JUDICIAL RECUSAL AND EXPANDING NOTIONS OF DUE PROCESS

Andrey Spektor[*]
Michael Zuckerman[**]

TABLE OF CONTENTS

* Andrey Spektor earned his J.D. *cum laude* from the University of Michigan Law School and his B.S. from Cornell University.

** Michael Zuckerman earned his J.D. *cum laude* from Cornell Law School and his B.S. from Cornell University. The authors would like to thank Cynthia Farina for her helpful guidance, and the staff of the *Journal of Constitutional Law* for their excellent editorial assistance.

I. INTRODUCTION

In 2009, two uniquely American experiences so grossly offended an individual right that a bitterly divided Supreme Court had to step in. Foreigners scoff at the idea of electing judges. Nor do they approve of heavy financial contributions to campaigns. Certainly no other country cloaks the right to give money with the maximum protection accorded by law the way our Constitution does with the First Amendment. When these factors all play out in a story that makes for a best-selling novel, then there are fireworks, public outrage, and, as the Chief Justice lamented, a chance to make bad law.[1] Fortunately, there is an evenhanded jurisprudential principle that courts may dispatch to referee the showdown in future cases.

Judicial elections began to gain popularity in the mid-nineteenth century "as part of the Jacksonian movement toward greater popular control of public office."[2] By the Civil War, over half of the states elected their judges,[3] and today thirty-nine states elect all or part of their judiciary.[4] As many as eighty-seven percent of all state judges face an election of some kind.[5] As judicial elections have transformed from dignified low-key affairs into polarized political contests,[6] critics like Sandra Day O'Connor have launched prominent efforts to persuade states to eliminate the practice of judicial elections.[7] Some states appear to be listening[8]—for good reason. Take the words of

1 *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2272 (2009) (citing the legal aphorism "hard cases make bad law" to describe extreme cases that test the boundaries of established legal principles).

2 Terri R. Day, *Buying Justice:* Caperton v. A.T. Massey: *Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. C. L. REV. 359, 363 (2009) (internal quotation marks and citation omitted).

3 *Id.*

4 Randall T. Shepard, *Electing Judges and the Impact on Judicial Independence*, 42 TENN. B. J. 22, 23 (2006).

5 *Id.*

6 As the Chief Justice of Indiana noted, "judicial elections are progressively looking more like elections in the executive and legislative branches." *Id.*

7 *See* Bill Mears, *Former Justice O'Connor Leads Push to End Judicial Elections*, CNN.COM (Dec. 15, 2009), http://www.cnn.com/2009/CRIME/12/15/judicial.elections/index.html (reporting that Sandra Day O'Connor seeks reform in election-based judicial systems as they raise doubts regarding a judge's impartiality).

8 *See, e.g.*, John Schwartz, *Efforts Begun to Abolish the Election of Judges*, N.Y. TIMES, Dec. 23, 2009, at A12 (reporting that Nevada and Ohio are considering changes to their judicial selection process).

Richard Neely, an elected justice of West Virginia, for example, who once wrote, "[a]s long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security."[9]

Enter the 2009 Supreme Court decision, *Caperton v. A.T. Massey Coal Co.*[10] At a minimum, *Caperton* exposes the pitfalls of judicial elections and calls into question the reach of the Due Process Clause in protecting a litigant's right to a fair tribunal before a fair judge. Discussed in more detail below, the case involved the refusal of a state supreme court justice to recuse himself, where a litigant who later had an appeal pending before the justice spent over three million dollars to support the justice's campaign. The Supreme Court held that because there was an objective appearance of bias, due process required recusal. *Caperton* has reignited the debate over judicial elections and the circumstances where a judge must recuse himself to avoid violating the Due Process Clause, with the media,[11] politicians,[12] academics,[13] interest groups,[14] judges,[15] and lawyers[16] all weighing in.

A review of the Supreme Court's recusal jurisprudence reveals the need for a due process test that balances constitutional concerns while taking into account the expanding role of the Due Process

---

9 *Small Steps: The Road to Prosperity Runs Through the Judiciary*, THE ECONOMIST, Jan. 23, 2010, at 29.

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

11 *See* Caperton v. Massey *Resource Page*, JUSTICE AT STAKE CAMPAIGN (Jan. 13, 2011), http://www.justiceatstake.org/resources/in_depth_issues_guides/caperton_resource_page/index.cfm (showing news anchor on CNN discussing debate regarding judicial elections).

12 *See* Erica Peterson, *WV Politicians React to Supreme Court Decision*, W. VA. PUB. BROADCASTING (June 8, 2009), http://www.wvpubcast.org/newsarticle.aspx?id=9950 (reporting the reactions of West Virginia Governor Joe Manchin and Senator Jeff Kessler to the Supreme Court decision).

13 *See* Caperton v. Massey Coal *and the Recusal of State Court Judges*, C-SPAN VIDEO LIBRARY (Jan. 26, 2010), http://www.c-spanvideo.org/program/291663-1 (showing panel discussion of academics at Georgetown University Law Center regarding *Caperton* and its effects).

14 *See* Caperton v. Massey, BRENNAN CENTER FOR JUSTICE (June 8, 2009), http://www.brennancenter.org/content/resource/caperton_v_massey/ (reporting the reaction of interest group leaders, such as the president of the American Bar Association and the executive director of Justice at Stake).

15 *See* Ed Brayton, *Michigan Leaders React to* Caperton *Ruling*, THE MICH. MESSENGER (June 10, 2009), http://michiganmessenger.com/20664/Michigan-leaders-react-to-caperton-ruling (showing the positive reaction of Chief Justice Marilyn Kelly of the Michigan Supreme Court).

16 *See* Steve Foley, *WV Legal Experts React to* Caperton v. Massey *Ruling*, THE MINORITY REPORT (June 8, 2009), http://www.theminorityreportblog.com/blog_entry/steve_foley/2009/06/08/ (reporting the reaction of several attorneys to the *Caperton* ruling).

Clause in mandating recusals. Beginning from the common-law, which required a direct pecuniary interest, the Court has gradually extended the requirement of recusal to include cases with less than direct financial interests, cases where previous judicial appearances had created a conflict, and most recently where there is an objective appearance of bias.

This Article argues that given *Caperton*'s push in this jurisprudence and the constitutional freedoms it now potentially sweeps, when assessing motions for recusals, courts should use the careful *Mathews v. Eldridge* test to assess whether there has been a violation of due process. This is good policy because *Mathews* confronts the tension between the First Amendment and procedural due process, while containing the scope of *Caperton*, all without sacrificing its principles. And, as explained below, given the test's linear structure, applying *Mathews* to recusal motions based on traditional pre-*Caperton* concerns would not change the analysis.

Part I provides an overview of the Due Process Clause and when it requires recusal of judges. It starts by outlining the many applications of due process, then focuses on procedural due process, specifically when it requires judicial recusal. It details a series of cases, culminating in *Caperton*, that consider judicial recusal. With this background, Part II examines the boundaries of the First Amendment as they relate to judicial elections, addressing the controversial proposition that recusals do not burden speech. Part III then argues that given the complications that *Caperton* has added to the due process jurisprudence, applying the *Mathews* test is not only in line with the Court's precedence, but it makes for good policy: It would contain *Caperton*, alleviating the dissenter's concerns, while taking into account the concerns that drove the majority's decision.

II. WHEN DUE PROCESS DEMANDS RECUSAL

A. Overview of Due Process

The Fourteenth Amendment to the U.S. Constitution provides that

> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.[17]

This language has been interpreted to protect both the substantive and procedural rights of individuals.[18] Specifically, as one federal court recently explained, the Due Process Clause operates in three primary ways[19]: (1) it incorporates many provisions of the Bill of Rights against the States;[20] (2) it bars certain government action that affects certain substantive rights "regardless of the fairness of the procedures used to implement them";[21] and (3) it guarantees fair procedures.[22]

With regard to the guarantee of fair procedures—commonly referred to as procedural due process—courts closely scrutinize state action that has the effect of depriving an individual of "life, liberty, or property."[23] The Supreme Court has found such violations in many

---

17 U.S. CONST. amend. XIV § 1; *see also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."). The Due Process Clause is derived from the Magna Carta, which read in relevant part: "No freemen shall be taken and imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." MAGNA CARTA, § XXXIX (1215), *available at* http://www.constitution.org/eng/magnacar.htm; *see also* Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819) ("As to the words from Magna Charta [sic], incorporated into the constitution . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government . . . .").

18 *See, e.g.*, Prater v. City of Burnside, Ky., 289 F.3d 417, 431 (6th Cir. 2002) ("This Clause clothes individuals with the right to both substantive and procedural due process.") (citation omitted).

19 *See* Fieger v. Ferry, No. 04-60089, 2007 U.S. Dist. LEXIS 71274, at *16–18 (E.D. Mich. Sept. 26, 2007) ("The Due Process Clause provides three types of protections."); *see also* Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) ("[T]he Due Process Clause of the Fourteenth Amendment . . . is the source of three different kinds of constitutional protection.").

20 This is the rationale behind § 1983 claims. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("First, the [Due Process] Clause incorporates many of the specific protections defined in the Bill of Rights.").

21 *Id.* (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). This substantive guarantee extends to many areas of law. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (privacy); Meyer v. Nebraska, 262 U.S. 390, 392 (1923) (education in foreign languages).

22 *See, e.g., Mathews*, 424 U.S. at 332 (explaining that procedural due process prevents government from freely depriving individuals of liberty of property).

23 An interesting question of state action arises in the context of prison facilities operated by private contractors. For example, in *Correctional Services Corporation. v. Malesko*, 534 U.S. 61, 71 (2001), the Court decided that the holding of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which recognized an implied private action for violations of constitutional rights, did not extend to private correctional facilities. In doing so, the Court assumed that due process is required in privatized correctional in-

contexts,[24] including administrative action,[25] the reach of a state's extraterritorial jurisdiction,[26] and the procedures accompanying the issuance of a writ of garnishment.[27] Regardless of the context in which a procedural due process violation is alleged, the Court applies a two-step analysis. The first step is determining whether the state has in fact deprived an individual of a protected interest—life, liberty, or property.[28] A deprivation of a protected interest, however, is not itself unconstitutional;[29] rather, once the court has found a deprivation of a protected interest, the second step is to determine whether the state deprived the individual of that interest without due process of law.[30] Put another way, a constitutional violation will arise only if the Court finds that the state deprived the individual of that interest without due process of law.[31] Therefore, a procedural due process violation is independent of the merits of the underlying claim.[32]

---

stitutions, but did not decide the question. *See also* Richardson v. McKnight, 521 U.S. 399, 412 (1997) (concluding that "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case").

