NO ACTUAL BIAS NEEDED: THE INTERSECTION OF DUE PROCESS AND STATUTORY RECUSAL*

I. INTRODUCTION

Judges frequently come under fire in the court of public opinion for their failure to recuse. Justice Scalia was the subject of a media firestorm in 2004 when he refused to recuse himself from a case involving Vice President Dick Cheney after he and the Vice President had gone duck hunting together while the case was pending.[1] In the Ninth Circuit, by contrast, Chief Judge Alex Kozinski recused himself from an obscenity trial after the Los Angeles Times reported that his personal website contained sexually explicit images.[2] The Third Circuit conducted an investigation and found that while Judge Kozinski did not intend for the images to be publicly accessible, his behavior was careless, judicially imprudent, and deserving of admonishment.[3] However, the court declined to address Judge Kozinski's decision to recuse.[4]

Media hue and cry notwithstanding, a judge's decision to recuse or not to recuse from a case is rarely subject to review by other judges. For West Virginia Supreme Court of Appeals Justice Brent Benjamin, however, this usual rule did not apply. Justice Benjamin was roundly criticized by the media when he failed to recuse himself from a case where one party had contributed large sums to a political action committee that had supported Justice Benjamin in his election campaign.[5] In June 2009, the Supreme Court of the United States held in *Caperton v. A. T. Massey Coal Co.*[6] that the Due Process Clause required Justice Benjamin to recuse himself from the case.[7] The Court had never before considered the

---

* Marie McManus Degnan, J.D. Candidate, Temple University Beasley School of Law, 2011. I would like to thank my faculty advisor, Professor Craig Green, and the staff and editorial board of Temple Law Review. I would also like to thank my husband, Ryan, for acting as a sounding board for my ideas and for giving me support and encouragement throughout the writing process.

1. *See, e.g.*, Editorial, *Beyond the Duck Blind*, N.Y. TIMES, Mar. 15, 2004, at A20 (calling for Justice Scalia to recuse on ground that his personal friendship with Vice President Cheney fell within federal recusal statute's "impartiality might reasonably be questioned" standard).

2. *In re* Complaint of Judicial Misconduct, 575 F.3d 279, 280 (3d Cir. 2009); *see also* Scott Glover, *9th Circuit's Chief Judge Posted Sexually Explicit Matter on His Website*, L.A. TIMES, June 11, 2008, http://www.latimes.com/news/local/la-me-kozinski12-2008jun12,0,6220192.story (reporting nature of obscene material and fact that Judge Kozinski would soon preside over obscenity trial).

3. *In re Complaint of Judicial Misconduct*, 575 F.3d at 284.

4. *See id.* at 296 n.13 ("Absent special circumstance such as racial or ethnic bias, not present here, a judge's recusal decision is merits-related and, as such, is not a subject for determination under judicial misconduct rules.").

5. *See, e.g.*, Editorial, *Supreme Mess: High Court High Jinks*, CHARLESTON GAZETTE, Nov. 19, 2008, at 4A (describing West Virginia Supreme Court of Appeals' entanglement with campaign donor as "a supreme mess").

6. 129 S. Ct. 2252 (2009).

7. *Caperton*, 129 S. Ct. at 2265. See *infra* Part II.B.3.a for a detailed discussion of the Supreme

requirements of due process in the judicial election context.[8] Since thirty-nine states elect at least some of their judges,[9] the intersection between judicial election donations and constitutionally mandated recusal is potentially of widespread importance.

Part II.A of this Comment examines state judicial codes and the federal recusal statute. Part II.B examines the situations in which the Supreme Court has held that due process requires recusal. Parts II.B.1 and II.B.2 analyze the two categories of situations which the Court has historically found violate the Due Process Clause: a judge's pecuniary interest in the case's outcome and a judge's personal embroilment in a criminal contempt proceeding. Part II.B.3.a looks closely at the Court's recent decision concerning Justice Benjamin's failure to recuse in *Caperton*. Part II.B.3.b surveys courts' responses in the aftermath of the *Caperton* decision.

Part III.A of this Comment argues that *Caperton* made due process more stringent than it had been under the Court's older recusal precedents. Part III.B.1 further asserts that *Caperton* renders most state recusal codes and the federal recusal statute indistinguishable from the due process floor. Despite the *Caperton* Court's problematic reasoning, Part III.B.2 concludes that raising the due process floor to comport with recusal codes achieves a definition of due process that is more in line with popular notions of what comprises the constitutional guarantee of a fair trial.

II. OVERVIEW

"A fair trial in a fair tribunal is a basic requirement of due process."[10] The judge's impartiality is essential for implementing a fair trial. Impartiality implicates freedom from bias,[11] prejudice,[12] and interest.[13] Accordingly, the Supreme Court has recognized situations where due process requires a judge's recusal[14] from a case because of the judge's interest in the outcome. The Supreme

---

Court's opinion in *Caperton*.

8. *Caperton*, 129 S. Ct. at 2262.

9. Adam Liptak, *Justices Issue a Rule of Recusal in Cases of Judges' Big Donors*, N.Y. TIMES, June 9, 2009, at A1.

10. *In re* Murchison, 349 U.S. 133, 136 (1955).

11. "*Bias* implies a mental leaning in favor of or against someone or something." Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 2 n.5 (1994).

12. "*Prejudice* implies a preconceived and unreasonable judgment or opinion . . . marked by suspicion, fear, intolerance, or hatred." *Id*.

13. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 523 (1927) (finding that judge's pecuniary interest in outcome of case violated due process). The common law required recusal only when the judge had an interest in the case; bias or prejudice were not grounds for recusal. Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 512 (2007).

14. The terms "recusal" and "disqualification" are often used interchangeably. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 1.1 (2d ed. 2007). The Supreme Court generally uses "recuse" to refer to a judge's removal of himself or herself from a case and "disqualify" to refer to involuntary removal of a judge from a case, as by a litigant's motion pursuant to a statute or the Due Process Clause. *See, e.g.*, Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2258 (2009) ("Justice Starcher urged Justice Benjamin to recuse himself . . . . Caperton moved a third time for disqualification [of Justice Benjamin] . . . ."). The federal recusal statute, on the other hand, sets forth circumstances in which a "justice, judge, or

Court has observed that "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."[15] As an exercise of legislative discretion, all fifty states have passed judicial codes[16] and Congress has enacted a statute governing recusal of federal judges.[17] Recusal statutes and codes seek not only to implement due process of law, but also to foster a public perception of judicial impartiality.[18] The Supreme Court has considered few cases in which a litigant challenged a judge's failure to recuse on constitutional grounds.[19]

A. Recusal Statutes

The following will survey state judicial codes, the federal recusal statute, and their construction by courts. The federal recusal statute and the fifty state judicial codes adopted substantially the American Bar Association's Model Code of Judicial Conduct; accordingly, the federal recusal statute and these state codes are similar in structure, content, and policy considerations.

1. State Judicial Codes

All fifty states have adopted the American Bar Association's Model Code of Judicial Conduct ("Model Code") in substantial part.[20] Rule 2.11 of the Model Code

---

magistrate judge of the United States shall disqualify himself." 28 U.S.C. § 455 (2006).

15. *Tumey*, 273 U.S. at 523.

16. See *infra* Part II.A.1 for a discussion of state judicial codes.

17. See *infra* Part II.A.2 for a discussion of the federal recusal statute.

18. *See, e.g.*, Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 532 (2005) (observing that judiciary derives its legitimacy from its appearance of impartiality).

19. See *infra* Part II.B for a review of the Supreme Court's recusal precedents from 1927 through 2009.

20. The American Bar Association adopted the Model Code of Judicial Conduct in 1972. Since then, Congress and all fifty states have adopted Canon 2, Rule 2.11 (formerly Canon 3E) in substantial part. *See* 28 U.S.C. § 455(a) (2006); ALA. CANON OF JUDICIAL ETHICS 3C (2001); ALASKA CODE OF JUDICIAL CONDUCT CANON 3E (2010); ARIZ. CODE OF JUDICIAL CONDUCT R. 2.11 (2009); ARK. CODE OF JUDICIAL CONDUCT R. 2.11 (2009); CAL. CODE OF JUDICIAL ETHICS Canon 3E (2009); COLO. CODE OF JUDICIAL CONDUCT R. 2.11 (2010); CONN. CODE OF JUDICIAL CONDUCT Canon 3(c) (1974); DEL. JUDGES' CODE OF JUDICIAL CONDUCT Canon 3C (1994); FLA. CODE OF JUDICIAL CONDUCT Canon 3E (2010); GA. CODE OF JUDICIAL CONDUCT Canon 3E (2004); HAW. REV. CODE OF JUDICIAL CONDUCT R. 2.11 (2008); IDAHO CODE OF JUDICIAL CONDUCT Canon 3E (2008); ILL. CODE OF JUDICIAL CONDUCT Canon 3C (1993); IND. CODE OF JUDICIAL CONDUCT R. 2.11 (2010); IOWA CODE OF JUDICIAL CONDUCT Canon 3C (2009); KAN. CODE of JUDICIAL CONDUCT R. 2.11 (2009); KY. CODE OF JUDICIAL CONDUCT Canon 3E (2003); LA. CODE OF JUDICIAL CONDUCT Canon 3C (2003); ME. CODE OF JUDICIAL CONDUCT Canon 3E (2005); MD. CODE OF JUDICIAL CONDUCT Canon 3D (2005); MASS. CODE OF JUDICIAL CONDUCT Canon 3C (1998); MICH. CT. R. § 2.003(C) (2010); MINN. CODE OF JUDICIAL CONDUCT R. 2.11 (2009); MISS. CODE OF JUDICIAL CONDUCT Canon 3E (2002); MO. CODE OF JUDICIAL CONDUCT Canon 3E (2004); MONT. CODE OF JUDICIAL CONDUCT R. 2.12 (2008); NEB. CT. R. § 5-203(E) (2008); NEV. CODE OF JUDICIAL CONDUCT R. 2.11 (2010); N.H. CODE OF JUDICIAL CONDUCT Canon 3E (2010); N.J. CODE OF JUDICIAL CONDUCT Canon 3C (1994); N.M. CODE OF JUDICIAL CONDUCT R. 21-400 (2004); N.Y. R. OF THE CHIEF ADMIN. JUDGE § 100.3(E) (2010); N.C. CODE OF JUDICIAL CONDUCT Canon 3C (1998); N.D. CODE OF JUDICIAL CONDUCT Canon 3E (2006); OHIO CODE OF JUDICIAL CONDUCT Canon 3E (2009); OKLA. CODE OF JUDICIAL CONDUCT Canon 3E (2010); OR. CODE OF JUDICIAL CONDUCT R. 2-106(A) (1996); PA. CODE OF JUDICIAL CONDUCT Canon 3C (2005); R.I. CODE OF JUDICIAL CONDUCT Canon

governs recusal.[21] Rule 2.11(A) provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to" six specific examples then listed.[22] The comment to Rule 2.11 indicates that this provision is a catch-all, and that recusal is not limited to the situations given as examples.[23]

