

CAPERTON V. A.T. MASSEY COAL CO.: THE
OBJECTIVE STANDARD FOR
JUDICIAL RECUSAL

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On June 8, 2009, the Supreme Court ruled on the fascinating legal saga of *Caperton v. A.T. Massey Coal Co.*¹ The particular—and seemingly outrageous—facts of the case garnered a tremendous amount of national attention² and even inspired a John Grisham novel.³ At issue in the case was the failure of Justice Brent Benjamin of the West Virginia Supreme Court of Appeals to recuse himself from hearing an appeal involving a fifty million dollar judgment against the company of his largest campaign contributor—Don Blankenship, the chairman, CEO, and President of A.T. Massey Coal. Blankenship spent roughly three million dollars of his own personal wealth during the election—an incredibly large amount for any state election, and for West Virginia in particular—to help elect Benjamin to the bench in place of Justice Warren McGraw during the 2004 elections.⁴ Naturally, the plaintiff moved to disqualify Justice Benjamin based on the apparent conflict of interest and probable bias caused by Blanken-

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1 129 S. Ct. 2252 (2009).

2 See Robert Barnes, *Case May Define When a Judge Must Recuse Self*, WASH. POST, Mar. 2, 2009, at A1; Adam Liptak, *U.S. Supreme Court Is Asked to Fix Troubled West Virginia Justice System*, N.Y. TIMES, Oct. 12, 2008, at A41; James Sample, Op-Ed., *Justice for Sale*, WALL ST. J., Mar. 22, 2008, at A24; Lawrence Messina, *Legal Groups Blast W. Va. Justice in Massey Case*, CHARLESTON DAILY MAIL, Aug. 5, 2008, <http://www.dailymail.com/News/200808050215>.

3 JOHN GRISHAM, *THE APPEAL* (2008); see also Joan Biskupic, *At the Supreme Court, a Case with the Feel of a Best Seller*, USA TODAY, Feb. 17, 2009, at A1 (explaining background of the case and connection to Grisham's novel); Paul J. Nyden, *Novel Linked to State Election*, CHARLESTON GAZETTE, Jan. 30, 2008, at 1A (detailing John Grisham's appearance on the Today Show, explaining the idea behind the novel).

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

ship's campaign involvement.⁵ Nonetheless, Justice Benjamin declined to remove himself from the case on three separate occasions and was the deciding vote in a 3-2 reversal of the fifty million dollar trial verdict against Massey.⁶ On November 14, 2008, the United States Supreme Court granted certiorari⁷ to address the question of whether the Due Process Clause of the Fourteenth Amendment was violated when Justice Benjamin denied a recusal motion.⁸

Part I of this Note will examine the *Caperton* case and the new recusal rule based on "probability of bias," which was derived from the case. Part II will explore and scrutinize the concerns expressed by Chief Justice Roberts in his dissent—that the majority's holding in this case would lead to an overwhelming number and variety of "*Caperton* motions" from parties asserting that the judge in their particular case is biased, primarily because the majority did not provide sufficient guidelines through which to examine future probability of bias claims.⁹ While only a year has passed since the Court's ruling in the case, is there any evidence to suggest that state legal systems are struggling with this recusal standard? Was the Chief Justice's use of the old legal aphorism that "[h]ard cases make bad law" justified in this case?¹⁰ Part II will also address the Chief Justice's second concern—that this decision will bring the judicial system into unnecessary disrepute because constant attacks on judicial impartiality will erode public confidence in the system.¹¹ I argue that lower courts dealing with this new probability of bias standard neither struggle with the content nor overall quantity of so-called "*Caperton* motions." The use of the probability of bias standard is rare and will neither overwhelm courts nor bring undue disrepute to the bench.¹²

5 *Id.*

6 *Id.* at 2258.

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

8 *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2256 (2008).

9 *See id.* at 2272–73 (Roberts, C.J., dissenting).

10 *See id.* at 2272.

11 *See id.*

12 A related topic, but one outside the scope of this Note, is the role judicial elections play in maintaining judicial impartiality as a whole. Even in cases where there are no egregious campaign contributions to a candidate, bias issues can arise from the normal campaign conduct of a candidate. The Supreme Court held in *Republican Party of Minnesota v. White*, 536 U.S. 765, 778 (2002), that it was a violation of the First Amendment for a state's canon of judicial conduct to prevent judicial candidates from announcing their views on disputed legal or political issues. Voters frequently wish to know a candidate's views on controversial political issues. After hearing unequivocal statements about a candidate's views, how can the public expect the judge to approach the issue freshly on the bench? Originally, judicial elections

I. CAPERTON V. A.T. MASSEY COAL CO.

A. Background

This matter originated in 2002, when a West Virginia jury delivered a verdict against A.T. Massey Coal Co. (“Massey”) for fifty million dollars in compensatory and punitive damages for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relationships.¹³ Hugh Caperton charged Massey with various efforts to intentionally ruin his business—also a coal operation—through fraudulent dealings and by cutting off existing contractual relations with the petitioners such that Caperton’s business would be forced into bankruptcy.¹⁴ Over the next few years, the trial court denied Massey’s post-trial motions challenging the jury verdict and

were implemented in the nineteenth century to make judges accountable to the populace and the rule of law rather than to the appointing governor or legislature. See Charles G. Geyh, John F. Kimberling Professor of Law, Ind. Univ. Sch. Of Law, Moderator at Panel 1: Judicial Selection Systems and the Judicial Canons of Ethics (Oct. 17, 2007), in 21 GEO. J. LEGAL ETHICS 1347, 1356 (2008). Yet, many dispute whether these goals are still being accomplished through judicial elections and whether a change to meritorious judicial selection—or some other system—would be preferable. See Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL’Y 67, 88–94 (2009) (identifying the shortcomings of judicial elections and arguing for merit selection as a better alternative). This is an active debate involving many pre-eminent legal thinkers. Some—most notably retired Justice Sandra Day O’Connor—believe that the elimination of state judicial election is necessary to retain a respected, impartial judiciary free from the potential corrupting influence of campaign contributions. See *Republican Party of Minn.*, 536 U.S. at 788–92 (O’Connor, J., concurring) (arguing that “the very practice of electing judges undermines [the State’s interest in an impartial judiciary]”); Sandra Day O’Connor, Associate Justice, Retired, U.S. Supreme Court, Closing Remarks to the Debate over Judicial Elections and State Court Judicial Selection (Oct. 17, 2007), in 21 GEO. J. LEGAL ETHICS 1347, 1419 (2008) (arguing that reforms are necessary for judicial elections and “preservation of the status quo is probably not our best option or even a good idea”). Others believe that strengthened state recusal rules—which can differ greatly between states—or more articulated standards of judicial conduct would succeed in accomplishing a more impartial judiciary. See *Republican Party of Minn.*, 536 U.S. at 792–96 (Kennedy, J., concurring) (arguing that states should be free to elect judges if they choose and that articulated standards of judicial conduct are appropriate and sufficient to maintain judicial integrity); 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, 707–11 (2007) (“[I]n most jurisdictions, existing recusal standards are too constricted to be effective in attaining an independent and impartial third branch.”); Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct’s Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS, 441, 449–54 (2006).

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

14 Brief for Petitioners at 3–5, *Caperton*, 129 S. Ct. 2252 (No. 08-22).

damages and requesting judgment as a matter of law.¹⁵ Prior to Massey's appeal to the West Virginia Supreme Court of Appeals, however, were the 2004 state judicial elections, during which Don Blankenship—the chairman, CEO, and president of Massey—sought to replace Justice Warren McGraw with a relatively unknown Charleston lawyer named Brent Benjamin.¹⁶

Blankenship contributed roughly three million dollars to Benjamin's campaign.¹⁷ First, Blankenship contributed \$1,000 directly to Benjamin's campaign committee—the statutory maximum allowed.¹⁸ In addition, he donated \$2.5 million to the § 527 political organization named "And For The Sake Of The Kids."¹⁹ Blankenship created this organization after the trial verdict against Massey for the sole purpose of unseating Justice McGraw and electing Benjamin in his place.²⁰ This money was primarily used to finance campaign advertisements, many of which accused Justice McGraw of being soft on crime.²¹ Finally, Blankenship also spent over \$500,000 on independent campaign expenditures, such as direct mailings and television advertisements, seeking support for Benjamin in the election.²²

These contributions were "more than the total spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."²³ In fact, the contributions by Blankenship to "And For The Sake Of The Kids" were the largest by any one person or group to a § 527 organization in any state judicial race in 2004.²⁴ The donations by Blankenship had their intended effect, as Benjamin beat McGraw by a tally of 382,036 votes (53.3%) to 334,301 votes (46.7%).²⁵

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

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 Brief for Petitioners, *supra* note 14, at 6–7.