24 *See* Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 269 (1991) (noting that procedural due process is implicated by, for example, "disciplining prisoners and school children, suspending drivers' licenses and welfare benefits, terminating employment and parental rights, curtailing public programs, prosecuting public offenders, and compelling public access to beachfront property").

25 *Compare* Londoner v. City of Denver, 210 U.S. 373, 385–386 (1908) (requiring notice and an opportunity to be heard in actions where site-specific taxes are irrevocably fixed) *with* Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (stating that general statutes that affect taxes do not require notice and an opportunity to be heard).

26 *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (holding that due process prevents a state from making binding judgments against "defendant[s] with which the state has no contacts, ties, or relations").

27 *See, e.g.*, N. Ga. Fishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975) (holding that issuance of writs of garnishment must not violate due process).

28 The Court has struggled to define this step. For instance, in *Bailey v. Richardson*, 341 U.S. 918 (1951) (per curiam), the Court applied what has later been termed the "right/privilege" distinction. *See* PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES & COMMENTS 774–83 (10th ed. 2003). The Court seemed to retreat from this standard in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972), where the Court defined the liberty and property interest in more specific terms. *See also* Perry v. Sindermann, 408 U.S. 593, 603 (1972) (moving further away from the entitlement analysis of *Bailey v. Richardson*); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 484 (1977) (criticizing the Court's definition of property interests).

29 *See* Carey v. Piphus, 435 U.S. 247, 259–60 (1978).

30 *Id.* at 259 (noting that procedural due process is meant to protect against the "*mistaken or unjustified* deprivation of life, liberty, or property" (emphasis added)).

31 Zinermon v. Burch, 494 U.S. 113, 125 (1989) ("[T]he constitutional violation actionable . . . is complete when the wrongful action is taken.") (internal citation omitted).

32 Mathews v. Eldridge, 424 U.S. 319, 330–31 (1976) (noting that the respondent's "constitutional challenge is entirely collateral to his substantive claim of entitlement").

The question of what procedures due process demands is not easily answered. As the Supreme Court has noted, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances."[33] To this end, the Court applies a variety of tests to determine the appropriate level of process. In the administrative context, as well as select other areas,[34] the Court applies a balancing test.[35] This test was borne out of the so-called "procedural due process revolution" of the 1970s,[36] which began with the watershed case of *Goldberg v. Kelly*.[37] In *Goldberg*, the Supreme Court held that New York City deprived welfare recipients of due process by not providing them with a hearing prior to terminating their welfare benefits.[38] Whatever uncertainty was created by *Goldberg*—and much uncertainty *was* created—it was resolved by the Supreme Court in *Mathews*.

The *Mathews* test requires courts to balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, in-

---

33 Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring)); Connecticut v. Doehr, 501 U.S. 1, 10 (1991) (quoting the same sentence from *Cafeteria & Rest. Workers Union*); *see also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situations demands."); *Cafeteria & Rest. Workers Union*, 367 U.S. at 895 ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."). Nonetheless, note that it is clear that at its core, procedural due process requires notice and opportunity to be heard. *See Mathews*, 424 U.S. at 333, 348–49 (noting that both notice and the opportunity to be heard are fundamental to due process); *see also* People v. David W., 733 N.E.2d 206, 211 (N.Y. 2000) (noting that the "bedrock of due process is notice and opportunity to be heard") (citing, *inter alia*, *Mathews*, 424 U.S. at 333; Goldberg v. Kelly, 397 U.S. 254, 265–68 (1970); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

34 *See* discussion *infra* notes 199–202 and accompanying text.

35 *See Mathews*, 424 U.S. at 334–35 (formulating an analysis of due process weighing the private interest, risk of erroneous deprivation of that interest, and the government interest at stake).

36 *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1273 (1975) (noting that "we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution"); Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights*," 46 WM. & MARY L. REV. 213, 252 n.177 (2004) (charting the major cases in the establishment of procedural due process).

37 397 U.S. 254 (1970).

38 *See id.* at 261–71 (discussing the private interest in retaining welfare benefits, the government interest in promoting citizens' sufficiency and dignity, and the administrative costs of pre-termination hearings).

> cluding the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[39]

One important area where procedural due process operates to limit government action is judicial recusals.[40] Although nearly every jurisdiction has a statute that requires recusal in certain situations,[41] courts have used procedural due process to limit the prerogative of judges to hear every case that may come before them. That is, fundamental fairness (and thus due process) demands that a judge recuse herself in certain situations.[42] These decisions are an outgrowth of the constitutional maxim that "[a] fair trial in a fair tribunal is a basic requirement of due process."[43]

B. Early Recusal Challenges

The Due Process Clause does not "impose a constitutional requirement that the states adopt statutes that permit disqualification for bias or prejudice."[44] In fact, as the Supreme Court has stated, "only in the most extreme cases would disqualification" be constitutionally mandated.[45] At its most basic level, the Due Process Clause incorporates the common-law rule that recusal is required when a judge has a "direct, personal, substantial, pecuniary interest" in a case.[46] As the Supreme Court has noted, this common-law rule is derived from 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 im-

---

39 *Mathews*, 424 U.S. at 335.

40 *See* Caperton v. A..T. Massey Coal Co., 129 S. Ct. 2252, 2259 (citing, *inter alia*, Tumey v. Ohio, 273 U.S. 510, 523 (1927); Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

41 *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES (2d ed. 2007).

42 *See Caperton*, 129 S. Ct. at 2257 ("Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" (quoting *Withrow*, 421 U.S. at 47)).

43 *In re* Murchison, 349 U.S. 133, 136 (1955); *see also Caperton*, 129 S. Ct. at 2259 (discussing *Murchison*); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The requirement of neutrality has been jealously guarded by this Court."); Friendly, *supra* note 36, at 1279–80 (noting that an unbiased tribunal is essential to a fair hearing). The Supreme Court has further observed that "[t]he theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155 (1878). Put another way, an accused has the right to be tried by "a public tribunal free of prejudice, passion, excitement, and tyrannical power." Chambers v. Florida, 309 U.S. 227, 236–37 (1940).

44 Fieger v. Ferry, No. 04-60089, 2007 U.S. Dist. LEXIS 71274 (E.D. Mich. Sept. 26, 2007) (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986)).

45 *See Lavoie*, 475 U.S. at 821 (requiring disqualification of a state supreme court justice where the disposition of the matter before the court would affect that justice's interest in a separate legal action).

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

probably, corrupt his integrity."[47] Yet as discussed in the text that follows, the Supreme Court has gradually expanded this common-law rule over the last century to require recusal based on due process in new situations.

The first departure from the common-law came in 1927 when the Supreme Court decided the case of *Tumey v. Ohio*.[48] In that case, the Court held that Due Process was violated where the salary of a town's mayor, who also served as town justice, was tied to the amount of fines he imposed and where sums from criminal fines were deposited into the general village treasury.[49] In the face of a challenge, the Court held that this arrangement violated the Due Process Clause "both because of his [the individual's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village."[50] Specifically, the Court held:

> 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.[51]

In so holding, the Court departed from the narrow common-law focus on direct pecuniary interest. Instead, the decision sought to protect against those interests that might attempt adjudicators to "disregard neutrality."[52] Indeed, as the Supreme Court recently explained, the due process violation in *Tumey* "was less than what would have been considered personal or direct at common law."[53] In a number of subsequent decisions, the Supreme Court further defined and expanded the reach of *Tumey*.[54]

---

47 *See Caperton*, 129 S. Ct. at 2259; Gutierrez v. Lamagno, 515 U.S. 417, 428 (1995) (quoting THE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961)).

48 273 U.S. 510 (1927).

49 *Id.* at 524–24.

50 *Id.* at 535.

51 *Id.* at 532.

52 *See Caperton*, 129 S. Ct. at 2260 (noting that the *Tumey* Court examined conflicts of interest beyond financial involvement in a case).

53 *Id.* at 2259–60.

54 In *Ward v. Village of Monroeville*, for instance, the Court, in facts similar to *Tumey*, invalidated a system whereby a town mayor would impose fines that went to the town's general treasury. 409 U.S. 57 (1972). Although the mayor had no direct, personal interest in assessing a fine, the Court reasoned that a "judge's financial stake need not be as direct or positive as . . . in *Tumey*." *Caperton*, 129 S. Ct. at 2260 (internal citation omitted). In a later series of cases, the Court held that it is permissible for the trial judge to have been involved in some earlier proceedings in the case. *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 58 (1975) (noting that issuing arrest warrants and presiding over arraignments does not

In a second series of cases, the Supreme Court further expanded the reach of the Due Process Clause, once again departing from the common-law of recusal. These cases "emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding."[55] In *In re Murchison*,[56] a trial judge charged a defendant with contempt after the defendant refused to answer the judge's questions; the judge also charged another individual with perjury for failing to answer the judge's questions truthfully.[57] After the trial, the very judge that charged both individuals also convicted them.[58] The defendants appealed, and the Supreme Court set aside their convictions as violative of Due Process.[59]

Although recognizing that the standard for disqualification "cannot be defined with precision," the Court held that in this case, "[h]aving been a part of that [one-man grand jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused."[60] The Court reasoned that "[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session."[61] The Court distinguished this from ordinary grand jury proceedings, because here the jury was part of the accusatory process.[62]

Next, the Court in *Mayberry v. Pennsylvania*[63] considered whether the trial judge who would be sentencing convicted defendants may also preside over their criminal contempt charges, for contempt committed against the same trial judge. The Court held that "a defendant in criminal contempt proceedings should be given a public

---

preclude the trial judge from ultimately hearing the case, even though the judge had to make a preliminary determination of probable cause); *cf.* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822–23 (1986) (holding that a justice casting the deciding vote on a state high court to uphold a large punitive award while acting as lead plaintiff in the identical case below violated due process, although noting that "what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision") (citation omitted) (internal quotation marks omitted).

55 *See Caperton*, 129 S. Ct. at 2261.

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

57 *Id.* at 134–35.

58 *Id.* at 135.

59 *Id.* at 139.

60 *Id.* at 137.

61 *Id.* at 138.