Rule 2.11(A)(1) through (6) require recusal in instances of the judge's personal bias against a party or lawyer; the judge's personal knowledge of the facts of the proceeding; an economic interest[24] in the outcome of the litigation on the part of the judge or his spouse, parent, or child; when the judge, his spouse, or his close family member is a party, trustee or officer to a party, lawyer, material witness, or has an interest substantially affected by the proceeding; and when the judge has made public statements that appear to commit the judge to an issue in the case.[25] Rule 2.11(A)(4) provides for recusal when "the judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than $[insert amount],"[26] leaving it up to the state adopters of the Model Code to determine the year and dollar amounts. At least one state has adopted Rule 2.11(A)(4).[27]

2. The Federal Recusal Statute

28 U.S.C. § 455 governs recusal of federal judges and substantially incorporates the Model Code, providing a general command that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[28] A mere "appearance of impropriety" to an objective observer is enough to trigger disqualification under § 455(a); the judge need not even be aware of the disqualifying circumstances.[29]

3E (2009); S.C. CODE OF JUDICIAL CONDUCT Canon 3E (2010); S.D. CODE OF JUDICIAL CONDUCT Canon 3E (2006); TENN. CODE OF JUDICIAL CONDUCT Canon 3E (2002); TEX. CODE OF JUDICIAL CONDUCT Canon 3D (2002); UTAH CODE OF JUDICIAL CONDUCT R. 2.11 (2010); VT. CODE OF JUDICIAL CONDUCT Canon 3E (1994); CANONS OF JUDICIAL CONDUCT FOR VA. Canon 3E (2004); WASH. CODE OF JUDICIAL CONDUCT Canon 3D (1995); W. VA. CODE OF JUDICIAL CONDUCT Canon 3E (1993); WIS. SCR 60.04(4) (2010); WYO. CODE OF JUDICIAL CONDUCT R. 2.11 (2009). See *infra* Part II.A.2 for a discussion of 28 U.S.C. § 455, the federal recusal statute modeled on the Model Code.

21. MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2004) (formerly Canon 3E).

22. *Id*.

23. *Id*. at R. 2.11 cmt. 1.

24. The economic interest must be greater than a de minimis interest in order to trigger disqualification. *Id*. at R. 2.11(A)(2)(c).

25. *Id*. at R. 2.11(A).

26. *Id*. at R. 2.11(A)(4).

27. *See* UTAH CODE OF JUDICIAL CONDUCT Canon 2.11(A)(4) (2010), *available at* http://jcc.utah.gov/code/index.html (setting minimum contribution amount at fifty dollars).

28. 28 U.S.C. § 455(a) (2006).

29. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859–60 (1988). The *Liljeberg* Court concluded that section 455(a) could not require the judge's actual knowledge because such an interpretation would render extraneous section 455(b)(4)'s explicit requirement of knowledge. *Id.* at 859.

Liljeberg v. Health Services Acquisition Corp.[30] exemplified the sort of "appearance of impropriety" that—even without the judge's awareness of it—gives rise to disqualification. In *Liljeberg*, Judge Collins, a district judge, had served on the board of trustees of a university that had sold a parcel of land to the petitioner with the understanding that the petitioner would build a hospital on the land.[31] The dispute centered on the respondent's challenge to the petitioner's ownership of a corporation that was going to construct the hospital.[32] The value of the negotiations to the university therefore hinged on the petitioner's success before Judge Collins.[33] The Supreme Court held that even though Judge Collins had forgotten about the university's interest in the outcome, his participation in the case violated § 455(a).[34] A confluence of facts—Judge Collins' regular attendance at university board of trustees meetings, the other trustees' awareness of Judge Collins' conflict of interest, and Judge Collins' failure to recuse himself when he finally did discover the university's interest in the case—might "reasonably cause an objective observer to question Judge Collins' impartiality" and therefore required recusal.[35] Courts are divided over whether the appropriate standard requires examining perceived impartiality from the perspective of a reasonable member of the general public or from the perspective of a reasonable judge.[36]

B. The Due Process Floor

At common law, a judge's pecuniary interest in the outcome of a case was the only situation that required recusal.[37] A judge's bias or prejudice was not enough to require recusal.[38] Since 1927, the Supreme Court has identified additional instances in which the Due Process Clause requires recusal.[39] Few such cases

30. 486 U.S. 847 (1988).

31. *Liljeberg*, 486 U.S. at 850.

32. *Id.*

33. *Id.*

34. *Id.* at 861.

35. *Id.* at 865–67.

36. *Compare* United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998) (defining "hypothetical reasonable observer" as person outside judicial system who is not unduly concerned with judicial bias), *with In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990) (observing importance of incorporating judge's perspective in recusal standard for fear that outside observers will fail to appreciate mental fitness of judges).

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

38. *Id.* at 609–10; *see also* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (stating that though issues of "kinship, personal bias, state policy, remoteness of interest" are left to legislature, judge's pecuniary interest in outcome of case violates due process rights).

39. *See* Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009) (holding that due process required judge to recuse when one litigant had contributed large amounts to political action committee that had campaigned on judge's behalf); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 823–24 (1986) (holding that state supreme court judge's interest in affirming large jury verdict, which would increase judge's chances of prevailing in pending personal lawsuit, was violation of due process and judge therefore should have recused); Ward v. Vill. of Monroeville, 409 U.S. 57, 60 (1972) (holding that mayor's interest in enriching town coffers violated due process when mayor sat as judge who collected fines only upon conviction); Mayberry v. Pennsylvania, 400 U.S. 455, 463–64 (1971) (holding that defendant's vicious personal attacks on judge's integrity required judge's recusal from contempt proceeding); *In re* Murchison, 349 U.S. 133, 138–39 (1955) (holding that judge's role as both judge and

exist, however, because "'most matters relating to judicial disqualification [do] not rise to a constitutional level.'"[40] Sections 1, 2, and 3 *infra* examine the three situations in which the Supreme Court has held that the Due Process Clause requires a judge's recusal.

1. Direct, Personal, and Substantial Pecuniary Interest

The common law rule concerning judicial recusal was 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.'"[41] *Tumey v. Ohio*[42] held that the Due Process Clause of the Fourteenth Amendment incorporated this common law rule.[43] In *Tumey*, the Ohio Prohibition Act empowered village mayors to sit as judges in cases concerning violations of the Act.[44] The village of North College Hill passed an ordinance providing for its mayor to pocket as his costs a portion of the fine imposed on defendants convicted under the Prohibition Act.[45] The ordinance further provided that fifty percent of the fine would be deposited into a village fund used for enforcing prohibition laws.[46] Such a fine was levied only when a defendant was convicted.[47] During a six-month period in 1923, the mayor of North College Hill received $696.35 in costs from trying cases under the Prohibition Act, in addition to his regular salary.[48] The mayor received twelve dollars in costs upon convicting the *Tumey* defendant of violating the Act.[49]

The Supreme Court held that the mayor's power to hear prohibition cases and impose fines on those convicted was a violation of the defendant's due process rights for two reasons. The first reason was the judge's "direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant]."[50] The Court examined the English common law tradition and found that there was no custom or tradition of conditioning judicial officers' compensation on their convicting the defendant.[51] On the contrary, the Court found that "[t]here was at the common law the greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace."[52] The Court

---

grand jury in earlier proceeding from which contempt charges arose required his recusal from contempt trial); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that judge's receipt of costs only upon conviction of defendant was violation of due process requiring recusal).

40. *Caperton*, 129 S. Ct. at 2259 (alteration in original) (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).

41. *Id.* (alteration in original) (quoting THE FEDERALIST NO. 10, at 59 (J. Madison) (J. Cooke ed., 1961)).

42. 273 U.S. 510 (1927).

43. *Tumey*, 273 U.S. at 523.

44. *Id.* at 516–17.

45. *Id.* at 519.

46. *Id.* at 518.

47. *Id.* at 520.

48. *Id.* at 521–22.

49. *Id.* at 523.

50. *Id.*

51. *Id.* at 524–26.

