CAPERTON'S NEW RIGHT TO INDEPENDENCE IN JUDGES

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I. INTRODUCTION

In *Caperton v. A.T. Massey Coal Co.*, the United States Supreme Court expanded the Due Process Clause of the Fourteenth Amendment, applying it to invalidate the decision of a justice on the West Virginia Supreme Court of Appeals denying the plaintiff's recusal motion.[1] The recusal motion was based on the justice's receipt of $3 million of campaign

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1. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257, 2267 (2009).

assistance from the defendant during the justice's election campaign.[2] The case reached the Supreme Court after the West Virginia court reversed a jury award of $50 million to the plaintiff, a coal company, which was based on a finding that the defendant, also a coal company, drove the plaintiff out of business through a series of business torts.[3] The Court expanded the scope of due process by requiring inquiry into conflicts of interest arising out of support in judicial election campaigns. While the facts of the case read like a movie script—with a big, bad, arrogant villain against a down-trodden hero—it is far from clear that the Supreme Court should have intervened.[4]

II. FACTS

The Harman Mine in southwestern Virginia's Buchanan County was thought to be spent when lifelong coal man Hugh M. Caperton purchased it in 1993.[5] By the end of 1993, however, the mine's yield had increased to one million tons of bituminous coal per year, quadrupling its previous output.[6] A.T. Massey Coal Company and its chief executive officer, Don L. Blankenship, offered to purchase the mine.[7] But Caperton was unwilling to sell, despite what he described as intimidating warnings from Blankenship.[8]

Caperton's prized customer was Wellmore Coal Company, which sold

2. *Id.* at 2257.

3. *Id.* at 2256–57.

4. The case has already spawned a novel. *See* Steven Brill, *Uncivil Action*, N.Y. TIMES, Mar. 30, 2008, *available at* http://www.nytimes.com/2008/03/30/books/review/brill.html?pagewanted=2 (reviewing JOHN GRISHAM, THE APPEAL (2008)).

5. John Gibeaut, *Caperton's Coal: The Battle Over an Appalachian Mine Exposes a Nasty Vein in Bench Politics*, A.B.A. J., Feb. 2009, *available at* http://www.abajournal.com/magazine/article/capertons_coal/; *see also* Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 328–29 (W. Va. 2009) (explaining that Hugh M. Caperton formed Harman Development Corporation in 1993 and purchased Harman Mining Corporation, Southern Kentucky Energy Company, and Sovereign Coal Sales (collectively Caperton), thereby becoming the owner of the Harman mine, which was previously owned by Inspiration Coal Corporation, through those three subsidiaries).

6. Gibeaut, *supra* note 5.

7. *Id.*; *see also Caperton*, 690 S.E. 2d at 330, 331 n.18 (listing the subsidiaries of Blakenship's company, A.T. Massey Coal Company: Elk Run Coal Company, Independence Coal Company, Mar Fork Coal Company, Performance Coal Company, and Massey Coal Sales Company (collectively Blakenship)).

8. Gibeaut, *supra* note 5.

the coal it bought from Caperton to LTV, a steelmaker in Pittsburgh.[9] In 1997, Caperton and Wellmore renegotiated their existing arrangement and signed a new five-year coal supply agreement (CSA).[10] At the same time, however, Blankenship was seeking LTV's business.[11] After failing to convince LTV that his coal was as good as Caperton's Harman Mine coal, Blankenship acquired Wellmore.[12] He then engaged in a series of transactions that led to Caperton's bankruptcy.[13] He used the expansive force majeure clause in the 1997 CSA to cut Wellmore's purchases of Caperton's coal by more than fifty percent.[14] He also bought abutting properties to the Harman Mine that Caperton had planned to buy.[15] And he again offered to buy the Harman Mine.[16] Caperton finally agreed to sell in early 1998.[17] But on the day the deal was to be consummated, Massey reneged, forcing Caperton into bankruptcy.[18]

After filing a Chapter 11 petition, Caperton filed a breach of contract action in Virginia against Blankenship, claiming that the facts did not support the declaration of force majeure under the CSA.[19] The circuit court awarded Caperton a judgment of $6 million.[20] Caperton then sued Massey in West Virginia state court, alleging fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations.[21] There, he won a $50 million jury verdict.[22]

Following a number of post-trial motions attacking the verdict, Blankenship appealed.[23] During the pendency of the appeal before the West Virginia Supreme Court of Appeals (WVSCA) in 2004, West Virginia held an election for the WVSCA.[24] Blankenship spent some $3

9. *Caperton*, 690 S.E.2d at 329–30.
10. *Id.* at 329.
11. *Id.* at 330.
12. *Id.*
13. *See id.* at 330–31.
14. *See id.* at 330.
15. *Id.* at 331.
16. *Id.* at 331 & n.15.
17. *Id.*
18. *Id.*
19. *Id.* at 331.
20. *Id.*
21. *Id.* at 331–32.
22. *Id.* at 332.
23. Caperton v. A.T. Massey Co., 129 S. Ct. 2252, 2257 (2009).
24. *Id.*

million in the campaign in support of (or, more accurately, against the opponent of) Charleston lawyer Brent Benjamin, whose campaign was ultimately successful.[25] After the election, the WVSCA reversed the trial court's $50 million judgment, with Justice Benjamin casting the deciding vote, on the basis of a forum-selection clause.[26] A motion for a rehearing was granted, resulting in an affirmance.[27]

Meanwhile, Blankenship's relationships with other members of the court began drawing attention.[28] In early 2008, photos surfaced of Blankenship vacationing on the French Riviera with Justice Elliott Maynard.[29] Though he insisted that he paid his own way and did nothing wrong, Justice Maynard withdrew from the coal case in January, 2008.[30] His term as a justice ended with his defeat in the May, 2008 primary.[31] Meanwhile, Justice Larry Starcher, an especially vociferous and public critic of Massey and its practices,[32] had a conflict with Blankenship, who not only sought his recusal in *Caperton*,[33] but also sought to use his harsh attacks as justification to disqualify him from another Massey case, *Massey*

25. *Id.*
26. *Id.* at 2258.
27. *Id.*
28. Gibeaut, *supra* note 5; *see also Caperton*, 129 S. Ct. at 2258.
29. *Caperton*, 129 S. Ct. at 2258; *see also* Gibeaut, *supra* note 5.
30. Gibeaut, *supra* note 5; *see also Caperton*, 129 S. Ct. at 2258.
31. *See* Gibeaut, *supra* note 5.
32. As Justice Larry Starcher stated:

> I repeat—the pernicious effects of Mr. Blankenship's bestowal of his personal wealth and friendship have created a cancer in the affairs of this Court. And I have seen that cancer grow and grow. . . . At this point, I believe that my stepping aside in the instant case *might* be a step in treating that cancer—but only if others as well rise to the challenge. If they do not, then I shudder to think of the cynicism and disgust that the lawyers, judges, and citizens of this wonderful State will feel about our justice system.
>
> And I reiterate that unless another justice also steps aside in this case, my replacement on the Court will be selected by the justice whose campaign was supported by something close to $4,000,000 from monies that came from one side of the case.

JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUST., FAIR COURTS: SETTING RECUSAL STANDARDS 19 (2008), http://www.ajs.org/ethics/pdfs/Brennancenter recusalreport.pdf (quoting Notice of Voluntary Disqualification of the Hon. Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, *A.T. Massey Coal Co. v. Caperton*, No. 33350 (Feb. 15, 2008)).

33. *Caperton*, 129 S. Ct. at 2258; *see also* Gibeaut, *supra* note 5.

Energy Co. v. Wheeling-Pittsburgh Steel Corp.[34] Justice Starcher "dissented in the first *Caperton* decision but withdrew before the rehearing. He declined to comment, but in his written recusal he hinted that Blankenship had disrupted the state supreme court's business."[35]

Another rehearing in April, 2008 again resulted in an affirmance.[36] Caperton then brought the case to the Supreme Court.[37] One month later, Justice Benjamin added a concurrence to the state court's April ruling.[38]

III. THE SUPREME COURT DECISIONS

The Supreme Court split 5–4 in reversing the decision of the West Virginia Supreme Court of Appeals, with Justice Anthony Kennedy writing the opinion for Justices John Paul Stevens, David Souter, Stephen Breyer, and Ruth Bader Ginsburg.[39] The opinion stated the issue as "whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion" in light of the fact that "the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages."[40] The Court asked whether "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[41]

There are two categories of precedent for a mandated disqualification on the basis of due process: (1) cases in which the adjudicator has a financial interest that favors or disfavors one of the parties; and (2) criminal contempt cases in which a judge cites a party for contempt and then goes on to try the contempt.[42] The first category consists of three principal cases: *Tumey v. Ohio*, *Ward v. Village of Monroeville*, and *Aetna Life Insurance Co. v. Lavoie*.[43] In *Tumey*, "the mayor of a village had the

34. Gibeaut, *supra* note 5.
35. *Id.*
36. *See Caperton*, 129 S. Ct. at 2258.
37. *See id.* at 2259.
38. *Id.*
39. *Id.* at 2256.
40. *Id.* at 2256–57.
41. *Id.* (citing Witherow v. Larkin, 421 U.S. 35, 47 (1975)).
42. *Id.* at 2259–60, 2261.
43. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986); Ward v. Vill. of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

authority to sit as a judge (with no jury) to try those accused of violating a state law prohibiting the possession of alcoholic beverages."[44] For performing his judicial duties, the mayor received a salary supplement the sole source of which was fines assessed in cases he heard.[45] Additional "sums from the criminal fines were deposited to the village's general treasury fund for village improvements and repairs."[46] The Court reasoned that the Due Process Clause incorporated the common law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case.[47] This rule reflects the maxim that "[n]o 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."[48] The mayor–judge had a direct pecuniary interest in convictions, which paid his salary supplement, and he also had an interest as the village's chief executive officer, since fines helped meet the financial needs of the village.[49] The Court explained the controlling principle:

> 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.[50]

Ward invalidated a conviction in another mayor's court where fines assessed went into the municipal treasury.[51] "[T]he mayor's executive responsibilities for village finances," the Court stated, "may make him partisan to maintain the high level of contribution [to those finances] from the mayor's court."[52]

Lavoie involved a justice on the Alabama Supreme Court who cast the deciding vote to uphold a punitive damages award against an insurance company for bad-faith refusal to pay a claim.[53] At the time of his vote, the justice was the lead plaintiff in a nearly identical lawsuit pending in

44. *Caperton*, 129 S. Ct. at 2260 (citing *Tumey*, 273 U.S. at 520).
45. *Id.* (citation omitted).
46. *Id.* (citation omitted).
47. *Id.* at 2268 (Roberts, C.J., dissenting) (quoting *Tumey*, 273 U.S. at 523).
48. THE FEDERALIST NO. 10, at 107 (James Madison).
49. *Caperton*, 129 S. Ct. at 2260.
50. *Id.* (citing *Tumey*, 273 U.S. at 532).
51. Ward v. Vill. of Monroeville, 409 U.S. 57, 58–59, 62 (1972).
52. *Id.* at 60.
53. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 816–17 (1986).

