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HIGH COURT PRETENSE, LOWER COURT CANDOR: JUDICIAL IMPARTIALITY AFTER *CAPERTON V. MASSEY COAL CO.*

*Lynne H. Rambo**

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INTRODUCTION

The judiciary envisioned by the Constitution stood decidedly apart from the political branches. James Madison had made quite clear the dangers of the majority faction in a democracy,¹ and the judiciary was intended as one of the ways the new government could guard against the excesses—the “wicked projects”—of a powerful majority.² As Alexander Hamilton wrote, the judiciary “not only serves to moderate the immediate mischiefs of [laws] but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to an iniquitous intention are to be expected from the scruples of the courts, [will] qualify their attempts.”³

If those serving in the federal government generally were to be those “whose patriotism and love of justice will be least likely to sacrifice it to temporary and partial considerations,”⁴ as Madison described them, then those who sat on the judicial bench were surely to be the cream of that crop.⁵ They were, after all, appointed by the President, confirmed by the Senate,⁶ and given terms for life or “Good Behav-

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¹ See THE FEDERALIST NO. 10, at 71-72 (James Madison) (Clinton Rossiter ed., 1999) (“Complaints are everywhere heard from our most considerate and virtuous citizens . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and anxious majority.”).

² See *id.* at 79; see also THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (“the courts of justice are too be considered as the bulwarks of a limited Constitution against legislative encroachments”).

³ THE FEDERALIST NO. 78, at 469 (Alexander Hamilton).

⁴ THE FEDERALIST NO. 10, at 76 (James Madison).

⁵ The Federalist No. 78 describes those the Framers hoped would serve as judges, and why they should be given life tenure:

[T]here can be but few men in the society who will have sufficient skill in the laws to qualify for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us that the government can have no great option between fit characters; and that a temporary duration in office which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity.

THE FEDERALIST NO. 78, at 470 (Alexander Hamilton).

⁶ U.S. CONST. art. II, § 2, cl. 2.

our,” whichever ended first.⁷ The judiciary was to be insulated from the swales of public reaction so that it could deliberate more intently on the public good and justice.⁸ As judicial codes across the land now reflect, the ideal was independence, integrity and impartiality.⁹

In the last twenty years, that ideal has been under attack on multiple fronts. Thirty-nine states now subject judges to popular election either to obtain or keep their seat.¹⁰ Money has poured into these races such that expenditures have nearly tripled in the last decade, and most of the money has come from large political organizations trying to impose a particular ideology on the courts.¹¹ There has been a concerted attack on judicial code provisions aimed at depoliticizing the elections and minimizing the effect of campaign contributions, and the Supreme Court has stricken virtually all such provisions as First Amendment violations.¹² A few state legislatures have attempted public financing of judicial elections in order to reduce the potential for corruption, but the Court has stricken those efforts as well.¹³ The complete politicization of the judiciary has begun to appear inevitable.

Standing boldly in the midst of the onslaught is the Court’s decision five years ago in *Caperton v. Massey Coal Co.*¹⁴ The facts of the *Caperton* case illustrate how far from the judicial ideal the country has allowed itself to stray.¹⁵ The CEO of a West Virginia company who

⁷ U.S. CONST. art. III, § 1.

⁸ See THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (judicial independence is necessary to guard the Constitution and the rights of individuals from “the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations . . . and serious oppressions of the minor party in the community.”).

⁹ Some version of the ABA Model Code of Judicial Conduct has been adopted by all fifty states, see *infra* note 23 and accompanying text, and the current 2007 version opens with “A judge shall uphold and promote the independence, integrity and impartiality of the judiciary.” MODEL CODE OF JUDICIAL CONDUCT Canon 1, at 15 (2011) [hereinafter MODEL CODE].

¹⁰ See *infra* notes 83-87 and accompanying text.

¹¹ See *infra* notes 88-101 and accompanying text.

¹² See *infra* notes 106-134 and accompanying text.

¹³ See *infra* notes 289-90 and accompanying text.

¹⁴ 556 U.S. 868 (2009).

¹⁵ Much has been made of the similarities between the *Caperton* case and John Grisham’s novel, *The Appeal*. See Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA TODAY (Feb. 16, 2009), http://usatoday30.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm. Grisham has said, however, that his novel was not based on the *Caperton* case, but on the experience of a Mississippi judge. Joanne Doroshov, *Watch Hot Coffee, a Powerful New Film on HBO June 27*, THE HUFFINGTON POST (June 26, 2011, 2:44 PM), <http://>

suffered a \$50 million trial verdict against it decided he had other options: he suddenly became the largest campaign contributor in the next West Virginia Supreme Court election, saw his candidate elected, and then obtained a reversal when the candidate he had placed on the bench cast the deciding vote. Nothing in West Virginia law prevented that development,¹⁶ so the only possible remedy was a due process ruling from the Supreme Court of the United States.

Five of the justices agreed that the newly elected judge's participation in the case could not be squared with the Constitution. The Court recognized that its prior holdings on judicial bias had involved only three limited situations, and the dissenters argued vehemently that no extension of due process was called for. But the Court looked beneath the factual settings of its precedent and emerged convinced that due process requires a judge's disqualification when the circumstances raise an undeniable likelihood of bias. And in so holding, the Court set forth a far-reaching, probability-of-bias standard. On an allegation of bias, the court should ask "whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias,'"¹⁷ and should include in that assessment "a realistic appraisal of psychological tendencies and human weakness."¹⁸

So the battle lines have been drawn in the war for judicial impartiality. On one side, protected by the first amendment, are judicial elections complete with attack ads, multi-million dollar war chests filled by potential litigants, and would-be judges committing ever more forcefully to political views in order to stand out and gain monied supporters. On the other side are the due process constraints on candidates once they reach the bench, which under *Caperton* include an assessment of the likelihood that the judge can remain impartial. The question is whether *Caperton* is providing a counterweight in favor of impartiality sufficient to balance the forces turning the judiciary into an entirely political domain. And if not, what more can be done?

www.huffingtonpost.com/joanne-doroshov/watch-hot-coffee-a-powerf_b_884318.html.

There is a certain irony in the fact that Grisham had ready knowledge of another egregious judge-buying case: i.e., *Caperton* apparently was not that unusual.

¹⁶ Under West Virginia law, in order to have the newly elected judge disqualified, *Caperton* had to file a motion with the judge himself, and the judge alone made the decision that he would not step aside. *Caperton*, 556 U.S. at 873-74.

¹⁷ *Caperton*, 556 U.S. at 869 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971)).