62 *Id.* at 137 (noting that "[a] single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror").

63 400 U.S. 455 (1971).

trial before a judge other than the one reviled by the contemnor."[64] As the Court reasoned, a judge in these circumstances "necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication."[65]

C. Recent Expansion of Due Process

1. Caperton v. A.T. Massey Coal Co., Inc.

Perhaps the most significant expansion of due process with respect to judicial recusals came in 2009.[66]

In *Caperton*, the Court held that due process requires a judge to recuse herself when, based on "objective and reasonable perceptions," there is a "probability of bias" by the judge towards one of the litigants.[67] The facts leading up to the Supreme Court case began in 2002, when a West Virginia state jury returned a verdict against A.T. Massey Coal Co., Inc. ("Massey"), finding it liable to Hugh Caperton, for $50 million in compensatory damages on a variety of tort theories.[68] The trial court denied Massey's post-verdict motions in 2004.[69]

Having failed to receive relief at the trial court, Don Blankenship, Massey's chairman, resorted to politics in an attempt to reverse the judgment against his company. Before the Supreme Court of Appeals of West Virginia heard Massey's appeal, Blankenship decided to support a local attorney, Brent Benjamin, who was campaigning to replace Justice McGraw of the Supreme Court.[70] Blankenship not only contributed $1,000 to Benjamin's campaign committee, but he also donated more than $2.5 million to a so-called "527" organization that opposed McGraw and supported Benjamin;[71] this significant donation constituted more than two-thirds of the organization's total fund-

64 *Id.* at 466.

65 *Id.* at 465.

66 *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2262 (2009) ("This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed."). This latest modification to the Due Process recusal inquiry comes on the heels of *Minnesota Republican Party v. White*, 536 U.S. 765 (2002), which considered the First Amendment rights of judicial candidates to announce their views during a campaign for judicial office. *See infra* Part III.

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

68 *Id.* at 2257. The other defendants included Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales. *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

raising.[72] Blankenship also gave over $500,000 in independent expenditures in support of Benjamin's candidacy.[73] As the Supreme Court noted, Blankenship's contributions and expenditures "were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."[74] In the end, Benjamin won the 2004 judicial election, receiving 53.3% of the vote, defeating incumbent Justice McGraw who received 46.7% of the vote.[75]

As Massey's appeal reached the Supreme Court of Appeals of West Virginia, Massey filed a motion to disqualify the newly-elected Justice Benjamin under both a state statute and the Due Process Clause of the U.S. Constitution.[76] The Court denied the motion.[77] The appeal reached the high court in November 2007, and in a 3–2 ruling, the Court reversed the $50 million verdict against Massey in an opinion joined by Justice Benjamin.[78]

The defendants sought a rehearing and moved for disqualification of three of the five justices who ruled on the appeal.[79] Two of the justices agreed to recuse themselves, while Justice Benjamin declined to do so,[80] with one justice warning that "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court."[81] At the rehearing, Justice Benjamin was acting as Chief Justice and selected two additional justices to hear the appeal.[82] In April 2008, the high court once again reversed the jury verdict, relieving Massey of its $50 million tort liability.[83] Jus-

72 *Id.* The organization was called "And for the Sake of Kids," and was organized under 26 U.S.C. § 527. For background on so-called 527s, see generally Richard Kornylak, Note, *Disclosing the Election-Related Activities of Interest Groups Through § 527 of the Tax Code*, 87 CORNELL L. REV. 230 (2001).

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

74 *Id.* The petitioner in the Supreme Court further contended that "Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined." *Id.*

75 *Id.*

76 *Id.*

77 *Id.* at 2257–58 (finding "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") (internal citation and quotation marks omitted).

78 *Id.* at 2258. The opinion was not unanimous. For instance, Justice Starcher dissented, opining that the "majority's opinion is morally and legally wrong." *Id.* (citation omitted).

79 *Id.*

80 *Id.* at 2262. As the Court points out, Justice Benjamin wrote four separate opinions during the course of the appeal detailing why no actual bias existed. *Id.* at 2262–63.

81 *Id.* at 2258 (citation omitted).

82 *Id.*

83 *Id.*

tice Benjamin found himself in the 3–2 majority again with two Justices writing a scathing dissent: "Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority."[84] The U.S. Supreme Court granted certiorari and reversed.[85]

After noting that the U.S. Supreme Court had not previously considered a recusal challenge in the context of judicial elections, the Court reiterated that the test is an objective one.[86] That is, "the Due Process Clause . . . do[es] not require proof of actual bias."[87] In the context of judicial elections, the Court held that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[88] To define this test, the Court 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.'"[89]

Turning to the facts of the case, the Court concluded that Blankenship's campaign activities "had a significant and disproportionate influence" in placing Justice Benjamin on the case.[90] This is evident, the Court reasoned, from the large amount of money that Blankenship spent on this campaign.[91] Although the Court conceded that Blankenship's campaign activities might not have directly caused Justice Benjamin's electoral victory, this was of little significance to the Court. The size of Blankenship's contributions relative to the total amount spent in the election, combined with the small margin of victory, allowed the Court to find that "[t]he risk that Blankenship's influence engendered actual bias is sufficiently substantial that it 'must be forbidden if the guarantee of due process is to be adequately im-

84 *Id.*

85 *Id.* at 2267.

86 *Id.* at 2263 ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.").

87 *Id.* (citing, *inter alia*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986); Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

88 *Id.* at 2263–64.

89 *Id.* at 2263 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1976)).

90 *Id.* at 2264.

91 *Id.* (comparing Blankenship's monetary contributions to the total amount raised by the campaign).

plemented.'"[92] The Court further noted the close temporal relationship between the campaign contributions and the justice's election such that it was "reasonably foreseeable" when Blankenship made the contributions that the appeal would come before Justice Benjamin if he won the election.[93]

The Court concluded by opining that it was addressing "an extraordinary situation," and that its holding would not cause adverse consequences.[94] Just as with previous decisions addressing extreme facts giving rise to recusal, the Court believed that lower courts are "quite capable" of applying the standard that it announced in the case.[95] This is particularly true because state statutes often require recusal above and beyond the constraints of due process that the Court was announcing.[96]

Chief Justice Roberts wrote a vigorous dissent, in which he argued that *Caperton* will "inevitably lead to an increase in allegations that judges are biased," thus eroding the public's confidence in the impartiality of the judiciary.[97] After explaining how the Court has departed from its prior precedents, the Chief Justice posed forty questions to highlight the uncertainties that he believed would result from the majority's holding.[98] In the end, the Chief Justice predicted that the Court will "regret" this decision because lower courts will expand its boundaries, "each claiming the title of 'most extreme' or 'most disproportionate' [facts]."[99]

Justice Scalia also dissented, arguing that "the principal consequence of today's decision is to create vast uncertainty" in the thirty-nine states that elect their judges.[100] He predicted the rise of the "*Caperton* claim" and the indeterminate law that will have to be applied when adjudicating such claims.[101] Justice Scalia also lamented that the decision will reinforce the public perception that litigation is simply a game.[102] In this case, Justice Scalia believes "the relevant

92 *Id.* (quoting *Withrow*, 421 U.S. at 47).
93 *Id.* at 2264–65.
94 *Id.* at 2265.
95 *Id.* at 2266.
96 *Id.* at 2267 ("Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.").
97 *Id.* at 2267 (Roberts, C.J., dissenting).
98 *Id.* at 2269–72.
99 *Id.* at 2273.
100 *Id.* at 2274 (Scalia, J., dissenting).
101 *Id.*
102 *Id.*

question . . . is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule."[103]

2. *Scope of* Caperton *and Boundaries of Due Process*

Caperton has fundamentally changed the interplay between judicial recusals and the Constitution. Given the significance of *Caperton* and the questions it leaves open, the boundaries of the decision are unclear, and lower courts may interpret the case as an invitation to require recusal in an even greater number of situations.[104]

As a preliminary matter, courts interpreting *Caperton* will undoubtedly struggle with framing the facts of the actual case. On the one hand, the facts have the "feel of a best seller,"[105] not only because they *did* make for a best seller—John Grisham's "The Appeal"—but also because they ooze corruption and unfairness. In the Court's own words they are "extreme," "extraordinary," "rare," and "exceptional."[106] On the other hand, both the majority and the public may have exaggerated the facts.[107]

And even on the undisputed facts, as Chief Justice Roberts points out, it is unclear as to how extreme they really are.[108] Blankenship had contributed to other candidates in the past, which the dissenters found "undercut[] any notion that his involvement in this election was 'intended to influence the outcome' of particular pending litigation."[109] His only direct contribution amounted to $1,000, and his independent expenditures were not so outlandish when compared to what other lawyers, in aggregate, spent on Benjamin's opponent.[110]

---

103 *Id.* at 2275.

104 *See* Richard M. Esenberg, *If You Speak Up, Must You Stand Down:* Caperton *and its Limits*, 45 WAKE FOREST L. REV. 1287 (2010) (arguing that the scope and likely application of the decision "can be informed by the Court's recent decisions on judicial campaign speech and campaign finance regulation"); Stephen M. Hoersting & Bradley A. Smith, *The* Caperton *Caper and the Kennedy Conundrum*, CATO SUP. CT. REV. 319, 319 (2009) (noting that the *Caperton* standard is a "largely unworkable standard for judicial recusal").

105 Joan Biskupic, *At the Supreme Court, a Case with the Feel of a Bestseller: Like a Grisham Novel, W.Va. Dispute Examines Conduct of Elected Judges*, USA TODAY, Feb. 17, 2009, at 1A.

106 *See Caperton*, 129 S. Ct. at 2263, 2265, 2267.

107 *See* Hoersting & Smith, *supra* note 104, at 322–23 ("The press depiction of the *Caperton* facts is enough to horrify anyone who believes in impartial justice. It is also completely incorrect.").

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

109 *Id.* at 2274.