Alabama's lower courts.[54] His deciding vote, the Court surmised, "undoubtedly 'raised the stakes'" for the insurance defendant in the justice's suit.[55] The Court stressed that it was "not required to decide whether in fact [the justice] was influenced."[56] The proper constitutional inquiry is whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"[57]

A similar result was reached in *Gibson v. Berryhill*, in which the Court held that the optometrists who made up an administrative board had a pecuniary interest of "sufficient substance" to disqualify them from presiding over a hearing against competing optometrists.[58]

The second category of cases in which recusal is required under due process emerged in the criminal contempt context in cases in which a judge was challenged because of a conflict arising from his participation in an earlier proceeding. In *In re Murchison*, a state court judge held a hearing to determine whether criminal charges should be brought.[59] Two witnesses were called.[60] One answered questions, but the judge found him untruthful and charged him with perjury.[61] The second declined to answer on the ground that he did not have counsel with him, as state law seemed to permit.[62] The judge charged the witness with contempt and proceeded to try and convict the witness.[63] The Supreme Court set aside the convictions because the judge had a conflict of interest at the trial stage based on his earlier participation in charging the witnesses.[64] Thus, the Due Process Clause required disqualification.[65] The Court recited the general rule that "no man can be a judge in his own case," adding that "no man is permitted to try cases where he has an interest in the outcome."[66]

Following *Murchison*, the Court held in *Mayberry v. Pennsylvania*

54. *Id.* at 822.
55. *Id.* at 823–24.
56. *Id.* at 825.
57. *Id.* (quoting *Ward*, 409 U.S. at 60) (omissions in original).
58. *See* Gibson v. Berryhill, 411 U.S. 564, 579 (1973).
59. *In re* Murchison, 349 U.S. 133, 134 (1955).
60. *Id.*
61. *Id.*
62. *Id.* at 135.
63. *Id.*
64. *Id.* at 137–39.
65. *Id.*
66. *Id.* at 136.

"that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor."[67] The Court reiterated that this rule rests on the relationship between the judge and the defendant: "[A] judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication."[68] The Court asked not whether a judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional "potential for bias."[69]

IV. DUE PROCESS

The Fourteenth Amendment states that no state shall "deprive any person of life, liberty, or property, without due process of law."[70] Criminal proceedings can result in the taking of a defendant's life or a deprivation of liberty through incarceration. Criminal defendants can be fined and civil defendants can have money judgments entered against them, both of which result in property deprivations. The two central concerns of procedural due process are the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.[71] The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.[72] At the same time, it preserves both the appearance and the reality of fairness, "generating the feeling, so important to a popular government, that justice has been done"[73] "by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[74] It "assures equal

67. Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971).

68. *Id.* at 465.

69. *Id.* at 465–66 (citing Ungar v. Sarafite, 376 U.S. 575, 584 (1964)).

70. U.S. CONST. amend. XIV.

71. *See* Carey v. Piphus, 435 U.S. 247, 259–62, 266–67 (1978).

72. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

73. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

74. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); *see also* Bracy v. Gramley, 520 U.S. 899, 905 (1997) (recognizing the argument that due process would be violated if a judge ruled against defendants who did not bribe him to fix their case, solely to cover up the fact that he regularly ruled in favor of defendants who did); Johnson v. Mississippi, 403 U.S. 212, 215–16 (1971) (holding that a judge violated due

application of the law" and guarantees "that the judge who hears his case will apply the law to him in the same way he applies it to any other party."[75]

Due process requires notice and an opportunity to be heard in each such instance. The hearing must be real and the judge or hearing officer must conduct the proceedings fairly, find the facts based upon the evidence (or instruct a jury how to find facts), and apply the relevant law. The parties have a right to present evidence and to be heard on their respective versions of the facts and their legal claims.[76] If it is established that the judge wore ear plugs during hearings or was listening to an iPod, a party could claim a failure to be heard.[77] Likewise, if a judge was inebriated or suffering from a psychotic episode wherein the judge was hearing voices, a party could claim a failure to be heard.[78] Indeed, distractions of all sorts, including reading a newspaper, talking to court personnel or on a cell phone, day dreaming, or sleeping, undermine the right to be heard.[79]

A harder question arises when the judge or hearing officer is not open to persuasion because she has closed her mind to a party's claim.[80] The causes or sources of the closed-mindedness are infinite. *Caperton* held that

process by hearing a case in which one of the parties was a previously successful litigant against him); Gerard J. Clark, *An Introduction to Constitutional Interpretation*, 34 SUFFOLK U. L. REV. 485, 493 (2001) (noting that a court's reasons for a decision should transcend the immediate result).

75. Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002) (invalidating the prohibition against the announcing of views in judicial elections); *see also* Gerard J. Clark, Ingraham v. Wright *and the Decline of Due Process*, 12 SUFFOLK U. L. REV. 1151, 1167 (1978) (stating that a regularized hearing process promotes equality).

76. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 536–37 (2004) ("It would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge.").

77. *See In re* Murchison, 349 U.S. 133, 136 (1955) ("[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" (quoting Offutt v. United States, 348 U.S. 11, 14 (1954))).

78. *See id.*

79. *See id.*

80. *See White*, 536 U.S. at 778 ("A third possible meaning of 'impartiality' (again not a common one) might be described as open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.").

a party has a right to raise this question and to litigate it.[81] The *Caperton* Court quoted *Tumey* for the due process standard: "Every procedure which would offer a possible temptation to the average man as a judge to forget" his obligation to apply the law "nice, clear and true" denies due process of law.[82] The Court characterized this as an objective standard.[83]

The objective standard avoids a personal and potentially nasty inquiry by asking how the average man as judge would be affected by the conflict-causing conduct. But who is this average man as judge, and how do we know what would influence him? Is friendship or enmity sufficient? The average man as judge is what the court reviewing the claimed conflict thinks he is.[84] Indeed, Justice Benjamin asserted that a judge should be afforded a presumption of honesty and integrity by appellate courts.[85]

Blankenship contributed the $1,000 statutory maximum to Justice Benjamin's campaign committee.[86] Further, his company, Massey Coal, is the sixth-largest coal producer in the United States,[87] making it an entity of substantial political influence in West Virginia.[88] In August, 2004, Blankenship also formed a § 527 organization (so named for the section of the Internal Revenue Code that allows such groups to collect money to support or oppose candidates).[89] The organization, called And For The Sake Of The Kids, was designed not to work for Republican challenger and political novice Benjamin, but instead to fund televised attack advertisements aimed at defeating Warren McGraw, the Democratic incumbent.[90] Justice McGraw was under intense public scrutiny for joining an unsigned opinion that freed a child molester from custody and placed

81. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2260 (2009).

82. *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

83. *Id.* at 2261.

84. *See id.* ("What degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.'" (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986))).

85. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 298 (W. Va. 2008) (Benjamin, C.J., concurring).

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

87. U.S. ENERGY INFO. ADMIN., MAJOR U.S. COAL PRODUCERS (2008), http://www.eia.doe.gov/cneaf/coal/page/acr/table10.pdf.

88. *See, e.g.*, Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 143 n.164 (2009) (discussing Blankenship's regular campaign contributions to West Virginia politicians).

89. 26 U.S.C. § 527 (2006).

90. Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. L.A. L. REV. 671, 687–88 (2009).

him on probation.[91] Blankenship also asserted that "'anti-business rulings'" by Justice McGraw poisoned West Virginia's economic climate.[92]

Of the $3.6 million raised by the organization, $2.4 million came directly from Blankenship, while twenty-five other contributors gave $1.1 million.[93] Of all the § 527 organizations in the nation, And For The Sake Of The Kids ranked fifth in the amount raised in a state election.[94] In addition, Blankenship "contributed $515,000 in direct support to Benjamin's campaign committee, while other donors contributed the remaining $330,000 of the $845,000 the committee raised."[95]

Regarding campaign contributions made by litigants or attorneys and the probability that bias may ensue, Justice Kennedy noted that:

> there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.[96]

Thus, Justice Kennedy acknowledged the role that campaign spending plays in influencing outcomes. If spending can influence judges, the same would appear to apply to candidates for other offices. However, Justice Kennedy took a different position in *McConnell v. FEC*, in which he insisted that the only bases for limiting campaign contributions in federal elections were quid pro quo situations which are tantamount to "corrupt favoritism."[97] Moreover, there is a key distinction in campaign

91. Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1.

92. Gibeaut, *supra* note 5, at 55.

93. *Id.*

94. *Id.*

95. *Id.* at 55–56.

96. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009); *see also* George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1551 (2008) ("[P]ublic opinion surveys . . . identify these contributions as fostering a negative perception of the state courts.").

97. McConnell v. FEC, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring in part and dissenting in part).

finance law between contributions and expenditures.[98] Independent expenditures, like creating and paying for a newspaper advertisement that supports a candidate or an issue, are akin to pure speech and thus receive full First Amendment protection.[99] Contributions to a candidate have a conduct component and are subject to reasonable regulation.[100] Some payments, like contributions to issue-orientated political action committees (PACs), are difficult to categorize. In *Caperton*, Justice Kennedy misstated the issue as follows: "The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages."[101] However, only $1,000 of the $3 million spent by Blankenship came in the form of a contribution to Justice Benjamin's campaign, in compliance with a West Virginia limitation on campaign contributions.[102] The remaining funds were dispersed as independent expenditures; the funds were not received by Justice Benjamin but rather by a § 527 organization.[103] Justice Kennedy, as a proponent of an expansive reading of the First Amendment, joined the Court's opinion in *FEC v. Wisconsin Right to Life*,[104] in which the Court refused to apply *McConnell*'s facial approval of limitations on expenditures on electioneering communication to television advertisements suggesting that Senator Feingold was playing politics with the President's appointments to the federal judiciary.[105] The Court stated that "[t]he

98. Buckley v. Valeo, 424 U.S. 1, 19–23 (1976) (establishing the distinction between contributions and expenditures for purposes of First Amendment review of campaign finance laws).

99. *See id.* at 39.

100. *Id.* at 24–25; *see also* Mark Spottswood, *Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns*, 101 NW. U. L. REV. 331, 346 (2007) (stating that approximately one-quarter of judges believe their decisionmaking is affected by a pecuniary interest).

101. *Caperton*, 129 S. Ct. at 2256–57.

102. *See id.* at 2258.

103. *See id.*

104. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 488 (2007). See also *Citizens United v. FEC* ("The Hillary Movie Case"), which began as a challenge to the distribution of a conservative interest group's documentary denouncing Hillary Clinton during her presidential election campaign. *See* Citizens United v. FEC, 130 S. Ct. 876, 887 (2010). Because the documentary was funded with corporate money, the FEC claimed authority to prevent its distribution under the "McCain-Feingold" Bipartisan Campaign Reform Act of 2002 (limiting corporate expenditures nationwide on political campaign messaging transmitted via broadcast, satellite, or cable television). *Id.* at 887–88.

