Extreme Facts, Extraordinary Case: The *Sui Generis* Recusal Test of *Caperton v. Massey*

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Introduction

Speech during judicial campaigns and its ramifications on successful candidates' judicial capacities has become an increasingly important issue in campaign speech regulation. In 2002, the United States Supreme Court recognized that judicial candidates' right to announce their views during their campaigns was constitutionally protected.[1] This principle has been expanded to include statements of political affiliation,[2] personal solicitation[3] and endorsements.[4] Where such protections have gained less recognition is in the context of recusal.[5] States across the nation have begun to include in their judicial codes the requirement that judges must recuse themselves for statements made during their campaigns that commit or appear to commit on issues likely to come before the court.[6]

The potential ramifications of the recent United States Supreme Court decision *Caperton v. A.T. Massey Coal Co.*[7] on such provisions, and on speech during judicial campaigns more generally, is significant. In *Caperton*, the Court held that a West Virginia justice should have recused himself when the CEO of a party before the court was a financial supporter of that justice's campaign that expended, in the form of contributions and independent expenditures, in excess of $3 million.[8] This article argues that the scope of Caperton ought to be extremely limited—indeed, limited to the facts of the Caperton case itself—in light of the extraordinary nature of case, the structure and language of the decision, and prior Supreme Court precedent. To that end, Part I will discuss some preliminary considerations regarding judicial elections and due process.[9] Part II will analyze the facts and holding of the *Caperton* decision.[10] Part III will discuss the likely, though perhaps unintended, ramifications of the *Caperton* decision.

I. Judicial Elections and Due Process

Judicial elections have a long history in the United States.[11] Election of judges began in Georgia localities in 1789, and by the Civil War twenty-one of the thirty states in the Union elected their judges.[12] This tradition has continued to the present day, with thirty-nine states currently selecting some or all of their judges via election.[13]

Where the public has been given the option to replace judicial elections with some other system, such proposals have been roundly rejected.[14] Since 1969, attempts to abolish or restrict judicial elections by ballot measure have been rejected by the voters in Pennsylvania, Illinois, Nevada, Tennessee, Florida, Oregon, Arkansas, Ohio, Louisiana and South Dakota, in some cases, multiple times.[15] In fact, aside from a popular referendum approving merit selection for judges in Green County, Missouri, no referendum moving a jurisdiction from popular election to some other method of judicial selection has been approved in over twenty years.[16]

The public's continued support for judicial elections is based in part on the special role that state judges play in developing a state's law. "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well."[17] Elections ensure that judges are held accountable to the people, rather than to political elites and insiders, and provide a mechanism to keep judges within their legitimate bounds.[18] Because judges are given a predominant role in setting public policy, popular sovereignty and democracy require that the people play a role in determining the make-up of the courts.[19] With rare exceptions, judicial elections have been funded through campaign contributions. While three states have recently enacted limited public funding for some judicial elections,[20] the main source of funding for judicial elections, as with elections generally, has been campaign contributions.[21]

Despite being an ubiquitous feature of judicial elections, campaign spending, whether in the form of contributions or independent expenditures made on a candidate's behalf, has traditionally not been taken to justify mandatory recusal where the party who has spent money on behalf of a judge appears before him as a litigant, even where the amount of spending has been substantial.[22] At common law, disqualification standards were narrow and simple: "[A] judge was disqualified for direct pecuniary interest and for nothing else."[23] The standard, borrowed from English law, stated that no man shall be a judge in his own case.[24] Beyond disqualification for pecuniary interests, according to Blackstone, a judge was free to hear any matter before him.[25]

The United States Supreme Court has clearly adopted the common law rule as the standard for determining when recusal is required under the Due Process Clause.[26] It has historically been reluctant, however, to hold that due process necessitates disqualification for other types of bias.[27] As the Seventh Circuit has noted:

> The constitutional standard the Supreme Court has applied in determining when disqualification is necessary recognizes the same reality the common law recognized: judges are subject to a myriad of biasing influences; judges for the most part are presumptively capable of overcoming those influences and rendering evenhanded justice; and only a strong, direct interest in the outcome of a case is sufficient to overcome that presumption of evenhandedness.[28]

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Due process sets only a minimal standard for mandatory recusal, while leaving states free to adopt more stringent standards where no other constitutional right is implicated.[29]

II. Analysis of *Caperton*

A. The Caperton *Decision*

In 2002, a West Virginian jury entered a $50 million verdict against A.T. Massey Coal Company in compensatory and punitive damages, awarded to Hugh Caperton, Harman Development Corporation, and others.[30] Subsequent to the verdict but prior to filing an appeal, judicial elections were conducted in West Virginia, including a seat for the Supreme Court of Appeals of West Virginia.[31] Mr. Don Blankenship, Massey's chairman, CEO and president, decided to support challenger Brent Benjamin against incumbent Justice McGraw for the Court of Appeals seat.[32] He contributed $1,000 to Benjamin's campaign—the maximum allowable by law—and donated almost $2.5 million to "And for the Sake of the Kids" ("ASK"), a political organization organized under the Political Organizations section of the United States Code, section 527, that supported Benjamin's bid for office.[33] He also made independent expenditures in the amount of $500,000 supporting Benjamin, in the form of direct mailers, letters, and TV and newspaper ads.[34] In total, this amount exceeded all money spent by Benjamin's supporters and was three times the amount spent by Benjamin's own campaign committee.[35] As compared to other 527s, ASK's spending was on par with McGraw's support from organizations like Consumers for Justice, which spent $2 million.[36] Benjamin won the election by a little over 47,700 votes, with 53.3% of the vote.[37]

Three years later, just prior to Massey's appeal of the adverse jury verdict, Caperton filed a motion to disqualify Justice Benjamin on the grounds of Blankenship's campaign involvement.[38] Justice Benjamin denied the motion, asserting that there was "no objective information . . . to show that this Justice has a bias for or against any litigant," or that he had prejudged the matter such that he could not be impartial and fair.[39]