¹⁸ *Id.* at 883 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

This Article asserts that *Caperton* has had a very positive impact on the state and federal judicial systems over the last five years—spurring substantial procedural changes by a number of states and a much more honest approach to judicial bias by the lower courts as a whole—but that it will be hard to sustain such reform without a deeper commitment from the Supreme Court itself. Part One acquaints the reader generally with the regulatory framework that seeks to ensure judicial impartiality, focusing particularly on the judicial codes of conduct and disqualification provisions. Part Two sets forth the developments in recent years that have contributed to the judiciary’s politicization and now operate to prevent reforms designed to ensure impartiality. Part Three examines *Caperton* in depth and demonstrates how it has advanced impartiality within the state and federal judiciaries. Part Four focuses on the gap between the lower courts’ efforts and the Supreme Court’s approach to disqualification and political activity, highlighting the need for more leadership from our most closely observed judges.

I. THE REGULATORY FRAMEWORK FOR ENSURING IMPARTIALITY WITHIN THE STATE AND FEDERAL JUDICIARIES

Sitting judges in the United States, at both the state and federal levels, are subject to two distinct sources of regulation requiring that they aspire to act impartially. Most immediately, in the courtroom, judges must operate within the bounds of disqualification rules, which set forth specifically the situations in which a judge is required to recuse himself or herself.¹⁹ Compliance with the disqualification laws is invoked by litigants in specific cases, and enforced by court review of specific cases (at least in the jurisdictions where there is review).²⁰

Beyond the courtroom, judicial codes of conduct govern judges’ comportment in ways that are intended to further their ability to be im-

¹⁹ See *infra* notes 26-41 and accompanying text.

²⁰ Judicial ethics scholar Charles Gardner Geyh has written an important frameworking piece identifying the three dimensions in which judicial impartiality is sought—the ethical, procedural, and political—and observing how each dimension serves a different constituency and function. See Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 497-98 (2013). The section that follows here seeks to acquaint the reader with what Professor Geyh would describe as regulation in the ethical and procedural dimensions—judicial codes of conduct and disqualification law, respectively—primarily as background material for understanding the issues that *Caperton* and the proposals here present. Discussion of regulation in what Professor Geyh would describe as the political dimension—provisions governing impeachment and removal—are beyond the scope of the piece.

partial.²¹ These codes are generally enforced by commissions made up of other judges within the given jurisdiction.²² The codes of conduct applied to judges across the nation are not entirely uniform, but they are quite similar. As of 2009, all fifty states and the District of Columbia had adopted some version of the ABA's Model Code of Judicial Conduct.²³ The federal Code of Conduct for United States Judges is likewise based on the ABA's Model Code,²⁴ albeit an earlier version with

²¹ See *infra* notes 42-71 and accompanying text.

²² See *infra* notes 58-60 and accompanying text.

²³ What is now the ABA Model Code of Judicial Conduct was first promulgated in 1924. See MODEL CODE, *supra* note 9, at xi. Called the Canons of Judicial Ethics, and consisting of 36 principles, it was intended to be only a guide, an aspirational document, rather than any basis for discipline. Many states, however, not only adopted the Canons, but transformed them into law and established sanctions for their violation, noted in Randall T. Shepherd, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1065 n.26 (1996) (citing Robert Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 410 (1972)). Forty-five years later, the ABA convened a Special Committee on Standards of Judicial Conduct under the direction of California Supreme Court Justice Roger Traynor, and in 1972, approved the first Code of Judicial Conduct designed to be enforceable, see Shepherd, *supra*, at xii (citing LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 8 (1992)). There have been two major revisions since that 1972 Code, one in 1990 and one in 2007. Currently twenty-nine states have adopted a version of the 2007 Model Code, see, e.g., *ABA Chart on Status of State Review of Model Code*, http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/mcjc.html (last visited Aug. 6, 2014). This includes Montana, which, prior to 2008, had not adopted any version of the ABA Model Code, but was still adhering to the 1924 Canons of Judicial Ethics. See Order, In re 2008 Montana Code of Judicial Conduct, No. AF 08-0203, at 1-2 (Mont. Dec. 12, 2008), available at http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html. Three more states have proposed revisions in line with the 2007 Code, and fifteen states have established committees to review their codes for updating. The remaining four states appear to be content for the moment operating under the 1990 version of the Code.

²⁴ 28 U.S.C. § 331 (2012) (the Judicial Conference of the United States is responsible for setting the policy for the lower federal courts). See also ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MARCH 13-14, 1969 AND JUNE 10, 1969, at 41, 43, available at <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1969-03.pdf> (in June 1969, in the wake of controversies involving Supreme Court Justice Abe Fortas and Tenth Circuit federal district judge Stephen Chandler, Chief Justice Earl Warren convened the Conference for a special session to address judicial ethics, and the Conference resolved to formulate standards of judicial conduct); and Andrew J. Lievens & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 275 (2007) (within the same time frame, the ABA created the committee chaired by California Justice Traynor to create a model code, and asked the Judicial Conference to work with that committee in the review of the 1924 Canons and the drafting of the new code, and the Conference agreed). This led the Judicial Conference to create its Committee on Codes of Conduct, and so after the ABA approved the 1972 Model Code, it took little time for the Judicial Conference to adopt the Code as well, see ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF

different formatting. So for ease of reference and the reader's understanding, unless the particular discussion warrants greater specificity, judicial code references here will be to the 2007 version of the ABA's Model Code of Judicial Conduct,²⁵ with the corresponding provision of the federal code, if it exists, provided in the footnote.

A. *State and Federal Disqualification Provisions*

In the federal system, judicial disqualification is governed by statute, primarily 28 U.S.C. § 455. Subsections (a) and (b) of section 455 set forth the substantive grounds for disqualification. Subsection (b) identifies several specific recurring situations where disqualification is required:

- (1) [the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) [the judge] in private practice . . . served as lawyer in the matter in controversy, or a lawyer with whom [the judge] previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

THE JUDICIAL CONFERENCE OF THE UNITED STATES, APRIL 5-6, 1973, at 10, *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1973-04.pdf>. After the ABA proposed major revisions to the Code in 1990, the Judicial Conference was slower to act on the ABA's work. Ultimately—in September 1992—the Conference adopted the new Model Code, but this time the Conference made several important changes. Most significantly, the Conference changed the ABA's mandatory language in the Canons—the word “shall”—to the hortatory “should,” *see* Lievense & Cohn, *supra*, at 278; *see also* ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, SEPTEMBER 22, 1992, at 62 (“In August 1990, the American Bar Association approved a New Model Code of Judicial Conduct. In light of this New Model Code, the Committee on the Codes of Conduct conducted a comprehensive review of the Judicial Conference's Code of Conduct for United States Judges and recommended revisions to the Code.”), *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1992-09.pdf>.

²⁵ *See Comparison of State Codes of Judicial Conduct to Model Code of Judicial Conduct*, ABA, http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/comparison.html (last visited Mar. 15, 2015) (to the extent a reader wants to determine whether a cited Model Code provision applies in his or her state, the portion of the ABA website devoted to the Center for Professional Responsibility website has a table revealing whether a state has adopted a particular section of the Code).