105. *Wis. Right to Life*, 551 U.S. at 457; *see also* Gerard J. Clark, *The Finger in*

freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[106] Justice Kennedy distinguished *Caperton* in *Citizens United*, suggesting that *Caperton* was not about limiting speech, but requiring recusal.[107] Thus, in the closely related field of campaign finance, it is clear that Blankenship had a First Amendment right to make his contributions to And For The Sake Of The Kids and to independently run advertisements to influence the West Virginia Supreme Court of Appeals elections.[108]

Canon 4 of the American Bar Association (ABA) Model Code of Judicial Conduct (Model Code) addresses the special conflicts arising out of elections and fund-raising, but its provisions are weak and do not specifically prohibit judges from receiving campaign contributions from parties to proceedings in their courts or from lawyers who appear before them.[109]

Objective tests are at odds with the reality that a conflict of interest is a very personal, and therefore subjective, opinion of an individual judge. For instance, assume that a judge declares that he has always harbored a hatred of a party in a case before him, that he will use his position as a judge to harm the party, and that doing so will give him great satisfaction.[110] If the judge refuses to recuse himself, we can assume that the subsequent decision against his avowed enemy would violate due process. His personal enmity would dominate his deliberations, and no other factor, factual or legal, could dissuade him from acting on his bias. Clearly the victimized party has been denied the right to be heard just as effectively as if the judge wore earplugs at the hearing or silenced the party before he spoke. Further, while the conflict is subjective, it would qualify under the objective rubric as well because "the average man as . . .

the Dike: Campaign Finance After McConnell, 39 SUFFOLK U. L. REV. 629, 637–38 (2006) (suggesting that the complexities of the subject undermine the idea of successfully regulating it).

106. *Wis. Right to Life*, 551 U.S. at 469 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

107. *Compare Citizens United*, 130 S. Ct. at 910 (discussing recusal in the context of *Caperton*), *with id.* at 961, 967–68 (Stevens, J., dissenting) (suggesting that the majority's limited view of corruption to quid pro quo was inconsistent with *Caperton*'s requirement of recusal in the absence of quid pro quo).

108. *See, e.g.*, McLucas, *supra* note 90, at 698.

109. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4 (2007).

110. This is just one example. For a long list of possible judicial defalcations, see Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 433–35 (2004).

judge"[111] who expressed this level of enmity would also be presumed to be disqualified.

What of the judge who is less forthcoming than the one described above? He has a similar enmity against a party but does not declare it. Does due process vest additional rights in the victimized party, such as hearings, cross-examination, discovery, or expert testimony? Can he conduct a searching inquiry into the mind and motives of the judge? *Caperton*'s finding of a due process violation would seem to imply that the victim now has additional procedural rights to minimize the risk of error and to participate in the process as an incident of individual dignity.

In re Murchison, which required that an independent and uninvolved judge hear a contempt case, would seem to require that independent and uninvolved judges hear recusal motions.[112] The new fact-finder would have to disbelieve the targeted judges' protestations of denial. The fact that the fact-finder is herself a judge may cause a new conflict arising out of a solidarity among judges and a common belief that such inquiries are demeaning and inappropriate. Justice Benjamin argued that a subjective conflict was the only legitimate basis for recusal.[113] But the psychological literature that tells us that bias is subconscious would appear to disqualify Justice Benjamin from being a judge of his own bias.[114] Might the judge under inquiry be examined under oath? Could the proponent of the conflict claim have the judge examined by a psychological expert? Could the psychologist analyze the target judge and testify that, in his expert opinion, the judge was deluding himself and engaging in defensive behavior because of a will to succeed born from the criticisms of a strict father? What about psychological testimony that the judge feels a great deal of gratitude to his staunchest ally in a difficult and personally contentious election campaign? Psychologists have claimed for years that human beings tend to create justification narratives for their wrongful behavior.[115] Could a court-approved expert psychologist testify about these tendencies in general in a hearing on a recusal motion?

111. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

112. *See In re* Murchison, 349 U.S. 133, 139 (1955).

113. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2262–63 (2009).

114. *See* J.F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 533 (1997).

115. *See generally* John A. Bargh & Felicia Pratto, *Individual Construct Accessibility and Perceptual Selection*, 22 J. EXPERIMENTAL SOC. PSYCHOL. 293 (1986) (studying the degree of control a person has over the construction of his or her social reality).

Caperton held that Justice Benjamin violated Caperton's right to due process. Thus, *Caperton* grants some recusal movants a chose in action, and judges such as Justice Benjamin are in effect constitutional tortfeasors. Of what use are these new rights and liabilities? Rights supposedly spawn remedies. A claim for damages seems foreclosed by the venerable doctrine of judicial immunity, which is absolute, at least as to liabilty for damages.[116] Recent amendments to 42 U.S.C. § 1983 seem to expand judicial immunity against most injunctive relief.[117] If the due process violation occurred in a criminal case, the wrongfully convicted defendant would have an enhanced right to challenge his incarceration in a federal habeas corpus proceeding.[118] Otherwise, the case may only expand the bases for petitions for certiorari from the state courts.

The Court in *Caperton* never alluded to the well-established doctrine of the judiciary's absolute immunity.[119] The leading case is *Stump v. Sparkman*, in which a state court judge approved an ex parte petition filed by the parents of a fifteen-year-old girl to have her sterilized without her consent.[120] The Supreme Court held that the judge did not lose his absolute immunity by virtue of the fact that there was no state statute which authorized his conduct.[121] The rationales in favor of absolute immunity include: the need for judges to be free to act on their own convictions without fear of personal consequences; the fact that judges

116. *See* Bradley v. Fisher, 80 U.S. 335, 347 (1871) ("[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority invested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.").

117. Section 1983 provides that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.*

42 U.S.C. § 1983 (2006) (emphasis added).

118. *See* 28 U.S.C. § 2254 (2006).

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

120. Stump v. Sparkman, 435 U.S. 349, 351–52 (1978).

121. *Id.* at 359–60.

often sit between very hostile parties—one of whom is likely to feel aggrieved by the judge's decision with a desire to retaliate; the risk that liability to suit might cause the judge to engage in counterproductive, self-protective behavior; the general rule that most judicial decisions are reviewable; the fact that there are other mechanisms for supervision of the courts; and the fact that vexatious litigation could be easily filed.[122]

The Court in *Caperton*, however, stated that "[b]ecause the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances."[123]

V. CONFLICT OF INTEREST

A. *Common Law Origins of Conflict of Interest*

Conflict of interest has wide application in American law.[124] Its source is the fiduciary duty.[125] The fiduciary duty is imposed by the law on those who are entrusted with discretion to care for the property or well-being of another.[126] It demands independence and prohibits self-dealing.[127]

122. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 90 (1983).

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

124. Indeed, conflict of interest is a major issue in all of western philosophy. In Plato's *Republic*, those who were vested with governing power were required to be isolated from the rest of society and from the riches and comforts of the world, lest their own self-interest interfere in their decisions. 2 PLATO, THE REPUBLIC 235, 237 (Paul Shorey trans., Harvard Univ. Press 1980) (1935). In Rawls's *A Theory of Justice*, those deliberating about the foundations of the just society are separated from a knowledge of their particular circumstances by a veil of ignorance lest they be influenced by favoring rules from which they might profit. JOHN RAWLS, A THEORY OF JUSTICE 118 (rev. ed. 1999). Thomas Hobbes and John Locke utilize the veil of ignorance as well. *See id.* at 238 (noting that similar to Hobbes's state of nature theory, there is a certain degree of difficulty in recognizing the single action that would best serve all people); *id.* at 29 (explaining that for Locke, "the only permissible departures from the state of nature are those which respect [equal] rights and serve the common interest"). Western philosophy has recognized the problem of conflict of interest for over three thousand years. Its solutions however have been make-shift at best, possibly because a judge or human being cannot be effectively isolated from his or her self-interest, making ideological purity difficult or even impossible to achieve.

125. Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 1–3 (1975).

126. *See* Paula A. Monopoli, *Fiduciary Duty: New Ethical Paradigm for*

Independence is undermined by conflict of interest.[128] Trustees owe their settlors and beneficiaries a fiduciary duty to use their best efforts to protect the properties entrusted to them.[129] Likewise, agents owe a fiduciary duty to advance the principal's project with prudence and expertise.[130] Self-dealing with the principal's property or taking on additional principals with interests that are at odds with the agent's initial engagement inject prohibited conflicts of interest into the arrangement and entitle the principal to damages in a civil action.[131]

B. *Conflict of Interest in Other Law*

A recognition of the need to protect against conflicts of interest can

Lawyers/Fiduciaries, 67 MO. L. REV. 309, 314 (2002).

127. *See* Weinrib, *supra* note 125, at 3–4 (distinguishing a fiduciary who acts as a middleman from one who benefits from his bargaining, and explaining that the latter behavior falls within the scope of "rigid prohibitions against unauthorized profits").

128. *Id.* at 4.

129. A trust relationship to property arises out of an agreement between a settlor and a trustee that the trustee shall take title to the property and hold it for the benefit of the settlor's designees. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003). The trustee has duties of prudence, loyalty, impartiality among beneficiaries, income productivity, delegation when the trustee himself may lack the requisite skills, and an obligation to furnish information to the beneficiaries. *Id.* §§ 77–80, 82. More specifically, the trustee is prohibited from "engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." *Id.* § 78(2). The trustee is also required to "communicate to the beneficiary all material facts." *Id.* § 78(3).

130. Agency is a relationship created by an agreement between a principal and an agent that the agent shall act for the principal and under the principal's control. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). An agent has a fiduciary duty "to act loyally for the principal's benefit in all matters connected with the agency relationship." *Id.* § 8.01. The agent is prohibited from acquiring a benefit for himself "from a third party in connection with transactions conducted . . . on behalf of the principal or otherwise through the agent's use of [his own] position." *Id.* § 8.02. Likewise, agents may not place themselves in a position where they deal with the principal as an adverse party or on behalf of the principal's competitors. *Id.* §§ 8.03–.04. The agent may not use the property of the principal for the agent's own purposes or for the benefit of a third party. *Id.* § 8.05(1). The agent may not use confidential information for his own benefit or communicate it to a third party. *Id.* § 8.05(2).

131. These kinds of relationships are ubiquitous indeed. Business organizations like corporations and partnerships are replete with agency obligations. *Id.* § 1.01 cmt. c. The members of the boards of directors of corporations owe these duties to the entity. *Id.* § 8.03 cmt. b, illus. 3. The same can be said of officers and employees. Partners owe these duties to one another. *Id.* The independence duty requires an avoidance of self-dealing and of other relations that will undermine objectivity by introducing conflicts of interest into the relationship.

be found in the Constitution,[132] as well as in professional codes.[133] Further,

132. The very idea of separation of powers in the United States Constitution is at least, in part, grounded in the idea of avoidance of conflict of interest. The enforcers of the law need independence from the makers of the law. *See* THE FEDERALIST NO. 47, at 373–74 (James Madison) (John C. Hamilton ed., 1892) ("The accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny."). The interpreters and appliers of the law also need separation from the enforcers and the creators of the law. *See id.* at 377. ("'[T]he legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them.'"). Judicial independence is further enhanced for federal judges by life tenure and the protection from salary diminutions. Diversity of citizenship jurisdiction in the federal courts attempts to protect foreign litigants from an assumed parochialism in the state courts. The Twenty-seventh Amendment limits Congress's ability to vote itself a salary increase. U.S. CONST. amend XXVII.

133. Professional codes often impose independence on their professional members. For example, the ethical rules of the legal profession require zealous advocacy. *See generally* SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE (2002) (reporting a massive empirical study on conflict of interest in law firms in Illinois). This radical dedication to the client excludes engagements that might detract from the goal of zealously advocating for the client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2009) (limiting a lawyer's ability to "represent a client if the representation involves a concurrent conflict of interest").

The Model Rules state that:

> A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Id.