21 *Id.* at 7. In their brief, the petitioners described how the name "And For The Sake Of The Kids" related to the group's continued assertions that Justice McGraw was "soft on crime," particularly as it resulted in crimes against children. One such ad released by the group accused McGraw of voting to release a convicted child molester, thus allowing him to work in a high school. *Id.*

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

23 *Id.*

24 Brief for Petitioners, *supra* note 14, at 28; see RACHEL WEISS, NAT'L INST. ON MONEY IN STATE POLITICS, FRINGE TACTICS 5 (2005), available at <http://www.followthemoney.org/press/Reports/200508251.pdf>.

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

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In October 2005, prior to Massey filing its appeal with the West Virginia Supreme Court of Appeals, Caperton moved to disqualify Benjamin under the West Virginia Code of Judicial Conduct²⁶ and the Due Process Clause of the Fourteenth Amendment.²⁷ Yet Benjamin denied this motion and, after examining his own supposed biases, held there was “‘no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial.’”²⁸ Soon thereafter, Massey filed its appeal on the fifty million dollar jury verdict, which the court reversed by a 3-2 margin in November 2007.²⁹ Justice Benjamin was in the majority.³⁰

Caperton sought a rehearing, and the parties collectively petitioned for the disqualification of Benjamin and two other justices who ruled on the case. Caperton successfully moved for the recusal of Justice Maynard, who was photographed vacationing with Blankenship in the French Riviera.³¹ In addition, Massey successfully moved for the recusal of Justice Starcher, who had been publicly critical of the role Blankenship had played in the 2004 election of Justice Benjamin.³² However, Justice Benjamin again refused to recuse himself from the matter.³³ During the rehearing—and with two lower court judges replacing the other disqualified justices—the court again reversed by a 3-2 margin with Justice Benjamin in the majority.³⁴ For a third time Caperton moved for disqualification, and for a third time Benjamin denied this request.³⁵

26 See W. VA. CODE OF JUDICIAL CONDUCT Canon 2(A) & cmt. (1993), available at <http://www.state.wv.us/wvsca/JIC/Codejc.htm> (“A judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge’s activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.”).

27 *Caperton*, 129 S. Ct. at 2257–58.

28 *Id.* at 2258 (alteration in original) (quoting Joint Appendix at 336a–37a, *Caperton*, 129 S. Ct. 2252 (No. 08-22)).

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

Justice Benjamin wrote a concurring opinion to this decision, first reviewing his agreement with the majority on the merits of the case,³⁶ then writing a lengthy defense of his refusal to recuse himself.³⁷ Justice Benjamin rejected the argument of the dissenting opinion that apparent conflicts of interest can implicate due process considerations.³⁸ Rather, Benjamin wrote that actual justice, rather than apparent justice, should be the standard by which recusal is measured.³⁹ Furthermore, examining his own bias and prejudged opinions on the matter, Benjamin determined that “I have no pecuniary interest in the outcome of this matter. . . . I have no conflicting dual role in this matter. . . . I have no personal involvement with nor harbor any personal antipathy toward any party or counsel herein.”⁴⁰ It was upon the question of whether due process was implicated in Benjamin’s failure to recuse himself that the Supreme Court granted certiorari.⁴¹

B. The Supreme Court Develops Expanded Due Process Requirement for Judicial Recusal Based on the Probability of Bias

In a 5-4 decision, the Supreme Court reversed the West Virginia Supreme Court of Appeals decision and held that under “these extreme facts the probability of actual bias [rose] to an unconstitutional level” and required Justice Benjamin to recuse himself despite his subjective assertions that no actual bias was involved.⁴² Writing for the majority, Justice Kennedy held that any subjective examination by a judge is merely one step in the process for the examination of bias—“objective standards may also require recusal whether or not actual bias exists or can be proved.”⁴³

Traditionally, the Due Process Clause was held to incorporate the common law rule that recusal is required when a judge has “a direct, personal, substantial, pecuniary interest” in a case.⁴⁴ This rule was

36 *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 287–92 (W. Va. 2008) (Benjamin, Acting C.J., concurring), *rev’d*, 129 S. Ct. 2252 (2009).

37 *Id.* at 292–309.

38 *See id.* at 293 n.14 (“While appearances should be considered in a discussion of public confidence in the judiciary, appearances alone, subject as they are to manipulation by partisan elements (including litigants), should never alone serve as the basis for a due process challenge to an otherwise well-founded legal opinion of a court of law.”).

39 *Id.* at 294.

40 *Id.* at 296.

41 *See Caperton*, 129 S. Ct. at 2256.

42 *See id.* at 2265.

43 *Id.*

44 *See id.* at 2259 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)); *see also* John P. Frank, *Disqualification of Judges*, 56 *YALE L.J.* 605, 609 (1947) (“The common law of

seen to “reflect[] 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.’”⁴⁵ This standard “demarks only the outer boundaries of judicial disqualifications”⁴⁶ and due to various state codes of judicial conduct, “most disputes over disqualification will be resolved without resort to the Constitution.”⁴⁷ However, two situations have been recognized by the Court where recusal is required as an objective matter, absent any subjective examination by the judge of his or her own bias.

The first situation previously recognized by the Court involves a judge with an indirect pecuniary interest in the case considered less than the “direct, personal, substantial” interest required for recusal at common law.⁴⁸ This standard emerged in *Tumey v. Ohio*,⁴⁹ where a village mayor also sat as a judge, without a jury, to try those accused of violating certain Prohibition-era alcohol laws.⁵⁰ The mayor/judge received personal compensation for performing these judicial duties in the form of a percentage of the fines handed down for the infractions. Thus, because no fines were levied against acquitted parties, there was “no way by which the Mayor [could] be paid for his service as a judge, if he [did] not convict those who [were] brought before him.”⁵¹ Also, the proceeds from the fines were given to the treasury of the village to contribute to general village improvements, for which the mayor was ultimately responsible.⁵² The Court held that it was a denial of due process for the accused to be subjected to a 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

disqualification . . . was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else.”).

45 *Caperton*, 129 S. Ct. at 2259 (second alteration in original) (quoting THE FEDERALIST No. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)).

46 *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

47 *Caperton*, 129 S. Ct. at 2267. The American Bar Association’s Model Code of Judicial Conduct—some variation of which is used by all American court systems and is usually incorporated into state law—provides ethical standards designed to lead a biased judge to recusal. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (2004); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 2.8 (2d ed. 2007 & Supp. 2009); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1260 (2008).

48 See *Caperton*, 129 S. Ct. at 2259–61.

49 273 U.S. 510.

50 See *id.* at 520.

51 *Id.*

52 *Id.* at 521–22.

true between the State and the accused.”⁵³ Further cases emphasized that the judge’s financial interest need not be direct⁵⁴ nor have actually influenced the judge⁵⁵ to be a violation of due process.

The second situation previously recognized by the Court as requiring recusal emerged from criminal contempt proceedings where a judge has no financial interest in the case, but where his participation in an earlier proceeding could lead to a conflict of interest.⁵⁶ The Court referred to *In re Murchison*,⁵⁷ where a judge examined two defendants to determine whether charges should be brought against them, as a “one-man grand jury.”⁵⁸ The judge charged one man with contempt for failure to adequately answer questions asked by the judge and proceeded to try and convict both defendants after this contempt charge had been leveled.⁵⁹ The Court threw out these convictions on the grounds that, having been a part of the decision whether or not to try the defendants, the judge could not be “wholly disinterested in the conviction or acquittal of those accused.”⁶⁰ Furthermore, in *Mayberry v. Pennsylvania*⁶¹ the Court held that due process required a defendant in criminal contempt proceedings be tried “before a judge other than the one reviled by the contemnor.”⁶² Thus, in a case where a defendant verbally attacked the judge by calling him, among other things, a “dirty sonofabitch”⁶³ and a “dirty, tyrannical old dog,”⁶⁴ there existed a due process requirement that the judge recuse himself for the adjudication of these charges.⁶⁵ Much like the group of indirect financial interest cases, the bias inquiry is an objective one.⁶⁶ “The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in

53 *Id.* at 532.

