidate [or opponent] and the total support received by all candidates for that judgeship.
- (5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
- (6) The judge:
- (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
 - (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
 - (c) was a material witness concerning the matter;
 - (d) previously resided as a judge over the matter in another court.
- (7) A motion to disqualify has been filed in which a party or a lawyer representing a party in the proceeding has brought to the judge's attention, and the judge does not contest, that the judge has, in connection with the proceeding or controversy, violated the re-

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quirements of the foregoing provisions of this paragraph or of Rule 2.3, 2.4, 2.6, 2.8(B), 2.9, or 2.10.

VARIANT: A motion to disqualify has been filed on behalf of a party to the proceeding by a lawyer who has submitted a sworn affidavit alleging that the judge has, in connection with the proceeding or controversy, violated the requirements of the foregoing provisions of this paragraph or of Rule 2.3, 2.4, 2.6, 2.8(B), 2.9, or 2.10.

- (B) A judge shall keep informed about the judge's personal and fiduciary economic interests— and shall make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and ~~minor children~~ members of the judge's family who reside ~~residing~~ in the judge's household.
- (C) Any motion to disqualify the judge, or the appeal from the denial of such a motion, shall be decided promptly after all papers relating to the motion, or briefs on appeal, have been filed, or the time for filing such papers or briefs under applicable law* has elapsed, whichever occurs first. Denials of disqualification motions, and decisions on appeals therefrom, should be in writing or otherwise on the record and should set forth the reasons for the decision.
- (D) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the partes and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Amendments to Commentary

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph

(A)(2)(c), the judge's disqualification is required. Similarly, if the judge within the preceding three years [states are free to vary this time frame] was engaged in the private practice of law in association with a person who is involved in the case in one of the capacities enumerated in paragraph 2(a) through (d), the judge's disqualification is required; where such professional association took place more than three years previously, disqualification is discretionary and should be analyzed under the general standard of whether the judge's impartiality might reasonably be questioned. In some states, it may be appropriate to create an exception to the three-year (or other time period) rule where the judge practiced law with a small firm, or in a rural area where not too many lawyers practice, or both. The distinction between this provision and paragraph 6(a) is that the latter deals with the judge's prior association with a lawyer in the case during the time of that association (i.e., prior to the judicial service), whereas this provision deals with a lawyer involved in the case not during the prior association but within a relatively short period of time since the prior association with the judge ended. Moreover, as the language of the rule makes clear, these black letter provisions are not intended to be exclusive, and certain other relationships, such as a close and longstanding personal friend of the judge or the spouse of such a friend, might fall within the appearance of impartiality standard.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification. To assist judges in fulfilling this obligation, courts should promulgate rules requiring parties and their counsel to disclose corporate and other business organization affiliations and, in those states in which judges face some kind of election, details of campaign contributions and independent expenditures made to support the election campaign of any judge before whom they are appearing [or the judge's opponent] by any party or counsel, or any of their affiliates or associates.

* * *

[7] Since paragraph (A)(4) was added to the Code in 1999, judicial elections have become significantly more contentious, and campaign support has increased exponentially. To avoid the appearance of partiality or unfairness, as well as due process problems of the sort identified by the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), paragraph (A)(4) mandates disqualification, in states where judges face some form

of election, when campaign support for the judge's election campaign [or for the election campaign of an opponent whom the judge defeated in the election], from, or from donors associated or affiliated with, a party or counsel appearing before the court, rises above a sum certain, the appropriate level of which would be determined separately by each jurisdiction. For judges to have adequate information in order to comply with this rule, appropriate disclosures from campaign supporters under state statute or under court rules are necessary. To prevent litigants and lawyers from "gaming" the system by making contributions precisely in order to be able to disqualify particular judges, the amounts specified by each jurisdiction should be high enough to discourage such behavior, and the other parties to the proceeding will have the ability to waive disqualification in accordance with the provisions of this rule. In order to provide the States with a menu of choices when considering adoption of this Rule, two variants have also been proposed. Variant 1 uses a particular dollar amount as the trigger for disqualification, while Variant 2 uses a percentage as the trigger and offers three alternative options; each variant also enumerates a set of factors which are not exclusive but which should be considered in determining (whether or not the determination is prompted by motion) if the support in question raises a question about the judge's impartiality such that disqualification is appropriate.

[8] In order not to enlarge unduly the length and cost of litigation, decisions on disqualification issues should be both meaningful and prompt. Each jurisdiction should have in place procedures for interlocutory review of a denial of a motion to disqualify. Denials of motions to disqualify, and decisions on appeals from such denials, should be rendered as quickly as possible after the motion or the appeal, as the case may be, is filed, and all such decisions should be in writing or otherwise on the record and contain an explanation of the reasons for the decision. Decisions voluntarily to disqualify or to grant a disqualification motion need not contain an explanation of the reasons therefor, but a judge may decide, in the exercise of discretion, to provide such an explanation.