The accounting profession has similar rules. *See* CODE OF PROF'L CONDUCT § 102-2 (Am. Inst. of Certified Pub. Accountants 2009) ("A conflict of interest may occur if a member performs a professional service for a client . . . that could . . . be viewed . . . as impairing the member's objectivity."); *see also id.* § 101 ("A member in public practice shall be independent in the performance of professional services . . . ."); *id.* § 101-1 (providing an extensive list of relationships where "[i]ndependence shall be considered to be impaired").

The American Medical Association's Code of Medical Ethics dictates independence only in the most general way. *See* CODE OF MEDICAL ETHICS pmbl. VIII (AMA 2001), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.shtml ("A physician shall, while caring for a patient, regard responsibility to the patient as paramount."). The Code of Medical Ethics formerly stated "[i]n the practice of medicine a physician

legislative attempts to maintain the integrity of governmental officials at every level prohibit self-dealing and conflict of interest.[134]

should limit the source of his professional income to medical services actually rendered by him, or under his supervision, to his patients." CODE OF MEDICAL ETHICS pmbl. § 7 (AMA 1957), *available at* http://www.ama-assn.org/ama/upload/mm/369/1957_principles.pdf. The current Code eliminates any prohibitory reference to sources of income. *See* CODE OF MEDICAL ETHICS pmbl. VIII (AMA 2001), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.shtml; *see also* Aetna Health Inc. v. Davila, 542 U.S. 200, 218 (2004) (holding that when "[the] plaintiff's treating physician was also the person charged with administering plaintiff's benefits[,]" "Congress did not intend [the defendant HMO] or any other HMO to be treated as a fiduciary to the extent it makes mixed eligibility decisions acting through its physicians." (quoting Pegram v. Herdrich, 530 U.S. 211, 228, 231 (2000))). Similar concerns are voiced by scholars, journalists, and teachers.

134. Governmental service is analogous to agency and trusteeship. A legislator is referred to as a representative or an agent of the people. *See* Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849, 873 (2001) (stating that legislators are bound by the agency rule). Governmental service may be referred to as a public trust. *See* Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 360 (2000) (stating that government officials have a "fiduciary-like" duty to the citizens they represent). Although governmental officials are not fiduciaries in a technical sense, as they represent multiple constituencies, often with conflicting interests, prohibiting conflict still advances integrity in government and combats corruption. *See* Michael Kent Curtis, *Constitutional Law of Speech and Press: Politics, Rhetoric, and Dialogue*, 103 NW. U.L. REV. 1863, 1888–89 (2009) (stating that there is a danger that the legislator's view will be skewed toward large economic interests that differ from the people's best interests). The goal of these prohibitions is to keep the subject independent to exercise her discretion to make good judgments. *See* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 71 (1992) (stating the goal of conflicts prohibitions is to allow government officials to be "most virtuous" in pursuing "the common good"). At the federal level, the criminal statutes include bribery and prohibit financial interests in a matter or decision before a government agency, including a court. *See* 18 U.S.C. § 208(a) (2006). The Ethics in Government Act of 1978 prohibits self-dealing in § 208. *Id.* It makes it a crime for any

> officer or employee of the executive branch of the United States Government, or of any independent agency of the United States . . . [who] participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement

C. *An Attempt at Definition*

Conflict of interest enforcement seeks to promote independence in perception, narration, deliberation, and judgment. The best decision making results from deliberation that is free from the interferences and irrelevancies of self-interest. The crime of bribery—which requires a quid pro quo exchange—is the most extreme example of a conflict.[135] State and federal conflict statutes, which typically apply to each of the three branches of government, usually catalogue prohibited financial conflicts, including those arising from family, investments, and fiduciary relations.[136] Although there is no definitive catalogue of biases that constitute prohibited conflicts, they typically spring from an allegiance or a loyalty. Although a parent will almost always prefer a child, other relationships, values, interests, and individual experiences may cause conflicts.[137] Justice Kennedy suggested that the due process inquiry required "a realistic appraisal of psychological tendencies and human weakness."[138]

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concerning prospective employment, has a financial interest . . . .

Id. Each house of Congress polices its members' conflict through rules enforced at the committee level. *See* OFFICE OF CONG. ETHICS 111TH CONG., RULES III (2009), *available at* http://oce.house.gov/pdf/OCE_Rules_Adopted_February_27_2009.pdf (noting the ethics committee is authorized to review and enforce allegations of misconduct against members of the House of Representatives). Each state has its own definition of these prohibited relationships and its own enforcement mechanism. *See, e.g.*, United States v. Weyhrauch, 548 F.3d 1237, 1244 (9th Cir. 2008) (discussing the definition of "honest services" in relation to mail fraud under 18 U.S.C. § 1346); United States v. Black, 530 F.3d 596, 600 (7th Cir. 2008) (discussing mail and wire fraud under 18 U.S.C. § 1341 and § 1346).

135. *See* 18 U.S.C. § 201 (2006) (requiring that the government prove quid pro quo for crime of bribery).

136. *See, e.g.*, *id.* § 208(a) ("Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or any independent agency of the United States . . . participates personally and substantially as a Government officer or employee . . . in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest . . . [s]hall be subject to the penalties set forth in section 216 of this title.").

137. *See generally* John T. Jost et al., *Non-Conscious Forms of System Justification: Implicit and Behavioral Preferences for Higher Status Groups*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 586 (2002) (studying the effects of socioeconomic status on personal relationships).

138. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

There is no position of omniscience from which we can objectively judge the quality of decisions. Biases often are undiscoverable by an outsider, and a more searching process of discovery would be an unacceptable invasion of the psyche and privacy of the decision maker. We are left with the somewhat weak alternative of relying upon the sense of duty, professionalism, commitment to justice, and objectivity of the judge. Thus, conflict rules are comprised of prophylactic prohibitions, *mala prohibita*, that are considered most predictive of conflict. As such, they are at least two steps removed from our real objective: good deliberation.[139]

Justice Benjamin refused to make an objective inquiry because he claimed it was political and therefore illegitimate.[140] He wrote in his

139. *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002) (invalidating campaign restrictions on judges). This opinion discussed the state's interest in impartiality in the context of a First Amendment challenge to a prohibition against judicial candidates from announcing their views on issues they may face on the bench. The opinion found three meanings of impartiality.

One meaning of impartiality is "the lack of bias for or against either *party* to the proceeding." *Id.* at 800. Thus, impartiality "assures equal application of the law." *Id.* at 776. "[I]t guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party." *Id.*

Another possible meaning of "impartiality" is the "lack of preconception in favor of or against a particular *legal view*." *Id.* at 777. This interest "has never been thought a necessary component of equal justice, and with good reason." *Id.*

> Since most Justices come to [the Supreme Court] no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution . . . . Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Id. at 777–78 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972) (memorandum opinion)). The Minnesota Constitution dictates that judges "shall be learned in the law." MINN. CONST. art. VI, § 5.

A third possible meaning of "impartiality," again not a common one, might be described as open-mindedness. *White*, 536 U.S. at 778–79. This quality in a judge demands not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions and remain open to persuasion when the issues arise in a pending case. *See id.* This sort of impartiality seeks to guarantee each litigant not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. Lavoie might be an example of this. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

140. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 293–94 (W. Va. 2008) (Benjamin, C.J., concurring).

concurrence that:

> [t]he fundamental question raised by the Appellees and the Dissenting opinion herein is whether, in a free society, we should value "apparent or political justice" more than "actual justice." . . . Actual justice is based on actualities. Through its written decisions, a court gives that transparency of decision-making needed from governmental entities. Apparent or political justice is based instead on appearances and is measured not by the quality of a court's legal analysis, but rather by the political acceptability of the case's end-result as measured by dominant partisan groups such as politicians and the media, or by the litigants, themselves. Apparent or political justice is based on half-truths, innuendo, conjecture, surmise, prejudice and bias.[141]

Based upon Justice Benjamin's criteria, how do we judge his decision? Was it faithful to the Court's own precedent? Was it well-reasoned? Did it follow the Court's procedural rules? Was it correctly decided? Justice Kennedy's opinion never made this inquiry.[142]

Justice Benjamin filed his thirty-three page concurring opinion in July of 2008,[143] and the West Virginia Supreme Court of Appeals wrote three exhaustive opinions, as well.[144] There were two independent legal grounds for the reversal of the jury verdict. First, Caperton's damage action in the West Virginia courts was violative of a valid forum-selection provision, signed by Blankenship's predecessor, Wellmore, that bound Caperton to bring any action arising under the contract in the Virginia courts;[145] and second, Caperton had failed to assert all of his outstanding claims against Blankenship in the earlier contract action, and any additional rights that he had against Blankenship were merged in the $6 million judgment.[146]

The author has reviewed the two Supreme Court of Appeals opinions and the respective dissents and concurrences. The majority opinion concerning the forum-selection clauses seems wrong.

> The 1997 CSA between Sovereign, Wellmore, and Harman Mining provided that the "[a]greement, in all respects, shall be governed, construed and enforced in accordance with the substantive laws of the

141. *Id.*
142. *See Caperton*, 129 S. Ct. 2252.
143. *See Caperton*, 679 S.E.2d at 285 (Benjamin, C.J., concurring).
144. *See id.*, 679 S.E.2d 223 (majority opinion).
145. *Id.* at 233.
146. *Id.* at 233, 256.

> Commonwealth of Virginia. All actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia. . . ." In the proceeding below, the Massey Defendants filed a motion to dismiss alleging, in relevant part, that the forum-selection clause in the 1997 CSA required that any action related to that agreement be brought in the Circuit Court of Buchanan County, Virginia. Accordingly, the Massey Defendants argued that the action was improperly before the Circuit Court of Boone County, West Virginia, and that the instant action should therefore be dismissed. The circuit court denied the motion to dismiss.[147]

Putting aside the fact that neither Caperton nor Blankenship signed the contract in question, they both seem bound as privies of their signatories.[148] Caperton controlled the plaintiff signatories,[149] and Blankenship acquired the defendant signatory, but the forum-selection clause applied to actions arising out of the contract or "in connection with" the contract. The majority found that the whole controversy sprung out of the declaration of force majeure, and thus Caperton's tort actions were in connection with the 1997 contract.[150] The reality, however, was that Blankenship seems to have had a much larger plan—namely, to drive Caperton out of business and seize the valuable Harman Mine with its incomparable coal. The declaration, which served to void Caperton's contractual rights to sell his coal to Wellmore, was only part of the plan, and while one could conceivably assert that the whole diabolical plan was "connected" to the 1997 CSA, a more reasonable interpretation is that only controversies about the terms of the contract were covered. Blankenship's offer, and then refusal, to buy Caperton's interest in his mine seems too distant from the 1997 CSA to bootstrap that controversy into the 1997 CSA's forum-selection clause. Of course, the terminology "in connection with" is imprecise, and the two controversies are not entirely unconnected, either. Indeed, everything is ultimately interconnected; it is just a question of to what degree. The Blankenship plan had more parts and more parties than a breach of the 1997 CSA, and the connections between them were too tenuous to force Caperton into a court he did not choose, which was his right as a plaintiff.

The res judicata claim is closer. The federal joinder rule allows the

147. Caperton v. A.T. Massey Coal Co., No. 33350, 2009 WL 3806071, at *8 (W. Va. Nov. 12, 2009) (footnote omitted).

148. *See id.* at *20.

149. *Id.* at *22.