52. *Id.* at 525.

rejected Ohio's argument that the compensation was small enough that it was unlikely to influence a judicial officer.[53] The Court concluded its discussion of the judge's "direct, personal, substantial, pecuniary interest" with broad dicta: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."[54]

The second reason that the Court found a due process violation was the village ordinance's provision for a portion of the fines from the Prohibition Act to go to the village treasury.[55] The mayor's interest as an executive officer in securing monies for the village made his participation as a judicial officer a violation of the Due Process Clause.[56] The "mere union of the executive power and the judicial power" in the mayor did not violate due process.[57] However, the mayor's responsibility for the financial condition of the village—coupled with his power to convict defendants and impose fines that would flow directly to the village treasury, and to do so in trials without a jury and with limited opportunity for review—created the likelihood of an unfair trial.[58]

Ward v. Village of Monroeville[59] clarified the test the Court laid out in *Tumey*. In *Ward*, an Ohio statute empowered village mayors to sit as judges in cases of village ordinance violations.[60] Persons convicted of such violations in the village of Monroeville, Ohio, paid a fine that went directly to the village treasury.[61] Fines from cases tried in the mayor's court comprised between roughly one-third to one-half of Monroeville's revenues in 1964, 1965, and 1966.[62]

The Supreme Court held that this procedure was a due process violation that fell squarely within its sweeping "possible temptation" language in *Tumey*.[63] The Court explained that the fact that the *Tumey* mayor personally pocketed the costs he received from convictions "did not define the limits of the principle."[64] Indeed, the Court in *Ward* held that the mayor's responsibility for the financial condition of the village "offer[ed] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant" because a conviction would enrich the village coffers.[65]

Aetna Life Insurance Co. v. Lavoie[66] is a modern application of the principles established in *Tumey* and *Ward*. In *Lavoie*, the Alabama Supreme Court affirmed,

53. *Id.* at 523–24.
54. *Id.* at 532.
55. *Id*. at 533.
56. *Id.*
57. *Id.* at 534.
58. *Id.* at 533.
59. 409 U.S. 57 (1972).
60. *Ward*, 409 U.S. at 57.
61. *Id.* at 58.
62. *Id.*
63. *Id.* at 59.
64. *Id.*
65. *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)) (internal quotation marks omitted).
66. 475 U.S. 813 (1986).

in a 5-4 decision, a jury verdict awarding plaintiff-appellees $3.5 million in punitive damages in a lawsuit against the appellant insurer for the tort of bad-faith refusal to pay a valid insurance claim.[67] In a per curiam opinion, the Alabama Supreme Court recognized its holding as clarifying its earlier cases, which did not decide whether a plaintiff could maintain a bad-faith lawsuit when the insurer had made partial payment of the claim.[68] Justice Embry voted with the majority and joined the per curiam opinion.[69] The award was thirty-five times the amount of the largest punitive award ever approved by the Alabama Supreme Court.[70]

While the matter was pending before the Alabama Supreme Court, Justice Embry had filed two lawsuits in an Alabama trial court alleging bad-faith failure to pay an insurance claim and seeking punitive damages.[71] When the appellant in *Lavoie* learned of Justice Embry's pending litigation, it moved for his recusal.[72] The Alabama Supreme Court denied the motion.[73] In a 5-4 decision, the Alabama Supreme Court also denied the appellant's motion for rehearing.[74]

The Supreme Court of the United States held that the Due Process Clause of the Fourteenth Amendment required Justice Embry's recusal.[75] The Court stated that the test was whether Justice Embry had a "direct, personal, substantial, pecuniary interest" in the outcome of the case.[76] "[A] reasonable formulation of the issue" was whether Justice Embry's participation in the case "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance

---

67. *Lavoie*, 475 U.S. at 816.

68. *Id.* at 816–17.

69. *Id.* at 817.

70. *Id.* at 823.

71. *Id.* at 817.

72. *Id.* Because Justice Embry had brought his lawsuit against one of the insurers as a representative of state employees insured under a group plan, the appellant filed a second motion for recusal of the eight other Alabama Supreme Court justices as potential class members. *Id.* After each member of the court considered the issue of his recusal individually, the court unanimously denied the recusal motion. *Id.* at 817–18. The Supreme Court of the United States affirmed. *Id.* at 825. The Supreme Court reasoned that while the justices may have had a slight interest in the outcome of Justice Embry's suit, the interest did not rise to the level of "direct, personal, substantial, [and] pecuniary." *Id.* at 825–26 (alteration in original) (quoting Ward v. Vill. of Monroeville, 409 U.S. 57, 60 (1972)) (internal quotation marks omitted). Furthermore, there was no evidence that the other eight justices were aware of Justice Embry's pending lawsuit before they issued their decision on the merits. *Id.* at 826.

73. *Id*. at 817–18. Justice Embry considered the issue of his recusal individually. *Id.* at 818. The Alabama Supreme Court voted unanimously to deny both of the appellant's recusal motions. *Id.* at 817–18. See *supra* note 72 for a discussion of the appellant's motion for recusal of the other eight justices.

74. *Lavoie*, 475 U.S. at 818.

75. *Id.* at 825. The Court rejected the appellant's argument that Justice Embry's deposition testimony, which revealed a general frustration with insurance companies, constituted a disqualifying bias under the Due Process Clause. *Id.* at 820–21. The Court explained that only "the most extreme of cases" of such bias would rise to the level of a constitutional violation. *Id.* at 821. Bias and prejudice as judicial disqualifiers are usually matters of "legislative discretion." Tumey v. Ohio, 273 U.S. 510, 523 (1927). The *Lavoie* Court emphasized that Congress and the states were free to adopt more stringent recusal standards than those constitutionally required. *Lavoie*, 475 U.S. at 828. See *supra* Part II.A for a discussion of state and federal codes governing judicial recusal.

76. *Lavoie*, 475 U.S. at 822 (quoting *Tumey*, 273 U.S. at 523).

nice, clear and true."[77] The Court concluded that Justice Embry had a "direct, personal, substantial, [and] pecuniary" interest in the outcome of *Lavoie* because he received a "tidy sum" from the insurance company in his class action lawsuit soon after *Lavoie* was decided.[78]

Justice Embry's participation in the case constituted his "act[ing] as a judge in his own case," a due process violation under *In re Murchison*.[79] In *Lavoie*, Justice Embry cast the deciding vote in a case clarifying unsettled law that would directly control the disposition of his suit pending in a lower state court.[80] The Alabama Supreme Court's affirmation of the largest ever punitive damages award "undoubtedly 'raised the stakes' for [the insurance company in Justice Embry's suit], to the benefit of Justice Embry" when the insurance company settled with him.[81] The Alabama Supreme Court's opinion in *Lavoie* "had the clear and immediate effect of enhancing both the legal status and the settlement value" of Justice Embry's lawsuit.[82] The United States Supreme Court vacated and remanded the decision because Justice Embry had cast the deciding vote and authored the court's opinion.[83] The Court did not decide whether vacatur would be required if Justice Embry's vote had not been decisive.[84]

2. Criminal Contempt: An "Embroiled" Judge

The Supreme Court has recognized due process problems in limited circumstances relating to a judge's participation in multiple proceedings in the

77. *Id.* (omissions in original) (quoting *Ward*, 409 U.S. at 60) (internal quotation mark omitted). *Tumey* formulated the test as whether a procedure "would offer a possible temptation to *the average man as a judge* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." 273 U.S. at 532 (emphasis added). *Ward* and *In re Murchison* articulated the standard by quoting the *Tumey* language in its entirety. *Ward*, 409 U.S. at 60; *In re* Murchison, 349 U.S. 133, 136 (1955). The *Lavoie* Court's alteration of this quotation from "the average man as a judge" to "the average . . . judge" marks an unexplained departure from the original *Tumey* language. The Court later incorporated the "average judge" language in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 n.12 (1988), and in *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2261 (2009), both instances in quotations of *Lavoie*. However, the *Caperton* Court also included a quote to the original language from *Tumey*. *Caperton*, 129 S. Ct. at 2260. The Court's willingness to use "the average man as a judge" and "the average . . . judge" interchangeably suggests that the proper metric is "the average judge," rather than "the average man off the street sitting as a judge for a day." The *Caperton* Court's paraphrase of the test as "whether the average judge in his position is 'likely' to be neutral" bolsters this interpretation. *Id.* at 2262. On the other hand, Chief Justice Roberts's dissent in *Caperton* expressed uncertainty as to whether the standard was "a reasonable person, a reasonable lawyer, or a reasonable judge." *Id.* at 2270 (Roberts, C.J., dissenting). This debate mirrors the division in lower federal courts over the proper definition of the objective observer in 28 U.S.C. § 455(a) (2006). See *supra* note 36 and accompanying text for a discussion of this split.

78. *Lavoie*, 475 U.S. at 824 (internal quotation marks omitted).

79. *Id.* (quoting *Murchison*, 349 U.S. at 136) (internal quotation marks omitted).

80. *Id.* at 823–24.

81. *Id.*

82. *Id.* at 824.

83. *Id.* at 828.

84. *Id.* at 827 n.4.

criminal contempt context. In *In re Murchison*,[85] a Michigan statute permitted any state judge to act as a "one-man grand jury" and compel witnesses to testify in secret.[86] A judge acting as a "one-man grand jury" called two witnesses to testify before him.[87] Believing that one witness had committed perjury, the judge charged him with perjury and criminal contempt.[88] When the other witness refused to testify without a lawyer present, the judge charged him with contempt as well.[89] The judge then tried both witnesses in open court, found them both guilty of contempt, and imposed sentence.[90]

The Supreme Court held that it was a violation of due process for the same judge who charged the witnesses with contempt in a secret grand jury proceeding to subsequently try, convict, and sentence them for contempt.[91] Citing *Tumey*, the Court observed that the proper inquiry centered on whether the procedure would "offer a possible temptation to the average man as a judge" not to remain impartial, and that actual bias need not exist for a procedure to violate due process.[92] The likelihood that the judge's opinions about the secret proceeding would color his judgment of the contempt proceedings in open court created a constitutionally impermissible possibility of partiality.[93] The judge's role essentially as a witness for the prosecution exacerbated the due process problem because the defendants did not have an opportunity to cross-examine the judge as they would any other witness.[94]

In *Mayberry v. Pennsylvania*,[95] a defendant on trial for charges arising from his conduct while in prison repeatedly insulted the judge and called him names.[96] The judge found the defendant guilty of criminal contempt.[97] The Supreme Court held that the Due Process Clause of the Fourteenth Amendment required that a defendant who was charged with criminal contempt because of personal attacks on the judge receive a public trial on the contempt charges with a different

85. 349 U.S. 133 (1955).