On appeal, the West Virginia Supreme Court reversed the jury verdict.[40] Caperton requested rehearing of that decision, which was granted.[41] Caperton and Massey moved to disqualify three justices from the rehearing: Chief Justice Maynard, who recused because he had vacationed with Blankenship in the French Riviera while the case was pending,[42] Justice Starcher, who recused based on public criticism of Blankenship's involvement in the 2004 elections,[43] and Justice Benjamin, who again declined to recuse.[44] Because of the disqualification of Chief Justice Maynard, Justice Benjamin became acting chief justice and appointed two judges to replace the recused justices.[45] Caperton again moved to have Justice Benjamin recuse, citing a poll[46] reflecting a 67% distrust among West Virginians that Justice Benjamin could be impartial and fair in light of Blankenship's financial support and contending that Justice Benjamin failed to apply the correct standard for recusal.[47] Justice Benjamin again declined to recuse, finding the poll to be inadequate to base recusal on.[48]

On rehearing, the jury verdict was again reversed three-to-two.[49] Justice Benjamin joined the majority decision, but filed a concurring decision four months later, defending the majority decision and his decision not to recuse.[50] He stressed that "a standard merely of "appearances' seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations."[51]

Caperton filed a writ of certiorari to the United States Supreme Court, which was granted.[52] Justice Kennedy, writing for a majority of the Court, found that Justice Benjamin should have recused. Emphasizing the exceptional and extreme character of the facts of the case, Kennedy articulated what is effectively an eight part test for analyzing recusal requirements in the campaign finance context:

> 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.[53]

Factors relevant to this holding were "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."[54]

Applying the test to Justice Benjamin's circumstances, the Court concluded that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case," with "the temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical" to the Court's analysis.[55]

B. Criticisms of Caperton

The Court offered little analysis of how the facts actually satisfied the test, perhaps because the test was designed to fit the facts exactly. The decision's lack of factual analysis is notable since, in assessing whether a judge should recuse, "the decision whether a judge's impartiality can "reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported."[56]

Indeed, the Court's recusal analysis seems incomplete. The Court fails to weigh countervailing evidence that might lessen the serious risk of actual bias Justice Benjamin's judicial participation poses under the test. For example, it did not consider that Justice Benjamin voted against Massey's interest four times since 2005.[57] Nor that, in those cases, parties such as the Attorney General and Department of Environmental Protection of the State of West Virginia declined to seek Justice Benjamin's disqualification, as they perceived no grounds for doing so.[58] Likewise, the Court refuses to consider that it was not so much Blankenship or ASK's involvement in the judicial race but Benjamin's opponent's own tirade over the campaign's Labor Day weekend that influenced his judicial race, though it was aware of that influence.[59] The Court's presumption that mandatory recusal is required because of Blankenship's involvement satisfies the test is apparently irrefutable.

Moreover, the test is not even premised upon actual considerations relevant to bias or the perception of bias. The

bias concern of the *Caperton* Court was based on the concern that contributions and expenditures can improperly influence judicial decision-making, harming judicial impartiality and ultimately due process.[60] A judge, it is feared, may feel indebted to a party whose financial assistance helped get her elected.[61] In addition, there is concern that a judge may rule in favor of a particular party in order to receive additional contributions in the future.[62]

Corruption is a serious charge, and serious charges demand serious evidence, particularly where one must overcome the presumption of impartiality accorded to judges.[63] The government has the affirmative burden of demonstrating that its regulation of campaign finance minimizes corruption. Yet it has failed to meet this burden. And the evidence demonstrates that campaign finance regulation has done nothing to serve this interest. As to the notion that campaign finance "reform" measures eliminate the appearance of corruption and improve citizen confidence in government, a September 2007 Gallup poll reveals that Americans "express less trust in the federal government than at any point in the last decade, and trust in many federal government institutions is now lower than it was during the Watergate era, generally recognized as the low point in American history for trust in government."[64]

Recent studies have found that "the effect of campaign finance laws is sometimes perverse, rarely positive, and never more than modest,"[65] and that citizens of countries with radically different systems of campaign finance regulation share Americans' lack of "confidence in the system of representative government,"[66] which suggests that campaign finance reformers might be surprised and "disappointed by the intractability and psychological roots of that lack of confidence."[67] The corrupting impact of campaign finance cannot legitimately be part of any campaign finance analysis, including in the *Caperton* context.

In regard to contributions specifically, it is difficult to test empirically whether campaign contributions influence official decision-making because of what is known as the endogeneity problem. Even assuming that votes by elected officials are correlated with the wishes of their contributors, this does not tell us anything about the direction of causation. An elected official might be influenced to vote in a certain way by a contribution; alternatively, a contributor might donate to a candidate because she perceives (correctly) that the candidate shares her position on a given issue.[68] Any attempt to show a corrupting effect on the judiciary caused by campaign contributions, therefore, must show not only that judicial decisions are correlated with campaign contributions, but also that this correlation is due to contributions influencing votes, rather than the other way around.

A great deal of empirical work has been done on the connection between contributions and voting in the legislative context over the last few decades. Numerous studies have found that contributions have little to no influence on legislative decision-making.[69] Others have claimed to find a more significant effect.[70] Overall, however, the scholarly community has been unable to come to any firm consensus as to whether contributions have a corrupting effect on official decision-making.

With respect to judicial elections, the evidence for influence is even weaker. Some early research, for example, found no difference between the decisions of judges who are appointed and those who are elected.[71] More recently, examination of contribution patterns for Supreme Court elections in Illinois, Michigan and Wisconsin found that when large contributors came before the court as litigants, they were successful less than half the time.[72] And even where a recent study claimed to find a correlation between campaign contributions and judicial decisions, its authors were ultimately forced to concede that "this Article does not claim that there is a cause and effect relationship between prior donations and judicial votes in favor of donors' positions."[73]

Finally, evidence of a corrupting effect from independent expenditures, as opposed to contributions, is virtually nonexistent. As the Court noted in *Buckley v. Valeo*,[74]

> unlike contributions . . . independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.[75]

In addition to threatening actual impartiality, campaign spending is said to threaten the perception of impartiality by the general public.[76] This threat, it is claimed, is particularly acute in the case of the judiciary because of its inherent weakness as a constitutional actor.[77] As famously stated by Alexander Hamilton, the judiciary is the "least dangerous" branch, as it has "no influence over either the sword or the purse."[78] Because courts have neither the power to levy taxes nor command armies, the only way for their decisions to have effect is if they are widely perceived as being impartial arbiters of justice, rather than mere political actors.[79]

Some degree of political cynicism or skepticism of government, however, need not be corrosive of public institutions, and in fact can have a salutary effect. Skepticism about the actions and motives of government officials, including judges, can serve as a powerful check on the abuse of government power.[80] And while some degree of perceived legitimacy is obviously necessary not only for the judicial but for other branches of government, experience has shown that democracy and skepticism about government institutions generally are capable of coexisting in the same society indefinitely.