150. *Id.* at *18.

joinder of all claims that a plaintiff has against a defendant in one case.[151] This liberal rule has pushed res judicata law in the direction of requiring such joinders.[152] Both of Caperton's actions were filed in the same year and both involved events related to coal produced from the Harman Mine.[153] One claim sounded in contract and the other sounded in tort.[154] Some of the evidentiary material produced for the first claim would duplicate evidence in the second.[155] A liberal interpretation of the transactional test in the *Restatement (Second) of Judgments* could easily conclude that both claims arose out of the same transaction, and that the failure to bring the tort case and the contract case together barred the tort case because of the doctrine of merger.[156] Indeed, it appears that both claims were in the original complaint in the Virginia court, but the tort claim was dropped in the amended complaint.[157] The applicable law in this defense is also vague. Was the declaration of force majeure in the 1997 CSA the same transaction as the series of business torts, or were they separate transactions? The application of the Restatement standard to these facts generates a great deal of uncertainty, as well.

Clearly, if either of these defenses is correct as a matter of law, then any claim of conflict of interest may be labeled as harmless error. Unfortunately, American case law is often uncertain, and the WVSCA's legal justifications are hard to judge. These two questions—whether Blankenship's whole destruction of Caperton was "in connection with" the 1997 CSA and whether the breach of contract and the series of torts were one transaction or more than one—are precisely the kinds of questions that can go either way, which leaves a large amount of discretion to the court.[158] What are the appropriate factors in such an exercise of discretion? Special care to avoid conflicts of interest seems appropriate. What seems not to have been considered is that even the WVSCA majorities that ruled

151. FED. R. CIV. P. 18(a).

152. *See* Ross v. Bd. of Educ. of Twp. High Sch. Dist. 211, 486 F.3d 279, 283 (7th Cir. 2007) ("[T]he function of res judicata is to require the joinder of all legal challenges to a wrong . . . .").

153. *Caperton*, 2009 WL 3806071, at *5.

154. *Id.* at *4–5.

155. *Id.* at *4.

156. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 60 (1982).

157. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 233 (W. Va. 2008).

158. Here, one is reminded of Holmes's disquisition on judging: "I[t] is the merit of the common law that it decides the case first and determines the principle afterwards." Oliver Wendell Holmes, Jr., *Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 717, 725 (1931).

against Caperton seemed to agree that the jury's verdict was well-justified because Blankenship's actions against Caperton were indeed egregious.[159] Nor was the court influenced by the fact that a reversal of a seven-year-old jury verdict would probably leave Caperton without a remedy and Blankenship with the substantial fruits of his wrongdoing,[160] since a new trial likely was barred by a statute of limitations and the evidence of and the witnesses to the dispute likely were no longer available. Justice Kennedy's opinion never inquired into the various claims and defenses under state law. Also absent from the Kennedy opinion is any discussion of the standards of review the Court applied to the findings of the court below.[161] Justice Benjamin found, as a matter of fact, that he was not biased.[162] On direct review from a state supreme court, one would expect deference to a finding of fact unless clearly erroneous.[163]

The Supreme Court reversed and remanded, and the WVSCA reheard the appeal on September 8, 2009.[164] The panel included Acting Chief Justice Robin Davis (filling the spot to which Justice Benjamin, now required to recuse, had been elevated while the case was before the Supreme Court), Justice Margaret Workman, and senior-status Judge Holliday (who was named by Chief Justice Davis to fill the seat left open by Justice Benjamin's absence).[165] The court sat in a panel of three, and it

159. *See* Caperton v. A.T. Massey Coal Co., No. 33350, at 13 (W. Va. Nov. 21, 2007) (withdrawn) ("At the outset, we wish to make perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case. However, no matter how sympathetic the facts are, or how egregious the conduct, we simply cannot compromise the law in order to reach a result that clearly appears to be justified."). Holmes may have thought otherwise.

160. *See Caperton*, 679 S.E.2d at 284 (Albright, J., dissenting) ("[T]he majority consciously chose to decide this case in such a way as to allow wrongdoers to skirt the consequences of their actions." (discussing the previous, withdrawn opinion of the WVSCA)).

161. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009) (discussing appellate review standards for recusal motions, but applying analysis under the Due Process Clause).

162. *Id.* at 2257–58.

163. *See, e.g.*, Paul B. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381, 407 (1990) (critiquing the abuse of discretion standard for not providing meaningful protection against judicial misconduct); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK L. REV. 589, 662–63 (1987) (same).

164. Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322 (W. Va. 2009).

165. Paul J. Nyden, *Supreme Court Appoints Judge in Rehearing of* Massey *Case*, CHARLESTON GAZETTE, June 12, 2009, *available at* http://www.wvgazette.com/Ne

is unclear why one of the other two temporary WVSCA members did not take the vacancy created by Justice Benjamin's forced recusal.[166] Judge Holliday joined the acting chief justice to affirm, for the third time, the reversal of the $50 million verdict.[167] The court's lengthy opinion, issued on November 12, 2009, relied solely on the forum-selection clause in the 1997 contract between Caperton and Wellmore, which Blankenship was able to plead because he acquired Wellmore in 1998—just long enough to be able to invoke the force majeure clause that set the events of the case in motion before he divested himself of that interest.[168] One can, of course, only speculate on the level of independence that Justice Davis's designee brought to the case that had served to shine a national spotlight on the WVSCA and King Coal. Justice Workman dissented and reserved her right to file a dissenting opinion at a later date.[169]

D. *Conflict Regulation of the Judiciary*

Judicial conflict prohibitions are enforced in a variety of ways. They include impeachment, prosecution, administrative sanctions, divestiture, disclosure, and recusal.[170]

1. *Impeachment*

Article III of the United States Constitution grants federal judges life tenure and protects them against salary diminution.[171] Removal of a federal judge requires impeachment by the United States House of Representatives and a trial before the Senate.[172] This cumbersome process is rarely used and is inappropriate for a run-of-the-mill ethical violation.[173]

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ws/watchdog/200906120195.

166. *Id.*

167. *See Caperton*, 690 S.E.2d at 328.

168. *Id.* at 348.

169. *Id.* at 357.

170. *See, e.g.*, Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted To Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439, 450–53 (2008) (explaining various ways to resolve a judicial misconduct issue, particularly in relation to federal judges).

171. U.S. CONST. art. III, § 1.

172. *Id.* art. I, §§ 2, 3.

173. The first federal judicial impeachment in twenty years occurred on June 19, 2009, when Judge Samuel Kent was impeached for sexual misconduct with his female staff and lying to investigators. Posting of Ben Pershing to Capitol Briefing, http://voices.washingtonpost.com/capitol-briefing/2009/06/house_impeaches_imprisoned_fed.html (June 19, 2009, 15:53 EST).

The procedures at the state level vary with each state's constitution, but they tend to be similarly cumbersome and rarely used.[174]

2. *Prosecution*

State and federal statutes criminalize some inappropriate relationships between judges and others. The most obvious example is bribery. One who "directly or indirectly, corruptly gives, offers or promises anything of value to any public official" to influence any official act commits that crime.[175] Although less obvious, certain conflict-creating behavior by government officials, including a judge acting as an attorney, attempting to influence (within statutorily defined time periods) an agency in which she was employed, or having a personal interest in a particular matter with which she must deal in an official capacity.[176] However, criminal penalties often appear harsh when the person who allegedly committed the *malum prohibitum* violation is either a professional or a person who has dedicated herself to a position out of good motives, which in turn may undermine a finding of mens rea. Further, these *mala prohibita* may have difficulty commanding the attention of prosecutorial authorities.

3. *Administrative Sanctions*

A workplace sanction such as a private or public reprimand, a reduction in rank or responsibility, a suspension, or a termination might seem more appropriate. All fifty states have established some kind of judicial oversight commission, usually under the authority of the state's highest court. The West Virginia Supreme Court of Appeals has the power to investigate and discipline judges.[177] It does so through the Judicial Investigation Commission of West Virginia, which is composed of nine members appointed by the supreme court—the commission includes: "three circuit judges; one magistrate; one family law master; one mental

174. *See, e.g.*, Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 459 (2004) (finding only two recent judicial impeachments in the Texas state judiciary).

175. 18 U.S.C. § 201(b)(1) (2006).

176. *See generally id.* § 201 (detailing the bribery of public officials).

177. In addition to formal discipline, these procedures can include informal mechanisms by which peer pressure may be applied to judges whose conduct falls short of expectations. *See* Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 305 (1993) (noting the impact of peer influence on misbehaving judges and proposing that "all available evidence suggests that its impact is salutary").

hygiene commissioner; and three members of the public."[178] The procedure for handling complaints is prescribed by the rules of the Judicial Investigation Commission.[179]

> At the federal level, responsibility for disciplining judges falls to the Chief Judge of each circuit and to the circuit Judicial Councils. Under the Judicial Conduct and Disability Act of 1980, any person may file a written complaint with the clerk of the relevant court of appeals containing a brief statement of the facts upon which the complaint is based. The clerk is required to promptly transmit the complaint to the Chief Judge of the circuit as well as to the judge whose conduct is questioned. The Chief Judge screens the complaint and either

178. Judicial Investigation Commission of West Virginia, General Information, http://www.state.wv.us/wvsca/JIC/geninfo.htm (last visited Apr. 7, 2010).

179. The procedure of the Commission is as follows:

> When a determination has been made that probable cause exists but that formal discipline is not appropriate under the circumstances, the Commission shall issue a written admonishment to the judge who has 14 days after receiving it to object. The written admonishment is available to the public. If an objection to the written admonishment is filed timely, the Commission shall file a formal charge with the Clerk of the Supreme Court of Appeals. Admonishment shall not be administered if: (1) the misconduct involved the misappropriation of funds; (2) the misconduct resulted or will likely result in substantial prejudice to a litigant or other person; (3) the respondent has been disciplined in the last three years; (4) the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years; (5) the misconduct involved dishonesty, deceit, fraud, or misrepresentation by the respondent; (6) the misconduct constituted a crime that adversely reflects on the respondent's [honesty], trustworthiness, or fitness as a judge; or (7) the misconduct was part of a pattern of similar misconduct.

Id.

> Some feel the state has not done enough regarding the financial interests of its judges:
>
> While West Virginia law and the Code of Judicial Conduct require state judges to annually file reports disclosing their financial interests, the filings are not available online and do not include some critical information, such as the economic interests of the judge's spouse.
>
> West Virginia's Code of Judicial Conduct does not place meaningful limitations on the reimbursements and compensation that judges may accept in connection with corporate and special interest funded trips.

HALT, JUDICIAL ACCOUNTABILITY REPORT CARD (2008), http://www.halt.org/jip/2008_jarc/pdf/WV_RC.pdf.

> dismisses it, finds that an appropriate corrective action has already been taken, or refers the matter to a special committee. If the third option is chosen, a committee consisting of the Chief Judge and an equal number of circuit and district judges investigates the complaint and reports its findings to the Judicial Counsel of the circuit, which then undertakes an appropriate intervention to redress the problem.[180]

The state codes of judicial conduct are based on the ABA's Model Code. A revised Model Code was approved by the ABA House of Delegates in 2007.[181] The preservation of independence and the avoidance of conflicts of interest are perhaps the chief concerns of the Model Code.[182] Canon 1 exhorts the judge to "promote the independence, integrity, and impartiality of the judiciary" and to "avoid impropriety and the appearance of impropriety."[183] Canon 2 states that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently."[184] Rule 2.11 goes on to state that:

> [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 personal knowledge of facts that are in dispute 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 . . . .[185]

Further, the "judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household."[186]

180. Miller, *supra* note 110, at 465–66 (footnotes omitted).
181. MODEL CODE OF JUDICIAL CONDUCT intro. (2007).
182. *See id.* (amended 1997, 1999, 2003).
183. *Id.* Canon 1.
184. *Id.* Canon 2.
185. *Id.* R. 2.11(A).
186. *Id.* R. 2.11(B).