54 *See* *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (holding that the levying by a mayor/judge of fines that would benefit the town treasury is a due process violation under *Tumey*, even without direct compensation to the mayor/judge).

55 *See* *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (clarifying that the Court was “not required to decide whether in fact [the judge] was influenced,” but only whether his position would offer a temptation to an average judge not to rule fairly).

56 *See* *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2261–62 (2009).

57 349 U.S. 133 (1955).

58 *Id.* at 133.

59 *Id.* at 134–35.

60 *Id.* at 137.

61 400 U.S. 455 (1971).

62 *Id.* at 466.

63 *Id.* at 456.

64 *Id.* at 457.

65 *Id.* at 466.

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

his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”⁶⁷

The Court applied this objective inquiry to the problem of potential bias relating to state judicial elections. The Court acknowledged the “probing search into his actual motives and inclinations” conducted by Justice Benjamin and did not question his subjective findings of impartiality.⁶⁸ Neither did the Court examine whether or not there was actual bias shown by Justice Benjamin on behalf of Massey and Blankenship in his judicial decisionmaking.⁶⁹ Rather, the Court held that a subjective, inward examination by a judge is not sufficient alone to satisfy due process requirements: “objective standards may also require recusal whether or not actual bias exists or can be proved.”⁷⁰ To define these objective standards, “the Court has asked whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or pre-judgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”⁷¹

The Court emphasized that this need for objective rules exists as “protection against a judge who simply misreads or misapprehends” his or her true motives while trying a case.⁷² It would be a nearly impossible task for the law to adequately review a judge’s own subjective inquiry into actual bias; therefore, objective standards based on the probability of bias—and which requires no actual proof of bias—are appropriate.⁷³ The objective inquiry examines the position of the hypothetical “average judge” and asks whether there exists an unconstitutional potential for bias.⁷⁴

C. *Application of the Objective Probability of Bias Standard to Justice Benjamin’s Failure to Recuse Himself*

Previously, the Supreme Court had only noted two instances when due process required a judge to recuse himself as an objective matter absent any findings of actual bias—when the judge obtains an indirect financial interest in the outcome and in certain criminal contempt proceedings.⁷⁵ To this framework, the *Caperton* Court added an

67 *Id.*

68 *See id.* at 2263.

69 *See id.* at 2265.

70 *Id.*

71 *Id.* at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

72 *Id.*

73 *Id.*

74 *Id.* at 2262.

75 *See supra* Part I.B.

objective standard based on the probability of actual bias—thus rejecting subjective assertions by each judge regarding his or her own biases.⁷⁶ The Court goes to great lengths to emphasize that the facts under consideration in this case are exceptional, and that “[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances.”⁷⁷ In fact, perhaps cognizant of the delicate constitutional debate surrounding the balancing of campaign finance regulations with free speech concerns,⁷⁸ the Court states that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires . . . recusal.”⁷⁹

When determining whether campaign contributions made to a judicial candidate rise to the level in which there is a serious probability of bias, the Court’s analysis “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.”⁸⁰ The size of the campaign contributions—primarily through

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

77 *Id.* at 2267. This point is also noted—with some degree of skepticism—by Chief Justice Roberts in his dissent. See *id.* at 2272 (Roberts, C.J., dissenting). The Chief Justice is concerned about the boundless nature of this new objective standard, its possible effect in future cases, and public confidence regarding the impartiality of the judiciary. See *id.* at 2267–74. For more on the concerns of Chief Justice Roberts—including his position that the majority left many questions crucially unanswered concerning the application of this test—and the possible future implications of this ruling, see *infra* Part II.

78 The debate over the legality and desirability of campaign finance reform is far outside the scope of this Note. It remains sufficient for this piece to understand that the Court has neither condemned campaign donations for judicial elections, nor placed restrictions on the donations that individuals or corporations—litigants at bar or otherwise—can make to judicial campaigns. It merely strengthens the due process requirements for an impartial judiciary when a litigant appears before a judge to whom he has extravagantly donated campaign funds. This decision not to strengthen the restrictions on this limited type of campaign finance is consistent with the general consensus of legal commentators that momentum—particularly from the Roberts Court—is moving away from campaign finance restrictions. See, e.g., Citizens United v. FEC, 130 S. Ct. 876 (2010); Richard Briffault, *Davis v. FEC: The Roberts Court’s Continuing Attack on Campaign Finance Reform*, 44 TULSA L. REV. 475, 476 (2009); Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in Wisconsin* Right to Life, 27 ST. LOUIS U. PUB. L. REV. 267, 267–68 (2008); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 600–01; Emma Greenman, Note, *Strengthening the Hands of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in a Post-Wisconsin Right to Life Era*, 24 J.L. & POL. 209, 210–11 (2008).

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

80 *Id.* at 2264.

the § 527 group “And For The Sake Of The Kids”—in relation to the total amount of money spent and collected during the campaign was undisputed. The three million dollars spent by Blankenship in his bid to elect Benjamin was 300% more than the amount spent by Benjamin’s campaign committee during the entire election.⁸¹

A more contentious issue arose in determining the apparent effect that Blankenship’s campaign contributions had on the outcome of the election. Both Massey, in the Brief for Respondents, and Justice Benjamin, in his concurrence to the West Virginia Supreme Court of Appeals decision, argued that Blankenship’s contributions were not the primary reason for the election victory.⁸² The Brief for Respondents argued that even if the “probability of bias” standard were to be applied to this set of facts, there was still insufficient evidence to warrant a recusal.⁸³ Evidently the majority of West Virginia newspapers endorsed Benjamin, and there was also a perception that Justice McGraw was a polarizing figure prone to seemingly bizarre antics and campaign activities.⁸⁴ Challenging the suggestion that Benjamin may owe a “debt of gratitude” to Blankenship and Massey for the role they played in his election, Massey argued that Justice McGraw was more to blame for his own loss and that “Justice Benjamin’s largest ‘debt of gratitude’ may therefore have been to his opponent.”⁸⁵

Justice Benjamin also gave little weight to the campaign contributions that aided his election to the bench and listed ten factors which supposedly supported his contention that he did not err in failing to recuse himself.⁸⁶ In fact, Benjamin asserted that not only was he under no duty to recuse himself from this matter, but that “in West Virginia, elected judges have a duty to hear cases unless disqualification is required.”⁸⁷ He went on to argue—among other things—that his election in 2004 “was due primarily to [his] campaign’s message of fairness, stability and predictability in decision-making, the importance of the rule of law to courts, and the need for judges to exercise civility, integrity and personal professionalism.”⁸⁸ Benjamin also

81 *Id.*

82 *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 299–304 (W. Va. 2008) (Benjamin, Acting C.J., concurring), *rev’d*, 129 S. Ct. 2252 (2009); Brief for Respondents at 54–55, *Caperton*, 129 S. Ct. 2252 (No. 08-22).

83 Brief for Respondents, *supra* note 82, at 49–56.

84 *See id.* at 54–55.

85 *Id.*

86 *See Caperton*, 679 S.E.2d at 299–301 (Benjamin, Acting C.J., concurring).

87 *Id.* at 299 (citing W. VA. CODE OF JUDICIAL CONDUCT CANONS 3(A), 3(B)(1) (1993)).

88 *Id.*

emphasized the devastating effect of a speech given by then-Justice McGraw in Racine, West Virginia which was described as a “rant[],”⁸⁹ “‘deeply disturbing,’”⁹⁰ and “unhinged.”⁹¹ It was these factors, argued Benjamin, and not the three million dollars in Blankenship campaign funds that ultimately tipped the election in his favor at the expense of Justice McGraw. Thus, even if this disqualification matter rose to a constitutional level of scrutiny—which he denied as a matter of law⁹²—Benjamin argued that the facts of the election did not support the suggestion that the campaign donations were the cause of his victory.⁹³

However, the Supreme Court rejected these arguments and held that the question of whether the campaign contributions actually caused Benjamin’s election victory was irrelevant.⁹⁴ The proper inquiry is “whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”⁹⁵ In such a close election, “Blankenship’s campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome.”⁹⁶ Thus, the risk and probability that this influence created actual bias—despite Benjamin’s subjective assertions to the contrary—is such that the due process protections require that he be removed from the judicial proceeding.⁹⁷

The Court went on to examine the temporal elements of this case, noting that these campaign contributions were made when Blankenship’s company was filing an appeal to the West Virginia Supreme Court of Appeals that would be heard after the conclusion of the election.⁹⁸ Thus, these contributions were made when Blankenship had a clear interest in the outcome. “Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in

89 *Id.* at 302 n.38.