- (3) [the judge] has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) [the judge] knows that [the judge], individually or as a fiduciary, or [the judge's] spouse or minor child residing in [the] household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) [the judge or the judge's] spouse, or a person within the third degree to either of them, or the spouse of such person: [is a party, officer of a party, a lawyer, or is likely to be a material witness in the proceeding, or has an interest that could be substantially affected by the outcome].²⁶

Subsection (a), in contrast, is open-ended, and therefore dramatically broader, and addresses the appearance of partiality: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”²⁷ In *Liteky v. United States*,²⁸ Justice Scalia traced the history of section 455 and emphasized the difference in the two subsections. Added in 1974, “subsection (a) . . . was an entirely new ‘catchall’ recusal provision” directed to “the *objective appearance* of partiality” and “goes beyond (b)” to cover “*all* aspects of partiality, and not merely those specifically addressed in subsection (b).”²⁹ So as a practical matter, a federal judge must evaluate whether he or she falls within the fact patterns of subsection (b), which require disqualification, and if not, ask for purposes of subsection (a) whether there is any *other* way in which the judge’s impartiality might reasonably be questioned.³⁰

²⁶ 28 U.S.C. § 455(b) (2012).

²⁷ *Id.* at § 455(a).

²⁸ 510 U.S. 540 (1994).

²⁹ *Id.* at 548, 553 n.2 (emphasis in original). Another federal statute, 28 U.S.C. § 144 (2012), addresses situations in which a litigant believes that a judge has a personal bias or prejudice against him or her or in favor of another party. It empowers the litigant to raise the issue by filing an affidavit explaining the basis for his or her belief, upon which the judge acts no further until another judge addresses the affidavit’s allegations.

³⁰ There is an additional, independent procedure in the federal system available when a litigant believes that a judge is actually personally biased against him or her, or in favor of an opponent. Under 28 U.S.C. § 144 (2012), a litigant can file an affidavit stating the “facts and reasons” behind such belief. Assuming the affidavit is filed timely and is ultimately deemed

At the state level, disqualification provisions typically appear as part of the state's judicial code of conduct, and track the disqualification provision appearing in Rule 2.11 of the 2007 ABA Model Code or its predecessor, Canon 3E of the 1990 Model Code (as amended in 1999 and 2003).³¹ In full, Rule 2.11 reads:

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.
 - (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of either of them is:
 - (a) a party [or a principal in a party] in the proceeding;
 - (b) acting as a lawyer in the proceeding;
 - (c) a person who has more than a de minimis interest that could be substantially affected in the proceeding; or
 - (d) likely to be a material witness in the proceeding.
 - (3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.
 - (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than
 - [Option 1:] [\$(insert amount) for an individual or \$(insert amount) for an entity] or [Option 2:] [is reasonable and appropriate for an individual or entity].

"sufficient," another judge is assigned to hear the proceeding. In *Litky*, Justice Scalia explained that this section was actually the first disqualification statute under federal law. See *Litky*, 510 U.S. at 544.

³¹ JAMES J. ALFINI, STEPHEN LUBET, JEFFREY M. SHAMAN & CHARLES GARDNER GEYH, JUDICIAL CONDUCT & ETHICS § 4.02, at 4-3-4-8 (4th ed. 2007).

- (5) The judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
- (6) The judge:
 - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
 - (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
 - (c) was a material witness concerning the matter;
 - (d) previously presided as a judge over the matter in another court.³²

As with the federal statute, a judge must disqualify himself or herself anytime “the judge’s impartiality might reasonably be questioned.”³³ The Model Rule, however, goes significantly further than the federal statute by identifying up front two additional situations in which a judge’s impartiality “might reasonably be questioned”: subsections (4) and (5)—addressing campaign contributions and public statements, respectively—have no counterpart in the federal statute.³⁴ And indeed, several states that have adopted the Model Code have foregone adopting those two subsections or have significantly modified them.³⁵

The origin of those subsections is particularly worth noting. Subsection (4), addressing the concern that judges could be influenced into

³² MODEL CODE, *supra* note 9, R. 2.11, at 25-26.

³³ *Id.*

³⁴ Compare MODEL CODE, *supra* note 9, R. 2.11(A) with 28 U.S.C. § 455 (2012).

³⁵ See ABA CPR Policy Implementation Committee, *Comparison of ABA Model Judicial Code and State Variations on Rule 2.11*, available at http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/aba_model_code_comparison.html (last updated Feb. 3, 2014). According to the ABA, as of Feb. 3, 2014, Arkansas, Colorado, Delaware, the District of Columbia, Hawaii, Indiana, Kansas, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, Ohio, North Dakota, Oregon, South Dakota and Wyoming have not included subsection (A)(4), while Arizona, California, Iowa, Oklahoma, Pennsylvania, Tennessee and Utah have included some version of the subsection. Delaware, Hawaii and South Dakota have also declined to include subsection (5).

favoring contributors to their election campaigns, was added to the Model Code in 1999.³⁶ The change “responded to a public perception, confirmed by polling data, that judges were influenced by the campaign contributions they received.”³⁷ Subsection (5), aimed at discouraging judges from sitting on cases their public statements suggest they have prejudged, was added in 2003.³⁸ It responded to the Supreme Court’s 2002 decision in *Republican Party v. White*,³⁹ holding that a state could not bar a judicial candidate from announcing positions that could come before him or her on the court without violating the First Amendment.⁴⁰ The idea was that if candidates could not be prevented from publicly committing to positions, the litigants who would later come before them ought at least be able to challenge their prejudgment of issues.⁴¹

B. *Judicial Code of Conduct Provisions Aimed at Impartiality*

“Impartiality” as defined by the Model Code has two aspects. One aspect sounds in terms of *parties*: it is “the absence of bias or prejudice in favor of, or against, particular parties or classes of parties.”⁴² The other sounds in terms of *ideas*: Impartiality means “the maintenance of an open mind in considering issues that may come before a judge.”⁴³

The Code is replete with general references to the need for judges to act impartially. The first, second, and fourth of the Code’s four Canons (which set forth the Code’s governing principles)⁴⁴ refer expressly to impartiality,⁴⁵ and the third directs judges to conduct their “personal

³⁶ See CONFERENCE REPORT: ABA Annual Meeting, 15 LAWS MAN. PROF. CONDUCT (ABA/BNA) 396, 399 (1999).

³⁷ ALFINI, LUBET, SHAMAN & GEYH, *supra* note 31, § 4.02, at 4-5.

³⁸ *Id.* at 4-6.

³⁹ 536 U.S. 765 (2002).

⁴⁰ *See id.* at 788.