Rule 3.1 states that when engaging in "extrajudicial activities," a judge shall not "participate in activities that will interfere with the proper performance of the judge's judicial duties."[187] Rule 3.11 provides that "[a] judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity."[188] The Model Code also mandates that a judge shall not engage in financial activities that "interfere with the proper performance of judicial duties."[189] "A judge shall publicly report the amount or value of . . . compensation received for extrajudicial activities . . . ."[190] Canon 4 goes into considerable detail in prohibiting judges from engaging in political activity.[191]

The West Virginia Code of Judicial Conduct also requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[192] The standard for federal judges stated in 28 U.S.C. § 455(a) is the same.[193] "Under Canon 3E(1), '[t]he question of disqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.'"[194] The Court has stated "that these codes of conduct serve to maintain the integrity of the judiciary and the rule of law."[195] This is a vital

187. *Id.* R. 3.1(A).

188. *Id.* R. 3.11(B).

189. *Id.* R. 3.11(C)(1).

190. *Id.* R. 3.15.

191. *See id.* Canon 4 ("A Judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.").

192. W. VA. CODE OF JUDICIAL CONDUCT R. 3E(1) (1994), *available at* http://www.state.wv.us/wvsca/JIC/codejc.htm.

193. *See* 28 U.S.C. § 455(a) (2006) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

194. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2266 (2009) (quoting State ex rel. Brown v. Dietrick, 444 S.E.2d 47, 52 n.9 (W. Va. 1994)). Indeed, some states require recusal based on campaign contributions similar to those in this case. *See, e.g.*, ALA. CODE §§ 12-24-1 to -2 (1976); MISS. CODE OF JUDICIAL CONDUCT Canon 3E(2) (2008).

195. *Caperton*, 129 S. Ct. at 2266. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." Brief for Conference of Chief Justices as Amicus Curiae Supporting Neither Party at 4, 11, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22).

state interest.[196]

4. *Divestiture*

Divestiture is applicable to financial conflicts and places the obligation to purge the conflict on the subject.[197] Divestiture rules assume that the termination of a financial connection will eliminate the conflict. Blind trusts or mutual funds are a simple solution for the typical investment portfolio and should be mandatory for the judge who wishes to own stock. While the rights of ownership in Fortune 500 companies by the typical small investor may be de minimus, a decision to invest signals a preference that is incompatible with judicial independence. Family business connections are clearly even more dangerous to independence.

5. *Disclosure*

Disclosure obligations typically apply only to financial interests. It makes the conflict a matter of public record but does not eliminate the conflict.[198] It assumes that the information will be available to interested members of the public, who will take the time to read and investigate the record and attribute the appropriate weight to the disclosure. Disclosure typically does not apply to ideological conflicts, which are harder to define

196. Here, Justice Kennedy quoted his own opinion in *White*.

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. 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.

Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

197. MODEL CODE OF JUDICIAL CONDUCT R. 3.11 cmt. 2 (2007) ("As soon as practical . . . the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification . . . .").

198. Judicial Watch maintains a website with the financial disclosure documents of all federal judges. Judicial Watch, Judicial Financial Disclosure, http://www.judicialwatch.org/judicial-financial-disclosure (last visited Mar. 30, 2010). The requirements of financial disclosure of state judges vary among states. West Virginia requires reporting of the financial interest of judges, but often the reports maintained are difficult to read. *See* Center For Public Integrity, West Virginia Disclosure Document Warehouse, http://projects.publicintegrity.org/StateDisclosure/State/DocumentWarehouse.aspx?statecode=wv&statename=westvirginia (last visited Mar. 30, 2010).

and evaluate. Disclosure also violates privacy interests of the subject and may discourage individuals from entering the field.

The *Caperton* Court took notice of the fact that the Model Code states a judge must avoid even the appearance of partiality.[199] The West Virginia rule states that "a judge shall avoid impropriety and the appearance of impropriety."[200] West Virginia's test for the 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."[201] This test seems similar to *Tumey*'s reasonable man as judge standard. Justice Ginsburg, dissenting in *White*, asserted that another compelling state interest protected by the pledges or promises clause is "preserving the public's confidence in the integrity and impartiality of its judiciary."[202] Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe.[203]

6. *Recusal*

Recusal occurs when an individual judge decides not to participate in the hearing or decision of a particular case. The decision to recuse may be prompted by a motion filed by a party or on the judge's own motion. The sources for recusal standards are common law, recusal statutes, judicial codes, and now the Due Process Clause. The judge in question should apparently engage in a two-part inquiry. First, she should ask all of the conflict questions referred to above by examining whether there is any personal reason why she cannot decide the question fairly.[204] Second, she should ask the more objective question of whether any of her relationships with the case would affect the average man as judge or raise a question in the mind of the reasonable, outside observer.[205] If either question is answered in the affirmative, the judge should recuse herself.

Under the rules of court in most jurisdictions, an application to recuse

199. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

200. W. VA. CODE OF JUDICIAL CONDUCT Canon 2A (1994), *available at* http://www.state.wv.us/wvsca/jic/codejc.htm (last visited Apr. 20, 2010).

201. *Id.* cmt.; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 1 cmt. 5 (2007).

202. Republican Party of Minn. v. White, 536 U.S. 765, 817 (2002) (Ginsburg, J., dissenting).

203. *Id.* at 817–18 (citing *Mistretta v. United States*, 488 U.S. 361, 407 (1989)).

204. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259–61 (2009).

205. *See id.*

is heard, at least in the first instance, by the targeted judge.[206] A recusal motion's usefulness is limited because a party may be reluctant to suggest to the judge of the party's case that the judge has an ethical problem—such a suggestion may generate retaliation. Recusal eliminates the conflict by replacing the person with the conflict with another who has no conflict. It is available only in situations where personnel are fungible—where an adequate and qualified substitute is readily available. In a court of last resort, it may cause a tie and deprive a party of final resolution. The availability of mandamus and interlocutory appeals is very limited. Recusal's usefulness can be enhanced with some of the reform proposals discussed below.

As stated above, the targeted judge must judge herself. The judge thus has a conflict of interest in deciding both questions. Most likely, the judge truly believes that the average man as judge would decide the matter as the judge did. Likewise, the judge would likely find that the appearance of her course of action in the eyes of the public is a model of propriety. Clearly, the practice of making recusal motions to the targeted judge is fatally flawed. But alternatives, especially in a court of last resort, are similarly flawed, assuming a reluctance of members of a court to make an accusatory finding against a colleague.

Justice Benjamin complained that his difficulties were attributable to the press.[207] This is similar to the complaints made by Justice Antonin Scalia in his response to a recusal request in the case of *Cheney v. United States District Court*.[208] The case was an action under the Federal Advisory Committee Act (FACA),[209] which was enacted in 1972 to ensure that advice by the various advisory committees formed to assist and advise the government is objective and accessible to the public.[210] It also formalized a process for establishing, operating, overseeing, and terminating these advisory bodies.[211] The plaintiffs sought discovery and other information concerning an Energy Advisory Panel, convened at the behest of Vice President Richard Cheney to assist the Bush Administration in formulating

206. SAMPLE ET AL., *supra* note 32, at 31.

207. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 293–94 (W. Va. 2008) (Benjamin, C.J., concurring).

208. Cheney v. U.S. Dist. Court, 541 U.S. 913, 914, 923, 929 (2004) (Scalia, J.) (mem.).

209. *See id.* at 918.

210. *See* 5 U.S.C. app. § 2 (2006).

211. *See id.* §§ 4–14.

energy policy.[212] The Government resisted disclosure of the meetings, lists of attendees, and conclusions as both beyond the reach of FACA and covered by executive privilege.[213]

The federal statute that defines when federal judges are to be disqualified relies upon a generalized objective standard in (a) and then continues with a longer and more specific list of relationships which dictate disqualification in (b).[214] In addition to situations in which a judge's

212. *See* Cheney v. U.S. Dist. Court, 542 U.S. 367, 372–74 (2004).

213. *Id.* at 374–75.

214. 28 U.S.C. § 455 (2006). Section 455 provides that:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

"impartiality might reasonably be questioned," the statute lists "personal bias or prejudice concerning a party" as grounds for disqualification.[215]

> (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
>
> . . . .
>
> (e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
>
> (f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Id.

§ 144 applies only in federal district courts:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Id. § 144.

215. 28 U.S.C. § 455(b)(1); *see also* Microsoft Corp. v. United States, 530 U.S. 1301, 1301–02 (2000) (Statement of C.J. Rehnquist) (noting that the fact that the Chief Justice's son worked for the law firm representing the petitioner was insufficient under § 455(a) or § 455(b)(5)(iii)); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 867 (1988) (noting a judge's ignorance of a disqualifying relationship is no excuse for failing to recuse).

One of the plaintiffs, the Sierra Club, moved that Justice Scalia recuse himself based on the fact that during the pendency of the appeal, Justice Scalia accompanied Vice President Cheney on a duck-hunting trip to Louisiana.[216] The Justice, his son, and his son-in-law were transported from Washington to Louisiana on the Vice President's official airplane.[217] The facts of the encounter are laid out in detail in Justice Scalia's memorandum.[218] He asserts that his time with the Vice President was very limited (he was never in the same "blind" as the Vice President) and that they never spoke about the case.[219]

In his discussion of the motion, Justice Scalia distinguished between cases where a public official is sued in his professional capacity—wherein his status as a party is nominal—and those where the official is sued individually, citing as examples *Clinton v. Jones* and *United States v. Nixon*.[220] He concluded that friendship cannot be a basis for disqualification in official-capacity cases, citing a long history of the social interaction of Washington society.[221] He cited the standard in the federal statute concerning whether "impartiality might reasonably be questioned,"[222] and concluded that it had not been met.[223]

Justice Scalia continued that "[i]f I were to withdraw from this case," it would "harm the Court."[224] It would "give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official."[225] He viewed this as "intolerable."[226] He cited other examples where "so-called investigative journalists . . . suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons."[227] For instance,

216. Cheney v. U.S. Dist. Court, 541 U.S. 913, 914 (2004) (mem. of Scalia, J.).

217. *See id.* at 914–15.

218. *See id.*

219. *Id.* at 915.

220. *See id.* at 916–18 (citing Clinton v. Jones, 520 U.S. 681 (1997); United States v. Nixon, 418 U.S. 683 (1974)).

221. *Id.* at 916–20 (noting such interaction is natural, beneficial, and innocuous, and therefore, an insufficient basis for the motion).

222. 28 U.S.C. § 455(a) (2006).

223. *Cheney*, 541 U.S. at 916, 920.

224. *Id.* at 927.