90 *Id.* (quoting an unnamed “political consultant”).

91 *Id.*

92 *See id.* at 294–97.

93 *Id.* at 299–302.

94 *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264 (2009).

95 *Id.* (alterations in original) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

96 *Id.*

97 *Id.*

98 *See id.* at 2265.

his own cause.”⁹⁹ Therefore, the objective probability of bias that emerged from this set of facts required the recusal of Justice Benjamin as a matter of due process.¹⁰⁰

II. THE DISSENT OF CHIEF JUSTICE ROBERTS: NEED COURTS BE CONCERNED?

In addition to disagreeing with the majority on the legal question of whether the Due Process Clause requires recusal due to a probability of bias,¹⁰¹ Chief Justice Roberts painted an unmistakably dreary picture of the consequences he believed would emerge from the majority’s decision in this case.¹⁰² While he “share[d] the majority’s sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such,”¹⁰³ he also believed that this decision “will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a

99 *Id.*

100 Sadly for poor Caperton, the West Virginia Supreme Court of Appeals, on remand, again reversed the ruling of the trial court. Through personnel changes on the court, only one of the original justices took part in this remanded proceeding. In fact, Massey picked up a vote, winning the remanded proceeding 4-1. *See* Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 357 (W. Va. 2009).

101 The Chief Justice viewed the Due Process Clause as providing a floor for judicial recusal requirements, with each state “free to adopt broader recusal rules than the Constitution requires.” *See* Caperton, 129 S. Ct. at 2268–69 (Roberts, C.J., dissenting). Thus, he argued, it is within the power of legislative discretion to consider what situations and types of bias require recusal in each state. *See id.* at 2268. “Subject to the two well-established exceptions described above, questions of judicial recusal are regulated by ‘common law, statute, or the professional standards of the bench and bar.’” *Id.* (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)).

102 *See id.* at 2267–74.

103 *Id.* at 2267. However, the Chief Justice did not believe that the facts here were such that they constituted an “extreme case” that would require a due process evaluation, even if the probability of bias standard was the appropriate standard to apply. He cited the fact that, aside from the \$1000 direct contribution to the Benjamin campaign allowed under West Virginia law, “Justice Benjamin and his campaign had no control over how this money was spent.” *Id.* at 2273 (emphasis omitted). Not only would it be inappropriate to require recusal from a judge due to the actions of a third party, he argued, but there is never any guarantee that these independent expenditures would even assist the campaign as a whole. *See id.* The Chief Justice also challenged the claim that these funds were “disproportionate” citing smaller—but still significant—contributions made by other private parties to both Benjamin and Justice McGraw’s campaign. *Id.* at 2273–74. Finally, the Chief Justice repeated the argument of Justice Benjamin and Massey that it was Benjamin’s successful campaign and McGraw’s erratic and disturbing behavior that tipped the balance of the race, not any campaign spending made by a third party. *Id.* at 2274.

particular case.”¹⁰⁴ Cautioning that, in this case, “the cure is worse than the disease,”¹⁰⁵ the Chief Justice was primarily concerned with two consequences. First, due to the majority’s unwillingness or inability to craft a truly objective test that can be applied to future decisions,¹⁰⁶ the Chief Justice was worried that state courts will be flooded with so-called “*Caperton* motions” in which a litigant challenges the impartiality of their judge for a host of reasons.¹⁰⁷ Second, the Chief Justice was of the belief that allowing a “probability of bias” standard to determine when due process requires judicial recusal “will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”¹⁰⁸

The Chief Justice presented forty questions in his dissent that he believed lower courts would be forced to answer regarding the scope and application of this probability of bias standard.¹⁰⁹ Among them are “[w]hat level of contribution or expenditure gives rise to a ‘probability of bias?’”;¹¹⁰ how to determine when an expenditure is disproportionate;¹¹¹ how long the probability of bias lasts;¹¹² whether the judge’s vote on the case must be outcome determinative in order for the standard to apply;¹¹³ whether there is an assumption that judges will feel bias towards opponents of their campaign;¹¹⁴ whether the probability of bias applies to all judicial elections, including non-partisan and retention elections;¹¹⁵ and whether the judge may respond to a bias allegation or whether his reputation lies in the hands of the litigants.¹¹⁶

104 *Id.* at 2267.

105 *Id.* at 2274.

106 *Id.* at 2269 (“[T]he standard the majority articulates—‘probability of bias’—fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.”).

107 *Id.* at 2272.

108 *Id.* at 2274.

109 *See id.* at 2269–72.

110 *Id.* at 2269.

111 *Id.*

112 *Id.*

113 *Id.* at 2270.

114 *Id.*

115 *Id.* at 2271. For a more comprehensive database cataloging the methods by which the judiciary is selected in every state, see *Judicial Selection in the States*, AM. JUDICATURE SOCIETY, <http://www.judicialselection.us> (last visited Sept. 28, 2010).

116 *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting).

Justice Kennedy, writing for the majority, agreed with the Chief Justice insofar as “[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications.”¹¹⁷ He also agreed that states “remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.”¹¹⁸ Thus, because states’ codes of conduct and statutes inevitably restrict more activity than the Due Process Clause alone, “[a]pplication of the constitutional standard implicated in [*Caperton*] will . . . be confined to rare instances.”¹¹⁹ He also noted that the previous recusal standards developed by the Court, as required by due process, implicitly contained similar unanswered questions about scope and application.¹²⁰ However, after those decisions “the Court was not flooded with *Monroeville* or *Murchison* motions. . . . Courts proved quite capable of applying the standards to less extreme situations.”¹²¹ Are courts today likely to be flooded with these “*Caperton* motions”? If so, will they be able to apply the standard introduced in *Caperton* to those facts without strict guidance from the Court regarding the specifics of the test?

An early look at judicial decisions which cite to *Caperton* illustrate that lower courts have neither been overwhelmed with *Caperton* motions nor had much difficulty applying the probability of bias test to the specific facts at bar. It is my contention that as time passes, courts will become increasingly adept at handling *Caperton*-like motions and begin—through application and practice—to supply answers to many of the Chief Justice’s forty questions. Perhaps then the Chief Justice will be less concerned with the aphorism “[h]ard cases make bad law”¹²² and come to believe that cases based on extreme fact patterns provide the Court an excellent opportunity to set standards and limits of the due process requirements for a fair trial and impartial tribunal. The Chief Justice feared that “[t]he end result [of the majority’s decision would] do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.”¹²³ However, public confidence in an impartial judiciary has perhaps already eroded to a greater extent than the Chief Justice is aware. A Harris Interactive Poll conducted prior to this case found that sixty-eight percent of those polled would doubt a judge’s

117 *Id.* at 2267 (majority opinion) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

118 *Id.* (quoting *Aetna*, 475 U.S. at 828).

119 *Id.*

120 *Id.* at 2266.

121 *Id.*

122 *Id.* at 2272 (Roberts, C.J., dissenting).

123 *Id.* at 2267.

impartiality if a party spent \$50,000 (which is 1.67% of the three million dollars spent by Blankenship) in campaign contributions to elect the judge.¹²⁴ In addition, eighty-five percent felt the judge should step aside if asked to rule on a campaign contributor of that magnitude.¹²⁵ While Justice Benjamin asserted that such “push-polls” are “neither credible nor sufficiently reliable to serve as the basis for an elected judge’s disqualification,”¹²⁶ such polls certainly lend credibility to the idea that the public has a declining faith in the impartiality of the judiciary and that new rules need to be put in place to allay these concerns.¹²⁷

A. *Early Court Rulings Favor a Narrow Application of Caperton, Adhering to the “Extreme Facts” Language*

As of October 19, 2010,¹²⁸ there were 105 reported¹²⁹ cases¹³⁰—at both the state and federal levels—that have cited *Caperton*. Not all

124 See Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677 [hereinafter Press Release].

125 See *id.*

126 *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 292 n.11 (W. Va. 2008) (Benjamin, Acting C.J., concurring), *rev'd*, 129 S. Ct. 2252 (2009).

127 Obviously, the newest constitutional due process requirement for the recusal of judges is just one—narrow—solution to this problem. For more on judicial elections and their role in the public’s view of the impartiality of the judiciary, see generally *The Debate Over Judicial Elections*, 21 GEO. J. LEGAL ETHICS 1347 (2008).