86. *Murchison*, 349 U.S. at 133.

87. *Id.* at 134.

88. *Id.* at 134–35.

89. *Id.* at 135.

90. *Id.*

91. *Id.* at 139.

92. *Id.* at 136 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

93. *Id.* at 138. When convicting one of the witnesses for contempt, the judge in *Murchison* appeared to take into account the witness's insolence during the secret grand jury proceeding even though this fact was not in the record. *Id.* Although the Supreme Court held that actual bias need not exist, the Court suggested that the judge's reliance on "his own personal knowledge and impression" of the grand jury hearing indicated that he was in fact biased. *Id.*

94. *Id.* at 138–39.

95. 400 U.S. 455 (1971).

96. *Mayberry*, 400 U.S. at 455–62. The contempt charges included eleven instances where the defendant launched personal attacks at the judge and disrupted the trial. *Id.* The record showed that the defendant called the judge a "dirty sonofabitch," *id.* at 456, a "dirty, tyrannical old dog," *id.* at 457, a "stumbling dog," and a "bum." *Id.* at 458. The defendant also told the judge to "[g]o to hell" and accused him of "working for . . . . [t]he prison authorities." *Id*.

97. *Id.* at 455.

judge.[98] Disruptive conduct by a party or a lawyer may not be enough to disqualify the judge;[99] however, "[n]o one so cruelly slandered [as the *Mayberry* trial judge] is likely to maintain that calm detachment necessary for fair adjudication."[100]

3. The "Extreme Facts" of *Caperton*

a. The Caperton *Opinion*

Caperton v. A. T. Massey Coal Co.[101] is "an exceptional case"[102] in which the Supreme Court concluded that a litigant's extraordinary contributions to a state judge's election campaign could require the judge's recusal under the Due Process Clause.[103] The facts of *Caperton* are "extreme."[104] In a West Virginia trial court in August 2002, petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales ("Caperton") won a fifty-million dollar jury verdict against respondent A. T. Massey Coal Co. ("Massey") for fraudulent misrepresentation, concealment, and tortious interference.[105] Massey filed several post-trial motions challenging the verdict, all of which the trial court denied.[106]

In 2004, before Massey appealed, West Virginia held its judicial elections.[107] Don Blankenship—Massey's chairman, chief executive officer, and president—decided to support attorney Brent Benjamin in Benjamin's run for justice of the West Virginia Supreme Court of Appeals, the state's highest court.[108] Blankenship donated one thousand dollars, the statutory maximum, to Benjamin's campaign and gave 2.5 million dollars to a political action committee that supported Benjamin's run for justice.[109] Blankenship also spent over five hundred thousand dollars on independent expenditures for advertisements and direct mailings supporting Benjamin's campaign.[110] Benjamin won the election with 53.3% of the vote.[111] The incumbent received 46.7% of the vote.[112]

98. *Id.* at 466.

99. *Id.* at 465–66 (citing Ungar v. Sarafite, 376 U.S. 575, 584 (1964)) (finding that witness's disobedient and disruptive conduct was not hostile enough to raise due process problems even though judge who had participated in earlier proceeding convicted witness of criminal contempt).

100. *Id.* at 465. The Court distinguished *Mayberry* from *Ungar* in that the "disagreeable commentary" in *Ungar* did not rise to the level of "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." *Id.* at 465–66 (quoting *Ungar*, 376 U.S. at 584) (internal quotation marks omitted).

101. 129 S. Ct. 2252 (2009).

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

103. *Id.* at 2263–64.

104. *Id.* at 2265.

105. *Id.* at 2257.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

In October 2005, Caperton moved to disqualify Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, citing Blankenship's contributions to Justice Benjamin's campaign.[113] In April 2006, Justice Benjamin denied the motion, noting that he found "no objective information . . . to show that this Justice has a bias for or against any litigant . . . or that this Justice will be anything but fair and impartial."[114]

In December 2006, Massey filed a petition for appeal in the West Virginia Supreme Court of Appeals.[115] The Supreme Court of Appeals reversed the verdict against Massey by a 3-2 vote.[116] The three-Justice majority consisted of then-Chief Justice Davis, Justice Maynard, and Justice Benjamin.[117] Caperton moved for rehearing and for disqualification of Justice Benjamin.[118] Justice Benjamin denied Caperton's recusal motion.[119] Caperton also moved for disqualification of Justice Maynard, who had been seen vacationing with Blankenship while the case was pending.[120] Justice Maynard granted Caperton's recusal motion.[121] Massey moved for disqualification of Justice Starcher, who had publicly criticized Blankenship's involvement in the judicial election.[122] Justice Starcher granted Massey's recusal motion and, in his recusal memo, called for Justice Benjamin to recuse himself as well.[123] Justice Benjamin did not recuse himself.[124]

Upon rehearing, Justice Benjamin chose two judges to replace Justices Maynard and Starcher.[125] Caperton for a third time moved for disqualification of Justice Benjamin on the grounds that "a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial," which was the standard for disqualification in West Virginia.[126] Justice Benjamin again denied the motion.[127] The newly composed court again reversed the jury verdict by a 3-2 vote, with Justice Benjamin joining the majority.[128]

---

113. *Id.*

114. *Id.* at 2257–58 (first omission in original) (internal quotation marks omitted).

115. *Id.* at 2258.

116. *Id.* While noting that "Massey's conduct warranted the type of judgment rendered in this case," the majority found that two procedural grounds—namely, res judicata and a forum selection clause in a contract to which Massey was not a party—warranted reversal of the jury verdict. *Id.* (internal quotation marks omitted). In dissenting opinions, Justice Starcher charged that the "majority's opinion is morally and legally wrong" and Justice Albright argued that the majority misapplied the law. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (internal quotation marks omitted).

127. *Id.*

128. *Id.* The dissenting justices argued that the majority opinion was "fundamentally unfair" and that there were "genuine due process implications arising under federal law" stemming from Justice

The Supreme Court of the United States held that Justice Benjamin's failure to recuse himself violated the Due Process Clause of the Fourteenth Amendment.[129] The Court reiterated the "controlling principle" from *Tumey v. Ohio*:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.[130]

The Court reviewed its prior recusal jurisprudence and concluded: "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[131] Citing the "difficulties of inquiring into actual bias," the Court emphasized "the need for objective rules."[132] Therefore, Justice Benjamin's search of his own motivations, in which he turned up no actual basis, was irrelevant to the Court's inquiry.[133]

The Court concluded that:

> [T]here 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.[134]

Benjamin's failure to recuse himself. *Id.* at 2258–59.

129. *Id.* at 2265.

130. *Id.* at 2260 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)) (internal quotation marks omitted).

131. *Id.* at 2262. In articulating the controlling test for constitutionally mandated disqualification, the Court borrowed concepts and language from *Withrow v. Larkin*, 421 U.S. 35 (1975), but did not discuss the case directly. *Withrow* addressed a constitutional challenge to a Wisconsin statute authorizing a state examining board (the "Board") to regulate the licensing of physicians. *Id.* at 37–38. The *Withrow* Court held that the Board's "combination of investigative and adjudicative functions" did not create an "unconstitutional risk of bias in administrative adjudication" because there was insufficient evidence to overcome the presumption of fairness attributed to state administrative agencies. *Id.* at 47, 55. The *Caperton* Court, in turn, adopted *Withrow*'s language concerning the standard for ascertaining constitutionally intolerable judicial bias while omitting *Withrow* from its discussion of prior recusal cases. *Caperton*, 129 S. Ct. at 2259, 2263.

132. *Id.* at 2263. In contrast to the *Caperton* Court's concern about the difficulty of inquiring into one's own personal biases, the Court's prior recusal precedents emphasized the presumption of judicial honesty and integrity. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *361) (observing traditional common law presumption of judicial impartiality); *Withrow*, 421 U.S. at 55 (finding insufficient evidence of bias to overcome presumption of honesty and integrity of state adjudicative agency). While *Caperton* did not emphasize the presumption of honesty and integrity, it is unlikely that *Caperton* eliminated it. *See* Henry v. Jefferson Cnty. Comm'n, No. 3:06-CV-33, 2009 U.S. Dist. LEXIS 78890, at *10–11 (N.D. W. Va. Sept. 2, 2009) (rejecting plaintiff's contention that *Caperton* changed *Withrow* test and observing that *Caperton*'s egregious facts made it unnecessary to weigh objective risk of bias against presumption of honesty and integrity).