Explanation of Proposed Changes

Rule 2.11(A)(2) would be amended by adding language to cover a lawyer involved in a case pending before the court with whom the judge had been professionally associated a short time before the judge had been elevated to the bench. The time period se-

lected was three years, but there is no magic to that number, and it is contemplated that states could use this as a menu option where each jurisdiction would be free to specify the time frame it felt most appropriate with respect to the prior association.²⁰⁷ This provision is being suggested in order to fill a gap left by 2.11(A)(6)(a), which covers a lawyer with whom the judge practiced represented the party during the period when that lawyer and the judge were associated, but does not cover the situation where that same lawyer represents the party *now*, rather than then. The concern here is not so much that the judge might be privy to nonpublic information about the party (as might be perceived to be the case in the (6)(a) situation), rather that the judge might be perceived as being less than completely impartial toward a lawyer (and, by extension, that lawyer's client) with whom the judge was recently associated. The passage of time would allay such concerns, however. For that reason, three years is being suggested as the cutoff, though, as noted, each jurisdiction is free to specify a longer or shorter time frame. In addition, in some states, it may be appropriate to give consideration to the impact of such a rule in small or rural jurisdictions. The language limiting the rule to private practice of law is intended to exempt from disqualification a judge who served as an assistant attorney general, prosecutor, public defender, or similar position, in which any kind of mandatory disqualification would be inappropriate. Explanatory language has also been added to Comment 4. The suggestion that similar situations might exist was added to the comment language rather than to the rule (the example chosen is a lawyer with whom the judge had no prior professional association but who is a close and longstanding friend or the spouse of such a friend.

* * *

Rule 2.11(A)(4) in its present form was added to the Model Code in 1999 to address concerns about threats to the appearance of fairness and impartiality posed by campaign finance in judicial elections. Today, over a decade later, not a single state has adopted this Rule, and, until recently, only two states, Alabama and Mississippi, had adopted provisions to address this particular

207. Cf. *Jewell Ridge Coal*, 328 U.S. at 897 (separate opinion of Jackson, J., criticizing Justice Black for sitting on a case argued by his former law partner of 20 years before).

concern (Alabama's provision actually antedated Rule 2.11(A)(4)).²⁰⁸

Preliminarily, it should be noted that nothing in the approach of the existing rule is ill-advised or unworkable. Some suggested revisions are being offered in order to clarify that disqualification may be just as necessary when the judge's (unsuccessful) opponent received substantial campaign support from a litigant or counsel now before the judge as when it was received by the judge's own campaign. At oral argument in the *Caperton* case, the latter was referred to by several of the Justices in questioning Massey's counsel about the concept of a "debt of gratitude."²⁰⁹ (The former could then be, and in post-*Caperton* discussions has been, referred to as a "debt of hostility"). Conceptually due process would logically require disqualification for disproportionate campaign opposition just as with disproportionate campaign support. If that is so, it seems only sensible for the Model Code to provide for both.

There is an antecedent question concerning how a judge would know about campaign support for an opponent unless it had been in the form of virulent attack ads with attribution, *e.g.*, "Paid for by the United Mine Workers" (to borrow the example used by Chief Justice Roberts during oral argument in *Caperton*) or state law were to require disclosures by supporters that were then made publicly available or, at a minimum, available to the candidates. In the wake of *Caperton* and *Citizens United*, judges will, at a minimum, need to have access to more information in order to be able to make appropriate campaign support disclosures in the cases over which they preside, and donors who are parties or are associated or affiliated with parties before the court (including counsel) must be required to make their own disclosures on the record. (This can be accomplished either by statutory provisions in state election laws or by rules of court, similar to existing court rules mandating disclosures of corporate affiliations, support for filing of briefs *amicus curiae*, etc.) Anticipating this, the phrase "disclosures mandated by law or" is proposed for insertion before "a timely motion" in the first clause of the Rule.

In addition, more expansive language is being suggested to replace the former formulation, "a party, a party's lawyer, or the law firm of a party's lawyer" with "donors associated or affiliated

208. ALA.CODE §§ 12-24-1, 12-24-2 (2006); MISS.CODE OF JUDICIAL CONDUCT, Canon 3E(2) (2008). For examples of more recent State reconsideration of judicial disqualification issues, see *supra* notes 22-30 and accompanying text.

209. See *e.g.*, Argument Transcript, *supra* note 117, at 38-39, 43-45.

with a party or counsel appearing before the court.” The intention here is to foreclose efforts to evade the Rule by funneling different contributions through affiliated or associated donors. The proposed language make use of the proposed new defined terms (see above) and hopes to capture all campaign support made by entities within a corporate complex, including those from individual directors, officers, employees, consultants, and other agents (and family members of the foregoing), and to accomplish a similar objective as to counsel appearing in the case by capturing support from their law firms, subsidiaries or affiliates of their law firms, and individual attorneys associated with any of them (along with family members). Suggested language on this topic has also been added to Comment 5.