128 I am cognizant that just over one year has passed since the Court handed down its decision in *Caperton*. Not only does this limit the amount of time that courts have had to cite to the case, but it also limits the time that attorneys have had to make arguments based on *Caperton* in support of their clients. In fact, it is entirely possible that some of the most difficult cases that would implicate *Caperton* concerns have yet to be decided and may not have even occurred. However, that does not, in my opinion, make an early examination of the case’s effects unnecessary or irrelevant. What the early cases show, with some confidence, is that the lower courts are more than capable of examining the majority’s holding in *Caperton* and applying it to the facts presented before them. As Justice Kennedy wrote, concerning the ability of the lower courts to apply previous due process standards expounded by the Court in *Tumey*, *Murchison*, and *Monroeville*, “[c]ourts proved quite capable of applying the standards to less extreme situations.” *Caperton*, 129 S. Ct. at 2266.

129 I make no effort through this Note to consider or examine any “reported case bias” that may exist and could result in potential over- or underreporting of *Caperton*-related cases. My sole purpose is to produce an early examination of how courts interpret the *Caperton* decision.

130 I choose to examine case results rather than briefings for two reasons. First, the cases themselves will create a clearer picture as to the legal framework being built by lower courts’ interpretations of the *Caperton* decision. While attorneys may put

cases were responsive to the issue of judicial bias.¹³¹ In addition, none of the cases dealing with judicial bias and recusal used the *Caperton* precedent to actually grant a party's motion to disqualify the judge. This illustrates that the lower courts, at least at this early stage, are heeding the majority's guidance that *Caperton*, and its constitutional standard, is to be "confined to rare instances"¹³² involving "extreme facts."¹³³ They are seemingly reluctant to extend this standard beyond the narrow holding and fact pattern of *Caperton*, perhaps taking into consideration the Chief Justice's assertion that "[a]ll questions of judicial qualification may not involve constitutional validity."¹³⁴

Of the cases dealing with judicial bias and recusal issues, few are directly analogous to the facts in *Caperton*. In *E.I. DuPont de Nemours & Co. v. Aquamar S.A.*,¹³⁵ the court, in a short per curiam decision, held that campaign contributions totaling \$4560 from the defendant's attorneys to the judge in their case did not amount to legally sufficient grounds for the disqualification of a judge.¹³⁶ The contributions were

forward exotic and unconventional theories to best serve their clients, only judicial decisions will provide clarity on the true meaning of *Caperton*. Second, with no effective way to thoroughly check pleadings from all fifty states, an examination of pleadings would rely on those federal pleadings electronically uploaded to Westlaw, Pacer, or some other service. With no state pleadings and only a handful of federal pleadings, any study of *Caperton's* effects would be fatally incomplete. While Chief Justice Roberts was understandably concerned about the number of court motions which could emerge from this decision, I will rely on cases to assess its effects.

131 For example, in *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (Timmons-Goodson, J., dissenting), a dissenting justice of the North Carolina Supreme Court cites Roberts's dissent in *Caperton* to assert that special exceptions to the law should not be made for sympathetic parties. *Id.* at 325 ("Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle." (quoting *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting))). This was in reference to the court finding a statute preventing convicted felons from owning firearms constitutionally unreasonable as applied to the petitioner, who was convicted of a nonviolent drug crime thirty years earlier and who had never been accused or convicted of being violent in any way. *See id.* at 321–23. Also, in *Snyder ex rel. Snyder v. Secretary of Health & Human Services*, 88 Fed. Cl. 706 (2009), *Caperton* is cited to establish the parties' basic constitutional due process right to a fair trial in a fair tribunal. *See id.* at 719 n.22 (citing *Caperton*, 129 S. Ct. at 2266). Undoubtedly, *Caperton* will continue to be cited in similar ways that are not responsive to examining the question of what activity merits recusal as a constitutional matter.

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

133 *Id.* at 2265.

134 *Id.* at 2268 (Roberts, C.J., dissenting) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

135 24 So. 3d 585 (Fla. Dist. Ct. App. 2009) (per curiam).

136 *See id.* at 585.

within the statutory limits, and the total “which the attorneys in the firms contributed to the judge’s reelection campaign does not approach the \$3 million contribution at issue in *Caperton*.”¹³⁷ This case is an excellent early example of courts beginning to assess the limits of this new constitutional standard and ensuring that only the most extreme facts, representing egregious violations of due process, are implicated.

Further, early cases have expounded on the limits of *Caperton* and its effects on judicial bias standards. In *Henry v. Jefferson County Commission*,¹³⁸ a commissioner made disparaging statements about the plaintiffs and then proceeded to recuse himself.¹³⁹ Despite this recusal, the plaintiffs argued that the commissioner’s statements and conduct tainted the impartiality of the entire tribunal, requiring recusal by every commissioner under *Caperton*.¹⁴⁰ The court rejected this argument, emphasizing that *Caperton* was meant to deal with “an extreme set of facts”¹⁴¹ and that the plaintiffs’ application of *Caperton* to this case stretched the meaning of *Caperton* too far.¹⁴²

If this court were to accept plaintiffs’ interpretation of *Caperton*, there would not be a judge or counsel in this country which could not be impugned. . . . There is always some possibility that something said in front of—or to—some judge or member of an adjudicative body that could bias that individual. The justice system, however, is founded on the ability of those individuals—and jurors—to put aside their own potential bias and look at the facts and the law.¹⁴³

The court also noted that the question of whether remaining members of a tribunal are biased after one member recused himself was not before the Court in *Caperton*; this meant that the decision was not instructive in the matter before the court.¹⁴⁴ This case demonstrates the early reluctance of lower courts to extend *Caperton*’s probability of bias standard to different fact patterns and less extreme apparent injustice.

In the case *In re Marriage of O’Brien*,¹⁴⁵ the husband in a divorce proceeding charged the presiding judge with being biased against

137 *Id.*

138 No. 3:06-CV-33, 2009 WL 2857819 (N.D. W. Va. Sept. 2, 2009).

139 *Id.* at *5.

140 *See id.*

141 *Id.* at *4.

142 *See id.*

143 *Id.*

144 *See id.* at *5.

145 912 N.E.2d 729 (Ill. App. Ct. 2009).

him (1) because the judge presided previously over criminal cases involving the husband, including one regarding a domestic violence charge against the husband, (2) because the judge knew the wife from his membership at the health club where she worked, and (3) because of the judge's friendly relationship with the wife.¹⁴⁶ Recognizing that *Caperton* created a "tension" with Illinois case law that rests on the "actual bias" standard criticized by the majority in *Caperton*,¹⁴⁷ the court nonetheless held that the husband's petition for removal was inadequate under either standard.¹⁴⁸ The *ex parte* communications between the wife and judge outside the courtroom were not sufficient to establish even a probability of bias that would violate due process¹⁴⁹: "To say that any involuntary meeting or conversation, no matter how trivial, gives rise to cause for disqualification would present too easy a weapon with which to . . . obtain a substitution of judges."¹⁵⁰ This ruling underscores judicial reluctance to extend *Caperton* too radically into existing state recusal rules and to treat *Caperton* and its constitutional due process requirements as a baseline designed to be used only in those "rare instances."¹⁵¹

In fact, many cases focus on the "extreme facts" requirement set out in *Caperton*, and the lower courts have been quick to point out that various types of behavior do not match the extreme nature of Blankenship's contributions to Benjamin's campaign and thus do not rise to a constitutional level.¹⁵² These early cases seem to have found

146 *Id.* at 734.

147 *Id.* at 743 ("We . . . acknowledge that the case law in this area has created a tension.").

148 *Id.*

149 *Id.*

150 *Id.* (alteration in original) (quoting *People v. Hicks*, 256 N.E.2d 823, 827 (Ill. 1970)).

151 *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009).