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

134. *Id.* at 2263–64. *Caperton* has been criticized for its failure to acknowledge that Justice Benjamin did not hear Massey's appeal until two years after the election, and that in the interim Justice Benjamin had ruled against Massey in several cases in which Massey was the plaintiff. *See, e.g.*, James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The* Sui Generis *Recusal Test of*

Blankenship's campaign efforts in this "exceptional case" created a "serious risk of actual bias—based on objective and reasonable perceptions."[135] Blankenship's expenditures in his effort to unseat the incumbent "eclipsed the total amount spent by all other Benjamin supporters," [136] supporting a conclusion that his efforts had a "significant and disproportionate influence in placing [Justice Benjamin] on the case. . . ."[137] The Court rejected Massey's argument that recusal was not required because Blankenship had not caused Justice Benjamin's election victory.[138] The Court countered that *Tumey*'s objective test—whether Blankenship's influence on the election would "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true"—was the proper inquiry.[139] The "temporal relationship" between Blankenship's campaign contributions, the election, and the pending appeal was a persuasive factor in the Court's analysis.[140] The Court emphasized the narrowness of its holding, which "addresse[d] an extraordinary situation" to which no comparable cases existed.[141]

Chief Justice Roberts and Justice Scalia wrote dissents.[142] Chief Justice Roberts' dissent criticized the majority for improperly expanding the reach of the Due Process Clause beyond the two scenarios in which the Court had theretofore found recusal to be constitutionally required—namely, where the judge had a pecuniary interest in the outcome of the case and in criminal cases where the judge had participated in an earlier proceeding. [143] His dissent cautioned that the majority's holding injected uncertainty into the law and "provide[d] no guidance to judges and litigants about when recusal [would] be constitutionally required"

Caperton v. Massey, 60 SYRACUSE L. REV. 305, 312 (2010) (arguing that *Caperton* majority should have considered countervailing considerations such as Justice Benjamin's four rulings against Massey since 2005); Andrew L. Frey & Jeffrey A. Berger, *A Solution in Search of a Problem: The Disconnect Between the Outcome in* Caperton *and the Circumstances of Justice Benjamin's Election*, 60 SYRACUSE L. REV. 279, 287–88 (2010) (arguing that Justice Benjamin's track record of voting against Massey belied actual bias toward Massey in *Caperton*); Stephen M. Hoersting & Bradley A. Smith, *The* Caperton *Caper and the Kennedy Conundrum*, 2008-09 CATO SUP. CT. REV. 319, 324 (2009) (observing that Justice Benjamin had ruled against Massey in prior case with verdict nearly five times larger than that in *Caperton*); Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A. T. Massey Coal Co., 60 SYRACUSE L. REV. 247, 270 (2010) (observing that Justice Benjamin voted to deny review of $243 million verdict against Massey shortly after deciding *Caperton*); Adam Liptak, *Case May Alter the Election of Judges*, N.Y. TIMES, Feb. 15, 2009, at A29 (observing that Massey was frequently in court as plaintiff).

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

136. *Id.* at 2264.

137. *Id.* at 2263–64.

138. *Id.* at 2264.

139. *Id.* (omissions in original) (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)) (internal quotation mark omitted).

140. *Id.* at 2264–65. The Court analogized the common law rule that "[n]o man is allowed to be a judge in his own cause," *id.* at 2259 (alteration in original) (quoting THE FEDERALIST NO. 10, *supra* note 41, at 59), to the situation in *Caperton*: "[S]imilar fears of bias can arise when . . . a man chooses the judge in his own cause." *Id.* at 2265.

141. *Id.* at 2265.

142. *Id.* at 2267 (Roberts, C.J., dissenting); *id.* at 2274 (Scalia, J., dissenting).

143. *Id.* at 2267 (Roberts, C.J., dissenting).

because a "'probability of bias' cannot be defined in any limited way."[144] His dissent set forth a forty-item list of situations in which courts post-*Caperton* would have to determine, "[w]ith little help from the majority,"[145] whether recusal was required.[146] Chief Justice Roberts's dissent also took issue with the majority's characterization of Blankenship's expenditures as "campaign contributions" and questioned whether the expenditures affected the outcome of the election.[147]

Justice Scalia's dissent accused the majority of undermining certainty in the law and of eroding public confidence in the judiciary by "adding to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim."[148] The precise inquiry required for this new ground of litigation, Justice Scalia predicted, would "be indeterminate for years to come, if not forever."[149] Justice Scalia concluded by likening the majority's new rule to a continuation of a "quixotic quest to right all wrongs and repair all imperfections through the Constitution."[150]

b. The Fallout of Caperton

In contrast to the dissenting Justices' concern that the majority had created a wide-reaching, ill-defined right that would "do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case,"[151] the majority took pains to emphasize the "extreme facts" under which the case arose.[152] In the months since the *Caperton* decision, lower federal courts and state courts have latched onto the majority's "extreme facts" language when

144. *Id.* Amici curiae also argued that a "probability of bias" standard would be unworkable. *See, e.g.*, Brief for James Madison Center for Free Speech as Amici Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 U.S. S. Ct. Briefs LEXIS 110, at *24–26 (arguing that mandatory recusal based on campaign spending would clog courts with recusal motions and enable litigants to use recusal offensively); Brief for Law Professors Ronald D. Rotunda and Michael R. Dimino as Amici Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 U.S. S. Ct. Briefs LEXIS 113, at *14 (expressing concern that "probability of bias" standard would encourage judge shopping); Brief for the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah as Amici Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 U.S. S. Ct. Briefs LEXIS 111, at *7–9, *19 (arguing that "probability of bias" standard would improperly federalize state recusal practice and would be impossible to administer consistently); Brief for Ten Current and Former Chief Justices and Justices as Amici Curiae Supporting Respondents, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 U.S. S. Ct. Briefs LEXIS 114, at *23 (warning that "appearance-based due process recusals" would enable litigants to use recusal offensively). *See generally* Bopp & Woudenberg, *supra* note 134, at 322–23 (arguing that *Caperton* enables litigants to judge-shop by making campaign contributions to judges they expect would rule against them).

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

146. *Id.* at 2269–72. Chief Justice Roberts's list included such questions as "[h]ow much money is too much money," whether the judge's vote must be outcome determinative, and whether a personal friendship between the judge and a party or lawyer creates a probability of bias. *Id.* at 2269–70.

147. *Id.* at 2273–74.

148. *Id.* at 2274 (Scalia, J., dissenting).

149. *Id.*

150. *Id.* at 2275.

151. *Id.* at 2267 (Roberts, C.J., dissenting).

152. *Id.* at 2265 (majority opinion).

considering *Caperton* motions.[153] A litigant has yet to successfully challenge a judge's refusal to recuse under the *Caperton* standard.

The California Supreme Court has interpreted *Caperton*'s standard as applying only to "exceptional case[s] presenting extreme facts."[154] The court distinguished "probability" of actual bias from "appearance" of bias and concluded that only the former implicated due process.[155] Despite acknowledging *Caperton*'s articulation of a broad objective standard for due process-mandated recusal, the court expressed reluctance to find a due process violation outside of the three factual scenarios in which the United States Supreme Court had recognized that due process required recusal.[156] The court, therefore, rejected the defendant's argument that the Due Process Clause required a trial judge to recuse himself because of his personal friendship with another judge whom the defendant was accused of stalking.[157]

In *State v. Allen*,[158] a fractured opinion, the Wisconsin Supreme Court divided bitterly over whether the court had jurisdiction under Wisconsin law to decide whether Supreme Court Justice Michael Gableman should have recused himself from the case.[159] Citing Justice Gableman's "tough on crime" judicial electioneering[160] and the Justice's belief that "defense counsel should not claim statutory or constitutional rights for a guilty client or perhaps a certain type of guilty client,"[161] the petitioner argued that the Due Process Clause required Justice Gableman's recusal from the case in which the petitioner had been a criminal defendant.[162] A per curiam order denied the petitioner's motion for Justice Gableman's recusal because no single opinion garnered the required four votes.[163]

---

153. *See, e.g.*, Bauer v. Shepard, 634 F. Supp. 2d 912, 943 (N.D. Ind. 2009) (acknowledging *Caperton*'s "exceptional, extraordinary, and extreme facts" but emphasizing importance of recusal in implementing due process generally); Valente v. Univ. of Dayton, No. 3:08-CV-225, 2009 U.S. Dist. LEXIS 108352, at *2, *11 (S.D. Ohio Nov. 19, 2009) (finding that *Caperton*'s holding turned on "egregious" nature of facts); Suh v. Mote, No. 03 C 7014, 2009 U.S. Dist. LEXIS 102348, at *21 (N.D. Ill. Nov. 3, 2009) (observing *Caperton*'s pronouncement that Constitution requires recusal only in "rare instances"); Bradbury v. Eismann, No. CV-09-352-S-BLW, 2009 U.S. Dist. LEXIS 97816, at *9 (D. Idaho Oct. 20, 2009) (finding that "serious risk of actual bias" could exist only in "extreme circumstances"); Stiffarm v. Montana, No. CV-09-67-GF-SEH-RKS, 2009 U.S. Dist. LEXIS 112947, at *7 (D. Mont. Oct. 8, 2009) (concluding that "'[e]xtreme facts' are required to create 'an unconstitutional probability of bias'" (quoting *Caperton*, 129 S. Ct. at 2265)); People v. Freeman, 222 P.3d 177, 184 (Cal. 2010) (finding that only "exceptional case[s] presenting extreme facts" implicated due process under *Caperton*); Marek v. State, 14 So. 3d 985, 1000 (Fla. 2009) (finding *Caperton*'s "extraordinary facts" inapplicable to prisoner's argument that sentencing judge's later participation in prisoner's motion for postconviction relief violated his due process rights).

154. *Freeman*, 223 P.3d at 184.

155. *Id.* at 184–85. According to the court, "mere appearance" would appropriately be resolved under judicial codes. *Id.* at 185.

156. *Id.* at 185.

157. *Id.*

158. 778 N.W.2d 863 (Wis. 2010).

159. *Allen*, 778 N.W.2d at 864.

160. *Id.* at 886.

161. *Id.* at 885.

162. *Id.* at 863.