Polling data consistently shows a generalized public skepticism about government institutions. For example, in surveys conducted since 1958 asking whether government officials were "crooked," between one quarter and one half of all respondents have indicated their belief that "quite a few of the people running the government are crooked."[81]

This long-standing, healthy skepticism is likewise present in the public's attitudes regarding the influence of campaign contributions and independent expenditures on the judiciary. It would be a mistake, however, to equate this generalized skepticism about the role of money in politics with a lack of public confidence in the courts. Despite the concerns

about campaign spending, public confidence in the judiciary remains high. A 2002 poll by the American Bar Association, for example, found that 72% of respondents were at least "somewhat concerned" about whether "the impartiality of judges is compromised by the need to raise campaign money to successfully run for office."[82] Yet the same poll found that 75% of respondents thought elected judges were more fair and impartial than appointed judges.[83]

Similarly, according to a recent poll, only 5% of respondents believed that campaign contributions made to judges had no influence at all on decisions judges made in Minnesota state courts.[84] Nonetheless, the same poll found widespread public confidence in the courts, with 74% of respondents saying that they had "a great deal" or "some" confidence in the courts, and 76% saying that they had "a great deal" or "some" confidence in judges (higher rates than for any other category except the medical profession).[85]

The courts are consistently among the highest ranked institutions in terms of public confidence. According to a 2001-2002 survey, 94% of respondents rated the job being done by courts and judges of their state as being either "excellent" or "good."[86] A 1999 survey found that 77% of respondents had either "a great deal" or "some" confidence in the United States Supreme Court, and 75% had similar confidence in local courts.[87] The same survey also found that 79% agreed with the statement that "judges are generally honest and fair in deciding cases."[88] And while the majority of Americans will express some level of concern about the potentially corrupting effect of money in elections, this does not appear to be their most pressing political concern.[89]

A recent study done in West Virginia reflects that a perception of bias is premised upon contributions, not independent expenditures, of an individual to a judicial candidate.[90] Failure of a judge to recuse because of independent expenditures has little effect on perceived bias, whereas the recusal of a judge for a contribution does little to improve the perceived bias of the judge.[91] Moreover, even in factual circumstances more extreme than those present in *Caperton*, a third of the respondents remained unfazed in their perceptions of impartiality.[92] The Court's inadequate assessment of bias and the perception of bias, as well as its disregard for the nature and the facts of the campaign participation at issue and for citizens' underlying institutional support for the judiciary, is a significant failing of the test it offers.

The Court also fails to consider that where concerns about judicial impartiality arise out of ordinary campaign activities, the concerns are inherent in the state's decision to elect judges in the first place, and thus cannot be used as a basis for restricting these campaign activities. In *White*, for example, this Court struck down a Minnesota judicial canon that prohibited judicial candidates from announcing their views on disputed legal or political issues.[93] Quoting Justice Marshall, the Court stated that "if the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[94] As Justice O'Connor elaborated in her White concurrence:

> Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.[95]

Similarly, in *Weaver* the Eleventh Circuit struck down a state judicial canon barring judges and judicial candidates from personally soliciting campaign contributions.[96] The *Weaver* court followed *White* in holding that any impartiality concerns raised by the personal solicitation of campaign funds were inherent in the state's decision to elect judges, and thus could not be used as a rationale to limit candidates' First Amendment rights.[97] Because private financing is such a pervasive feature of state judicial elections, any attempt to require recusal based on campaign spending can only result in a limitation on the states' ability to choose their method of judicial selection.

Moreover, campaign spending as a basis for recusal turns traditional recusal standards on their head. The *Caperton* Court's willingness to mandate recusal for judges based on campaign spending would alter traditional recusal standards in several respects. First, the American judicial system has traditionally granted judges a presumption of impartiality, which can be overcome only by objective evidence of actual bias.[98] Requiring recusal based on campaign spending would replace this presumption of impartiality with a presumption of corruption.

Second, while recusal has traditionally been required where a judge has a pecuniary interest in the outcome of a case, disqualification was mandatory only for a presently existing pecuniary interest, not for a previously received financial benefit. A judge, for example, could not hear a case involving a company in which he owned stock.[99] This impediment, however, continued only as long as the judge retained ownership of the stock.[100] As soon as the judge sold the stock, the impediment was removed, and no basis for disqualification would remain. Recusal is not required where a judge had owned party stock at some point in the past (on the theory that the judge might feel indebted to the party based on the financial benefits he had received from the company).

Where recusal has been required by due process, it has been premised on present rather than past circumstances. In *Tumey*, for example, the Supreme Court held that a village mayor could not preside over criminal proceedings where the mayor was paid only if the defendant was convicted and where the village received a share of the fine.[101] The inability of the mayor to hear these cases, however, continued only so long as these provisions remained in effect.[102] Likewise, *Aetna Life Insurance Co. v. Lavoie* involved a state supreme court justice who was, apart from his judicial duties, pursuing a bad-faith suit against an insurance company.[103] The Supreme Court held that it violated due process for the judge to participate in a similar case involving bad-faith refusal to pay an insurance claim because the court's decision could have had a direct impact on

the outcome of his own case.[104] The Court gave no indication, however, that the justice would be prevented from hearing such cases once his own suit had been resolved.

Requiring a judge's recusal whenever she had received a financial benefit from a party at some point in her life is also highly impractical. Confining recusal to presently existing pecuniary interests prevents disqualification from becoming a method of paralyzing justice, rather than of preserving it. Basing mandatory disqualification on present circumstances also gives judges a means of remedying the circumstances requiring recusal if they so choose. This provides judges with both a means and an incentive to limit the instances in which they would have to recuse, which serves the smooth application of the judicial process.