225. *Id.*

226. *Id.*

227. *Id.*

> [t]he Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean [Pepperdine's Kenneth Starr, independent counsel who investigated President Clinton,] whose school I had visited several weeks before—visited not at his invitation, but at his predecessor's. The same paper has asserted that it was improper for me to speak at a dinner honoring Cardinal Bevilacqua given by the Urban Family Council of Philadelphia because (according to the Times's false report) that organization was engaged in litigation seeking to prevent same-sex civil unions, and I had before me a case presenting the question (whether same-sex civil unions were lawful?—no) whether homosexual sodomy could constitutionally be *criminalized*.
>
> . . . .
>
> . . . The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.
>
> As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here—even to the point of becoming (as the motion cruelly but accurately states) "fodder for late night comedians."[228]

Justice Scalia proceeded to deny the motion.[229]

A similar question arose concerning whether Justice Breyer should recuse himself from ruling on two cases that decided the constitutionality of federal sentencing guidelines. When Justice Breyer was Chief Counsel to the Senate Judiciary Committee in 1984, he played a leading role[230] with regard to the Sentencing Reform Act.[231] The Act created the Sentencing

228. *Id.* at 927–29 (footnotes omitted) (internal citations omitted).

229. *Id.* at 929.

230. *See* Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513, 529 (2005) (identifying Breyer as '"the primary architect of the federal sentencing guidelines' when he served as Chief Counsel of the Senate Judiciary Committee.").

231. 18 U.S.C. § 3551 (2006).

Commission, which promulgated the controversial Federal Sentencing Guidelines.[232] Justice Breyer had served on the Sentencing Commission for four years, and he had personally created[233] much of the substance of the very Guidelines at issue in the two cases before the Court—*United States v. Booker* and *United States v. Fanfan*.[234] Yet Justice Breyer did not recuse himself from those cases. Should a Justice who played such a key role in developing the sentencing guidelines have participated in considering their constitutionality?[235]

Supreme Court Justice Ruth Bader Ginsburg has faced similar issues arising from her relationship with Legal Momentum, a legal advocacy organization formerly known as the National Organization for Women Legal Defense and Education Fund (NOW Fund). In January 2004, Justice Ginsburg gave the welcoming remarks at the Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law, a lecture series cosponsored by the NOW Fund and the Association of the Bar of the City of New York.[236] Two weeks prior to her remarks, Justice Ginsburg had voted in a medical screening case and had ultimately taken the side supported by the NOW Fund's amicus curiae brief.[237] Critics immediately questioned Justice Ginsburg's impartiality, including thirteen Republican congressmen who asked Justice Ginsburg to withdraw from any future cases involving abortion and the NOW Fund.[238] The NOW Fund brings lawsuits in the lower courts and regularly files briefs in the Supreme Court. In 2002 and 2005, it urged the Court to uphold affirmative action in two cases involving the University of Michigan, to endorse gay rights in a Texas law sodomy case, and to preserve the Family and Medical Leave Act in a Nevada case.[239]

232. *Id.*

233. *See* Freedman, *supra* note 230, at 529.

234. United States v. Booker, 543 U.S. 220 (2005); *see also* Freedman, *supra* note 230, at 529 & n.125.

235. *See* Freedman, *supra* note 230, at 529–32 (criticizing Justice Breyer for his failure to recuse himself here, as well as in other cases while presiding on the First Circuit).

236. Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, L.A. TIMES, Mar. 11, 2004, at A1, *available at* http://articles.latimes.com/2004/mar/11/nation/na-ginsburg11.

237. *Id.*

238. *GOP Lawmakers Ask Ginsburg to Withdraw from Abortion Cases*, L.A. TIMES, Mar. 19, 2004 at A18, *available at* http://articles.latimes.com/2004/mar/19/nation/na-ginsburg19.

239. Legal Momentum, Legal Momentum's History, http://www.legalmomentu

In his dissenting opinion in *Caperton*, which Justices Scalia, Samuel Alito, and Clarence Thomas joined, Chief Justice Roberts listed forty questions about how the new recusal standard is to be implemented, which he claimed the courts will have to answer in subsequent cases.[240] The Chief Justice was correct that the due process standard announced by the majority leaves open many questions.[241] The list is primarily concerned with uncertainty and causation. "Is it worth the risk of many more recusal motions and additional litigation to flesh out the details of the new recusal standard" and to promote the enhanced standards of fairness in the judicial process, especially in cases brought before elected judges?[242]

VI. ABA PROPOSALS

The ABA Standing Committee on Judicial Independence issued a new set of recommendations in response to *Caperton* on July 31, 2009.[243] The recommendations include: "assigning contested disqualification motions to a different judge," "adopting a *de novo* standard of appellate review in matters in which judges' decisions not to disqualify themselves are challenged," "establishing procedures for review of [decisions by appellate court judges to deny recusal motions] by the remainder of the court, by a specially constituted court, or by an advisory board," "adopting judicial substitution or peremptory challenge procedures for trial judges," "disseminating data about judicial disqualification within their jurisdictions," "encouraging judges to explain the reasons for their judicial disqualification decisions," and "providing more systematic guidance to the judiciary about when a judge's impartiality might reasonably be questioned."[244] Further, in states where judges are elected, "[s]tates should consider the following factors when giving guidance to judges concerning when the campaign support a judicial candidate receives might reasonably call his or her impartiality into question:" "[t]he level of support," "any

m.org/about/history.html (last visited Apr. 26, 2010).

240. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2269–72 (2009) (Roberts, C.J., dissenting); Posting of Richard L. Hasen to ACSblog, http://www.acslaw.org/node/13537 (June 8, 2009, 11:40).

241. *Caperton*, 129 S. Ct. at 2269 (Roberts, C.J., dissenting).

242. Posting of Richard L. Hasen, *supra* note 240; *see also* Posting of Keith Swisher to Judicial Ethics Forum, http://judicialethicsforum.com/2009/06/15/caperton-answers-to-chief-justice-roberts-twenty-questions-times-two/ (June 15, 2009, 08:50).

243. STANDING COMM. ON JUDICIAL INDEPENDENCE, ABA, REPORT TO THE HOUSE OF DELEGATES (2009), *available at* http://www.appellateacademy.org/events/aba_proposed_report.pdf.

244. *Id.* at 2–3.

distinction between direct contributions or independent expenditures," "[t]he timing of the support in relation to the case for which disqualification is sought," and "the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate, and (iv) the total support received by the judicial candidate and the total support received by all candidates for that judgeship."[245] A Brennan Center report echoed the ABA proposal, but added rules encouraging enhanced disclosure by judges and litigants, and system-wide reporting.[246] The ABA proposals and those of the Brennan Center would improve recusal.

VII. JUDICIAL ELECTIONS

West Virginia elects its Supreme Court of Appeals justices, circuit judges, family court judges, and magistrates through partisan primary and general elections.[247] Thirty-nine states have some form of judicial elections

245. *Id*. at 3.

246. *See generally* SAMPLE ET AL., *supra* note 32. To enhance disclosure by judges, the report suggests that judges be required, at the outset of litigation, to disclose any facts, particularly those that involve campaign statements or contributions, "that might plausibly be construed as bearing on their impartiality." *Id.* at 6. "To further enhance the disclosure of relevant information concerning disqualification, states could also provide a centralized system through which attorneys and their clients can review a judge's recusal history." *Id.*

To enhance disclosure by litigants, the Brennan Center noted that in order to assist judges in determining whether grounds for disqualification exist, nongovernmental corporate parties are often required to "file a statement identifying any parent corporation or publicly held corporation that owns a significant portion of the corporate party's stock early on in a court proceeding." Letter from J. Adam Skaggs, Brennan Ctr. for Justice, to Carrie Janto, Deputy Clerk Supreme Court of Wis. (Oct. 9, 2009), http://brennan.3cdn.net/c303974978d0a310e2_s6m6bhdu2.pdf. Similarly, states could require "all litigants and their attorneys to file an affidavit at the outset of litigation," listing any campaign contributions to, or expenditures in favor of, presiding judges or judicial candidates with whom the presiding judges have competed or will compete in a pending election (or to state that no such contributions or expenditures have been made). *Id.* Disclosure could be required of any expenditures or contributions by a party or its counsel that exceed a given threshold. *See id.*

To increase transparency in the recusal process, states should collect and publicize uniform data on recusal motions and their dispositions, including recusal histories of individual judges. *Id.* "In the short term, such data would be useful to litigants who could review the disqualification history of any judge involved in their case." *Id.* In the long term, "increased data collection would facilitate meaningful analysis of the impact of specific [recusal] policies" in force in a given jurisdiction, as well as comparative analysis of recusal policies across jurisdictions. *Id.*

247. A proposal by the Executive Director of the West Virginia Judiciary

for some or all their judges.[248] The conflict-causing conduct at issue in *Caperton* occurred during Justice Benjamin's campaign. The campaign expenditures by Blankenship, the owner of $50 million judgment debtor Massey, arguably delivered to Benjamin a judgeship on West Virginia's highest court.[249]

In her concurring opinion in *White*, Justice O'Connor explained her fear that the process of election of judges imposes additional pressures on judges.[250] Judges who must run for reelection "are likely to feel that they have at least some personal stake in the outcome of every publicized case."[251] Elected judges understand "that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."[252]

Association to end partisan elections of judges is under consideration by the West Virginia legislature. *See W. Va. Sticking with Partisan Judicial Elections*, HERALD-DISPATCH, Dec. 3, 2008, http://www.herald-dispatch.com/news/x1649868507/W-Va-sticking-with-partisan-judicial-elections.

248. Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring). *See generally* JAMES SAMPLE ET. AL, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 (2007), *available at* http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf.

249. Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-*White *World*, 55 DRAKE L. REV. 691, 698–99 (2007) (referring to lower court decisions in Alaska, Kansas, Kentucky, and North Dakota).

250. *See White*, 536 U.S. at 788–89 (O'Connor, J., concurring). In *White*, the Supreme Court invalidated the so-called Announce Clause in the Minnesota Code of Judicial Conduct in a 5–4 decision authored by Justice Scalia. *Id.* at 788. The Minnesota Constitution provided for the selection of all state judges by popular nonpartisan election. *Id.* at 768 (citing MINN. CONST. art. VI, § 7). Since 1974, candidates for a judicial office, including incumbent judges, had been subject to a legal restriction providing that one shall not "announce his or her views on disputed legal or political issues." *Id.* (citing MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000)). This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 ABA Model Code of Judicial Conduct, was known as the Announce Clause. Incumbent judges who violated the Announce Clause were subject to discipline, including removal, censure, civil penalties, and suspension without pay. MINN. RULES OF BD. ON JUDICIAL STANDARDS R. 4(a)(6), 11(d) (2002). Lawyers who ran for judicial office also had to comply with the Announce Clause. *Id.* Those who violated it were subject to, *inter alia*, disbarment, suspension, and probation. *Id.*

251. *White*, 536 U.S. at 788–89 (O'Connor, J., concurring).

252. *Id.* at 789 (citing Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 739 (1994); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995) (citing statistics indicating that judges who face elections are

Even in cases where judges are able to suppress their awareness of the "potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."[253]

Moreover, contested elections generally entail substantial funds.[254] Thus, judicial candidates who are not wealthy must incur the cost of fundraising. Yet relying on campaign donations may "leave judges feeling indebted to donors and interest groups."[255] "Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."[256]

VIII. CONCLUSION

The first thing that can be said about all of the recusal standards is that they are uniformly vague. Questions about "impartiality" or "public perception" or "the average man as judge" lack precision. The Supreme Court calls these standards "objective," but they are not. Imprecise standards provide uncertain guidance and invite disputes. Distinctions between appropriate and inappropriate influences defy easy definition. Indeed, the very inquiry borders closely on the limits of privacy of the judge and judicial immunity.