⁴¹ *See* ALFINI, LUBET, SHAMAN & GEYH, *supra* note 31, § 4.02, at 4-6.

⁴² MODEL CODE, *supra* note 9, Terminology, at 5.

⁴³ *Id.*

⁴⁴ *Id.*, Scope, at 2. “The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules.” *Id.*

⁴⁵ Canon 1 requires a judge to “uphold and promote the independence, integrity and impartiality of the judiciary,” and to “avoid impropriety and the appearance of impropriety.” *Id.*, Canon 1, at 15. Interestingly, the corresponding canon in the Code of Conduct for Federal Judges does not include the reference to “impartiality.” CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 (“A judge should uphold the integrity and independence of the judiciary.”) [hereinafter FEDERAL JUDICIAL CODE]. Canon 2 of the Model Code states that “[a] judge shall perform the duties of judicial office impartially, competently, and diligently. MODEL

and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office,” of which impartiality is obviously a huge part.⁴⁶ Rule 1.2 states that “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary.”⁴⁷ Rules 2.2 and 2.3 require judges to “perform all duties” of their office “fairly and impartially,” and “without bias or prejudice.”⁴⁸

The Code is not limited, however, to generalities. In service of avoiding partiality to parties, Rule 2.4 directs that a judge not submit to any “external influences”: he or she is not to “be swayed by public clamor or criticism,” “permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment,” or “convey the impression that any person or organization is in a position to influence the judge.”⁴⁹ In service of retaining the open-mindedness necessary to impartiality, Rule 2.10 prohibits judges from making public statements that could reasonably be expected to affect the fairness of a proceeding, and from making “pledges, promise, or commitments that are inconsistent with the impartial performance” of judging.⁵⁰

It is also expected that judges will limit their extrajudicial activities. The Code expressly allows activities concerned with “the law, legal system, or the administration of justice,” and those sponsored by non-profit “educational, religious, charitable, fraternal or civic organiza-

CODE, *supra* note 9, Canon 2, at 17; *see* FEDERAL JUDICIAL CODE, *supra*, Canon 3. Canon 4 of the Model Code reads: “A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity or impartiality of the judiciary.” MODEL CODE, *supra* note 9, Canon 4, at 49; *see* FEDERAL JUDICIAL CODE, *supra*, Canons 4 (“a judge should not participate in extrajudicial activities that . . . reflect adversely on the judge’s impartiality”), 5 (“A judge shall refrain from political activity”).

⁴⁶ MODEL CODE, *supra* note 9, Canon 3, at 33; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 4 (“A judge may engage in extrajudicial activities that are consistent with the obligations of judicial office.”).

⁴⁷ MODEL CODE, *supra* note 9, R. 1.2, at 15; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 2A.

⁴⁸ MODEL CODE, *supra* note 9, R. 2.2, 2.3(A), at 17-18; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 3 (“A judge should perform the duties of the office fairly, impartially, and diligently”).

⁴⁹ MODEL CODE, *supra* note 9, R. 2.4, at 19; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 2B.

⁵⁰ MODEL CODE, *supra* note 9, R. 2.10(A), (B), at 24-25; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 3A(6) (“A judge should not make public comment on the merits of a matter pending or impending in any court.”).

tions” are expressly allowed,⁵¹ but Rule 3.1 prohibits a judge from participating in any activities that “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”⁵² These prohibited activities can include attending events where a judge’s travel, food or lodging is provided or reimbursed, or fees or other charges are waived, no matter what type of organization, if a reasonable person would believe the reimbursement or waiver would undermine the judge’s impartiality.⁵³

⁵¹ MODEL CODE, *supra* note 9, R. 3.7(A), at 38-39; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 4A(3).

⁵² MODEL CODE, *supra* note 9, R. 3.1(C), at 33; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 4 (“a judge should not participate in extrajudicial activities that . . . reflect adversely on the judge’s impartiality”). The language of the cited Rule was changed between the 1990 Code and the 2007 Code. “The Commission believed that the standard used in the 1990 Code, which prohibited activities or conduct that ‘cast reasonable doubt’ on a judge’s impartiality, was too closely associated with the criminal law, and did not accurately express the appropriate threshold for prohibiting any particular activity.” CHARLES E. GEYH & W. WILLIAM HODE, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT, R. 3.1, at 57 (2009) (hereinafter “REPORTERS’ NOTES”).

⁵³ MODEL CODE, *supra* note 9, R. 3.14(A), at 46 (allowing expense coverage “unless otherwise prohibited by Rule[] 3.1,” which includes activities that a reasonable person would find undermine impartiality); *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 4H (“A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge’s judicial duties or otherwise give the appearance of impropriety.”). To apply that standard in evaluating their extrajudicial activities, judges are directed to consider a number of factors:

- (a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;
- (b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;
- (c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;
- (d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;
- (e) whether information concerning the activity and its funding sources is available upon inquiry;
- (f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge’s court, thus possibly requiring disqualification of the judge under Rule 2.11;

Finally, by the specific terms of Rule 4.1, a judge may not engage in a number of activities associated with “political organizations.”⁵⁴ As a judge, or as a candidate for judge, a person cannot contribute to or solicit funds for a political organization; act as a leader in, hold office in or make speeches for a political organization; or, except within a window of time immediately preceding an election, even publicly identify himself or herself as a candidate of, or endorsed by, a political organization.⁵⁵ Nor may a judge or candidate “personally solicit” campaign funds: contributions may be solicited and accepted only through a campaign committee organized for the purpose.⁵⁶

Under the Model Code as adopted by most of the states, anything denominated a “Rule” is enforceable against a judge.⁵⁷ Each state has a judicial conduct commission, and those entities address violations of the Code brought to their attention by the public or otherwise.⁵⁸ This does not mean that every violation results in discipline. The Model

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- (g) whether differing viewpoints are presented; and
 - (h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

MODEL CODE, *supra* note 9, R.3.14, comment 3, at 47.

⁵⁴ A “political organization” is defined as “a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office.” MODEL CODE, *supra* note 9, Terminology, at 7; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 5 Commentary (“‘political organization’ refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office”).

⁵⁵ MODEL CODE, *supra* note 9, R. 4.1(A)(1), (2), (4), (6), (7) at 49-50; *id.*, R. 4.2(C), at 54; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 5A (judge should not be leader of, hold office in, make speeches for, solicit funds for, contribute to, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate), 5C (“A judge should not engage in any other political activity.”).