110 *Id.* at 2273–74 ("Blankenship's independent expenditures do not appear 'grossly disproportionate' compared to other such expenditures in this very election. 'And for the Sake of the Kids'—an independent group that received approximately two-thirds of its funding

The dissenters were also unconvinced that money made the difference in this election—Benjamin's opponent may have been brought down by his lack of endorsements, refusal to participate in debates, and a disturbing speech.[111] And he lost by a healthy margin (seven points), suggesting that Blankenship's money was not the deciding factor.[112]

The holding of the case is no less controversial. It raises questions like "[h]ow much money is too much money?" or "[w]hat level of contribution or expenditure gives rise to a 'probability of bias?'"—two of the more than forty questions asked by the dissent.[113] But the more fundamental issue is whether *Caperton* is even limited to money. Reading the holding out of context, the answer seems to be "yes":

> We conclude that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case *by raising funds* or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the *contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.*[114]

The majority seems particularly troubled by the possibility of one of the litigants buying her own judge.[115] The underpinning of the holding, however, is broader than financial contributions; the problem that the court attempts to redress in *Caperton* is the objective "probability of bias."[116] Indeed, to reach its conclusion, the Court builds on the "principles" set out in a handful of cases for the sole purpose of highlighting the fundamental problem of judicial bias (rather than just influence through financial incentives).[117] Revealingly, none of those cases involved direct contributions and one—*In re Mu-*

---

from Blankenship—spent $3,623,500 in connection with the election. But large independent expenditures were also made in support of Justice Benjamin's opponent. 'Consumers for Justice'—an independent group that received large contributions from the plaintiffs' bar—spent approximately $2 million in this race. And Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was 'intended to influence the outcome' of particular pending litigation.") (citations omitted).

111 *Id.* at 2274.

112 *Id.*

113 *Id.* at 2269.

114 *Id.* at 2263–64 (majority opinion) (emphasis added).

115 *Id.* at 2265 ("Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.").

116 *Id.* at 2263.

117 *Id.* at 2262.

chison—had nothing to do with money.[118] Of course, Supreme Court precedent always develops to encompass different circumstances and factual scenarios. But given *Caperton*'s focus on the probability of bias, litigants in the courtroom of a judge who had been elected in "significant" part and as a result of "disproportionate" support from crusaders against the litigants, would have a plausible claim stemming directly from the holding of the case.[119]

This would not require a particularly robust interpretation of *Caperton*. As the dissenters point out, it logically flows from the holding that "there are a number of factors that could give rise to a 'probability' or 'appearance' of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, *prior speeches and writings*, religious affiliation, and countless other considerations."[120] Chief Justice Roberts is alarmed by how broad the majority's holding seems to be. As the Chief Justice wrote: "[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."[121]

If there was any doubt as to whether recusal claims based on the judge's speech as a candidate could plausibly be entertained, Chief Justice Robert's list of questions seems to put that notion to rest:

> 9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received "disproportionate" support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are "tough on crime," must the judge recuse in all criminal cases? . . . 20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?[122]

These uncertainties arise partly because the majority emphasizes the "extremeness" of the case,[123] with the hope that courts will not be

---

118 *Id.* at 2261.

119 *Id.* at 2264 (finding that the campaign efforts "had a significant and disproportionate influence in placing Justice Benjamin on the case"). It is worth noting that the speech would not have to be the necessary or sufficient factor in the judge's victory. *See id.*

120 *Id.* at 2268 (Roberts, C.J., dissenting) (emphasis added).

121 *Id.* at 2269 (emphasis added).

122 *Id.* at 2269–70.

123 *Id.* at 2272 ("To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority's only answer is that the present case is an 'extreme' one, so there is no need to worry about other cases. The Court re-

flooded with non-meritorious *Caperton* claims,[124] but says nothing about limiting it to financial contributions. It is not difficult to imagine a "speech" *Caperton* claim that is more "extreme" than one involving a miniscule financial contribution.

Even if the Court did try to limit the holding to instances involving financial contributions, expecting lower courts to be selective in applying the rule in only "extreme" cases is not realistic—and may indeed be "just so much whistling past the graveyard."[125] The history of federal jurisprudence abounds with examples of the Court setting out rules borne out of some "extreme" cases only to see it grow in the district courts.[126] The dissent provides one such "cautionary tale,"[127] but there are others. For instance, in 2007 the Supreme Court came down with its *Bell Atlantic v. Twombly* decision that raised the pleading standard in certain antitrust actions.[128] Although the decision appeared to be limited to the antitrust context, many lower courts quickly seized upon its holding as grounds to raise the pleading stan-

---

peats this point over and over. ('this is an exceptional case'); ('On these extreme facts'); ('Our decision today addresses an extraordinary situation'); ('The facts now before us are extreme by any measure'); (Court's rule will 'be confined to rare instances').") (internal citations omitted).

124 *Id.* at 2266 (majority opinion) ("As such, it is worth noting the effects, or lack thereof, of the Court's prior decisions. Even though the standards announced in those cases raised questions similar to those that might be asked after our decision today, the Court was not flooded with *Monroeville* or *Murchison* motions. That is perhaps due in part to the extreme facts those standards sought to address. Courts proved quite capable of applying the standards to less extreme situations.").

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

126 *See id.* ("There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: 'Hard cases make bad law.'").

127 The Court summed it up as follows:

> Consider the cautionary tale of our decisions in *United States v. Halper* and *Hudson v. United States*. Historically, we have held that the Double Jeopardy Clause only applies to criminal penalties, not civil ones. But in *Halper*, the Court held that a civil penalty could violate the Clause if it were 'overwhelmingly disproportionate to the damages [the defendant] has caused' and resulted in a 'clear injustice.' We acknowledged that this inquiry would not be an 'exact pursuit,' but the Court assured litigants that it was only announcing 'a rule for the rare case, the case such as the one before us.'
>
> Just eight years later, we granted certiorari in *Hudson* 'because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*.' The novel claim that we had recognized in *Halper* turned out not to be so 'rare' after all, and the test we adopted in that case—'overwhelmingly disproportionate'—had 'proved unworkable.' We thus abandoned the *Halper* rule, ruing our 'ill considered' 'deviation from longstanding double jeopardy principles.'

Id. at 2272–73 (citations omitted).

128 550 U.S. 544 (2007).

dard in other types of cases.[129] Only two years later, after much uncertainty in the lower courts,[130] the Supreme Court decided *Ashcroft v. Iqbal*, which held that *Twombly*'s heightened pleading standard is generally applicable in federal court.[131]

Whether "*Caperton* motions" for recusals based on the judicial candidates' platforms will be readily granted as a matter of straight application of *Caperton*, or because the holding is not explicitly limited to financial contributions, or because there is seldom uniformity in the application of new standards to the "rare" circumstances—whatever the reason may be, the distinct possibility that courts will have to deal with a "variety of *Caperton* motions," looms large.[132] Only with the application of a careful balancing test articulated in *Mathews* can the Court be sure that *Caperton* affords adequate due process protection to the litigant in a potentially biased courtroom without sacrificing the confidence in our judicial system or the candidates' First Amendment rights.[133]

---

129 *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) ("However, the [*Twombly*] Court's explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that prevailed in the federal courts ever since *Conley v. Gibson*, was decided half a century ago."); Leading Cases, *Federal Jurisdiction and Procedure, Civil Procedure: Pleading Standards*, 121 HARV. L. REV. 305, 305 (2007) (arguing that a "judicial opinion is the wrong forum for enacting a major change to settled interpretations of the Federal Rules," as the Court did in *Twombly*).

130 Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts after* Bell Atlantic Corp v. Twombly, 41 SUFFOLK U. L. REV. 851, 852 (2008) ("Because *Twombly* is so widely cited, it is particularly unfortunate that no one quite understands what the case holds.").

131 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950–51 (2009).

132 *See Caperton*, 129 S. Ct. at 2273.

133 *Id.* at 2274 (Roberts, C.J., dissenting) ("It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a 'probability of bias' should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous 'probability of bias,' 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. I hope I am wrong."). To be sure, the Supreme Court, in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 910 (2010), characterized *Caperton* as being "limited to the rule that the judge must be recused, not that the litigant's political speech could be banned." This statement does not speak directly to the First Amendment rights of judges, but to the extent it seeks in *dicta* to cabin the holding of *Caperton*, lower courts and litigants may nonetheless seize upon the language and ambiguities of the decision in the various ways described throughout this Article.

III. FIRST AMENDMENT LIMITATIONS ON RECUSAL

A. First Amendment Rights of Judicial Candidates

Just as the Due Process Clause protects the right of litigants to a fair tribunal, the First Amendment protects the judicial candidates' freedom of speech.[134] It is worth noting at the outset that (as the controversial recent Supreme Court decision reaffirmed) the First Amendment includes the right to give money.[135] More relevant for this discussion, however, is the idea that the amendment also protects the right to *receive* money.[136] If the Supreme Court or the circuit courts agree, then the argument in this section that there are pressing First Amendment concerns in recusal cases is even more forceful. But because this paper focuses on recent Supreme Court case law, where specific First Amendment considerations have been recognized, the discussion that follows centers on judicial candidates' speech. In a landmark decision, *Republican Party v. White*, the Supreme Court held that a state may not prohibit judicial candidates from explaining their views on disputed legal issues.[137] To be sure, judicial recusals are different from state canons that directly regulate speech. Nevertheless, as a result of *White*, even mandatory recusals, with their potential to chill speech, give rise to First Amendment concerns.

Like most states, Minnesota had judicial conduct canons, which were based on the ABA Model Code of Judicial Conduct.[138] At issue in *White* was Minnesota's "announce clause" that stated that "a candidate for a judicial office, including an incumbent judge . . . shall not . . . announce his or her views on disputed legal or political issues."[139] The controversy arose when Gregory Wersal, running for associate justice of the Minnesota Supreme Court, distributed literature in which he criticized several decisions of the Minnesota Supreme Court.[140] After a complaint was filed with the agency responsible for prosecuting ethical violations of judicial candidates, Wersal withdrew from the race.[141]

---

134 *See* U.S. CONST. amend. I; Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).
135 *Citizens United*, 130 S. Ct. at 917 (2010).
136 *See* Dean v. Blumenthal, 577 F.3d 60, 69–70 (2d. Cir. 2009).
137 536 U.S. 765 (2002).
138 *Id.* at 768.
139 *See* MINN. CODE OF JUDICIAL CONDUCT, CANON 5(A)(3)(d)(i) (1998).
140 *White*, 536 U.S. at 765.
141 *Id.* at 769.