152 *See Bradbury v. Eismann*, No. CV-09-352-S-BLW, 2009 WL 3443676, at *3-4 (D. Idaho Oct. 20, 2009) (rejecting an argument that the remainder of a judicial panel would be biased after deliberating and conferencing with a judge who would later recuse himself since the extreme facts necessary to implicate *Caperton* were not apparent); *Blackwell v. United States*, Nos. 2:08-CV-00168, 2:04-CR-00134, 2009 WL 6315322, at *43 (S.D. Ohio Sept. 22, 2009) (holding that being a member of the same church as a party before the court does not qualify as an extreme set of facts); *Duprey v. Twelfth Judicial Dist. Court*, No. Civ 08-0756 JB, 2009 WL 2482171, at *35 (D.N.M. July 27, 2009) ("[O]nly in extreme cases will a risk of bias on the part of a judge be sufficient to render a proceeding in front of that judge unconstitutional on due-process grounds. . . . Duprey has not alleged any facts that suggest that this case is one of those extreme ones."); *Ala. Dept. of Pub. Safety v. Prince*, 34 So. 3d 700, 707 (Ala. Civ. App. 2009) ("[I]t is evident that Prince has not established a probability of actual bias that is too high to be constitutionally tolerable. This case is simply not the 'rare

a way to apply the Court's narrow holding without falling into the traps suggested by the Chief Justice's dissent. The lower courts have recognized that the facts in *Caperton* were extraordinary and that few cases will rise to the constitutional level of due process expounded there. On the other hand, the lower courts are beginning to answer many of the forty questions suggested by the Chief Justice and are beginning to define the probability of bias standard that the Chief Justice asserted "cannot be defined in any limited way."¹⁵³

In another case, *Rhiel v. Hook (In re Johnson)*,¹⁵⁴ a federal bankruptcy court held that *Caperton* applies only to recusal matters "in the context of judicial elections"¹⁵⁵ and that its holding is "inapposite to the matter before this court."¹⁵⁶ This is the first case to hold that *Caperton* applies only to recusal matters emanating from judicial elections, but it remains to be seen whether or not other courts will also find that *Caperton* applies only in that context. Other early cases suggest that the due process requirements of *Caperton* apply to all recusal matters—albeit in cases where the courts found that the facts did not rise to the extreme circumstances in *Caperton*. This is a potential conflict over the meaning of *Caperton* which requires particular attention as time passes. If future courts will only examine recusal issues in terms of judicial elections, this case will have little precedential value. However, if courts continue to hold that the due process recusal rules of *Caperton* apply to all recusal matters, then the case clearly has the potential for a large precedential impact in the future.

instance' in which due process demands that a judge or decision maker be disqualified from a case."); *People v. Aceval*, 781 N.W.2d 779, 781–82 (Mich. 2010) (rejecting a number of *Caperton* claims of bias that were based on the judge's former marriage to a county prosecutor from the office obtaining the defendant's conviction and the judge's former role as a prosecutor in the same office); see also *Snider v. Comm'r of Soc. Sec.*, Nos. 07-14751, 01-10012, 2009 WL 3101028, at *7 (E.D. Mich. Sept. 22, 2009) ("Bias finding its source in the judge's view of the law or the facts of the case itself is not sufficient to warrant disqualification."); *Law v. United States*, Nos. 1:08CV171, 1:06CR20, 2009 WL 1884444, at *2–3 (N.D. W. Va. June 30, 2009) (holding that adverse legal rulings and general expressions of a judge based on trial experience regarding criminal recidivism are not grounds for disqualification); *State v. List*, 771 N.W.2d 644, 647 (S.D. 2009) (reasoning that a general expression of a judge's abhorrence to alleged activities of the defendant is not a sufficient showing of the court's partiality).

153 *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

154 408 B.R. 123 (Bankr. S.D. Ohio 2009).

155 *Id.* at 127 (quoting *Caperton*, 129 S. Ct. at 2262).

156 *Id.*

B. *Limited Support for a Broader Application of Caperton*

Not all judges at this early stage have been unanimous in support of a narrow interpretation of *Caperton* and the type of behavior which satisfies the “extreme facts” language. One such example from the Michigan Supreme Court is *United States Fidelity Insurance & Guaranty Co. v. Michigan Catastrophic Claims Ass’n*.¹⁵⁷ In this case, the Michigan Catastrophic Claims Association (MCCA) moved for the disqualification of Justice Hathaway on the grounds that her husband was a plaintiff’s attorney in the field of no-fault insurance.¹⁵⁸ The MCCA argued that she had the potential for financial benefit if the case law in this field were to shift—even though her husband was not directly involved in this case—since this would result in higher rewards for Hathaway’s husband’s clients and higher fees for attorneys.¹⁵⁹ Yet in an opinion by Justice Hathaway, joined by Chief Justice Kelly and Justices Cavanagh and Weaver, she held that, after an examination of *Caperton* and her own role in the case, there was no arguable, objective due process violation in this scenario.¹⁶⁰ The MCCA’s “assertion suggests a basis for recusal that is so attenuated from the facts of these cases that it strains reasoned logic.”¹⁶¹ Because neither the judge nor anyone in her family had a real or arguable financial interest in this case, there was no appearance of impropriety and no due process violation.¹⁶² This opinion also suggests a narrow reading of *Caperton* and strict adherence to the “extreme facts” language required to implicate constitutional due process protection.

However, three justices either dissented or requested further briefing on the application of *Caperton* to these facts and the potential for an objective probability of bias. Justice Corrigan dissented, arguing that with so little time to digest and understand the ruling of *Caperton*,¹⁶³ supplemental briefing on this issue was required to truly

157 773 N.W.2d 243 (Mich. 2009).

158 *Id.* at 244.

159 *See id.*; *see also id.* at 248 (Corrigan, J., dissenting) (“[Hathaway’s husband] has a direct interest that is more than *de minimis* in the MCCA’s unlimited obligations to reimburse insurers for personal protection insurance benefits paid to insureds who have been catastrophically injured in automobile accidents.”).

160 *Id.* at 244 (majority opinion) (“There is nothing alleged by the MCCA that would cause any reasonable person to believe that there is a significant and disproportionate influence being asserted upon me under any objective analysis.”).

161 *Id.* at 244–45.

162 *Id.*

163 This motion for recusal was denied on July 21, 2009, a mere month and half after the Supreme Court handed down the *Caperton* decision. *Id.* at 243.

test the objective probability of bias of Justice Hathaway in this case.¹⁶⁴ Corrigan noted that the statements made by Hathaway regarding her lack of bias were strikingly similar to those made by Justice Benjamin—which the Supreme Court rejected—in *Caperton*.¹⁶⁵ How is it possible, she asks, to “decide whether these alleged facts establish that ‘the probability of actual bias on the part of [Justice Hathaway] is too high to be constitutionally tolerable’ without first engaging in some kind of independent inquiry to test the claim and Justice Hathaway’s summary denial of it?”¹⁶⁶

Justice Young, also in dissent, agreed with Justice Corrigan and stated her belief “that this new United States Supreme Court opinion has radically altered the landscape of judicial disqualification and this change warrants that this Court *at least* entertain argument by the parties about how *Caperton* might affect the pending disqualification motion.”¹⁶⁷ Young strongly rebuked Hathaway for her “ cursory denial” of the motion to disqualify, as well as the majority’s “rote ratification” of that denial without giving due consideration to the theory regarding the huge profits Hathaway’s husband stood to gain as an indirect result from this case.¹⁶⁸ This, Justice Young believed, resulted in an “appearance of impropriety” that violates due process as expounded in *Caperton*.¹⁶⁹ Young stated that the majority had not given an objective look at the probability and appearance of bias for Justice Hathaway and instead incorrectly relied on Hathaway’s subjective assertions that she possessed no bias against either party.¹⁷⁰

Justice Markman also encouraged the filing of supplemental briefs to decide this question, arguing that considering the Supreme Court’s holding in *Caperton*—as well as Justice Hathaway’s own previous support in “propos[ing] new procedures that would require dis-

164 See *id.* at 246–52 (Corrigan, J., dissenting).

165 *Id.* at 250. Justice Hathaway remarked that “neither I nor any member of my immediate family has any real or arguable financial interest in this case. The allegations made by the MCCA are not a basis for recusal because there is no appearance of impropriety and no due process violation.” *Id.* at 245 (majority opinion). Justice Benjamin similarly asserted in *Caperton* that he had no bias and could rule impartially on the case, stating: “I have no pecuniary interest in the outcome of this matter. . . . I have no personal involvement with nor harbor any personal antipathy toward any party or counsel herein.” See *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 296 (W. Va. 2009) (Benjamin, Acting C.J., concurring), *rev’d*, 129 S. Ct. 2252 (2009).

166 *U.S. Fidelity*, 773 N.W.2d at 251 (Corrigan, J., dissenting) (alteration in original) (quoting *Caperton*, 129 S. Ct. at 2254).