⁵⁶ MODEL CODE, *supra* note 9, R. 4.1(A)(8), at 49; *see* FEDERAL JUDICIAL CODE, *supra* note 45, Canon 5A. The Code Rules collected here are important to exploring the “likelihood” of judicial bias as addressed by the *Caperton* case, but they are by no means the only Rules furthering an interest in judicial impartiality. The Code also includes Rules that are more pointed, in that they address actual bias and discrimination and financial interests. *See, e.g.*, MODEL CODE, *supra* note 9, R. 2.3 (Bias, Prejudice, and Harassment), 3.6 (Affiliation with Discriminatory Organizations), 3.8 (Appointments to Fiduciary Positions), and 3.11 (Financial, Business or Remunerative Activities).

⁵⁷ MODEL CODE, *supra* note 9, Scope, at 2.

⁵⁸ ALFINI, LUBET, SHAMAN & GEYH, *supra* note 31, §§ 1.04, 13.02, at 1-10, 13-2 to 13-3 (citing I. TESTITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 19-27 (2d ed. 1980)).

Code itself describes the Rules as “rules of reason,” and directs that disciplinary action depend on the seriousness of the transgression, the facts and circumstances as they existed at the time, the extent of any pattern of impropriety, the existence of previous violations, and the effect of the violations on others.⁵⁹ With that said, in most states, the disciplinary measures available range from admonishment all the way up to removal from office.⁶⁰

Enforcement of judicial code provisions is a somewhat different matter at the federal level. Importantly, when the Judicial Conference otherwise adopted the 1990 ABA Model Code, it chose not to adopt the mandatory language recommended.⁶¹ Thus, while the United States Code of Conduct for Federal Judges is substantively very similar to the 1990 ABA Code in the conduct it addresses, it uses the term “should” in most sections, rather than the mandatory “shall.”⁶² This in turn leaves a federal judge’s decisions about his or her conduct within his or her discretion,⁶³ and obviously detracts from the Code’s ready enforceability.

Complaints for Code violations, as well as any other conduct “prejudicial to the effective and expeditious administration of the business of the courts”⁶⁴ are heard by Federal Judicial Councils⁶⁵ associated with each of the thirteen circuits.⁶⁶ As with the state judicial conduct commissions, these councils are authorized to impose discipline for misconduct.⁶⁷ Unlike the state commissions, however, they cannot themselves remove a judge from office, because the Constitution reserves the impeachment and removal power to Congress.⁶⁸

⁵⁹ MODEL CODE, *supra* note 9, Scope, at 2.

⁶⁰ ALFINI, LUBET, SHAMAN & GEYH, *supra* note 31, §1.04, at 1-10 (citing I. TESTITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 19-27 (2d ed. 1980)).

⁶¹ Lievense & Cohn, *supra* note 24, at 278.

⁶² The only Canon employing mandatory language in the entire federal judicial code is the one addressing disqualification. Compare FEDERAL JUDICIAL CODE, *supra* note 45, Canon 3C with *id.*, Canons 1, 2, 3A, 3B, 3D, 4, 5.

⁶³ MODEL CODE, *supra* note 9, Scope, at 2 (“Where a Rule contains a permissive term, such as ‘may’ or ‘should,’ the conduct addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.”).

⁶⁴ 28 U.S.C. § 351(a) (2012).

⁶⁵ The Federal Judicial Councils consist of the chief circuit judge and an equal number of circuit judges and district judges. *Id.* § 332 (2012).

⁶⁶ *See id.* § 351(a) (2012).

⁶⁷ *See id.* § 354(a)(2) (2012).

⁶⁸ *See* U.S. CONST., art. I, § 2, cl. 5, § 3, cl. 6; *id.* art. III, § 1; 28 U.S.C. § 355 (b) (2012)

At first blush, limitations on a judge's conduct such as those presented here may seem onerous. But they are grounded expressly in the long-held beliefs that judges must always aspire to impartiality and that extensive activity in the political arena will render that impartiality much harder to attain. The Commentary to the Model Code section addressing judicial political conduct makes this very clear:

Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.⁶⁹

Perhaps just as importantly, judges choose to become judges, and they do so knowing that any conduct appearing to compromise their independence or impartiality will undermine public confidence in the judiciary.⁷⁰ Indeed, the Code makes clear within the very first Canon that they will be held to a restraint not asked of the public: "A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions of the Code."⁷¹

C. *The "Special" Supreme Court(s)*

As the preceding sections describe, federal and state judges are bound by disqualification provisions and judicial codes of conduct in their respective jurisdictions. There are, however, some very important caveats with respect to the nation's "top" courts.

First, the Supreme Court of the United States is technically bound by no code of judicial conduct whatsoever. The Code of Conduct for

(providing for Judicial Conference to recommend impeachment to the House of Representatives if it concurs with recommendation of Judicial Council).

⁶⁹ MODEL CODE, *supra* note 9, R. 4.1, comment 1, at 50.

⁷⁰ See MODEL CODE, *supra* note 9, R. 1.2, comment 3, at 15.

⁷¹ MODEL CODE, *supra* note 9, R. 1.2, comment 2, at 15; see also *Hayes v. Alabama Court of Judiciary*, 437 So. 2d 1276, 1278 (Ala. 1983); *In re Troy*, 300 N.E.2d 159, 191 (Mass. 1973); *In re Piper*, 534 P.2d 159, 164 (Or. 1975); see generally STEVEN LUBET, *BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES* (1984).

United States Judges, by its terms, applies only to the courts beneath the Supreme Court.⁷² Thus, according to Chief Justice Roberts, the members of the Supreme treat the Code as a “current and uniform source of guidance,” but are not bound by it.⁷³

Second, in considering whether to disqualify themselves from cases, the Supreme Court justices apparently go beyond the language of the disqualification law to consider the effect their disqualification will have on the hearing of any given case. Chief Justice Roberts has stated that the members of the Supreme Court do consider themselves governed by section 455, the federal disqualification statute, which requires recusal whenever their impartiality might reasonably be questioned.⁷⁴ But when making that decision, the Chief Justice has said, the justices must also consider that no one can substitute for them, and so “if a Justice withdraws from a case, the Court must sit without its full membership.”⁷⁵ It is unclear from the Chief Justice’s statement exactly what impact that recognition is supposed to have, but it does seem that the Chief Justice envisions section 455 applying differently at the Supreme Court level in some respect.

Finally, at the Supreme Court level, each judge herself or himself is the sole arbiter of disqualification questions.⁷⁶ No procedure exists for transferring a disqualification question to another Justice or seeking concurrence from the remainder of the Court.⁷⁷ In the Chief Justice’s view, peer review “would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.”⁷⁸

Many of the state supreme courts do likewise, allowing only the

⁷² FEDERAL JUDICIAL CODE, *supra* note 45, Introduction.

⁷³ 2011 Year-End Report on the Federal Judiciary, at 5 (Dec. 31, 2011) (Roberts, C.J.), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

⁷⁴ *Id.* at 7 (They do this the Chief Justice said, even though “the limits of Congress’s power to require recusal have never been tested.” The Chief Justice’s remark raises the interesting question of whether the Court considers it a separation of powers issue for Congress to issue rules of disqualification).