Not to be deterred, Wersal ran again two years later, this time seeking an advisory opinion from the agency on whether it planned to enforce the announce clause.[142] The agency's response was equivocal: Although it had doubts about the constitutionality of the provision, it was unable to answer Wersal's inquiry because he did not submit a list of announcements that he would be making.[143] Wersal subsequently filed a lawsuit in federal court that culminated in the *White* decision.[144]

The Supreme Court was careful in limiting its holding to the announce clause, which was separate from the clause that prohibited candidates from making promises other than "faithful and impartial performance of the duties of the office" (the "pledge" or "promise" clause).[145] The Court's interpretation of the announce clause, however, was more expansive than what the Minnesota Supreme Court, the District Court, and the Eighth Circuit offered.[146] The Court concluded that the clause prohibited a candidate "from stating his views on any specific nonfanciful legal question . . . except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*."[147]

Because the announce clause was a content-based regulation of speech and also burdened a category of speech that is at the core of what the First Amendment protects, the Court applied strict scrutiny.[148] Without deciding whether impartiality is a compelling interest,[149] or indeed even what interest was advanced by the state, the

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 770 ("All the parties agree this is the case, because the Minnesota Code contains a so-called 'pledges or promises' clause, which *separately* prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office'—a prohibition that is not challenged here and on which we express no view.") (citation omitted); *see also* Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 227 (6th Cir. 2004) ("Although the Supreme Court's decision in *White* applied only to an announce clause and did not involve a promises and commit clause, the district court found that the difference in this case is simply one of label: [T]he State has enforced the promises and commit clause as a *de facto* announce clause, and therefore the State is unlikely to succeed in light of the binding precedent in *White*.").

146 *White*, 536 U.S. at 771–72.

147 *Id.* at 773.

148 *Id.* at 775.

149 Courts interpreting *White* have since found that judicial impartiality can be a compelling goal. *See, e.g.*, Jenevein v. Willing, 493 F.3d 551, 559 (5th Cir. 2007) ("An impartial judiciary, while a protean term, translates here as the state's interest in achieving a courtroom that at least on entry of its robed judge becomes a neutral and disinterested temple, in

Court held that the announce clause was not narrowly tailored to any goal that could rise to the level of compelling.[150] Quite simply, the state was regulating speech based on its content, which in the eyes of the majority has little to do with impartiality.[151] As the Court explained,

> [W]hen a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.[152]

While the majority opinion clearly left the door open for lower courts to find that judicial impartiality is a compelling interest, it has provided little guidance on how a state canon's restriction on speech can ever be narrowly tailored. A federal appellate court has suggested one answer. In *Jenevein v. Willing*, a state judge facing public pressure over his refusal to withdraw from a case, chose to don his robe and hold a press conference in his courtroom.[153] The commission in charge of investigating ethical charges issued a censure order against the judge.[154] The Fifth Circuit held that the order could only survive strict scrutiny if it censured the judge for using state equipment, his robe, and the courtroom instead of a public forum: "Today we say only that the state can put the courtroom aside."[155] The commission, however, went over the line by directing the order at the content of the judge's speech.[156]

Perhaps the most forceful and memorable lines of *White* came from Justice O'Connor's concurrence. A critic of judicial elections, Justice O'Connor observed that Minnesota "has voluntarily taken on the risks to judicial bias" by instituting the practice of popularly electing judges.[157] As one court summarized O'Connor's argument, "the state cannot . . . attempt to have it both ways by electing its judiciary yet simultaneously gagging its judicial candidates and thus preventing

---

appearance and fact—an institution of integrity, the essential and cementing force of the rule of law. That this interest is compelling cannot be gainsaid.").

150 *White*, 536 U.S. at 776–77.

151 *Id.* at 776.

152 *Id.* at 776–77.

153 *Jenevein*, 493 F.3d at 561.

154 *Id.* at 560.

155 *Id.* at 561.

156 *Id.* at 562.

157 *See White*, 536 U.S. at 792.

the voting public from receiving the information necessary to cast an informed vote."[158]

One of the questions purposefully left open by *White* is whether the commit or pledge clauses also run afoul of the First Amendment.[159] No consensus exists either among state or federal courts on whether these regulations are like the announce clause struck down in *White* and therefore unconstitutional.[160]

Even if appellate courts or the Supreme Court ultimately limit *White* to announce clauses, uncertainty remains over "how, and whether, this new freedom can coexist with the goal of maintaining a fair, independent, and impartial judiciary."[161] Armed with *White*, candidates are free to criticize decisions of judges against whom they are running—criticism that may be steeped as much in populism as in the law or legal process. One commentator provides a particularly pointed view of a world in the wake of *White*:

> Instead of reciting platitudes about how they will be fair and efficient, judicial candidates will now have to engage each other and stake out distinct positions. They will have to develop campaign platforms, essentially, against which voters can compare their judicial records once elected. Fueled by rising levels of funds, high-profile advertisements will transmit the candidates' messages and the assessments of interested groups to more people. Voter turnout should rise. Retention rates should fall.[162]

Judicial candidates are not the only ones armed with a new found freedom; interest groups around the country have filed "right to lis-

---

158 Family Trust Found. of Ky. v. Wolnitzek, 345 F. Supp. 2d 672, 704 (E.D. Ky. 2004).

159 *White*, 536 U.S. at 770.

160 *See* Pa. Family Inst., Inc. v. Celluci, 521 F. Supp. 2d 351, 387 (E.D. Pa. 2007) (pledge and commit clauses are narrowly construed and constitutional); North Dakota Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1044 (D.N.D. 2005) (pledge and commit clauses are similar in scope to the announce clause and unconstitutional); *In re* Kinsey, 842 So.2d 77, 86–87 (Fla. 2003) (pledge and commit clauses are different from the announce clause and constitutional); Kan. Judicial Review v. Stout, 196 P.3d 1162, 1170 (Kan. 2008) (citing Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 227 (6th Cir. 2004) (pledge and commit clauses are similar in scope to the announce clause and unconstitutional)); *In re* Watson, 794 N.E.2d 1, 6 (N.Y. 2003) (pledge clause is different from the announce clause and constitutional).

161 Pa. Family Inst., Inc. v. Black, 489 F.3d 156, 163 (3d Cir. 2007) (citing Robert H. Alsdorf, *The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and Judiciary in a Democracy*, 30 HASTINGS CONST. L.Q. 197, 200 (2003); Rachel Paine Caufield, *In the Wake of* White*: How States are Responding to* Republican Party of Minnesota v. White *and How Judicial Elections are Changing*, 38 AKRON L. REV. 625, 629 (2005); Nancy Gertner, *To Speak or Not to Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1148 (2004); David Shultz, Minnesota Republican Party v. White *and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 986 (2006)).

162 David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 297 (2008).

ten" suits stemming from the questionnaires they have sent to candidates running for state court judgeships.[163]

When candidates have refused to fill out forms that ask them to announce their views on politically-charged legal questions, like the right to abortion, these groups have pointed to state canons as the reason for their refusal.[164] Whether these canons are indeed the perpetrators—or saviors—is less than clear, to say the least.[165] For some time, third party groups have run into what may have stricken them as a judicially-imposed formality, called standing: "[T]o maintain a 'right to listen' claim, a plaintiff must clearly establish the existence of a 'willing speaker' . . . [because] [i]n the absence of a willing speaker, 'an Article III court must dismiss the action for lack of standing.'"[166] But this wall may too be crumbling. In a 2008 decision of *Kansas Judicial Review v. Stout*, where a past judicial candidate claimed to have been this willing speaker who was discouraged to fill out a questionnaire because of the canons restricting his speech, the Tenth Circuit found that the interest group that circulated the questionnaire had standing.[167]

From a legal standpoint, however, *White*'s reach should not be overstated; in 2008, the Court, in a unanimous decision, has refused

---

163 *See Black*, 489 F.3d at 164 (citations omitted). Interest groups' interest in these questionnaires was not unpredictable, even if the number of the "right to listen" lawsuits is a bit jarring. *See* Pozen, *supra* note 162, at 300 ("The rapid rise in campaign spending, the aggressive outreach done by interest groups and political parties, and the politicization of campaign speech have transformed many judicial races from sleepy, low-key affairs into high-stakes, high-salience affairs. They have broken down the traditional regulatory, stylistic, and rhetorical barriers distinguishing judicial elections from other elections. Judicial candidates increasingly invoke their beliefs on abortion, same-sex marriage, tort reform, and other controversial issues; *if they do not proactively do so, interest groups may try to ferret them out through questionnaires.*") (emphasis added); Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-*White *Landscape*, 56 MERCER L. REV. 971, 981 (2005).

164 *Black*, 489 F.3d at 164 (discussing why judges are reluctant to answer questionnaires on political issues).

165 *See* Ind. Right to Life, Inc. v. Shepard, 507 F.3d 545, 548 (7th Cir. 2007) (noting that of the candidates who explained why they did not respond to a questionnaire asking for the views on *Roe v. Wade*, most explained that they did not rely on the canons, but either felt it professionally or personally inappropriate to respond); Terry Carter, *Loaded Questionnaires? Judicial Candidates Advised to Be Wary of Answers Inviting Suits Challenging Canons*, 5 ABA J. E-REPORT 3 (2006) (arguing that the reason why candidates choose to be silent may well be professional views that judges ought to guard their political views).

166 *Black*, 489 F.3d at 166–67 (quoting Competitive Enter. Inst. v. U.S. Dep't of Transp., 856 F.2d 1563, 1566 (D.C. Cir. 1988)); *see also Shepard*, 507 F.3d at 550; Alaska Right to Life v. Feldman, 504 F.3d 840, 843 (9th Cir. 2007) (addressing an interest group's claim that its decision to not circulate a questionnaire because of the canons was an inappropriate restriction of speech and dismissing the claim for lack of ripeness).

167 519 F.3d 1107, 1115 (10th Cir. 2008).

to use—indeed even consider—*White* as a sword to cut through the nominating process of judicial candidates in New York.[168] A candidate may have the right to speak, but, as it turns out, no guarantee that anyone would listen. The Second Circuit, in *Lopez Torres v. New York State Board of Elections*,[169] drew on and distinguished *White* to strike down the process by which political parties, given their clout, were effectively choosing state judges.[170] The Supreme Court, without citing *White*, overturned the Second Circuit, limiting the candidate's associational right not to join, while observing that the First Amendment does not call on the courts to manage the marketplace of ideas "by preventing too many buyers from settling upon a single product."[171] The fact that being chosen by a political party in New York was, for all practical purposes, the only way to guarantee an audience for your speech, had nothing to do with the First Amendment. As the court observed, it "says nothing more than that the party leadership has more widespread support than a candidate not supported by the leadership."[172] Nonetheless, *White*'s impact on judicial elections is significant: So long as a state chooses to hold popular elections for judges, *White* continues to protect candidates' speech.