Also suggested is the elimination of language limiting the concept of disqualifying support to donations made within a specified number of years prior to the case coming before the judge. If the support was sufficiently substantial, the passage of time alone will not necessarily eliminate the taint of partiality or unfairness in public perception. (Recall also the Robert Jackson-Hugo Black feud). The ability of other parties to waive disqualification in these circumstances is adequate protection against over-disqualification and avoids the arbitrariness of any chronological cut-off.

Though the existing Rule, particularly as revised, seems eminently reasonable, the ABA should face up to the uncomfortable reality that no state has adopted it. Given that reality, two variants on Rule 2.11(A)(4) are being proposed to supplement, not to supplant, the existing version. The purpose of these variants is to provide each State in which judges at any level are subject to any form of election with a menu of options in crafting a rule suitable for its particular circumstances.

The proposed Variant 1 on Rule 2.11(A)(4) once again expressly contemplates disclosures of campaign support by parties and counsel in accordance with applicable “law,” which, as used in the Terminology section, comprehends both statutory law and rules of court. A judge who knows (or learns as a result of the aforementioned disclosures or a disqualification motion) that the judge’s campaign, or that of the judge’s opponent during the campaign, received more than a specified dollar amount of support from donors associated or affiliated with a party or counsel appearing before the court, must withdraw from the case, subject to the ability of the parties to waive disqualification. The variant offers \$25,000 as a suggested dollar amount on the theory that it is neither too

low to attract “gaming” of the system by unscrupulous lawyers or litigants who wish to preserve the option to disqualify a judge they don’t like nor too high in terms of public perceptions of whether a judge has been “bought.”

Variant 1 also incorporates a non-exclusive list of factors to be considered by the judge in determining whether disqualification is appropriate in the campaign support context. These factors were adapted from the brief *amicus curiae* of the Conference of Chief Justices in the *Caperton* case, which were referred to from time to time at oral argument.²¹⁰ They include:

- (a) The level of support given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge’s [or opponent’s] campaign and to the total amount spent by all candidates for that judgeship;
- (b) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
- (c) The timing of the support in relation to the case for which disqualification is sought;
- (d) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate [or opponent], and (iv) the total support received by the judicial candidate [or opponent] and the total support received by all candidates for that judgeship.

Variant 2 adopts a similar approach but, instead of prescribing a dollar amount as the trigger for disqualification, substitutes a percentage. Three different options are offered for choosing a percentage: (1) a percentage of total support for the judge’s campaign (or that of the judge’s opponent); (2) a percentage of total support for all candidates for that judicial position; or (3) a combination of (1) and (2). Variant 2, like Variant 1, also incorporates a non-exclusive list of factors to be considered by the judge in determining whether disqualification is appropriate in the campaign support context.

210. See Argument Transcript, *supra* note 117, at 24 (Alito, J.), 46 (Breyer, J.), 52 (Stevens, J.).

Proposed language on the subject of this variant has been suggested for a new Comment 7 to Rule 2.11.

Having these slightly more nuanced variants as alternatives to the simplicity of pre-existing Rule 2.11(A)(4) will be helpful to the States and will, as noted above, provide them with something of a menu from which to craft provisions suitable to their particular circumstances.

* * *

A new Rule 2.11(A)(7), proposed in two alternate versions, is intended to address what appears to be an inadvertent lacuna in the Model Code. Canon 2 is replete with provisions regulating judicial conduct, but nothing is said about the consequences of failing to abide by any of those provisions. As is well known, state judicial conduct commissions exist to address complaints brought against judges, including complaints containing allegations of violations of the Model Code. In addition, however, some (though not all) of the provisions in Canon 2 refer to circumstances in which disqualification would be appropriate. The provisions in question are expressly noted in both versions of the proposed rule: Rules 2.3, 2.4, 2.6, 2.8(B), 2.9, 2.10, and 2.11(A)(1)-(6).