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 8 (“the individual Justices decide for themselves whether recusal is warranted under section 455”).

⁷⁷ *Id.* at 8-9 (“There is no higher court to review a Justice’s decision not to recuse in a particular case,” and “the Supreme Court does not sit in judgment of one of its own Members’ decision whether to recuse in the course of deciding a case”).

⁷⁸ *Id.* at 9.

challenged justice to make the disqualification decision.⁷⁹ Those who do so have defended it by expressly invoking the United States Supreme Court's practice.⁸⁰ A justice on the Wisconsin high court has also suggested that broadening the disqualification decision beyond a challenged justice would have its own negative impact on the public's perception: "the specter of four justices preventing another justice from participating will just as likely be seen by the public as a biased act of four justices who view a pending issue differently from the justice whom they disqualified."⁸¹ Other courts have disagreed, and subject their justices' disqualification decisions to review by the other court members.⁸²

⁷⁹ See *Stilley v. James*, 53 S.W.3d 524, 525 (Ark. 2001) ("each justice individually declines to disqualify"); *In re Estate of Carlton*, 378 So. 2d 1212, 1216-17 (Fla. 1979) (each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances); *People v. Wilson*, 497 N.E.2d 302, 303-04 (Ill. 1986) (Simon, J.) (rejecting suggestion that full court could recuse); *Peterson v. Borst*, 784 N.E.2d 934, 937 (Ind. 2003) (Boehm, J.) (individually denying recusal motion); *Dean v. Bondurant*, 193 S.W.3d 744, 746 (Ky. 2006) (Roach, J.) (individually granting recusal motion; "the decision to recuse should not be made lightly by a Kentucky Supreme Court Justice"); *In re modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, 438 N.W.2d 95 (Minn. 1989) ("[W]e have declined to rule on this motion and instead we refer the matter to Chief Justice Popovich individually for decision."); *In re Waltemade*, 1974 N.Y. LEXIS 1851 (N.Y. Ct. on the Judiciary 1974) ("the practice of the Court is for the individual Judge to decide the question"); *Noriega Rodriguez v. Hernandez Colon*, 20 P.R. Offic. Trans. 285, 296 (P.R. 1988) (adopting individual decisions by justices); *Cohen v. Manchin*, 336 S.E.2d 171, 175-76 (W. Va. 1984) ("Where a motion is made to disqualify or recuse an individual justice of this Court, that question is to be decided by the challenged justice and not by the other members of this Court.").

⁸⁰ See *State v. Henley*, 802 N.W. 2d 175, 181 (Wis. 2011) ("the court's IOP mirrors the way in which the United States Supreme Court addresses motions to disqualify a Supreme Court Justice"); see also *Pellegrino v. Ampco Systems Parking*, 807 N.W.2d 40, 40 n.2 (Mich. 2009) ("this Court's longstanding practice of [individual] judicial recusal is nearly identical to that of the United States Supreme Court") (Young, J.) (citing Supreme Court of the United States, Statement of Recusal Policy, Nov. 1, 1993 signed by Rehnquist, C.J., Stevens, O'Connor, Scalia, Kennedy, Thomas, and Ginsburg, JJ., available at http://www.eppc.org/docLib/20110106_RecusalPolicy23.pdf).

⁸¹ *Id.* at 184.

⁸² See *Mosk v. Superior Court of Los Angeles County*, 601 P.2d 1030, 1034 & n.2 (Cal. 1979) (court disqualified justice from participation after others had recused); *State ex rel. Mitchell v. Sage Stores*, 143 P.2d 652, 658-59 (Kan. 1943) (court denied motion to recuse and challenged justice did not participate); *State ex rel. Hall v. Niewoehner*, 155 P.2d 205, 209-210 (Mont. 1944) (court reviewed and denied motion to recuse four of five justices); *State ex rel. Short v. Martin*, 256 P. 681, 685 (Okla. 1927) (extensive discussion of review by court); *Goodheart v. Casey*, 565 A.2d 757, 764 (Pa. 1989) ("Where disqualification is raised before the Court and the merit of the motion obvious, the remaining Justices have the duty to request that Justice to accede to the recusal request"); *NEV. REV. STAT. ANN.* § 1.225(4) (2009) ("Hearing on

II. POLITICIZATION OF THE JUDICIARY AND THE SUPREME COURT'S OBSTACLES TO REFORM

There is no small irony in reviewing the codes of judicial conduct in effect across the country. Reading them in a vacuum would leave a reader convinced of the distance between life on the bench and life in the political arena. The codes present an image of judges who are involved in their communities but appreciate that they can perform their jobs best if they avoid the political rough and tumble and keep their public statements on controversy to a minimum.

A. *The Prevalence of Judicial Elections and the Millions Flowing Into Them*

Unfortunately, that commitment to circumspection—to a detachment from politics—is becoming increasingly difficult for judges to maintain. Federal judges continue to be appointed and confirmed in accordance with the Constitution, but at the state level, judicial election has become the norm.⁸³ In the vast majority of states, trial judges are popularly elected,⁸⁴ and in almost half of the states, the members of the

such charge shall be had before the other justices of the Supreme Court.”); TEX. R. APP. P. 16.3 (“challenged justice or judge must either [recuse] . . . or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc”); VT. R. APP. P. 31(e)(2) (requiring justice whose recusal is sought to refer motion to other justices).

⁸³ The country has gone back and forth in the prevalence of judicial elections. The first twenty-nine states to join the Union employed selection methods that did not involve popular election. See Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966) (citing EVAN HAYNES, *SELECTION AND TENURE OF JUDGES* 101-35 (1944)). During the Jacksonian movement toward popular democracy, this uniformity changed. The first elected judges were lower court judges in Georgia, then Mississippi adopted a completely elected judiciary, and the other states followed, until by the Civil War, 22 of the 34 states elected their judges.; Jona Goldschmidt, *Merit Selection: Current Status, Procedures and Issues*, 49 U. MIAMI L. REV. 1, 5 (1994). In the early twentieth century, however, the states began to shift to a hybrid model, widely known as the Missouri Plan, under which judges are initially appointed but then subject to unopposed retention elections. See Winters, *supra*, at 1084; see also Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 23 (1956) (reprinting Roscoe Pound’s 1906 speech asserting that “compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench”).