B. Recusal as Burdening Speech

Limiting a judicial candidate's or a sitting judge's speech through a judicial canon similar to the one at issue in *White* is, of course, not the same as discouraging comments made by judges through the implicit threat of mandatory recusals. To be sure, speech would still be burdened, if not forbidden, on the basis of its content. And, if it were made in the course of a campaign, discussing qualifications, that speech is at the core of the First Amendment protection.[173] But both the process and consequences are different: The regulation is indirect because the speech itself is not prohibited—only presiding over a case at a later date is—and the result is a potential disqualification

168 N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 196 (2008) (holding that New York's system of choosing party nominees for the State Supreme Court does not violate the First Amendment).

169 *Id.*

170 Lopez Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 183, 201 (2d Cir. 2006), *rev'd*, 552 U.S. 196 (2008).

171 *See Lopez Torres*, 552 U.S. at 208.

172 *Id.* at 205.

173 Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002) (deeming speech about the qualifications of candidates for public office to be "at the core of our First Amendment freedoms").

from a case, not the judgeship altogether.[174] These reasons may be why Justice Kennedy in his concurrence in *White* suggested that recusals are the preferred method of dealing with troubling comments made by the judges and candidates.[175] And it may be why in interpreting *White*, some courts have assumed that recusals are the constitutionally permissible alternatives to the canons.[176]

It could also be that recusals are narrowly tailored to the potentially compelling interest of judicial impartiality, in a way that the announce clause in *White* was not.[177] Indeed, in the highest courts of two states, New York,[178] and Florida,[179] even traditional pledge clause canons, not dissimilar from the one mentioned in *White,* have passed muster under strict scrutiny. The Florida Supreme Court held that it is "beyond dispute that [the Canon] serves a compelling state interest[:]" It preserves the "integrity" of the judiciary as "it would be inconsistent with our system of government if a judicial candidate could campaign on a platform that he or she would automatically give more credence to the testimony of certain witnesses or rule in a predetermined manner."[180] The canon was also narrowly tailored, the court found, because it allowed the candidate to state his personal views on

---

174 There are two strands to this argument. First, because recusals are not direct regulations of speech, they may be deemed incidental. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1178 (1996). Second, they may be content-neutral, so they would not get the same scrutiny that the state canon did in *White*. *See* David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 512 (2009).

175 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) ("[The state] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer.").

176 *See, e.g.*, *In re* Enforcement of Rule 2.03, Canon 5.B.(1)(c) (Mo. 2002) (en banc) ("Recusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.").

177 *See* Michelle T. Friedland, *Disqualifications or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 570 (2004) (discussing the "possibility of creating speech codes more closely tailored to prevent due process conflicts").

178 *In re* Watson, 794 N.E.2d 1, 1 (N.Y. 2003).

179 *In re* Kinsey, 842 So. 2d 77, 77 (Fla. 2003). The canon, that the court described as more "narrow," provided in part: "A candidate for judicial office . . . shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Fla. Code Jud. Conduct, Canon 7A(3)(d)(i)-(ii).

180 *In re Kinsey*, 842 So. 2d at 87.

disputed issues.[181] Similarly, the New York Court of Appeals in *In re Watson* upheld its state's canon under strict scrutiny, observing that "[j]udges must apply the law faithfully and impartially—they are not elected to aid particular groups, be it the police, the prosecution or the defense bar. Campaign promises that suggest otherwise gravely risk distorting public perception of the judicial role."[182]

Reminded by these decisions, it is not difficult to imagine how an expansive recusal standard would pass strict scrutiny; after all, it would target the same concerns and serve the same interests highlighted by the New York and Florida courts. Indeed, at least one federal court has held that a recusal statute satisfied strict scrutiny.[183] But triggering the strict scrutiny review is in and of itself a signal that there are major First Amendment considerations.[184]

Finally, a plausible argument can be made that recusals, given that they burden speech incidentally, are not subject to strict scrutiny.[185] In *United States v. O'Brien*, the Court announced a four-prong, intermediate-like test for laws that have the effect of restricting speech even if they do not aim at expression directly.[186] As mentioned previously, recusal standards do not *forbid* speech, but whether they target speech directly, is a matter of debate.[187] Assuming they do not—likely a dubious assumption given that it is precisely speech that would trigger a restriction (recusal) rather than a noncommunicative act like in *O'Brien*—and the *O'Brien* test applies rather than strict scrutiny, they are still an indication that there are major First Amendment

---

181 *Id.* (holding that "a candidate may state his or her personal views, even on disputed issues").

182 *In re Watson*, 794 N.E.2d at 1.

183 Family Trust Found., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 706 (E.D. Ky. 2004) (holding that a recusal canon and statute are narrowly tailored enough to accomplish a compelling state interest, thereby passing a test of strict scrutiny).

184 *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 211 (1992) (observing that it is a "rare case" where a law survives strict scrutiny).

185 *See* Dorf, *supra* note 174, at 1178; Stott, *supra* note 174, at 504 (citing United States v. O'Brien, 391 U.S. 367, 376–78 (1968)); *cf.* Carey v. Wolnitzek, 614 F.3d 189, 200 (6th Cir. 2010) (rejecting argument that free speech challenge to judicial cannon should be evaluated under intermediate scrutiny to "balance[] the competing fundamental rights of some judicial candidates (who have a right to engage in campaign speech) and some litigants (who have a right to an impartial judiciary)" (internal quotation marks omitted)).

186 391 U.S. 367, 377 (1968) (opining that the law must be within the constitutional power of the government, furthering a substantial interest, which is unrelated to the suppression of free speech, and the incidental restriction on the first amendment freedoms must be no greater than necessary).

187 Since such a standard would presumably list the type of speech that would disqualify a judge from presiding over a case, it seems that it is speech rather than some other, nonexpressive conduct that is targeted.

concerns.[188] Indeed, the purpose of intermediate scrutiny is to give the government "latitude in designing a regulatory" scheme rather than a conclusion that there are no constitutional concerns.[189]

Thus, whatever Justice Kennedy's reasons may be for embracing recusals, this form of regulation means that political speech is burdened, chilled, and possibly directly targeted, giving rise to weighty constitutional concerns that may even merit the highest level of judicial scrutiny when examining legislation. Since this standard emanates from *Caperton* rather than a statute or canon, the Court is without its most effective tool to ensure that "political speech . . . prevail[s] against laws that would suppress it by design or inadvertence"—strict scrutiny.[190] In order to ensure that First Amendment rights are fairly weighed against litigants' due process protections, a careful balancing test should be applied.

IV. RE-THINKING RECUSAL CHALLENGES: TOWARDS A NEW FRAMEWORK

As explained in more detail above, *Caperton*'s analysis and holding may be read to apply in cases that do not involve financial contributions. Indeed, "probability of bias" is as likely born out of a judicial candidate's speech against a litigant as it is out of a campaign contribution, as the *Caperton* dissent points out. As a result, courts must also be prepared to weigh First Amendment considerations. Aside from the right to receive money—a right that has not yet been recognized by the Court[191]—there are weighty concerns identified by *White*. The moment a state institutes judicial elections, the First Amendment attaches, and judicial candidates have the right to announce their views.[192] And if *Caperton* motions begin to mandate recusals, then speech may be burdened in a constitutionally intolerable way. This burden does not come from legislation, so the court would be left without its most powerful tool—strict scrutiny. Precisely for all these reasons, the due process test developed in *Mathews* is the perfect antidote: While weighing the litigant's right to due process, it would

188 *See, e.g.*, Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 53 (2006) (characterizing the *O'Brien* decision as an instance where even expressive conduct was deemed deserving of First Amendment protection).

189 *See* Turner Broad. Sys. v. Fed. Commc'n Comm'n, 520 U.S. 180, 213–14 (1997).

190 Citizens United v. FEC, 130 S. Ct. 876, 882 (2010).

191 *See* Dean v. Blumenthal, 577 F.3d 60, 66 (2d Cir. 2009) (discussing nominal damages in cases of violations of constitutionally protected rights).

192 *See* U.S. CONST. amend I; Republican Party of Minn. v. White, 536 U.S. 765 (2002) (holding that the announce clause violates the First Amendment).

consider the First Amendment as well as the integrity of the judicial system, producing a constitutionally hygienic outcome.

A. Mathews v. Eldridge *and the Reach of Its Balancing Test*

Mathews requires courts to balance three factors in determining whether the procedures employed in a particular situation comport with the Due Process Clause.[193] The first factor is the private interest at stake—that is, the precise nature of the life, liberty, or property interest that risks deprivation.[194] The second factor is the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards."[195] Courts will balance these two factors against the third factor, which is the government or public interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[196] The Court has used somewhat ambiguous language to describe this last factor,[197] which might vary considerably depending on the nature of the case.[198]

---

193 Commentators have analogized the three-factor *Mathews* test to the three-factor negligence formula famously described by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

194 *See* Mathews v. Eldridge, 424 U.S. 319, 321 (1976) (describing the first factor as "the private interest that will be affected by the official action . . . ."). These interests vary widely, and might consist of one's freedom from government confinement, *see, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004), or one's interest in fair procedures prior to issuing a prejudgment attachment order, *see, e.g.*, Connecticut v. Doehr, 501 U.S. 1 (1991).

195 *Mathews*, 424 U.S. at 335.

196 *Id.*

197 *See Doehr*, 501 U.S. at 11 (noting "any ancillary interest the government may have in providing the procedure or forgoing the added burden").

198 *See, e.g.*, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 466 (D.D.C. 2005) (noting the government's interest as "national security" under the third prong of *Mathews*). Although *Mathews* speaks in terms of the "government interest," the Court has made clear that in a private action, this may include the other private adversary's interest. *See* Andrew Blair-Stanek, Twombly *is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 20–21 (2010). In *Doehr*, the Court held that the state statute ran afoul of due process because it allowed prejudgment attachment of real estate without notice and hearing. 501 U.S. at 10. This case was significant in that it applied *Mathews* in a case that "pitted private interests against other private interests"; it did not involve a direct challenge to government action as in *Mathews* itself. *See* Blair-Stanek, *supra* at 12–14. The Court in *Doehr* adapted the test to "private civil litigants' use of the court system." Blair-Stanek, *supra* at 12.