167 *Id.* at 253 (Young, J., dissenting).

168 See *id.* at 255.

169 See *id.*

170 See *id.*

qualification whenever there is an ‘appearance of impropriety’¹⁷¹—“it is difficult to understand why Justice Hathaway believes that her conclusory response to defendant’s motion is sufficient.”¹⁷² These three justices all supported a more in-depth look at both the consequences of the new due process requirements in *Caperton* and how these standards apply to the probability of bias attached to Justice Hathaway due to the employment of her husband. While none of the three justices came to a decision over the merits of the MCCA’s claim, they supported the objective bias test laid out in *Caperton* and held that cursory statements regarding bias are no longer sufficient when a party raises a legitimate bias claim.

Justices Markman, Corrigan, and Young also expressed similar concerns in another Michigan Supreme Court case, *Schock v. Court of Appeals*.¹⁷³ A mere eight days after their ruling in *U.S. Fidelity*, the court was again confronted with the issue of how judges should examine their relationships and conduct in recusal motions. Here, a complaint for superintending control was denied as moot, a matter to which all justices agreed.¹⁷⁴ However, speaking on the issue of disqualification, Justice Weaver—who issued a concurrence that due process was not violated by Justice Hathaway’s presence in *U.S. Fidelity*¹⁷⁵—unilaterally held that she was not biased for or against Schock despite their prior friendly relationship, and that, therefore, there were no grounds for disqualification.¹⁷⁶ Unlike Justice Hathaway in *U.S. Fidelity*, Justice Weaver did not ask for her colleagues’ approval of this decision. Justice Markman (joined by Justices Corrigan and Young), while concurring in the holding of the case regarding the mootness of the complaint for superintending control,¹⁷⁷ nonetheless asserted that Weaver’s subjective cursory statement that she is not biased for or against Schock “is clearly an inadequate explanation for her decision . . . under the newly-established ‘objective’ test” expounded in *Caperton*.¹⁷⁸ This opinion again

171 *Id.* at 256 (Markman, J., writing separately) (quoting Order Amending Rule 2.003, Mich. Court Rules, ADM File No. 2009-04, at 2 (Mich. Nov. 25, 2009), available at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-112509.pdf>).

172 *Id.*

173 768 N.W.2d 320 (Mich. 2009).

174 *Id.* at 320–22.

175 *See U.S. Fidelity*, 773 N.W.2d at 245 (Weaver, J., concurring).

176 *See Schock*, 768 N.W.2d at 320–21 (Weaver, J., concurring).

177 *Id.* at 321 (Markman, J., concurring).

178 *Id.* at 322 n.3.

indicates a belief in the need for a closer, objective look at a judge's bias in order to satisfy the due process requirements in *Caperton*.

Since these cases, Rule 2.003 of the Michigan Court Rules has been amended to include an appearance of impropriety standard as a ground for recusal to be considered before the entire court.¹⁷⁹ Despite their previous dissents in support of a closer judicial examination of the role *Caperton* plays in judicial recusal, Justices Corrigan and Young believed that this rule, as amended, was unconstitutional and refused to sit in consideration of refusal motions under this provision.¹⁸⁰ “[T]he duty to sit clearly cannot require official acts that would violate our oaths to uphold the federal and Michigan constitutions.”¹⁸¹ Of particular concern was the amended rule's power to allow other judges to consider whether another should be recused.¹⁸² The opposing justices saw this refusal to participate as a dereliction of duty and reasoned that personal opinions on the constitutionality of the amended rule were irrelevant if the court has not adopted that view.¹⁸³ It appears likely that further battles will emerge in the Michigan Supreme Court regarding the integration of *Caperton* into state ethical and judicial rules.

Another case, *Slade v. State*,¹⁸⁴ illustrates that even with an objective test in place according to state law,¹⁸⁵ reasonable judges can come to differing opinions regarding the probability of bias. Here, a defendant convicted of gun possession charges moved for recusal because of the defendant's prior dealings with the trial judge—namely, the trial judge had both represented him as defense counsel and prosecuted him as an assistant district attorney.¹⁸⁶ Also, the defendant accused the judge of previously indicating that he would like to “throw” the defendant away.¹⁸⁷ The trial judge rejected this retelling of events and dismissed the motion for disqualification because, as a

179 MICH. CT. R. 2.003(C)(1)(b).

180 See *Pellegrino v. AMPCO Sys. Parking*, 789 N.W.2d 777, 786–804 (Mich. 2010) (Corrigan, J., not participating).

181 *Id.* at 786.

182 *Id.* at 789.

183 *Id.* at 777 (Kelly, C.J., concurring).

184 42 So. 3d 25 (Miss. Ct. App. 2009).

185 Canon 3 of the Mississippi Code of Judicial Conduct reads: “Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances” See MISS. CODE OF JUDICIAL CONDUCT Canon 3E(1) & cmt. (2002).

186 *Slade*, 42 So. 3d at 29–30.

187 *Id.*

frequent offender, the judge would have no discretion in sentencing.¹⁸⁸

Yet, in dissent, Judge Carlton asserted that, under the Mississippi objective standard and the Supreme Court's holding in *Caperton*, "a reasonable person, knowing all of the circumstances, might question the trial judge's impartiality based on the possibility that the judge's prior dealings with Thomas Slade caused him to have a bias or prejudice against Slade."¹⁸⁹ The dissent also rejected the trial judge's claim that because the judge had no discretion in sentencing, the judge's impartiality could not be questioned. "The imposition of a sentence was not Judge Helfrich's sole duty or sole decision in this case. Rather, this case involved various rulings during the course of the trial" for which the defendant was entitled to an impartial tribunal.¹⁹⁰ The majority does not cite *Caperton*, so it is difficult to know whether that decision played a role in their conclusions, but the objective test contained in the Mississippi Code of Judicial Conduct was sufficiently similar to the *Caperton* test that the judges in this case appeared to simply differ as to whether a reasonable person would question the judge's impartiality after knowing all the circumstances.

Increasingly, other courts are beginning to allow specific briefings on *Caperton* issues that may herald a new era of judicial examination into *Caperton* and its effects on state ethical codes.¹⁹¹ It remains to be seen whether other courts will follow this example or allow *Caperton* to pass into relative obscurity.

C. Lower Courts Are Not Overwhelmed by the Number or Complexity of *Caperton* Issues

Despite the differences expounded by the dissents in *U.S. Fidelity, Schock*, and *Slade* regarding the applicability of *Caperton* to the cases at bar, it is evident that, by and large, courts are beginning to craft workable rules to allow this new probability of bias test to take hold as a means to counter egregious miscarriages of justice emanating from judicial bias. Some courts remain reluctant to apply an objective test at all,¹⁹² yet most seem willing to begin answering some of the forty

188 *Id.*

189 *Id.* at 30 (Carlton, J., dissenting).

190 *Id.*

191 *See, e.g.,* State v. Allen, 778 N.W.2d 863, 865 (Wis. 2010) (opinion of Abrahamson, C.J.) (discussing the necessity of briefing and argument on *Caperton*'s effect on recusal motions in Wisconsin).

192 *See* Schock v. Court of Appeals, 768 N.W.2d 320, 320 (Mich. 2009); U.S. Fidelity Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass'n, 773 N.W.2d 243, 244 (Mich. 2009).

questions suggested by the Chief Justice in dissent. An early reading suggests that courts are keeping true to the apparent intentions of the majority—to save this due process protection for only the most “extraordinary” situations.¹⁹³ As yet, no court has invoked *Caperton* to require a judge to recuse himself. This is likely an implicit recognition that few instances match the extreme fact pattern of *Caperton* itself. The Chief Justice, in dissent, asserted that “hard cases make bad law,”¹⁹⁴ yet if courts continue to narrowly apply *Caperton* to only the most extreme cases, this new due process protection could afford a relatively simple protection against judicial bias where a judge subjectively denies any exists.¹⁹⁵

Chief Justice Roberts voiced two primary concerns: first, that courts will be inundated with “a wide variety of *Caperton* motions, each claiming the title of ‘most extreme’ or ‘most disproportionate’”¹⁹⁶ and second, that this new standard “will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”¹⁹⁷ Issues arising under this case have been relatively few. Even when such issues do arise, they are often promptly dismissed as courts are unwilling to extend the constitutional protections of *Caperton* beyond the most extreme facts.¹⁹⁸ While it remains to be seen whether problems in lower court interpretation will emerge, early signs show no prospect of such court squabbles over *Caperton* interpretation.