⁸⁴ Trial judges must be popularly elected to the bench in 33 states: Alabama, Arkansas, Arizona (only some districts), California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas (only some districts), Kentucky, Louisiana, Maryland (only some districts), Michigan, Minnesota, Mississippi, Missouri (only some districts), Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington, West Virginia, and Wisconsin. See American Judicature Society, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Aug. 29, 2014) (American Judicature Society compilation of methods,

highest courts are popularly elected.⁸⁵ In several more states, even when a judge is appointed through a merit selection process, the judge will at some point thereafter be subject to a retention election.⁸⁶ All told, only twelve state jurisdictions eschew popular election altogether for their judges.⁸⁷

Whether popular election in and of itself has a negative effect on judicial impartiality has been the subject of debate.⁸⁸ But there is little question that the current big-money campaigns are having a detrimental effect. Money has begun to flow so dramatically into judicial elections that justices feel increasingly that they have no choice but to seek major benefactors, and with benefactors come expectations.⁸⁹ According to a

state by state). In twelve of these states—Alabama, Illinois, Indiana, Kansas, Louisiana, Missouri, New Mexico, New York, Pennsylvania, Tennessee, Texas, and West Virginia—the elections that are held are partisan, political party affairs.

⁸⁵ Members of the state's highest court must be popularly elected in 22 states: Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. *See id.* In seven of these states—Alabama, Illinois, Louisiana, New Mexico, Pennsylvania, Texas, and West Virginia, the elections are openly partisan. *See id.*

⁸⁶ In six states—Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming—judges are never elected to the bench as an initial matter, but are nonetheless subject to retention elections. *See id.*

⁸⁷ Interestingly, the group of twelve states that do not engage in judicial elections at all includes eight of the original thirteen states: Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia. *See id.*

⁸⁸ Compare CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 128-38 (2009); Julius Uehlein & David H. Wilderman, *Opinion: Why Merit Selection Is Inconsistent with Democracy*, 106 DICK. L. REV. 769, 770-71 (2002); Michael Debow, et al., The Case for Partisan Judicial Elections, 33 U. TOLEDO L. REV. 393, 396 (2002); with Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 58-61 (2002); Meryl J. Chertoff, *Trends in Judicial Elections in the States*, 42 MCGEORGE L. REV. 51, 52 (2010). At one time, judges were elected, but many ran unopposed. In 1984, 33% of nonpartisan elections, and 75% of partisan elections were contested. Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21 (2004); Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337 (2003). By 2000, 75% of nonpartisan elections, and 95% of partisan elections, were contested. *Id.*

⁸⁹ An Ohio Supreme Court justice described the pressure this way: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote." Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Ruling*, N.Y. TIMES, Oct. 1, 2006 (quoting Justice Paul E. Pfeifer), available at <http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all>. A retired chief justice of the West Virginia Supreme Court of Appeals concurred. "It's pretty hard in big-money races not to take care of your friends. Its very hard not to dance with one who brung you." *Id.* (quoting former Chief

widely cited study of campaign funding, judicial candidates raised 2.5 times as much money in the 2000-2009 decade as they did from 1990-1999 (compared to a consumer price index rise of only 25%),⁹⁰ And there seems to be no end to it. In the 2011-2012 election cycle, for example, spending on television ads shattered all previous records, the \$33.7 million spent marking a 18% increase (in inflation-adjusted dollars) over the previous recordsetting year of 2007-2008.⁹¹

The influx of money into judicial campaigns did not just evolve organically: it is the product of the war over “tort reform.” It appears to have begun with Karl Rove’s organized efforts in the 1980’s and 1990’s to alter the composition of the Texas courts,⁹² and picked up nationwide momentum in 2000, when the United States Chamber of Commerce chose to become involved.⁹³ At that time, the Chamber announced that it would be “raising millions of dollars to support pro-business candidates in tight races where the Chamber’s help will make a difference.”⁹⁴ The Chamber cited reports by the American Tort Reform Foundation that plaintiffs’ lawyers associations had contributed \$18 million to judicial candidates over the previous three years.⁹⁵

In the fourteen years since, the Chamber has more than followed through on its 2000 promise. The Chamber has amassed a formidable group of active business allies. The National Association of Manufacturers has created a funding group called the American Justice Partner-

Justice Richard Neely).

⁹⁰ James Sample, Adam Skaggs, Jonathan Blitzer & Linda Casey, *The New Politics of Judicial Elections, 2000-2009: Decade of Change*, at 8 (August 2010), available at http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83e3.pdf (last visited Aug. 11, 2014).

⁹¹ *The New Politics of Judicial Elections 2011-2012*, at 1 (2013) (in inflation-adjusted dollars, \$28.2 million was spent on television ads in 2007-2008), available at <http://newpoliticsreport.org/report/2012-report/introduction/> (hereinafter “New Politics Report”).

⁹² See Joshua Green, *Karl Rove in a Corner*, THE ATLANTIC, Nov. 2004, available at <http://www.theatlantic.com/doc/200411/green>.

⁹³ See Robert Lenzner & Matthew Miller, *Buying Justice*, FORBES, July 21, 2003, available at <http://www.forbes.com/forbes/2003/0721/064.html>; William Glaberson, *U.S. Chamber Will Promote Business Views in Court Races*, N.Y. TIMES, Oct. 22, 2000; Jim VandeHei, *Political Cover: Major Business Lobby Wins Back Its Clout by Dispensing Favors*, WALL ST. J., Sept. 11, 2001; *Battle Over the Courts*, BUS. WK., Sept. 27, 2004.

⁹⁴ Press Release, United States Chamber of Commerce Institute for Legal Reform, *Chamber Calls Trial Lawyer Political Contributions a Wake-Up Call for Business* (Jan. 23, 2000), available at <http://www.instituteforlegalreform.com/resource/chamber-calls-trial-lawyer-political-contributions-a-wake-up-call-for-business>.

⁹⁵ See *id.* (quoting Chamber President Jim Wootten) (“The trial lawyers clearly want to influence the 2000 elections and the appointment of judges; block legal reform; and use government lawsuits to target unpopular industries.”).

ship and began making regular contributions to judicial races.⁹⁶ The large tobacco corporations fund state elections through the American Tort Reform Association and the Center for Individual Freedom.⁹⁷ Multiple large corporations—including Home Depot, AIG, Walmart, Daimler/Chrysler, and the American Council of Life Insurers—have contributed.⁹⁸ By the end of the decade, business groups had outspent union and trial lawyers' groups in state judicial elections by a rate of more than 2:1.⁹⁹

This is not to say that unions and plaintiffs' lawyers have not responded in kind. They have. As the last decade wore on, unions and plaintiffs' lawyers' organizations escalated their fundraising efforts as well, and pumped millions of dollars into judicial races, to the point that by the blockbuster 2007-2008 election cycle, both sides were equally inundating the campaigns with funds,¹⁰⁰ much of which was spent on negative advertising.¹⁰¹

In the end, the fact that millions are now regularly invested in judicial races has had several effects. Most immediately, it means that any candidate seeking election to a judgeship virtually has to ally with a major political organization, either one of the parties or a political action committee.¹⁰² Whether the candidate is well respected locally, or able to raise money from a wide roster of individuals, does not in the end matter that much, because her campaign is likely to be dominated by five political organizations spending literally 500 times as much as each of her individual donors.¹⁰³

Further, because that funding alliance has become necessary to be elected, the judge is likely to feel indebted to the interests that in effect bought her or his seat. Indeed, even assuming that the newly elected

⁹⁶ Sample et al., *supra* note 90, at 41.