163. *Id.*

The three justices who would have granted the motion stressed the broad sweep of *Caperton* and believed the parties should have the opportunity to brief the issue of *Caperton*'s application to the facts of the case.[164] Their opinion suggested that the facts of *Allen* could constitute "extreme facts" of *Caperton* magnitude and concluded that further deliberation would have been appropriate to determine whether extreme facts were even part of the *Caperton* standard.[165] A justice who would have denied the motion argued that *Caperton*'s application was limited because its holding hinged on the extreme nature of its facts.[166]

In *Valente v. University of Dayton*,[167] Magistrate Judge Michael Merz denied a motion for his recusal under the Due Process Clause.[168] Judge Merz observed that he had personal ties with the defendant university which might reasonably suggest a "probability of bias"; namely, his former employment as a professor at the University of Dayton Law School, his close personal friendship with a Law School professor, his friendliness with Law School faculty, and their common membership in the Dayton Bar Association.[169] However, Judge Merz did not read *Caperton* to extend to ordinary personal bias.[170] He interpreted *Caperton*'s "probability of bias" language as dictum and *Caperton*'s actual holding as applying more narrowly to an "egregious" case of judge buying.[171] Other courts have likewise taken a narrow view of the case when considering *Caperton* recusal motions.[172]

Caperton's critics have argued that the Supreme Court improperly interfered in a case where the political process would have provided an adequate remedy.[173] Commentators have also argued that the judicial election aspect of *Caperton* creates free speech problems.[174] The Supreme Court has since addressed these

---

164. *Id.* at 866–67.

165. *Id.* at 886.

166. *Id.* at 925 (Ziegler, J., concurring). Justice Ziegler took a narrow view of *Caperton*, concluding that *Caperton* was inapplicable because there was "no 'person with a personal stake' in *Allen* who 'had a significant and disproportionate influence' in placing Justice Gableman on the case 'by raising funds or directing [his] election campaign when the case was pending or imminent.'" *Id.* at 925–26 (alteration in original) (quoting Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009)).

167. No. 3:08-cv-225, 2009 U.S. Dist. LEXIS 108352 (S.D. Ohio Nov. 19, 2009).

168. *Valente*, 2009 U.S. Dist. LEXIS 108352, at *13.

169. *Id.* at *7–8.

170. *See id.* at *8–10 (finding that narrow holding of *Caperton* did not apply to alleged bias arising from judge's relationship with university and its faculty).

171. *Id.* at *2, *9.

172. *See, e.g.*, Smith v. Bender, 350 Fed. Appx. 190, 194 (10th Cir. 2009) (finding *Caperton* inapplicable to recusal motion for federal judge because *Caperton* concerned proper way for state court loser to raise issue of federal law); *In re* Johnson, 408 B.R. 123, 127 (Bankr. S.D. Ohio 2009) (suggesting *Caperton*'s inapplicability outside judicial election context).

173. *See, e.g.*, Terri R. Day, *Buying Justice:* Caperton v. A.T. Massey*: Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. C. L. REV. 359, 379 (2009) (observing that West Virginia legislature enacted contribution limits to 26 U.S.C. § 527 organizations in response to public outcry over *Caperton*); Hoersting & Smith, *supra* note 134, at 331–32 (arguing that proper remedy to address perceived bias of Justice Benjamin was for West Virginia voters to choose not to reelect him).

174. *See, e.g.*, Brief of Amicus Curiae James Madison Center for Free Speech Supporting Respondents at 23, Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22), 2009 U.S. S. Ct. Briefs LEXIS 110 at *37 (citing Republican Party of Minnesota v. White, 536 U.S. 765, 788 (2002))

free speech concerns in *Citizens United v. Federal Election Commission*.[175] In *Citizens United*, the Court held that 2 U.S.C. § 441(b)'s prohibition on certain independent expenditures by corporations in federal elections violated the First Amendment.[176] The Court harmonized its decision with *Caperton* on the basis that "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."[177] The Court observed that "[t]he appearance of influence or access" does not corrupt democracy, and emphasized that *Caperton* had not held that it did.[178]

III. DISCUSSION

Under the Court's recusal precedents prior to *Caperton v. A. T. Massey Coal Co.*,[179] a judge's personal interest in the case's outcome or his personal bias for or against a party would not be enough to require recusal under the Due Process Clause.[180] Yet, a "fair trial in a fair tribunal," a "basic requirement of due process,"[181] would seem impossible when the judge is biased or has an interest in the outcome. Canon 2, Rule 2.11 of the American Bar Association's Model Code of Judicial Conduct[182] recognizes this reality, as do Congress[183] and all fifty states that have adopted Rule 2.11's "impartiality might reasonably be questioned" standard.[184]

In *Caperton*, the Court abandoned its former categorical approach to recusal and replaced these categories with an objective test—"probability of actual bias"—applicable to all situations.[185] Despite the Court's attempt to limit *Caperton*,[186] the practical effect of its decision was to raise the due process floor and erase the distinctions between due process and the Model Code's recusal

(arguing that mandatory recusal based on campaign spending would conflict with Supreme Court precedent requiring states to afford First Amendment rights to participants in electoral process); Day, *supra* note 173, at 375 (arguing that *Caperton* threatens to infringe First Amendment rights associated with campaign contributions in state elections); Hoersting & Smith, *supra* note 134, at 333 (arguing that *Caperton* eviscerates Supreme Court's campaign finance jurisprudence, which has held that legislature cannot limit independent expenditures); Bradley A. Smith & Jeff Patch, *Can Congress Regulate All Political Speech?*, WALL ST. J., Mar. 3, 2009, at A13 (criticizing media depiction of *Caperton* and arguing that victory for Caperton would equal holding that citizens' independent free speech "corrupts" democracy).

175. 130 S. Ct. 876 (2010).

176. *Citizens United*, 130 S. Ct. at 913.

177. *Id.* at 910.

178. *Id.*

179. 129 S. Ct. 2252 (2009).

180. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 523 (1927) (observing that bias and non-pecuniary interest were matters of legislative discretion); Goldberg et al., *supra* note 13, at 512 (stating that English common law required disqualification only for direct pecuniary interest).

181. *In re* Murchison, 349 U.S. 133, 136 (1955).

182. See *supra* notes 21–26 and accompanying text for a discussion of the Model Code.

183. See *supra* Part II.A.2 for a discussion of the federal recusal statute.

184. See *supra* note 20 for a list of state statutes adopting the Model Code.

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

186. *See, e.g.*, *id.* at 2265 (noting that adverse consequences, such as flood of recusal motions, would not arise from decision because of the extreme nature of the facts).

standard. Although the Court misframed its precedents, *Caperton* reached the right result by refashioning due process to comport with popular notions of fairness and impartiality as reflected in judicial codes.

A. Caperton *Raised the Due Process Floor*

1. *Caperton*'s "Probability of Actual Bias" Test Transformed Dicta into Law

As Chief Justice Roberts's dissent emphasized, the Court prior to *Caperton* had recognized only two categories of cases in which the Due Process Clause required recusal:[187] (1) situations where the judge has a pecuniary interest in the outcome of the case[188] and (2) criminal contempt cases where the judge had adjudicated and was embroiled in the earlier proceeding from which the contempt charge arose.[189] The *Caperton* majority presented these categories of cases as examples, or "instances," of when recusal was required.[190] In reality, however, the *Tumey v. Ohio*,[191] *Ward v. Village of Monroeville*,[192] and *Aetna Life Insurance Co. v. Lavoie*[193] pecuniary interest cases and the *In re Murchison*[194] and *Mayberry v. Pennsylvania*[195] contempt cases were not simply a few scattered examples of a broader rule, but rather were the *only* "instances" in which the Court had ever held recusal to be constitutionally required.[196]

a. Splicing the Precedents

The broader rule *Caperton* purported to extract from its recusal precedents was the principle that "objective standards . . . require recusal when 'the *probability of actual bias* on the part of the judge or decisionmaker is *too high to be constitutionally tolerable*.'"[197] The Court drew this quoted language from *Withrow*

187. *Id.* at 2267 (Roberts, C.J., dissenting).

188. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 823–25 (1986) (holding that state supreme court justice's interest in affirming large jury verdict, which would increase justice's chances of prevailing in pending personal lawsuit, was violation of due process requiring recusal); Ward v. Vill. of Monroeville, 409 U.S. 57, 60 (1972) (holding that mayor's interest in enriching town coffers violated due process when mayor sat as judge who collected fines only upon conviction); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that judge's receipt of costs only upon conviction of defendant was violation of due process requiring recusal).

189. *See* Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971) (holding that defendant's vicious personal attacks on judge's integrity required judge's recusal from contempt proceeding); *In re* Murchison, 349 U.S. 133, 138–39 (1955) (holding that judge's role as judge and grand jury in earlier proceeding from which contempt charges arose required his recusal from contempt trial).

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

191. 273 U.S. 510 (1927).

192. 409 U.S. 57 (1972).

193. 475 U.S. 813 (1986).

194. 349 U.S. 133 (1955).

195. 400 U.S. 455 (1971).

196. See *supra* Parts II.B.1 and 2 for a discussion of these cases.

197. Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009) (emphasis added) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

v. Larkin.[198] Yet the Court excluded *Withrow* from its discussion of its prior recusal precedents, all the while borrowing heavily from that case throughout the *Caperton* opinion.[199] *Withrow* is not a recusal case; it is a case in which the Court rejected the contention that a state agency's "combination of investigative and adjudicative functions" violated due process.[200] Therefore, the Court's reliance on *Withrow* to articulate the due process standard for recusal is curious. Even more curious is the *Caperton* Court's wholesale borrowing of *Withrow*'s language without any discussion of that case. The *Caperton* Court's silence as to *Withrow* sharply contrasts with the opinion's thorough treatment of *Tumey*, *Ward*, *Lavoie*, *Murchison*, and *Mayberry*.[201]

The Court even seemed to quote *Withrow* out of context. *Withrow* expressed doubt that the appellee in that case could meet the "difficult burden of persuasion" required to show that the state agency's combined investigative and adjudicative functions violated due process.[202] Meeting this heavy burden would require a complainant to

> overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.[203]

Withrow conceived of these requirements as high hurdles that would almost always yield to the "presumption of honesty and integrity in those serving as adjudicators."[204] Indeed, the *Withrow* appellee failed to convince the Court that the state procedure at issue violated his due process rights.[205] The *Caperton* Court, however, quoted piecemeal from *Withrow* as though *Withrow* were paraphrasing a general rule governing all of the Court's recusal cases:

> In defining the[] standards [illustrated in the Court's recusal precedents] the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "*poses such a risk of actual bias or prejudgment* that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[206]

---

198. 421 U.S. 35 (1975).