Often, these sorts of violations are unintentional or inadvertent, and, in the press of court business, the judge may not even be aware that a possible violation has taken place. Proposed Rule 2.11(A)(7) provides that where a motion to disqualify brings this situation to the judge's attention, and the judge does not contest the factual allegations in the motion, then the judge should grant the motion withdraw from the case. What happens, however, if the judge does contest the factual predicate for the motion? A variant on this provision is being offered that would require the judge to accept as true any such factual allegations offered as a sworn affidavit of counsel accompanying the disqualification motion. In those circumstances, assuming the affidavit is legally sufficient and the motion is timely filed and otherwise meets such procedural requirements as are imposed on such motions under applicable law, then the judge must grant the motion. The latter variant has the advantage of providing a much cleaner procedure. Such a procedure is already in use in several states.²¹¹ The risk of

211. See, e.g., COLO. REV. STAT. ANN. § 16-6-2 (West, Westlaw through July 2010 legislation); COLO. R. CIV. P. R.97 (West, Westlaw through June 2010 amendments); COLO. R. CRIM. P. R. 21(b); D.C. SUPER. CT. R. 63-I (West, Westlaw through July 2010 amendments); FLA. STAT. ANN. § 38.10 (West, Westlaw through 2010 Sess.); FLA. R. JUD. ADMIN. R. 2.330 (West, Westlaw through March 2010 amendments); GA. SUPER. CT. R. 25.3; MONT. CODE

attorney abuse is small, since if the facts alleged in the affidavit are false, the judge, despite having had to disqualify himself or herself from the case in question, can still make a referral to bar disciplinary authorities.

Minor revisions have been proposed to Rule 2.11(B). There is no reason why the judge's duty to make a reasonable effort to keep informed about the personal economic interests of others residing in his or her household should be limited to minor children but should be extended to any member of the judge's family who resides in the judge's household. (N.B. Under the language of the Rule, the judge's duty to be informed appears to apply to a spouse or domestic partner regardless of whether that person resides in the judge's household; there is no reason to alter that).

* * *

A new Rule 2.11(C) is proposed. The foundational principle is that rulings on disqualification motions should be both meaningful and prompt. The proposed Rule addresses both. First, it requires a prompt decision on a disqualification motion and on an appeal from the denial of a disqualification motion. "Justice delayed is justice denied." This requirement is an appropriate addition to the Model Code inasmuch as it places an affirmative obligation upon judges to address an issue that is absolutely fundamental to both the appearance and reality of a judge's fairness and impartiality, the default proposition of Rule 2.11(A). Second, in the event a motion to disqualify has been denied, the proposed Rule requires that an explanation therefor be provided either in a written decision or otherwise on the record; the same requirement would apply to decisions on appeals from such denials. Such written explanations would not only enrich the law of judicial disqualification but, more importantly, would over time provide firmer guidance to judges who have to apply disqualification rules to novel factual settings.

Reluctance to provide such an explanation usually stems from the belief that judges might have to disclose on the record matters that are private or potentially embarrassing. In most instances the concern is unfounded. First, if a private or potentially embar-

ANN. § 3-1-805 (West, Westlaw through 2009 legislation). *See also* Goebel v. Benton, 830 P.2d 995 (Colo. 1992); Birt v. State, 350 S.E.2d 241, 242 (Ga. 1986). *Cf.* N.C. GEN. STAT. ANN. § 15A-1223 (West Westlaw through ch. 30 of 2010 Sess.); State v. Poole, 289 S.E.2d 335, 343 (N.C. 1982) (trial judge presented with disqualification motion should "either recuse himself or refer a recusal motion to another judge if there is 'sufficient force in the allegations contained in [the] motion to proceed to find facts.'" (quoting North Carolina Nat'l Bank v. Gillespie, 230 S.E.2d 375, 380 (N.C. 1976))).

rassing matter is the basis for the disqualification motion, it will already be set forth in the motion, which is a public document. Second, in such a situation, it would be prudent for the judge, who is in the best position to know about the private or potentially embarrassing facts, to have disqualified himself or herself voluntarily in the first instance, thereby obviating the need for the filing of a motion.

Note that the requirement for an explanation only applies to disqualification motions that are *denied*. If the judge *grants* such a motion, or disqualifies himself or herself voluntarily, no explanation is or should be mandatory. In such instances, it properly remains within the discretion of the judge whether to provide an explanation in a written opinion or on the record, and one anticipates that judges would only do so where the explanation would be of future value to the judiciary and the bar. Proposed language summarizing these principles has been suggested as a new Comment 8.

With the addition of new Rule. 2.11(C), former Rule 2.11(C) would be redesignated as Rule 2.11(D) but without any change to the language.

VI. CONCLUSION

Caperton's signal achievement was its considered and scrupulously narrow application of due process considerations to the fallout from judicial campaign finance. Walking so narrow a path is of limited future utility, however, both because Chief Justice Roberts's imposing dissent created doubts about the decision's long-term viability and because, as the majority discerned, setting aside a denial of disqualification on due process grounds alone is only possible under extraordinary circumstances. The burden is therefore squarely on the States in which judges face some form of election to fill the gap by developing workable rules for judicial disqualification when substantial levels of campaign support create a *soupçon* of impropriety or tend to foster reasonable public perception that the judge in question may not be fair and impartial. The modest suggestions offered in this article are but a small step on the path out of the *selva oscura* and into the light of not merely the fact, but also the appearance, of punctiliously observed judicial detachment, objectivity, and probity.