Although developed in the administrative law context, courts have imported the *Mathews* test into many other areas of the law.[199] It is simply not true that the *Mathews* test is applied only to weigh adequacy of administrative procedures when property interests are at stake, although this is a significant area where *Mathews* is applied. For example, the Court applied the *Mathews* test in weighing a company's due process right after an agency ordered immediate reinstatement of a fired employee with back pay.[200] Additionally, *Mathews* has been applied in civil adjudication. In *United States v. James Daniel Good Real Property*, the Court applied *Mathews* to hold that the government generally may not use an *ex parte* civil forfeiture proceeding to seize real property.[201] This case came two years after *Doehr*, where the Court used *Mathews* to hold that a state statute ran afoul of due process because it allowed prejudgment attachment of real estate without notice and hearing.[202]

It is important to note that although the *Mathews* test has been applied in many contexts,[203] the Court has "never viewed *Mathews* as announcing an all–embracing test for deciding due process claims."[204] Indeed, the Supreme Court has carved out certain areas where a different test should apply.[205] For instance, in *Medina v. California*,[206] the Supreme Court held that the *Mathews* test is not sufficiently deferential in the area of criminal procedure and process, namely in allocating burdens of proof. Likewise, the Supreme Court in *Weiss v. United States* held that the *Mathews* test is not appropriate for reviewing decisions by a military court because in the military context "[j]udicial deference . . . is at its apogee when reviewing congressional decision-

199 *See, e.g.*, *Hamdi*, 542 U.S. at 533 (relying on *Mathews* to hold that a citizen labeled as an "enemy-combatant" was entitled to received notice of the factual basis for his classification and challenge it before a neutral decision-maker).

200 Brock v. Roadway Express, Inc., 481 U.S. 252, 262 (1987).

201 510 U.S. 43, 53–55 (1993).

202 501 U.S. 1, 10–11 (1991).

203 Van Harken v. City of Chicago, 103 F.3d 1346, 1351 (7th Cir. 1997) (noting that the *Mathews* test is the "orthodox" method of evaluating procedural due process claims).

204 Dusenbery v. United States, 534 U.S. 161, 168 (2002).

205 *See, e.g.*, *id.* at 167 (stating that when evaluating adequacy of method used to give notice, a more "straightforward test of reasonableness" has been used).

206 505 U.S. 437, 445–46 (1992). *But see* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2332 n.3 (2009) (Stevens, J., dissenting) (opining that whether *Mathews* applies when evaluating state procedures for allowing state inmates access to new evidence is not necessarily foreclosed by *Medina*); Santosky v. Kramer, 455 U.S. 745, 758 (1982) (applying the *Mathews* standard to weigh the standard of proof necessary to terminate parental rights for neglect); Addington v. Texas, 441 U.S. 418, 433 (1979) (applying *Mathews* by a unanimous Court to find that a "clear and convincing evidence" was the minimum evidentiary standard required to commit someone to a mental health facility).

making."[207] Taken together, these cases suggest that the court does not apply *Mathews* when one interest at stake is so weighty that the court should give deference to that interest and not balance it with others. These areas, however, are narrow, and have been interpreted as such. For instance, in *Krimstock v. Kelly*, the Second Circuit rejected the argument that *Mathews* is inapplicable in criminal cases; *Medina*, the court explained, dealt only with constitutional guarantees in criminal proceedings regarding burdens of proof.[208]

B. Mathews *Meets* Caperton

Caperton fundamentally changed the interplay between judicial recusal (and judicial elections) and the Constitution. Given the uncertainty over the reach of *Caperton* and the constitutional freedoms it potentially implicates, courts should use the *Mathews* test to determine whether the Due Process Clause requires recusal. Although one might struggle in vain to reconcile the Supreme Court's varied use of the *Mathews* test, a review of the policies underlying many of the cases using *Mathews* supports the notion of applying *Mathews* in the context of judicial recusal. In some ways, applying *Mathews* in this context is more compelling than anywhere else: The test not only allows the court to carefully arrive at a fair result, but it holds *Caperton* together, with its principles intact. That is, it would allow the courts to confront the tension between due process and First Amendment rights without judging whether the case is sufficiently "extreme"—an exercise that was derided by the Chief Justice in *Caperton*'s dissent.[209]

1. Applying Mathews *Is Appropriate*

First, it is worth noting that simply because *Mathews* has not, to date, been applied by the Supreme Court to recusal challenges does not mean that it cannot be applied. Those that argue *Mathews* cannot be applied in this context contend that the Supreme Court's recusal jurisprudence evinces a deliberate absence of any citation to *Mathews*.[210] Although this argument cannot be discounted, it is by no

---

207 510 U.S. 163, 177 (1994) (internal quotation and citation omitted).

208 464 F.3d 246, 254 (2d Cir. 2006).

209 Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2272–74 (2009) (Roberts, C.J., dissenting).

210 *See* Friedland, *supra* note 177, at 575 n.48; John A. Meiser, Note, *The (Non) Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1820 (2009).

means controlling.[211] The Supreme Court has never suggested that *Mathews* cannot be applied to recusal challenges under the Due Process Clause, and, in fact, one federal district court recently cited *Mathews* in this regard.[212] Moreover, importing *Mathews* into this context is consistent with the Supreme Court's "deep—and growing—attachment to the *Mathews* test."[213] Recently, the Court in *Hamdi* relied on the *Mathews* test to hold that a citizen labeled by the government as an "enemy-combatant" was entitled to receive notice of the factual basis for his classification and challenge it before a neutral decision-maker.[214] The argument in favor of applying *Mathews* in this context is more persuasive in light of additional factors raised by *Caperton* that must be balanced with a litigant's due process rights.

Additionally, applying *Mathews* would not be that ground-breaking because its balancing test has been applied in circumstances analogous to judicial recusals. Many of the cases challenging administrative procedures occur in the context of adjudications and demonstrate courts' willingness to scrutinize the components of adjudications that contribute to a fair outcome, including the identity of the decision maker. For instance, in *Marshall v. Jerrico, Inc.*, the Supreme Court considered a challenge to a federal statutory scheme that remitted all penalties for violations of federal labor laws to the federal agency that imposed penalties.[215] The statute was challenged under the Due Process Clause on the basis that it created an impermissible risk of bias by encouraging the agency to impose "unduly numerous and large assessments of civil penalties."[216] The Court upheld the statute, refusing to apply the "strict requirements of judicial neutrality" to the determinations of an administrative prosecutor.[217] The Court then cited *Mathews* for the proposition that "the neutrality requirement helps to

211 *Cf.* Chen v. Gonzales, 177 F. App'x 159, 160 (2d Cir. 2006); Article II Gun Shop, Inc. v. Gonzales, 441 F.3d 492, 496 (7th Cir. 2006); Mayweathers v. Newland, 314 F.3d 1062, 1068 (9th Cir. 2002); Shinn v. Champion Mortg. Co., No. 09-CV-0013, 2010 WL 500410, at *7 n.4 (D.N.J. Feb. 5, 2010).

212 Fieger v. Ferry, No. 04-60089, 2007 U.S. Dist. LEXIS 71274 (E.D. Mich. Sept. 26, 2007) (citing *Mathews* in considering whether state recusal standards comport with due process).

213 *See* Blair-Stanek, *supra* note 198, at 12; s*ee also* Boumediene v. Bush, 553 U.S. 723, 781 (2008); City of L.A. v. David, 538 U.S. 715, 717 (2003) (applying *Mathews* to city procedures following the towing of a resident's car).

214 542 U.S. 507, 532–33 (2004).

215 446 U.S. 238, 239 (1980).

216 *Id.* at 241–42.

217 *Id.* at 250.

guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law."[218]

Similarly, as *Connecticut v. Doehr* suggests, *Mathews* is often used to evaluate the fairness of state and federal judicial proceedings. For instance, where the Supreme Court has had to weigh the adequacy of judicial process for a criminal defendant, it has chosen to use the *Mathews* test. In *United States v. Raddatz*, the Court considered whether due process permits a district judge to rule on a motion to suppress based only on the record made by a magistrate judge.[219] The Court applied the *Mathews* test without analysis, as if *Mathews* were the default test.[220] Other examples in this regard include *Parham v. J.R.*, where the Court used *Mathews* to evaluate the constitutionality of a procedure that allowed parents to commit their children to a mental health facility.[221]

Similarly, in the famous case of *Lassiter v. Department of Social Services*, the Court employed *Mathews* to determine whether due process requires the state to provide an indigent parent with counsel in a proceeding to terminate her parental rights.[222]

And, as noted above, the Court recently applied *Mathews* to determine whether a citizen held as an "enemy-combatant" was entitled to receive notice of the factual basis for his classification and challenge it before a neutral decision-maker.[223] As these cases show, *Mathews* has been applied in various contexts, most noteworthy of which include cases where individual rights were weighed against the state, in criminal cases, and where the fairness of the decision-maker was at stake—all important components of cases where *Caperton* motions will be made. Just as importantly, *Mathews* has been called the default test and one that involves the most careful balancing of rights.

2. Applying Mathews *Is Good Policy*

The benefit of applying the *Mathews* test to recusal motions is that it preserves existing precedent, while providing the flexibility neces-

---

218 *Id.* at 242. Although the Court thought it relevant that the agency acted more as a prosecutor than a judge, the case nonetheless demonstrates that the Court has at least used *Mathews* in the context of challenging the impartiality of a decision-maker.

219 447 U.S. 667, 677 (1980).

220 *Id.*

221 442 U.S. 584, 599–600 (1979).

222 452 U.S. 18 (1981). The Court weighed the complexity of the proceeding and the capacity of the parent to weigh the risk of an erroneous deprivation of a parent's right. *Id.* at 31–32.

223 Hamdi v. Rumsfeld, 542 U.S. 507, 532–33 (2004).

sary to address new concerns raised by *Caperton*. Put another way, *Mathews* is a natural outgrowth of existing recusal precedent and will allow courts to respond to the myriad issues that might arise in the future.