The same is not true of mandatory recusal based on past campaign spending. Since a judge cannot undo a contribution once made, such impediments cannot be remedied. And insofar as recusal is mandated based on independent expenditures made on the judge's behalf, the circumstances requiring a judge's recusal will be totally out of her control. Thus, requiring recusal based on campaign spending destroys a judge's ability to limit the circumstances requiring her recusal and adds a level of uncertainty into the judicial process.

More importantly, a presently existing pecuniary interest differs fundamentally from a previously received financial benefit in that only in the former case is the benefit conditioned on the judge's decision in a case. If a judge who has received a substantial contribution from a particular party later rules against that party, the judge need not return the money. Whereas in *Tumey* and *Lavoie*, the judges in question did stand to lose out financially if they ruled in a certain way.[105]

Finally, the recusal in cases involving pecuniary interests traditionally followed a bright-line rule: unless the amount involved was truly de minimis, any pecuniary interest, regardless of its size, was considered disqualifying. The *Caperton* decision replaces this bright-line standard with an amorphous test in which recusal is required only for "substantial" campaign spending.[106] Given the practical difficulties involved in requiring recusal whenever a contributor appears before a judge, this is understandable. But if the fact that a judge has received contributions or benefited from independent expenditures made by a party really does amount to having a pecuniary interest in the outcome of the case, then it is hard to see as a matter of constitutional principle why recusal should be required only based on "substantial" campaign spending.[107]

In fact, if recusal is to be required based on campaign spending on the theory that contributions and independent expenditures might improperly influence the judge, then it would be hard to see why the same principle would not require recusal of a judge in many other cases as well. The confirmation process for federal judges, for example, often involves large independent expenditures made in support of or in opposition to the confirmation of a given judge.[108] Any threat to judicial impartiality posed by such independent expenditures would appear to be present regardless of whether the expenditures are made in support of a judge's election or if they are made in support of her confirmation. Yet due process clearly does not require a judge to recuse herself every time a group that supported or opposed her candidacy appears before her as a litigant.

Requiring recusal based on campaign spending leaves judges vulnerable to strategic action by potential parties and their attorneys.[109] As noted above, those who spend money on a candidate's behalf fall into two groups. They may be spending on the candidate's behalf because they believe she shares their values and views, or they may be spending in an attempt to influence the candidate's views. Under the current system, those who simply wish to elect candidates who they believe share their values or views can donate to that candidate, or make independent expenditures on their behalf, though with no guarantee that the candidate they support will actually win.

A party who wishes to influence the views of a judge, by contrast, faces not only this uncertainty, but also the prospect that his spending will fail to improperly influence the judge as he wishes. He can donate to a judicial candidate, but this is no guarantee that the candidate he backs will be elected, let alone that the candidate will rule in his favor as judge. A litigant who pursues this strategy also has to worry that he will be out-bid by another party pursuing the same strategy. Mandating recusal based on campaign spending would ironically make it far easier for parties to influence the outcome of their litigation. Instead of worrying about whether a judge will change his vote in a case based on a given contribution or independent expenditure, a party can simply contribute to the campaigns of judges he believes are likely to rule against him, thus ensuring that these judges cannot hear his case. As then-Judge Breyer wrote in *In re Allied-Signal Inc.*, the standards governing recusal "must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."[110]

While mandating recusal based on campaign spending would not impede those who wish to use spending as a means of influencing a judge's vote, it would impede those who wish to spend on behalf of a candidate because they believe she shares their values and views. An individual who wishes to support a candidate out of a sense of shared judicial philosophy may be less likely to do so if he knows that doing so will require the judge's recusal. Mandatory recusal in these circumstances thus has the potential to chill individuals from making independent expenditures on behalf of candidates, or from getting involved in the political process.[111]

Nor is the risk of strategic recusal requests avoided simply by mandating recusal only in cases where spending is "substantial." If a party or attorney is willing to spend large amounts of money on behalf of a candidate in the hopes that this candidate will vote in accordance with his interests if elected, then there is no reason why he would not be willing to spend an equal amount of money on behalf of a candidate in order to secure his disqualification.

III. The Ramifications of *Caperton*

Upon close review, the *Caperton* decision is *sui generis*.[112] Like *Shelley v. Kraemer* and *Bush v. Gore*, the *Caperton* decision is applicable only to its own facts.[113] While Justice Kennedy

purports to assert a test for determining whether a judge should recuse based upon campaign financing, the test he posits is so specific to the facts of *Caperton* that it is clear that the test offered is of real import only in that case.[114] The test considers whether "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"—a test clearly crafted to match the facts before the Court.[115] The Court supplements the test with factors that weigh into this analysis: "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"—factors that likewise address the specific, perceived due process concern before the Court.[116]

The *Caperton* decision is potentially significant in two contexts: recusal motions and judicial campaign regulation.[117] In addressing these areas, two possible constructions of *Caperton* can be adopted by state courts. The courts can remain faithful to Kennedy's intent with the decision and construe it narrowly to apply to only extreme facts like those in *Caperton* for purposes of recusal requirements and judicial campaign regulation. Or they can construe it broadly to justify greater campaign regulation and enhanced recusal requirements. Crucially, courts should be consistent in their approach. And of the two interpretations, the narrow reading is the legitimate one.

A. Caperton *and Recusal Motion Practice*

Should the courts construe *Caperton* narrowly, *Caperton* recusal motions are unlikely to become standard litigation strategy as was forecasted by Chief Justice Roberts in his dissent.[118] Because the test has such a specific factual context in mind, justification for a recusal motion in circumstances other than those that satisfy the specific requirements of the test would be few and could be expeditiously dealt with.[119]

However, if state courts construe *Caperton* broadly, any state that uses judicial elections will see a marked increase in *Caperton* recusal motions. As Justice Benjamin warned,

> there will simply be no end to the alleged "appearance of impropriety' if every contribution to a candidate, or every contribution to an opposing candidate, or every independent opposition campaign, is viewed as raising an ethical question concerning a judge's participation in a case in which a contributor or an opposition contributor is involved.[120]

There would be the potential for recusal motions for every case heard by elected judges, filed to serve political rather than constitutional ends, and crippling the courts from effectively performing their responsibilities.[121]

If recusal is granted in even a significant fraction of these cases, this would not only cause hardship for both litigants and judges, but would also serve to bring the judiciary itself into disrepute.[122] On the other hand, if a judge denies a recusal request based on campaign spending, then the issue of whether the denial violated due process will have to be litigated on appeal. Even otherwise routine cases will take on a constitutional dimension, as one party argues that the level of campaign spending involved in the case warranted the judge's recusal. This will not only clog the courts, and especially the federal courts, with recusal related litigation, but because the recusal issue involves questions about a judge's integrity and capacity to overcome potential threats to his impartiality, requiring judges to evaluate the recusal decisions of their fellow judges can only add strains to the collegiality between judges essential for the smooth operation of the justice system.