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far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election)).

253. *Id.*

254. Justice O'Connor cited a source that reported "that in 2000, the 13 candidates in a partisan election for 5 seats on the Alabama Supreme Court spent an average of $1,092,076 on their campaigns." *Id.* (citing Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L. 849, 866). She also cited the ABA as "reporting that in 1995, one candidate for the Pennsylvania Supreme Court raised $1,848,142 in campaign funds, and that in 1986, $2,700,000 was spent on the race for Chief Justice of the Ohio Supreme Court." *Id.* (citation omitted).

255. *See* Kate Thomas, *Are Justices in Texas Getting Bought?*, NAT. L.J., Mar. 16, 1998, at A8 (reporting that a study by the public interest group Texans for Public Justice found that 40% of the $9.2 million in contributions of $100 or more raised by seven of Texas's nine Supreme Court justices for their 1994 or 1996 elections "came from parties and lawyers with cases before the court or contributors closely linked to these parties").

256. *White*, 536 U.S. at 790 (citation omitted); *see also* David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 379 (2001) (relating anecdotes of lawyers who felt that their contributions to judicial campaigns affected their chance of success in court).

Caperton breaks new ground with respect to the requirements of due process.[257] *Tumey* and *Ward* were easy cases. In *Tumey*, the judge benefitted from guilty findings and got nothing from acquittals.[258] Increased compensation would tempt the average man as judge.[259] Essentially all conflict principles would forbid this type of self-dealing—fiduciary duties of trustees and agents would prohibit it,[260] most professional codes prohibit financial interference with the exercise of professional judgment,[261] and many of the statutes applicable to governmental employees require the avoidance of situations where the employees have a financial interest in a matter involving their official duty.[262]

Murchison is a bit more subtle. There was no money involved.[263] The judge, acting in an unusual role in presiding over an investigation, had a stake in truth-finding, and when a witness refused to cooperate, the judge could cite him for contempt.[264] The judge assumed the role of prosecutor by filing an accusation,[265] and in doing so, the judge had lost all independence and had a stake in the outcome.[266] When he assumed the role of judge, his stake in the outcome remained—an acquittal would have suggested to an observer that the original citation of contempt was wrongful and that the judge–accuser had acted wrongfully. The judge had an interest in saving face, which was achieved by a finding of guilt.

Lavoie is even more remote. In that case, the appellate judge had an opportunity to establish a precedent which could later be used for his financial benefit in a case in which he was a member of a plaintiff class.[267] In hearing a case in which a similar issue was presented, the judge became

257. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J., dissenting) (discussing the new "rule" of the Court).

258. Tumey v. Ohio, 273 U.S. 510, 523 (1927); *see also* Ward v. Vill. of Monroeville, 409 U.S. 57, 59 (1972) (determining that the principles set forth in *Tumey* determine the case at bar).

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

260. *See* RESTATEMENT (THIRD) OF TRUSTS § 79 (2007).

261. *See* SHAPIRO, *supra* note133.

262. *See* 18 U.S.C. § 208(a) (2006); Citizens United v. FEC, 130 S. Ct. 876, 946 n.45 (2010).

263. *In re* Murchison, 349 U.S. 133, 134 (1955) (noting that the issue before the Court involved a contempt proceeding).

264. *Id.* at 134–35.

265. *Id.* at 135.

266. *Id.* at 137.

267. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822–24 (1986).

a participant in the creation of rules for his own case—the judge could then cite the law he created against an adversary, and the precedent could serve to advance his quest for a money judgment.[268] In both *Murchison* and *Lavoie*, the conflict-causing behavior was assuming a role—prosecutor in *Murchison*[269] and plaintiff in *Lavoie*[270]—that was incompatible with the independence necessary to the judicial office.[271]

Caperton is more remote again. In 2004, Justice Benjamin won a twelve-year term on the WVSCA. While his campaign committee did receive $1,000 from Blankenship, the other $3 million that Blankenship spent was in the form of independent expenditures not so much on Justice Benjamin's behalf as against his opponent.[272] However, Justice Benjamin suggested in his August, 2008 opinion that Justice McGraw dug his own grave with his "Rant at Racine."[273] Thus, the conflict-causing connection was the fact that three years beforehand, Justice McGraw was attacked for a decision concerning a child molester, which Blankenship publicized through expenditures made by And For The Sake Of The Kids.

Justice Benjamin's seat on the court was safe for another nine years when a case involving a ten-year-old business tort reached the court.[274] He received no benefit from a reversal and suffered no harm from an affirmance. The general assumption is that Justice Benjamin was grateful to Blankenship and that this gratitude pushed him to decide the case in Blankenship's favor (along with another justice who had no cause for gratitude toward Blankenship), thus departing from his obligation to "hold the balance nice and clear and true"[275] with respect to two claims that were very close legal questions.[276] Or, stated more succinctly, the average man as judge in Justice Benjamin's position would place his bias above his obligation. This breaks new ground by allowing a past connection with no present or future effect on the judge to serve to create an assumption of

268. *Id.*

269. *In re Murchison*, 349 U.S. at 134–35.

270. *Lavoie*, 475 U.S. at 817.

271. *See* MODEL CODE OF JUDICIAL CONDUCT R. 3.1 (2007) (prohibiting judges from assuming positions inconsistent with the judicial function).

272. *See supra* Part III.

273. Videoclip: McGraw's Political Speech, http://www.youtube.com/watch?v=TQ6nQaE2FM8 (last visited Apr. 1, 2010).

274. Gibeaut, *supra* note 5, at 1–2.

275. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

276. *See supra* Part IV.

bias.[277]

In states with active partisan elections for judgeships, the difficulties of such past connections multiply—judges, as candidates, likely will participate in fund-raising, seek endorsements, and make many speeches.[278] Thus, *Caperton* will generate some reconsideration of judicial elections. But Blankenship exercised his constitutional rights in the West Virginia judicial elections of 2004. There is no evidence of quid pro quo or even communication between Blankenship and Justice Benjamin. The case against Justice Benjamin is purely circumstantial, relying on inference and supposition.[279] Blankenship's expenditures required Justice Benjamin's recusal. If thirty-nine states elect their judges, the difference between the *Caperton* facts and some cases that come before the thousands of elected judges is really one of degree, not of kind. *Caperton* points out, in stark

277. Another case that broke new ground was *Gibson v. Berryhill*, in which the Court invalidated the decision of a board of optometrists who followed a newly enacted state statute that prohibited corporations from practicing optometry. Gibson v. Berryhill, 411 U.S. 564, 578 (1973). Apparently Lee Optical Company had taken the state by storm and was pushing the little guys out. *Id.* at 578. The Board cited a number of optometrists working for Lee Optical for assisting in the unauthorized practice of optometry. *Id.* The Court took the extraordinary step of enjoining the unexhausted state administrative proceedings to end the threat against the plaintiffs from the Board, which the Court assumed to be sufficiently conflicted to require due process intervention. *Id.* at 578–79. Very similar disputes have occurred in the legal profession under Rule 5.4 of the Model Rules of Professional Conduct. *See generally* Cincinnati Bar Ass'n v. Estep, 657 N.E.2d 499 (Ohio 1995) (finding a non-lawyer to have practiced law without a license in a workers' compensation claim). Certainly an assumption that licensing boards composed of licensees are tainted with conflicts in judging their competitors would apply to vast numbers of licensing proceedings. Indeed the problem of using state power to further monopolize has been before the court many times. *See generally* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (finding legislation regulating visual care to be constitutional); Slaughter-House Cases, 83 U.S. 36 (1872) (finding legislation granting a corporation the exclusive right to maintain slaughter houses constitutional).

278. James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES' J., Winter 2007, at 17–18.

279. *See, e.g.*, Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 202 (2008) (reviewing RICHARD A. POSNER, HOW JUDGES THINK (2008)) ("Empirical evidence of apparently political decision making at the Supreme Court level is extensive."); *see also* Ran Hirschl, *Resituating the Judicialization of Politics:* Bush v. Gore *as a Global Trend*, 15 CAN. J.L. & JURISPRUDENCE 191, 217 (2002) ("Constitutional scholars, legal practitioners, and political activists critical of the U.S. Supreme Court's crucial role in determining the outcome of the 2000 presidential election, regard the *Bush v. Gore* saga as the most glaring example of the judicialization of politics in the United States.").

relief, the incompatibility of elected judges and the ideal of an independent judiciary. Judges concerned about their reelection will not be independent.[280] The very reason for having elections is to tether the politician to the electorate, making for responsive legislators and executives. Judges tethered to the electorate, on the other hand, will sacrifice justice and the rule of law to public opinion.[281]

Indeed, *Caperton* is at war with judicial elections. It is inconsistent with *White*. The issue in *White* required the resolution of the conflict between speech and the protection of the judicial process from politics.[282] *White* favored speech; *Caperton* favored protection.[283]

Further, Justice Kennedy made adequately clear that *Caperton* is an extreme case.[284] One might ask what good a precedent on an extreme case does for the more run-of-the-mill cases with unjust results springing from judicial bias. One answer is that Supreme Court opinions are sizable public events. The Court's opinion has already generated extensive discussion on judicial conflict of interest and recusal, and it has shone a light on a problem which will spawn energetic responses from advocates and reformers. Others, including scholars, judicial conduct commissions, and the ABA, will elaborate on the decision. Procedural proposals like those advocated by the ABA and the Brennan Center will be considered, and hopefully adopted.

Although it has often been said that the role of the Supreme Court is not to do justice in the individual case,[285] the Court felt that Justice

280. *See generally* Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009) (relying on a comparative law perspective to suggest that judges who are elected violate due process).

281. *See* Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 84 (2009); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 282 (2008) (explaining the incompatibility of electoral politics and the judicial function).

282. Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002).

283. *See id.* at 788; *see also* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2266–67 (2009). Similar speech versus process questions arise in the trial publicity cases. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1076 (1991) (protecting attorney Gentile's press conference against a claim of improper trial publicity).

284. *Caperton*, 129 S. Ct. at 2265. Another notable extreme case was *Bush v. Gore*, in which the Court suggested that its holding would not be precedent in future cases by stating that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." Bush v. Gore, 531 U.S. 98, 109 (2000).

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

Benjamin could not be allowed to decide the case in favor of the company that had massively funded his election campaign. An affirmance would have sent a message to the public that justice can be bought. The opinion, in broadening the scope of the Due Process Clause, expanded federal oversight of state administration of justice.[286] Justice Scalia is undoubtedly correct that it will be used by lawyers to complicate the litigation process, which can be said of any expansion of rights.[287] The Court's due process standard, however, is really no different than the standards in recusal statutes and judicial codes. Thus, in the absence of a bright-line rule, future cases will have to be decided on a case-by-case basis—but with an enhanced attention paid to the independence of the judge.

286. Due process creates federal oversight of state procedure in many circumstances. *See* Philip Morris USA v. Williams, 549 U.S. 346, 352 (2007) (stating that a large punitive damages award may violate the defendant's right to notice).

287. *See Caperton*, 129 S. Ct. at 2274.