199. *See Caperton*, 129 S. Ct. at 2257, 2559 (quoting *Withrow* for proposition that "probability of actual bias" determines whether due process requires recusal); *id.* at 2263 (stating that due process is violated if, "'under a realistic appraisal of psychological tendencies and human weakness,'" judge's interest "'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented'" (quoting *Withrow*, 421 U.S. at 47)); *id.* at 2264 (concluding that risk of actual bias resulting from Blankenship's campaign contributions was too substantial for due process to be adequately implemented (citing *Withrow*, 421 U.S. at 47)).

200. *Withrow*, 421 U.S. at 58. See *supra* note 131 for a discussion of *Withrow*'s facts and for further illustration of the *Caperton* Court's reliance on this case.

201. *See Caperton*, 129 S. Ct. at 2259–62 (discussing cases in which due process required recusal).

202. *Withrow*, 421 U.S. at 47.

203. *Id.*

204. *Id.*

205. *Id.* at 58.

206. *Caperton*, 129 S. Ct. at 2263 (emphasis added) (quoting *Withrow*, 421 U.S. at 47).

But the Court's pre-*Caperton* recusal cases evince no such "risk of actual bias" standard. *Tumey* the seminal case, established that the Due Process Clause incorporates the common-law pecuniary interest prohibition.[207] *Ward* confirmed that the prohibited financial interest need not be so direct that the money flows straight into the judge's pocket.[208] *Lavoie* stands as a modern illustration of the pecuniary interest prohibition,[209] and *In re Murchison* and *Mayberry* carved out a narrow rule requiring recusal for judges adjudicating criminal contempt charges when the judge was in some way "embroiled" in the earlier proceeding that led to the contempt charge.[210] If a common thread runs through these cases, it is the *Tumey* principle:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.[211]

Each of the Court's pre-*Caperton* recusal cases, with the exception of *Mayberry*, quoted the *Tumey* dicta.[212]

Despite *Tumey*'s sweeping language, the Court's conception of constitutionally mandated recusal in the pre-*Caperton* recusal cases confined itself to two categories: pecuniary interest[213] and the criminal contempt context.[214] The *Caperton* majority thus was disingenuous in two respects. First, it reframed its past recusal cases as examples of a broader principle, when they were actually examples of two narrow categories. Second, it used this reframing to introduce a wholly new standard for constitutionally mandated recusal—"probability of actual bias"—while pretending that such had *always* been the standard.[215]

b. "Probability of Actual Bias"

It is well established in the Court's recusal precedents that personal bias is not enough to require recusal under the Due Process Clause.[216] The *Caperton*

---

207. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

208. Ward v. Vill. of Monroeville, 409 U.S. 57, 60 (1972).

209. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (holding that judge's direct pecuniary interest in outcome of case violated due process).

210. Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971); *In re* Murchison, 349 U.S. 133, 138–39 (1955).

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

212. *See Lavoie*, 475 U.S. at 822 (quoting *Ward*, 409 U.S. at 60); *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532); *Murchison*, 349 U.S. at 136 (quoting *Tumey*, 273 U.S. at 532). See *supra* note 77 for an analysis of the Court's application of the *Tumey* test through the line of recusal cases.

213. See *supra* Part II.B.1 for a discussion of Supreme Court cases finding that a judge's pecuniary interest in the outcome of the litigation violated due process.

214. See *supra* Part II.B.2 for a discussion of Supreme Court cases finding that it violated due process for a judge to preside over a criminal contempt trial when the judge was "embroiled" in the earlier proceeding from which the contempt charge arose.

215. *See, e.g.*, Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252, 2266 (2009) ("In this case we do nothing more than what the Court has done before.").

216. *See Lavoie*, 475 U.S. at 820 ("[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." (quoting *Tumey*, 273 U.S.

Court cited *Lavoie* for the proposition that "[p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the *Due Process Clause*.'"[217] Yet *Caperton* proceeded to hold that the Due Process Clause required recusal when there was a "probability of bias."[218] *Caperton* thus leads to a curious conclusion: "[p]ersonal bias or prejudice" is not enough to require recusal, but a "constitutionally intolerable probability of actual bias"[219] requires recusal under the Due Process Clause.

This apparent contradiction suggests that the Court intended for its constitutional standard to be met only in "extreme" cases and for the more mundane cases of personal bias to be caught by judicial codes. The Court's repetition of the word "extreme"—eight times in the majority opinion[220]—and its confidence that "[a]pplication of the constitutional standard implicated in this case will . . . be confined to rare instances"[221] indicate that the Court envisioned a "constitutionally intolerable probability of bias" to require something more shocking or outrageous than "mere" personal bias. This distinction is dubious; how is a judge's *actual* personal bias any less offensive to due process than a case of *probable* judge buying? Furthermore, the "probability of actual bias" standard itself contains no such limiting feature. Some lower federal courts, however, have ascribed an "extreme facts" requirement to *Caperton*'s standard.[222]

The "probability of actual bias" test appears to incorporate the objective component of the *Tumey* "average man as a judge" test.[223] Whether *Caperton*'s objective component[224] hinges on a "reasonable person" or a "reasonable judge" standard is not entirely clear from the Court's opinion. A fair reading of *Caperton* is that the objective test inquires whether a reasonable person would perceive a serious risk of bias in the average judge. The "reasonable person" component thus encompasses the traditional notion that "justice must satisfy the appearance of

---

at 523)); *Tumey*, 273 U.S. at 523 (citing Wheeling v. Black, 25 W. Va. 266, 270 (1884)) (same).

217. *Caperton*, 129 S. Ct. at 2259 (quoting *Lavoie*, 475 U.S. at 820).

218. *Id*. at 2265–66.

219. *Id.* at 2262. The Court adopted this language from *Withrow*'s observation that due process is violated when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35, 47 (1975); *see also Caperton*, 129 S. Ct. at 2257 (citing *Withrow*, 421 U.S. at 47) (observing that Court's precedents identified situations in which probability of bias was too high to be constitutionally tolerable); *id.* at 2259 (citing *Withrow*, 421 U.S. at 47) (characterizing recusal precedents as exemplifying application of objective test for constitutionally intolerable probability of bias). See *supra* notes 199–206 and accompanying text for a discussion of the *Caperton* Court's adoption of *Withrow*'s language.

220. *Caperton*, 129 S. Ct. at 2265–66.

221. *Id*. at 2267.

222. See *supra* notes 153–72 and accompanying text for a discussion of cases interpreting *Caperton* as hinging on the "extreme" nature of its facts.

223. *See Caperton*, 129 S. Ct. at 2261 (observing importance of *Tumey* test's "objective component"); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (noting that due process is violated when "average man as a judge" might be in situation that skews "nice, clear and true" balance between state and defendant).

224. *Caperton* formulated its objective test as "a serious risk of actual bias—based on objective and reasonable perceptions." *Caperton*, 129 S. Ct. at 2263.

justice,"[225] and the "average judge" component finds validity in *Tumey*'s dicta[226] and the Court's quoting of the *Tumey* dicta in its subsequent recusal cases.[227]

2. *Caperton*'s New Standard Is Not Limited to the Judicial Election Context

Caperton articulated a broad standard: the Due Process Clause requires recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[228] *Caperton* evinced no intention of limiting its holding to the judicial election context. Rather, the Court declared that it was applying the same standard it had used in its prior recusal cases, but this time "in the context of judicial elections, a framework not presented in [*Tumey*, *Ward*, *Lavoie*, *Murchison*, and *Mayberry*]."[229] The Court conceived of its prior recusal precedents as examples of situations that "created an unconstitutional probability of bias."[230] In the Court's view, the constitutionally intolerable bias resulting from the state election campaign in *Caperton* was merely a new illustration of an old standard. The Court saw no constitutional significance in the specific fact that a judicial election brought about the probability of bias.[231]

Facing criticism from the dissents[232] and from amici curiae[233] that a "probability of actual bias" standard would be unworkable, the Court sought to reassure its critics by emphasizing that the facts of *Caperton* were "extreme by any measure"[234] and that "this [was] an exceptional case"[235] and "an extraordinary situation."[236] The majority's opinion concluded with the promise that because most states had adopted recusal standards "more rigorous" than the due process

225. Offutt v. United States, 348 U.S. 11, 14 (1954). The public outcry over the perceived bias on the part of Justice Benjamin may have factored into the Court's finding that there were "objective and reasonable perceptions" of a probability of actual bias. *Caperton*, 129 S. Ct. at 2263.

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

227. See *supra* note 77 for a discussion of how the *Tumey* principle likely envisions "the average judge" rather than "the average man sitting as a judge for a day."

228. *Caperton*, 129 S. Ct. at 2257 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)) (internal quotation marks omitted).

229. *Id.* at 2262.

230. *Id.* at 2265. See *supra* Part III.A.1.a for a discussion of the Court's reframing of its recusal precedent.

231. *Caperton*, 129 S. Ct. at 2263. *Caperton*'s critics, on the other hand, argue that the judicial election aspect creates free speech problems. See *supra* note 174 for a discussion of critics' views of the free speech implications. See *supra* notes 175–78 and accompanying text for a discussion of the Supreme Court's dismissal of these concerns in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

232. *See Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting) (arguing that the "probability of bias" standard contained no limiting principle and expressing concern that it would encourage flood of recusal motions); *id.* at 2274 (Scalia, J., dissenting) (arguing that majority's holding would create uncertainty and erode public confidence in judiciary). See *supra* notes 142–50 and accompanying text for a discussion of the dissenting opinions in *Caperton*.

233. See *supra* note 144 for a summary of the amici arguments against a "probability of bias" standard.

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

235. *Id.* at 2263.