In the minds of the public, requiring a judge to recuse himself in certain circumstances is tantamount to a declaration that the judge is incapable of being impartial, at least in those circumstances. Any rule, therefore, that would require judges to recuse in a significant number of cases—or which would lead to an exponential increase in the number of cases where recusal was requested but denied—has the potential of leaving the public with the impression that judges are generally corrupt or incapable of rendering justice dispassionately and fairly.

B. Caperton *and Judicial Conduct Regulation*

Properly construed, *Caperton* has little significance to judicial campaign canons, which regulate judicial political speech such as solicitation, political affiliation, and promises made during campaigns.[123] Judicial codes of conduct regulate the conduct of judges and judicial candidates, not those who participate in their campaigns. The *Caperton* test is solely focused on due process concerns as implicated by those who disproportionately and substantially participate in a judicial election and then subsequently appear before that judge.[124] There is little if anything a judicial candidate can do to prevent such speech and participation. And most states already regulate campaign contribution amounts in some fashion. Judicial campaign canons should not be impacted at all by *Caperton*.[125]

However, some courts are considering revisions to their judicial codes that reach well beyond the scope of the due process interests recognized in *Caperton*. California's State Supreme Court is considering revising its judicial conduct code to require recusal based upon contributions of a party in excess of $1,500 for the two years following receipt of the contribution, even though $1,500 neither represents the extreme circumstance found in *Caperton* nor legitimately implicates due process concerns.[126] Ohio and Wisconsin are likewise reviewing its mandatory recusal requirements based upon the dollar amount contributed.[127] And at least one federal court has given justification for such revisions by applying Caperton to a challenge of judicial campaign canons that prohibit statements that "appear to commit" judicial candidates during their campaign and mandate recusal in such circumstances.[128] Such revisions run afoul of the Supreme Court precedent that protects judicial candidates' First Amendment political speech rights during their campaigns.[129]

Under *Caperton*, neither of these two regulations—recusal for contributions of $1,500 contributions and for judicial candidates' statements on issues that "appear to commit" them—are constitutionally justified. Recusal for a $1,500 contribution does not credibly reach the level of "significant

and disproportionate influence in placing the judge on the case."[130] Nor is it limited to "raising funds or directing the judge's election campaign when the case was pending or imminent."[131] In fact, the only part of the test implicated by such a recusal requirement is that it involves "raising funds" through campaign contributions.[132]

While it does not raise the due process concerns of *Caperton*, it does have a significant chilling effect on constitutionally protected political speech. Such a recusal requirement will function as the equivalent of a contribution limit and penalize campaign activity. Judicial candidates, rather than having to deal with possible recusal motions, should they succeed in their bid for judge, will limit their contribution receipts to the $1,500 threshold. This chilling effect on speech is completely unjustified by any interest in due process. Due process is already protected through state-imposed contribution limits.[133]

Likewise, prohibitions for "appearing to commit" during a judicial campaign and mandatory recusal for making such statements are not justified under *Caperton*. Such "commits clauses" state that a judicial candidate shall not "in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."[134] In determining whether this rule is violated, the enforcing body looks to "the totality of the statement . . . to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result."[135] *Caperton* is not relevant in this context because it fundamentally dealt with bias as to parties, a due process concern not implicated by provisions such as the commits clause, which are issue-oriented.

For this reason, the appropriate analysis for judicial campaign speech regulation and mandatory recusal in such contexts is found in Republican Party of *Minnesota v. White*.[136] The Supreme Court, in applying strict scrutiny review, recognized impartiality, when defined as lack of bias for or against parties, as a compelling interest because it addresses due process concerns.[137] Conversely, it found due process is not preserved through regulating judicial campaign speech on issues.[138] In conducting its analysis, the *White* Court weighs both First Amendment and Fourteenth Amendment concerns, unlike the *Caperton* decision, which focuses only on due process.

A more recently employed recusal restriction borrows from the commits clause to mandate recusal where "the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."[139] The provision attempts to account for the *White* decision by reaching not issue-oriented speech, but result-oriented speech. *White* specifically recognized that judicial candidates could be prohibited from pledging or promising certain results in a particular case.

But the fundamental First Amendment concern with both of the above restrictions is that their application is premised on how the speech at issue appears to others. Both the commits clause and the recusal clause assert this standard. Yet the Supreme Court has consistently stated that a speaker, in determining whether her speech is prohibited, cannot be left to the perceptions of a listener.[140] As a result, restrictions on speech that are dependent on the subjective perceptions of the hearer are unconstitutional because they are vague.[141]

Moreover, this subjectivity can reach announced views though it may be unintended. Statements that announce views by criticizing *Roe v. Wade*, or expressing "views about substantive due process, economic rights, search and seizure, the war on drugs, the use of excessive force by police, the conditions of the prisons, or products liability" could be believed to commit a candidate on an issue.[142] This contravenes *White*, which recognized a constitutionally protected speech right for judicial candidates to announce their views on disputed issues during their campaigns.[143]

Construing *Caperton* beyond its legitimate scope will seriously undermine the free exchange of ideas during judicial elections in two critical ways. Judicial candidates will be unconstitutionally prohibited and chilled from exercising their right to exercise their free speech and associational rights during their campaigns even though exercising those rights would not implicate due process. And third party political speech during judicial campaigns will be chilled because those wishing to contribute or spend their own money to support a candidate or even solicit a candidate for their views on issues will refrain from doing so because it may somehow interfere with a judicial candidate's ability to serve as a judge. Such effects run in direct conflict with prior First Amendment precedent, and are not justified by *Caperton*.