In cases raising pre-*Caperton* concerns, such as direct pecuniary interest[224] and personal animosity,[225] *Mathews* will generally leave the existing legal landscape unchanged. These types of cases have focused on the specific rights of individuals to fair tribunals,[226] rather on the more macro-issues like the public or government interest. Courts have sometimes found that the individual right to a fair tribunal is so strong and no countervailing interest exists that the cases are not susceptible to balancing.[227] While this may initially seem to mitigate against applying *Mathews*, a closer examination shows otherwise; even if *Mathews* were applied, the cases would likely come out the same way, since the first two factors—individual interest and risk of an erroneous deprivation—would likely outweigh the public interest, which in any case would be either small or completely in line with the public interest (i.e., to vindicate the litigant's due process rights).[228]

With regard to motions raising *Caperton* concerns—including campaign contributions, "prior speeches and writings" of the judge, or other factors that give rise to an objective appearance of bias,[229] a flexible approach is needed. *Caperton* motions implicate two competing interests: The First Amendment and the Due Process Clause.[230] Since, as discussed above, *Caperton* may invite lower courts to expand its holding into new areas in which there exists an objective appearance of bias, including extra-judicial speech, the case risks chilling the speech of judges who seek to avoid disqualification. As one commentator noted, "[j]udicial elections present a dilemma for candidates because their desire to say things that might win votes clashes with their duty to ensure due process."[231] Indeed, Justice O'Connor

224 *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 535 (1927).

225 *See, e.g.*, Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971).

226 *See supra* notes 44–65 and accompanying text.

227 *See* Medina v. California, 505 U.S. 437, 445 (1992).

228 *Cf.* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 111–12 (1973) (noting the public interest in fairness).

229 Caperton v. A.T. Massey Coal Co, 129 S. Ct. 2252, 2268 (2009) (emphasis in original).

230 *See* Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1120-21 (2006).

231 *See* Shepard, *supra* note 4, at 24.

goes so far as to argue that judicial elections as an institution undermine the public interest in appearance of a fair tribunal.[232]

The fact of judicial elections challenges the deeply-rooted idea in American law that a decision-maker must be neutral—that is, not committed to an outcome before the parties present their arguments. But many candidates for judicial office, for example, often campaign on 'tough-on-crime' platforms, and "jockey for the position of who will treat defendants more harshly."[233] Once elected, political pressure may persuade the judge to treat criminal defendants in a manner that pleases the electorate, rather than in a way that would dispense justice to the defendant.[234] This contravenes the important counter-majoritarian benefit of judicial review, which exists to protect individual rights against the majority.[235]

Adding fuel to the fire, *White* opens the door for—indeed encourages—the type of speech that would undermine a litigant's right to due process. First, *White* allows judicial candidates to announce their views and to criticize decisions.[236] Even if a state has the (arguably) constitutional promise clause—forbidding judicial candidates from making specific promises on how they would rule in future cases—the practical effect of *White* is permitting candidates to announce concrete views on issues that will likely come before them as judges. It does not take much for the electorate to make the connection between one's views and one's actions after donning the robe.[237] Should

---

232 *See* Republican Party of Minn. v. White, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).

233 *See* Weiss, *supra* note 230, at 1105 (citing numerous examples of similar campaign platforms).

234 Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 199, 200 n.97, 201 (1996).

235 *See id.* at 206 n.123.

236 *See White*, 536 U.S. at 765.

237 As Justice Ginsburg, in dissent in *White*, explained:

> Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, 'although I cannot promise anything,' or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate's commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court's example, a candidate who campaigns by saying, 'If elected, I will vote to uphold the legislature's power to prohibit same-sex marriages,' will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: 'I think it is constitutional for the legislature to prohibit same-sex marriages.' Made during a campaign, both statements contemplate a *quid pro quo* between candidate and voter. Both effectively 'bind [the candidate] to maintain that position after election.' And both convey the impression of a candidate prejudging an issue to win votes. Contrary to the Court's assertion, the 'nonpromissory' statement averts none of the dangers posed by the 'promissory' one.

the judge fail to live up to his words as a candidate, he will be punished at the polls next time around. The next candidate will make the same "announcements" (dare we say promises?) and be sure to live up to them. And so it goes.

Second, as discussed in more detail earlier, *White* has encouraged organizations, mostly of conservative stripes, to issue detailed questionnaires about the judicial candidate's or judge's thoughts on hot-button issues, such as abortion. If the candidate was reluctant to announce his positions before, he may have little choice now, as more than enough rivals will eagerly put their views on paper. And if the candidate was oddly open-minded before, he will be encouraged, or at least perceived to be, more committed now. The result is that in states where judges are elected, few litigants will walk into a courtroom, expecting due process, but face a judge who has not been on record announcing his stance on a legal issue. If that issue is being adjudicated in the litigant's case, he can hardly expect anything like the due process our Constitution guarantees.[238]

In contrast to cases like *Medina v. California*[239] and *Weiss v. United States*,[240] no one interest is so weighty in this context to preclude use of *Mathews*.[241] Both the protections of procedural due process and the First Amendment are important individual rights that cannot defer to one another as a matter of law in the same way that certain interests may yield to the deference of the military. Instead of creating rigid rules, the tension between procedural due process and the First Amendment is best settled through a flexible balancing approach under the circumstances.[242]

By using the *Mathews* test, courts will adequately balance these often-competing interests. The first factor is "the private interest that

---

536 U.S. at 819–20 (Ginsburg, J., dissenting) (alteration in original) (citations omitted).

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

239 505 U.S. 437 (1992).

240 510 U.S. 163 (1994).

241 Justice Stevens made this point in *Lassiter v. Department of Social Services of Durham County, North Carolina*, where in his dissent he opined:

> The issue [of having counsel in a termination of parental rights proceeding] is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.

452 U.S. 18, 60 (1981) (Stevens, J., dissenting).

242 *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 224–25 (2005) (applying *Mathews* to determine what process is due to an inmate because due process in this situation calls for a flexible approach).

will be affected by the official action."[243] In this regard, courts may ask, among other things, what the litigant may stand to gain or lose in the action;[244] whether it is a criminal or civil matter; and whether, in a criminal case, the defendant is charged with a felony or misdemeanor.[245] The second factor is the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards."[246] The weight of this factor depends on the precise circumstances of the case, but the inquiry will generally look to the degree of potential bias, i.e. the greater the objective appearance of impropriety, the more weight this factor holds.

Against these two factors courts will balance the public interest. In addition to the public interest in procedural fairness, the public also has an interest in protecting the First Amendment.[247] As the Supreme Court has held, "[t]he First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference.[248] If recusal burdens speech, then affording too much weight to a litigant's due process rights may infringe upon the presiding judge's right to speak outside the courtroom, including on the campaign trail, thus harming the marketplace of ideas. And even if recusal does not burden speech, the public still has an important interest in permitting the presiding judge to speak his views outside the courtroom,[249] especially if the state has made a determination to permit judicial elections.

Additionally, separate and apart from these First Amendment concerns, courts may consider other factors that weigh into the public interest. As suggested by the *Caperton* dissent, the case raises the prospect of a flood of non-meritorious recusal motions,[250] which

---

243 Mathews v. Eldridge, 424 U.S. 319, 335 (1975).

244 *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985) (noting that the individual interest in retaining employment is significant, given the severity of depriving one of a livelihood).

245 *See* Rachel S. Weiss, Note, *Defining the Contours of* United States v. Hensley*: Limiting the Use of Terry Stops for Completed Misdemeanors*, 94 CORNELL L. REV. 1321, 1339–41 (2009) (noting the common law roots of the felony/misdemeanor distinction).

246 *Mathews*, 424 U.S. at 335.

247 *See, e.g.*, ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999) (opining that "the importance of protecting freedom of speech is to foster the marketplace of ideas. If speech, even unconventional speech that some find lacking in substance or offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered").

248 N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008).

249 *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264 (11th Cir. 2001) (noting the public interest in the "free flow of information").

250 *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2266 (2009) ("As such, it is worth noting the effects, or lack thereof, of the Court's prior decisions. Even though the stan-

would operate to undermine public confidence in the impartiality of the judiciary. As a result, courts may consider specific grounds for recusal in light of the public interest in maintaining the integrity of the judiciary by discouraging non-meritorious recusal motions.[251] Additionally, the public has an interest in preventing litigants from gaming the system. Since the opposite of gratitude is revenge, a potential litigant might purposefully oppose a judge's election campaign for the purpose of later making a motion to disqualify the judge under *Caperton*.[252] Allowing courts to take situations like this into account under the public interest, *Mathews* would operate to discourage such a practice, thus bolstering the integrity of the judicial system.

V. CONCLUSION

The merits of judicial elections have been litigated in journals around the country.[253] In light of the recent Supreme Court decisions in *White* and *Caperton*, this debate will only intensify. Rather than revisit the arguments for and against electing judges, this Article has argued that applying the *Mathews* test in cases where a litigant's due process is threatened by an elected judge—a possibility that the Court initially dismissed in *White* against Justice Ginsburg's protests,[254] and then took head on in *Caperton*—will balance First Amendment rights that judicial elections breed against the rights of the litigants that the Constitution protects. This test would also be mindful of the larger concern voiced by the *Caperton* dissent: That *Caperton* motions will undermine the integrity of the judiciary. In sum, the flexibility and elegance of the test in this context is also made timely in light of the uncertainty raised by the Court's expansive rulings in the areas of

---

dards announced in those cases raised questions similar to those that might be asked after our decision today, the Court was not flooded with *Monroeville* or *Murchison* motions. That is perhaps due in part to the extreme facts those standards sought to address. Courts proved quite capable of applying the standards to less extreme situations.").

251 *Cf.* Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct 1093, 1099 (2009) (noting, in another context, the state's interest in preserving the integrity of its electoral system).

252 *See, e.g.*, Brief for Respondents at 32–33, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22).

253 Indeed, the topic of judicial election is the single most written about topic in academia. *See* Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 31 (1986); Pozen, *supra* note 162, at 269.

254 *See* Republican Party of Minnesota v. White, 536 U.S. 765, 813 (2002) (Ginsburg, J., dissenting) ("This judicial obligation to avoid prejudgment corresponds to the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to 'an impartial and disinterested tribunal in both civil and criminal cases.'") (citation omitted).

judicial elections, due process protection, and First Amendment rights. Lower courts should be relieved that they would not need to break new ground to apply *Mathews* in this context. And the Chief Justice's prediction that the Court will have to revisit *Caperton* to measure the "extremeness" of the facts in future cases may not come true after all.[255]

255 *Caperton*, 129 S. Ct. at 2273 (Roberts, C.J., dissenting) ("I believe we will come to regret this decision as well, when courts are forced to deal with a wide variety of *Caperton* motions, each claiming the title of 'most extreme' or 'most disproportionate.'").