Yet even if such issues were likely to arise, as the Chief Justice suggests, such a situation has not previously stopped the Supreme Court from making legal rule changes as it perceived them necessary. An illustrative example is the Supreme Court’s treatment of notice pleading in *Bell Atlantic Corp. v. Twombly*¹⁹⁹ and *Ashcroft v. Iqbal*.²⁰⁰ In these cases, the Court abandoned the “no set of facts” standard to assess the requirements of a complaint under Rule 8(a)(2).²⁰¹ This

193 See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009).

194 See *id.* at 2272 (Roberts, C.J., dissenting).

195 See Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 132 (2009) (casting serious doubt on the presumption that *Caperton* will result in an overflow of recusal motions and litigation).

196 *Caperton*, 129 S. Ct. at 2273 (Roberts, C.J., dissenting).

197 *Id.* at 2274.

198 See, e.g., *State v. Quezada-Meza*, No. 1 CA-CR 07-1065, 2009 WL 1900441, at *3 (Ariz. Ct. App. July 2, 2009) (holding that a judge’s comments to the jury regarding the defendant being an illegal immigrant did not create disqualifying bias at either the state code or constitutional level).

199 550 U.S. 544 (2007).

200 129 S. Ct. 1937 (2009).

201 *Twombly*, 550 U.S. at 556–63.

was essentially replaced with a standard based on the plausibility of the complaint, despite the previous standard enjoying over fifty years of common usage in the federal courts.²⁰² This change was fraught with potential problems, as legal professionals nationwide were forced to examine the extent of this change to the pleading requirements. As one would expect, lower courts and commentators have struggled with the parameters and guidelines which this new standard presented.²⁰³ Yet nowhere in these majority opinions is there a shred of concern for the potential difficulty that lower courts and practitioners will face in interpreting and applying this new standard. In fact, the Chief Justice's fear of lower courts being "forced to deal with a wide variety of *Caperton* motions"²⁰⁴ would be far more accurate were he to have written it about *Twombly* or *Iqbal* instead. In the years since these cases were decided, thousands of cases have cited the decisions. Surely if the Court were willing to bear the consequences of altering a fundamental pleading standard, it should have no difficulty dealing with a far less frequently used due process recusal requirement.

Another example of the Court having no hesitancy in creating new rules overturning decades of precedent is *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*²⁰⁵ This opinion, drafted by Justice Kennedy and also joined by Chief Justice Roberts, overturned the nearly century-long precedent of per se illegality for resale price maintenance as a vertical price restraint²⁰⁶ and replaced it with a rule of reason analysis in which courts are to examine the potential procompetitive effects of the price maintenance before deciding on its illegality.²⁰⁷ In fact, the majority illustrated its confidence in lower court interpretation of this new rule of reason analysis by writing that "[a]s courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive

202 See *Iqbal*, 129 S. Ct. at 1944; *Twombly*, 550 U.S. at 563.

203 See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893 (2008); Jason Bartlett, Comment, *Into the Wild: The Uneven and Self-Defeating Effects of Bell Atlantic v. Twombly*, 24 ST. JOHN'S J. LEGAL COMMENT. 73 (2009). For a thorough empirical study of the early effects of the *Twombly* decision, see Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

204 *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2273 (2009) (Roberts, C.J., dissenting).

205 551 U.S. 877 (2007).

206 See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408–09 (1911).

207 *Leegin*, 551 U.S. at 886–99.

restraints from the market and to provide more guidance to businesses.”²⁰⁸ It is telling that Justice Kennedy penned both *Leegin* and *Caperton*. His faith in the lower courts to handle these issues has not wavered,²⁰⁹ yet the Chief Justice strangely seems to believe that lower courts are capable of in-depth economic analysis,²¹⁰ but not capable of determining when due process requires judicial recusal based on a probability of bias standard.²¹¹

D. The Caperton Decision Will Not Bring the Legal Profession into Disrepute

Chief Justice Roberts’s second concern is that this decision “will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”²¹² Yet this assertion seems to ignore poll data that indicates public disapproval of Justice Benjamin’s actions. Polls show that sixty-eight percent would doubt a judge’s impartiality if he were to receive a significant campaign contribution from a party before him, and eighty-five percent believe that a judge should recuse himself—regardless of his partiality—if he were to receive such a contribution from a party.²¹³ In addition, public confidence in the judiciary has remained quite consistent over the last thirty years. Gallup poll data collected since January 1973 has consistently found that between sixty-five and eighty percent of the public has either a great deal or fair amount of trust and confidence in the judicial branch as headed by the Supreme Court.²¹⁴ Further, similar standards to that adopted

208 *Id.* at 898.

209 *Caperton*, 129 S. Ct. at 2266. While illustrating the previous instances the Court has attached due process standards to recusal matters, Justice Kennedy uses similar language to that used in *Leegin* in asserting his belief in lower court ability to address these unanswered questions and parameters: “Courts proved quite capable of applying the standards to less extreme facts.” *Id.*

210 Such antitrust analysis—particularly rule of reason analysis—is frequently considered among the most complex, expensive, and time-consuming practices in law. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 105 (2005) (“Under [the rule of reason] courts have engaged in unfocused, wide-ranging expeditions into practically everything about the business of large firms in order to determine whether a challenged practice was unlawful.”).

211 *Caperton*, 129 S. Ct. at 2269–72 (Roberts, C.J., dissenting) (“[T]he standard the majority articulates—‘probability of bias’—fails to provide clear, workable guidance for future cases.”).

212 *Id.* at 2274.

213 See Press Release, *supra* note 124.

214 See Jeffrey M. Jones, *Trust in Government Remains Low*, GALLUP (Sept. 18, 2008), <http://www.gallup.com/poll/110458/trust-government-remains-low.aspx>.

in *Caperton* are already in use in many jurisdictions to govern the conduct of lawyers and possible conflicts of interest.²¹⁵

It is my belief that this consistently solid public support for the judiciary will only be enhanced by judicial application of constitutional safeguards as demonstrated by the majority in *Caperton*. Rather than bringing the judiciary into disrepute as the Chief Justice fears, the Court has demonstrated that an underlying sense of fairness encompasses judicial decisions. It is important for citizens to feel confident that the judiciary—and Supreme Court in particular—is capable of rendering such a judgment in cases that clearly unsettle the public's trust in the courts and judicial integrity. It is unclear how addressing a problem which unsettles the public will cause less trust in the judiciary. Rather, the opposite seems true. Early empirical evidence suggesting that courts have neither had difficulty applying this new recusal standard nor been overwhelmed with motions asserting that the standard should apply in their case supports the idea that the Chief Justice was mistaken when he wrote that this case “will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.”²¹⁶ Instead, fixing the constitutional problems inherent in Justice Benjamin's actions is a more important result, as it allows faith to be restored in the system without overly burdening lower courts.

CONCLUSION

Only time will tell how lower courts continue to interpret the *Caperton* decision. The Court set forth a new due process recusal requirement based on the objective probability of bias, and as Chief Justice Roberts rightly points out, courts will have to construct the framework and scope of this requirement as new fact patterns are presented to them. However, early signs suggest the Chief Justice was wrong to be apprehensive about this outcome. Courts have neither been inundated with requests for judicial disqualification—particularly when compared to other recent rule changes initiated by the Supreme Court—nor have they struggled to apply the Court's *Caperton* test to the facts before them. As of yet, not a single court has found the facts before them to have risen to the extraordinary stan-

215 See KATHLEEN MAHER, AMERICAN BAR ASSOCIATION, KEEPING UP APPEARANCES (2005), available at http://www.abanet.org/judicialethics/resources/TPL_AppearanceofImpropriety.pdf (detailing the continued use of the “appearance of impropriety” standard for attorney conduct in many jurisdictions, despite its formal removal from the ABA's Model Rules of Professional Conduct).

216 *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

dard of the three million dollar campaign contribution to Justice Benjamin and required that another judge be disqualified. This illustrates that lower courts will only apply constitutional objective due process standards when the facts meet the “extreme facts” level of *Caperton* and that such an outcome will be understandably rare. The public can have more faith in a system which consists of objective due process protections against judicial recusal decisions. This will not “erode public confidence in judicial impartiality” as the Chief Justice suggests; rather, it will enhance public confidence while providing a necessary check on radical judicial impartiality.