Conclusion

There is no reason to believe that the other Justices signing onto Kennedy's decision viewed it as *sui generis* as he appears to. In this regard, the decision was probably ill-advised. Hard cases make bad law, and to leave the scope of the case open to broad interpretation opens the door to inconsistent and potentially unconstitutional applications of the standard among the states. The dissenting Justices recognized this. Only time will tell.

Endnotes

1 Republican Party of Minn. v. White, 536 U.S. 765, 781-82 (2002).

2 *See, e.g.*, Republican Party of Minn. v. White, 416 F.3d 738, 755-56 (8th Cir. 2005); Siefert v. Alexander, 597 F. Supp. 2d 860, 867-71 (W.D. Wis. 2009); Carey v. Wolnitzek, No. 3:06-36-KKC, 2008 WL 4602786, at 9 (E.D. Ky. Oct. 15, 2008).

3 *See, e.g.*, *White*, 416 F.3d at 765-66; Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002); *Siefert*, 597 F. Supp. 2d at 887-89; *Carey*, 2008 WL 4602786, at 15-17.

4 *See, e.g.*, *Siefert*, 597 F. Supp. 2d at 886.

5 *See, e.g.*, Bauer v. Shepard, 634 F. Supp. 2d 912, 950 (N.D. Ind. 2009); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1234 (D. Kan. 2006), *vacated on other grounds*, 562 F.3d 1240, 1244, 1248-49 (2009); Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1084 (D. Alaska 2005), *rev'd on other grounds*, 504 F.3d 840, 844 (2007); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005); Family Trust Found. of KY., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 710 (E.D. Ky. 2004). *But see* Duwe v. Alexander, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007).

6 *See, e.g.*, Ind. Code Ann. § 2.11(A)(5) (LexisNexis 2009) (A judge shall recuse when "the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy."); Wis. Stat. Ann. § 60.04(4)(f) (West 2004) (A judge shall recuse himself if "the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following: 1. An issue in the proceeding. 2. The controversy in the proceeding."); KS. S. Ct. R. 601B, 2.11(A)(4) (A judge shall recuse if "the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.").

7 129 S. Ct. 2252 (2009).

8 *Id.* at 2264.

9 *See infra* text accompanying notes 11-28.

10 *See infra* text accompanying notes 12-111.

11 Three types of judicial elections exist: partisan election, nonpartisan election, and retention election. Brandice Canes-Wrone et al., *Judicial Independence and Retention Elections*, Sept. 19, 2009, at 2, http://ssrn.com/abstract=1475657. A recent study shows that retention and nonpartisan elections are no better at preserving judicial independence as are contested partisan elections and, in fact, judges so elected are more impacted by public opinion than those elected in a partisan manner. *Id.* at 26.

12 Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L.J. 1077, 1093 (2007).

13 *Id.* at 1094.

14 *See* American Judicature Society, Chronology of Successful and Unsuccessful Merit Selection Ballot Initiatives, http://www.judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf (last visited Dec. 23, 2009).

15 *See id.*; *see also* Anita Kumar, *Floridians Keep Right to Elect Judges*, St. Petersburg Times, Nov. 8, 2000, at 1, *available at* http://www.sptimes.com/News/110800/Election2000/Floridians_keep_right.shtml (Florida referendum allowing merit selection and retention election of Florida trial court judges was defeated 61% to 38%).

16 Press Release, American Judicature Society, Voters in Four Jurisdictions Opt for Merit Selection on November 4 (2008), *available at* http://www.ajs.org/selection/docs/Update%20on%20merit%20selection%20inititives.pdf.

17 Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002).

18 *See generally* James Bopp Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 First Amend. L. Rev. 180 (2007).

19 *See id.*

20 *See* N.M. Stat. Ann. §§1-19A-1 to -19A-17 (2009); N.C. Gen. Stat. Ann. §§163-278.6 to -278.70 (2007); Wis. Stat. Ann. § 11.50 (West 2004).

21 *See* Weaver v. Bonner, 309 F.3d 1312, 1322 (11th Cir. 2002) (noting that "campaigning for elected office necessarily entails raising campaign funds"); *see also White*, 536 U.S. at 789-90 (O'Connor, J., concurring) ("[U]nless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fundraising.").

22 *See, e.g.*, Shepherdson v. Nigro, 5 F. Supp. 2d 305, 311 (E.D. Pa. 1998); Massongill v. County of Scott, 991 S.W.2d 105, 108-09 (Ark. 1999); *Ex Parte* Kenneth D. McLeod, Sr., Family Ltd. P'ship XV, 725 So. 2d 271, 274 (Ala. 1998); Aguilar v. Anderson, 855 S.W.2d 799, 802 (Tex. App. 1993); Keane v. Andrews, 555 So. 2d 940, 940 (Fla. Dist. Ct. App. 1990).

23 John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947).

24 *See, e.g.*, Dr. Bonham's Case, (1609) 77 Eng. Rep. 638 (K.B.) (holding by Lord Coke that members of a board determining physicians' qualifications could not both impose and personally receive fines).

25 William Blackstone, 3 Commentaries on the Laws of England 361 (The University of Chicago Press 1979) (1768).

26 *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824-25 (1986) (supporting disqualification of a judge whose ruling would impact the relevant law in two cases in which the judge was a plaintiff); Ward v. Vill. of Monroeville, 409 U.S. 57, 61-62 (1972) (holding that a city mayor could not serve as a traffic court judge because the matters coming before such a judge involved funding for town finances); Tumey v. Ohio, 273 U.S. 510, 531 (1927) (finding a judge should be disqualified because he would only be paid if the defendant was convicted).

27 *See, e.g.*, *Tumey*, 273 U.S. at 523 (finding recusal was not constitutionally mandated where kinship or personal bias were at issue. Instead, other types of bias are left as matters of legislative discretion, "Matters of kinship [or] personal bias . . . would seem generally to be matters merely of legislative discretion."); *see also* FTC v. Cement Institute, 333 U.S. 683, 702 (1948) ("Most matters relating to judicial disqualification [do] not rise to a constitutional level.").

28 Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1373 (7th Cir. 1994).

29 Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) (noting that states "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.").