236. *Id.* at 2265.

requirement, "[a]pplication of the constitutional standard implicated in this case will . . . be confined to rare instances."[237]

However, as Chief Justice Roberts's dissent pointed out, *Caperton*'s broad "probability of actual bias" standard provided no limiting feature besides the Court's assurance that recusal statutes and codes would generally prevent constitutional recusal questions from arising.[238] One commentator criticized *Caperton* for "killing a fly with a sledge hammer."[239] Lower federal courts and state courts will determine *Caperton*'s practical effect.[240] In any event, it is clear from *Caperton*'s language that the application of the "probability of actual bias" test is not limited to any particular factual context.[241]

B. "Probability of Actual Bias" Blurs the Line Between Due Process and the "More Rigorous" Statutes and Codes

1. Objective Test as an Equalizer

Caperton broadened the standard for when due process requires a judge to recuse.[242] *Caperton*'s broader "probability of actual bias" standard signifies a blurring of what had previously been a clear line between due process requirements and the recusal standards in place in the states[243] and the federal courts.[244] Despite the Court's insistence that "[a]pplication of the constitutional standard implicated in this case will . . . be confined to rare instances" because state judicial codes are "more rigorous" than due process requires,[245] the practical effect of its decision is to chip away at the distinction between due process and the recusal statutes and codes.[246]

Caperton's holding itself illustrates this point. West Virginia has adopted Rule 2.11(A) of the Model Code,[247] requiring a judge to "disqualify himself or herself in

237. *Id.* at 2267. See *infra* Part III.B.1 for an argument that "probability of bias" moved the due process standard within reach of the ABA Model Code's "impartiality might reasonably be questioned" standard.

238. *Caperton*, 129 S. Ct. at 2267–69 (Roberts, C.J., dissenting).

239. Day, *supra* note 173, at 380 (internal quotation marks omitted).

240. Courts that have entertained *Caperton* claims have generally taken a narrow view of the case. See *supra* notes 153–72 for a discussion of cases in which state and lower federal courts have considered *Caperton* motions.

241. *See* Frey & Berger, *supra* note 134, at 288–89 (observing "no principled basis" for reading *Caperton*'s "'serious risk of actual bias' standard" as applying only in judicial election context).

242. See *supra* Part III.A for an analysis of how *Caperton*'s broad new "probability of actual bias" standard raised the due process floor.

243. See *supra* Part II.A.1 for a discussion of state judicial codes.

244. See *supra* Part II.A.2 for a discussion of 28 U.S.C. § 455, the federal recusal statute.

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

246. *See* Elizabeth B. Wydra, *The Fourteenth Amendment's Due Process Clause and* Caperton*: Placing the Federalism Debate in Historical Context*, 60 SYRACUSE L. REV. 239, 244 (2010) (arguing that *Caperton* preserves federalism principles because its lack of a bright-line standard allows states to "fill in the contours of the constitutional rule").

247. See *supra* notes 21–26 and accompanying text for a discussion of the Model Code.

a proceeding in which the judge's impartiality might reasonably be questioned."[248] The *Caperton* Court described codes of judicial conduct, like West Virginia's Code, as providing "more protection than due process requires,"[249] but the Court's holding had the effect of blurring this distinction. Justice Benjamin determined that the state's judicial code did not require him to recuse,[250] yet the Supreme Court of the United States found that due process required his recusal.[251] If codes of judicial conduct were actually "more rigorous" than the due process floor, the Supreme Court of the United States would not have found a due process violation in *Caperton*.

The underpinnings of Rule 2.11(A) are remarkably similar to the principles underlying *Caperton*'s "probability of actual bias" standard. One commentator analyzed the meaning of Rule 2.11(A)'s "might reasonably be questioned" standard as follows: "Might [embodies] a shade of doubt or a lesser degree of possibility," while "reasonably" suggests an objective standard requiring recusal even if there is no actual bias.[252] This definition of "reasonably" is strikingly similar to *Caperton*'s objective test. The Court's interpretation of the federal recusal statute modeled on Rule 2.11(A) likewise reflects an emphasis on objective standards requiring recusal even when the judge lacks actual bias.[253] *Caperton* articulated precisely the same standard.[254]

2. Merits of *Caperton*'s Objective Test

Both *Caperton* and the Model Code reflect a concern with preserving public trust in the judicial system. The Model Code's stated aim is to "enhance and maintain confidence in our legal system."[255] Most states construe Rule 2.11(A) by using an objective "reasonable person" standard based on the rationale that an outside observer of the judicial system is less likely than an insider (that is, a judge) to ascribe impartiality to an adjudicator.[256] *Caperton* also appeared to use a "reasonable person" standard when applying its objective test.[257]

---

248. W. VA. CODE OF JUDICIAL CONDUCT Canon 3E(1) (1993).

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

250. *Id.* at 2259.

251. *Id.* at 2265.

252. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 GEO. J. LEGAL ETHICS 55, 58 (2000) (quoting WEBSTER'S NEW WORLD COLLEGE DICTIONARY 859 (3d ed. 1997)) (internal quotation mark omitted).

253. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860–61 (1988) (citing Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986)). See *supra* notes 30–35 for a discussion of *Liljeberg* and its interpretation of 28 U.S.C. § 455 (2006).

254. *See Caperton*, 129 S. Ct. at 2265 (observing that due process requires objective standards which may sometimes force recusal of judges with no actual bias); Bauer v. Shepard, 634 F. Supp. 2d 912, 948 (N.D. Ind. 2009) (observing that Indiana's "impartiality might reasonably be questioned" standard for recusal mirrors *Caperton*'s objective test).

255. MODEL CODE OF JUDICIAL CONDUCT, PREAMBLE (2007), *available at* http://www.abanet.org/cpr/mcjc/pream_term.html#PREAMBLE. See *supra* note 225 for a discussion of the potential role public outcry over *Caperton* may have played in the Court's analysis.

256. Abramson, *supra* note 252, at 71–72 (citing Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374, 386 n.9 (W. Va. 1995)).

257. See *supra* Part III.A.1.b for an analysis of *Caperton*'s objective test.

Despite its circuitous path,[258] *Caperton* reached the right result. As one pre-*Caperton* commentator observed, "due process requires an independent and impartial adjudicator, but, as expressed by the Supreme Court, the recusal implications of that founding premise are rather limited."[259] *Caperton* changed this. *Caperton* raised the due process floor to a level that better corresponds with our traditional, and perhaps aspirational, conception of due process, as expressed in judicial codes and statutes already in force.[260]

As the federal recusal statute[261] and nearly all the state judicial codes[262] recognize, an objective recusal standard is necessary to ensure public faith in the judicial system's impartiality. Commentators suggest that the judiciary derives its authority solely from the public's perception of its legitimacy.[263] An objective standard is important also because due process is implemented through judges deciding their own recusal. As the *Caperton* majority observed, it is a more difficult and sensitive inquiry for a judge to examine his subjective biases than to apply the circumstances to an objective test.[264]

Caperton cemented the availability of a due process claim to litigants challenging a judge's decision not to recuse, and thus has the salutary effect of eliminating state judges' monopoly on deciding their own recusal.[265] Although each state's highest court will continue to have the final say on whether a judge's recusal is required under that state's judicial code, litigants have available a federal claim as a check on the state's highest court.[266] This check is particularly important where, as in *Caperton*, a litigant seeks to disqualify a judge sitting on the state's highest court and the challenged judge is the sole decider of the motion.

IV. CONCLUSION

In *Caperton v. A. T. Massey Coal Co.*,[267] the Supreme Court raised the due process floor for judicial recusal.[268] Contrary to the dissent's concern that the new "probability of bias" standard would be impossible for lower courts to apply,[269] *Caperton*'s new standard will not have a significant impact on state and lower

258. See *supra* Part III.A.1.a for a discussion of *Caperton*'s less-than-forthright use of precedent.

259. John A. Meiser, Note, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1809 (2009) (footnote omitted).

260. See *supra* Part II.A for a discussion of judicial codes and statutes and their construction by courts.

261. See *supra* Part II.A.2 for an examination of the federal recusal statute.

262. See *supra* Part II.A.1 for an examination of state judicial codes.

263. *See, e.g.*, Frost, *supra* note 18, at 532 (observing that judiciary derives its legitimacy from public perception of its impartiality).

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

265. *See* Wydra, *supra* note 246, at 244–45 (arguing that *Caperton*'s rule is "something of a federalism virtue" because it sets due process floor while allowing states to fill in contours). *But see* Day, *supra* note 173, at 376–77 (arguing that *Caperton* improperly federalizes state court recusal practice).

266. The actual success rate of such due process claims is likely to be very low. See *supra* notes 153–72 for discussion of lower courts' narrow reading of *Caperton*.

267. 129 S. Ct. 2252 (2009).

268. See *supra* Part III.A for an analysis of *Caperton*'s effect on the standard for due process.

269. See *supra* notes 143–47 for a discussion of Chief Justice Roberts's dissent.

federal courts' recusal practice because the vast majority of these courts are already subject to an equivalent "impartiality might reasonably be questioned" standard.[270]

This is the right result. The Court's pre-*Caperton* formulation of due process would allow judges with personal interest and biases to decide cases without offending due process; recusal would be required only when the judge had a pecuniary interest[271] or in a criminal contempt case in which the judge had prior adjudicative involvement.[272] A "probability of bias" standard raises the due process floor to a level roughly equivalent to the recusal standard in all fifty states and the federal courts, thus aligning the definition of due process with widely held notions of fairness and impartiality.

270. See *supra* Part II.A.1 for a discussion of state judicial codes. See *supra* Part II.A.2 for a discussion of the federal recusal statute.

271. See *supra* Part II.B.1 for a discussion of disqualifying pecuniary interests.

272. See *supra* Part II.B.2 for a discussion of criminal contempt.