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

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

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

36 *Id.* at 2273-74 (Roberts, J., dissenting).

37 *Id.* at 2257 (majority opinion).

38 *Id.*

39 *Id.* at 2258.

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

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

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

46 *Id.*

47 *Id.*; *see* W. Va. Code Ann. § 29(b) (LexisNexis 2009) ("A justice shall disqualify himself or herself, upon proper motion or *sua sponte*, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct or, when *sua sponte*, for any other reason the justice deems appropriate."); W. Va. Code Ann. § 3(E)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it; (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding; (d) the judge or the judge's 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 a more than de minimis interest that could be substantially affected by the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding.") (footnotes omitted).

48 *Caperton*, 129 S. Ct. at 2258; Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 293 n.11 (W. Va. 2008) (Benjamin, Acting C.J., concurring).

49 *Caperton*, 679 S.E.2d at 264-65.

50 *Id.* at 285 (Benjamin, Acting C.J., concurring).

51 *Id.* at 306.

52 *Caperton*, 129 S. Ct. at 2259.

53 *Id.* at 2263-64.

54 *Id.* at 2264.

55 *Id.*

56 Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 914 (2004) (citing Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000)).

57 Editorial, *Conflict: Disturbing Problem*, Charleston Gazette, Feb. 26, 2008, at P6A; *see also* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 300 n.29 (W. Va. 2008) (Benjamin, Acting C.J., concurring) ("[T]he instant case may represent the only decision in which I have voted in favor of Appellant Massey's position and certainly does not represent the highest dollar value at issue for a case involving Massey.").

58 *Caperton*, 679 S.E.2d at 300 n.31.

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

60 *See id.*

61 *Id.* at 2262.

62 Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 Chi.-Kent L. Rev. 133, 138 (1998) ("There is a grave risk that a judge will be more favorably disposed to those who gave or spent money and those who might be counted on for contributions or expenditures in the future.").

63 *Cf.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 379 (2000) (noting that "this Court has never accepted mere conjecture as adequate to carry a First Amendment burden").

64 GALLUP: Trust in Federal Government, On Nearly All Issues, Hits New Low—Even Less than Watergate Era, Editor & Publisher, Sept. 27, 2007, *available at* http://www.editorandpublisher.com/eandp/search/article_display.jsp?vnu_content_id=1003647275.

65 David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 Election L.J. 23, 36 (2006).

66 Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 174 (2004).

67 *Id.*

68 *See generally* Henry W. Chappell, Jr., *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 Rev. Econ. & Stat. 77 (1982).

69 *See* Stephanie D. Moussalli, Campaign Finance Reform: The Case for Deregulation 4-6 (1990); Larry Sabato, *Real and Imagined Corruption in Campaign Financing*, *in* Elections American Style 155, 159-62 (A. James Reichley ed., 1987); Frank J. Sorauf, Inside Campaign Finance: Myths and Realities 166-72 (1992); Frank J. Sorauf, Money in American Elections 316 (1988); Stephen Ansolabehere et al., *Why Is There so Little Money in U.S. Politics?*, 17 J. Econ. Persp. 105, 116 (2003); Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J.L. & Econ. 317, 346-47 (1997); Janet M. Grenzske, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 Am. J. Pol. Sci. 1, 19-20 (1989); Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 Hofstra L. Rev. 369, 377 (1989); Mary H. Vesenka, *Economic Interests and Ideological Conviction: A Note on PACs and Agriculture Acts*, 12 J. Econ. Behav. & Org. 259, 261-62 (1989); John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 Am. Pol. Sci. Rev. 400, 410-11 (1985); Chappell, *supra* note 68, at 83.

70 *See, e.g.*, David B. Magleby & Candice J. Nelson, The Money Chase: Congressional Campaign Finance Reform 78 (1990); Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797, 813-15 (1990).

71 *See, e.g.*, Richard A. Watson & Rondal G. Downing, The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan 343-48 (1969); Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 Am. Pol. Q. 427, 440-48 (1974); Beverly B. Cook, *Should We Change Our Method of Selecting Judges?*, 20 Judges J. 20, 22 (1981) ("Political science research suggests that judges define their roles and decide cases independently of the selection process used."); Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make: Selection Procedures in State Courts of Last Resort*, 5 Just. Sys. J. 25, 39 (1979); Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. Pub. L. 104, 117-18 (1964).

72 *See* Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 Election L.J. 79, 83-86 (2003).

73 Veron Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 Tul. L. Rev. 1291, 1294 n.14 (2008). Aside from causation issues, the Palmer and Levendis study suffers from a number of methodological and other problems, which render its conclusions suspect. *See generally* Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 La. L. Rev. 307 (2009); Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 La. L. Rev. 281 (2009).

74 424 U.S. 1 (1976).

75 *Id.* at 47.

76 *Id.* at 288 (Marshall, J., concurring in part and dissenting in part).

77 The Federalist No. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield ed., 1966).

78 *Id.*

79 James L. Gibson, *Nastier, Nosier, Costlier—and Better*, Miller-McCune, Aug. 2008, at 27 ("Because courts are weak, they require institutional legitimacy, the belief that an institution has the right to make binding decisions for a constituency and that such decisions must be complied with."), *available at* http://www.miller-mccune.com/politics/nastier-noisier-costlier-%E2%80%94-and-better-495.print.

80 *See* Bridges v. California, 314 U.S. 252, 270-71 (1941) ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion . . . an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."); *see also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521, 527 (1977) (noting "the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials").

81 *See* Am. Nat'l Election Studies, The ANES Guide to Public Opinion and Electoral Behavior: Are Government Officials Crooked 1958-2004, http://www.electionstudies.org/nesguide/toptable/tab5a_4.htm (last visited Dec. 23, 2009) (In 2004, 35% of respondents thought "quite a few of the people running the government" are crooked, while 53% thought "not many" were crooked, and 10% said "hardly any" were crooked.).

82 Harris Interactive Telephone Survey, Prepared for the American Bar Association (Aug. 2002) (on file with the authors).

83 *Id.*

84 Decision Res. Ltd., Justice at Stake Study: Minnesota Statewide 2 (Jan. 2008), http://www.gavelgrab.org/wp-content/resources/polls/MinnesotaJusticeatStakesurvey.pdf (questions nine and eleven).

85 *Id.*

86 Justice at Stake, State Judges Frequency Questionnaire 1 (Nov. 5, 2001-Jan. 2, 2002), http://www.georgiacourts.org/councils/state/research/7.%20Statistics.pdf.

87 Nat'l Ctr. for State Courts, How the Public Views the State Courts: A 1999 National Survey 12 tbl.1 (May 1999), http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

88 *Id.* at 30 fig.17.

89 *See 55% Say Media Bias Bigger Problem than Campaign Cash*, Rasmussen Reports, Aug. 11, 2008, http://www.rasmussenreports.com/public_content/politics/election_20082/2008_presidential_election/55_say_media_bias_bigger_problem_than_campaign_cash (55% of respondents thought media bias posed a bigger problem in politics than large campaign contributions).

90 James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?*, July 2, 2009, at 30, http://polisci.wustl.edu/media/download.php?page=faculty&paper=156.

91 *Id.* at 21.

92 *Id.* at 30.

93 Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

94 *Id.* (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (emphasis omitted).

95 *White*, 536 U.S. at 792 (O'Connor, J., concurring).

96 Weaver v. Bonner, 309 F.3d 1312, 1322-23 (11th Cir. 2002).

97 *See id.* at 1322 ("The impartiality concerns, if any, are created by the State's decision to elect judges publicly.").

98 *See* Liteky v. United States, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) ("We accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office.") (internal citations and quotations omitted); *see also* Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363, 1372 (7th Cir. 1994) ("We expect—even demand—that judges rise above their potential biasing influences, and in most cases we presume judges do.") (citation omitted).

99 *See, e.g.*, Model Code of Judicial Conduct Canon 3C(1)(c), 3C(3)(c) (1972) (requiring a judge to disqualify himself when he "has a financial interest . . . in a party to the proceeding" where "financial interest" is defined to include "ownership of a legal or equitable interest, however small").

100 *See, e.g.*, 28 U.S.C. § 455(f) (2006).

101 Tumey v. Ohio, 273 U.S. 510, 531-32 (1927).

102 *Id.* at 534.

103 475 U.S. 813, 817 (1986).

104 *Id.* at 825.

105 *See Tumey*, 273 U.S. at 535; *Lavoie*, 475 U.S. at 833. One might argue that ruling against a party might make them less likely to contribute to a judge in the future, but this will be true of any party, regardless of whether this party has contributed to the judge in the past.

106 Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2255-56 (2009).

107 *Id.*

108 *See* Press Release, Brennan Ctr. for Justice, TV Advertising Data Reveals Groups Adopting Different Strategies in Alito Confirmation Battle (Jan. 26, 2006), *available at* http://www.brennancenter.org/press_detail.asp?key=100&subkey=34246.

109 *See* Howard J. Bashman, *Recusal on Appeal: An Appellate Advocate's Perspective*, 7 J. App. Prac. & Process 59, 71 (2005) (noting that while "the subject of strategic recusal . . . is not often discussed, no doubt because the goal seems unfair and perhaps unethical . . . you can be sure that strategic recusals do occur").

110 891 F.2d 967, 970 (1st Cir. 1989) (citations omitted).

111 *Cf.* Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir. 1994) (invalidating a Minnesota public funding scheme because of the chilling effect it had on independent expenditures).

112 Black's Law Dictionary defines *sui generis* as "of its own kind or class; unique or peculiar." Black's Law Dictionary 1448 (7th ed. 1999).

113 334 U.S. 1, 13 (1948); 531 U.S. 98, 109, 143 (2000); Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263, 2267 (2009).

114 "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." *Caperton*, 129 S. Ct. at 2263.

115 *Id.* at 2263-64.

116 *Id.* at 2264.

117 *See id.* at 2256-57.

118 *See id.* at 2267 (Roberts, C.J., dissenting).

119 *Id.* at 2266.

120 Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 306 (W. Va. 2008).

121 *Id.*

122 *See* Feichtinger v. State, 779 P.2d 344, 348 (Alaska Ct. App. 1989) (noting that while judges may sometimes be tempted to recuse in order to avoid controversy, "to surrender to such a temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage"); *see also* Adair v. Mich. Dep't of Educ., 709 N.W.2d 567, 579 (Mich. 2006) ("Each unnecessary recusal adversely affects the functioning of the Court.").

123 *See, e.g.*, Model Code of Judicial Conduct R. 4.1 (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

124 Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2256 (2009).

125 *Id.* at 2267 ("Application of the constitutional standard implicated in this case will thus be confined to rare instances.").

126 Comm'n for Impartial Courts, Final Report: Recommendations for Safeguarding Judicial Quality, Impartiality, and Accountability in California 39 (2009), http://www.courtinfo.ca.gov/jc/tflists/documents/cic-finalreport.pdf.

127 John Gibeaut, *Caperton Capers: Court's Recusal Ruling Sparks States to Mull Judicial Contribution Laws*, ABA Journal, Aug. 2009, *available at* http://www.abajournal.com/magazine/caperton_capers; JoAnne Viviano, *Ohio Chief Justice Wants New Ethics Policy*, Ohio.com, June 10, 2009, http://www.ohio.com/news/ohiocentric/47548647.html.

128 Bauer v. Shepard, 634 F. Supp. 2d 912, 948-49 (N.D. Ind. 2009).

129 *See generally* Buckley v. Valeo, 424 U.S. 1, 24, 143 (1976).

130 Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263-64 (2009).

131 *Id.* at 2264.

132 *Id.*

133 *See generally Buckley*, 424 U.S. at 35, 143.

134 Model Code of Judicial Conduct R. 4.1(A)(13) (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

135 *Id.* at cmt. 13.

136 536 U.S. 765, 774-75 (2002).

137 *Id.* at 775-76.

138 *Id.* at 776.

139 Model Code of Judicial Conduct R. 2.11(A)(5) (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

140 536 U.S. at 770 ("We know that 'announcing . . . views' on an issue covers much more than promising to decide an issue a particular way.") (emphasis omitted); *id.* at 813 (Ginsburg, J., dissenting) ("The State may constitutionally prohibit judicial candidates from pledging or promising certain results.").

141 *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992).

142 *See* Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993).

143 Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).