⁹⁷ *Id.*

⁹⁸ *Id.* at 41 (citing Lenzner & Miller, *supra* note 93).

⁹⁹ *Id.* at 40.

¹⁰⁰ *Id.* ("plaintiffs' lawyers/unions/liberals" contributed \$6.175 million to judicial races while "business/conservatives" contributed \$6.174 million).

¹⁰¹ *See id.* at 28-29.

¹⁰² *See* Sample et al., *supra* note 90, at 42-48, 50-51 (identifying the key funding organizations of the left and right in judicial elections). Conservative and business interests tend to funnel their contributions through a national network of political action committees, while liberal interests tend to fund campaigns through state organizations and party contributions. *See id.* at 42-48.

¹⁰³ *See id.* at 1 ("The top five spenders in each of [29] studied elections invested an average of \$473,000, while the remaining 116,000 contributors averaged \$850 each.")

have been and continue to be capable of resisting favoritism, the public is not willing to assume that that is so. Polls uniformly show that the public believes that judges are influenced in their decisions by where their campaign money has come from.¹⁰⁴

B. *The Increasing Insistence on Ideological Purity: Republican Party v. White and the Questionnaire Phenomenon*

When political groups pour money into judicial campaigns, they are consciously advocating resort to certain political views and policy choices in the application of the law. At a minimum, they are seeking to place a certain *type* of judge on the bench, one who will lean one way or the other politically whenever there are opportunities to do so. They may want a business-oriented judge, for example, or one who will be tough on crime. Perhaps this sort of politicization of the bench is inevitable as long as there are judicial elections, but the influx of big money seriously exacerbates it. It becomes that much more difficult for judges not to think about their contributors' reactions to decisions because those contributors will be life-or-death when the next election comes around.

This politicization of the bench would be worrisome enough, but at least some of the political groups seeking control of the judiciary have not been content with such general control over the bench. They have gone beyond seeking certain general leanings in judicial candidates to seeking an ideological purity with respect to certain *issues*.¹⁰⁵ As part of this effort, they have embarked on a far-reaching campaign to strike down the judicial code of conduct provisions limiting the political activ-

¹⁰⁴ Justice at Stake/Brennan Center National Poll, conducted Oct. 22-24, 2013, at 3, *available at* http://www.justiceatstake.org/file.cfm/media/news/toplines337_B2D51323DC5D0.pdf (87 percent of respondents felt that direct contributions to a judicial campaign or indirect contributions in the form of paid advertising would have either a great deal or some influence on judges' decisions). *See also id.* at 4 (in the cited poll, 90 percent of the respondents felt that a campaign contributor appearing before a judge would present a very or somewhat serious problem and 92 percent responded that the judge should step aside); Harris Interactive Financial Limit Survey, conducted Feb. 12-15, 2009, *available at* http://www.justiceatstake.org/media/cms/Justice_at_Stake_Campaign_Final_Tab_BE1C0586C9129.pdf (68 percent of people polled would doubt impartiality of judge if one party had donated \$50,000 to the judge's campaign); History of Reform Efforts: Opinion Polls and Surveys, *available at* http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state (last visited Aug. 22, 2014) (reporting on state polls).

¹⁰⁵ *See* Terry Carter, *Loaded Questionnaires?: Judicial Candidates Advised To Be Wary of Answers Inviting Suits Challenging Canons*, 5 No. 36 ABA J. E-REPORT 3 (Sept. 8, 2006).

ities of judicial candidates.¹⁰⁶ Their success in this endeavor began with the Supreme Court's decision in *Republican Party v. White*.¹⁰⁷

In *White*, the Court held that Minnesota's "announce" clause violated the first amendment.¹⁰⁸ The clause, based on Canon 7(B) of the 1972 Model Code, stated that a judicial candidate or judge was not to "announce his or her views on disputed legal or political issues."¹⁰⁹ As a restriction on speech, the clause was subject to strict scrutiny, and the majority, speaking through Justice Scalia, held that the clause was not narrowly tailored to the state's interests in preserving judicial impartiality and the public's perception of that impartiality. The majority would not accept the proposition that a judge could face untoward and unacceptable pressure in decisionmaking to the extent a politicized judicial campaign forced him or her to announce stances on issues that were likely to end up before the judge on the bench.¹¹⁰ And Justice Scalia all but ridiculed the idea that a judicial candidate might be expected to adopt different conduct—depoliticized conduct—in honor of the profession he or she was seeking to join.¹¹¹

Justices Stevens, Souter, Ginsburg and Breyer dissented, and Justices Stevens and Ginsburg each filed opinions joined by all the others.¹¹² Justice Stevens minced no words in decrying the majority's failure to distinguish judicial and political candidacies. He wrote that "every good judge is fully aware of the distinction between the law and a personal point of view," and so a judicial candidate had no business encouraging people to vote for him or her on the basis of that "personal point of view."¹¹³ "Indeed," Stevens wrote, "to the extent that such statements seek to enhance the popularity of a candidate by indicating how he would rule in specific cases if elected, they evidence a *lack of fit-*

¹⁰⁶ See *infra* notes 127-34 and accompanying text.

¹⁰⁷ 536 U.S. 769 (2002).

¹⁰⁸ See *id.* at 788.

¹⁰⁹ *Id.* at 768 (quoting MINN. STAT., Code of Jud. Conduct, Canon 5(A)(3)(d)(i) (2000)).

¹¹⁰ See *id.* at 781 ("[I]t suffices to say that respondents have not carried the burden imposed by our strict-scrutiny test to establish this proposition (that campaign statements are uniquely destructive of open-mindedness) on which the validity of the announce clause rests...").

¹¹¹ See *id.* at 779-80. Justice Scalia wrote: "[A judicial candidate may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.]" *Id.*

¹¹² See 536 U.S. at 797 (Stevens, J., dissenting); See also *id.* at 804 (Ginsburg, J., dissenting).

¹¹³ *Id.* at 798 (Stevens, J., dissenting).

ness for the office.”¹¹⁴

Justice Ginsburg elaborated on the distinction between the judicial and political roles. In her opening paragraph, she quoted Justice Scalia himself for the proposition that judges are actually supposed to “stand up to what is generally supreme in a democracy: the popular will.”¹¹⁵ Because of this, she wrote, the Court’s “unrelenting reliance on decisions involving contests for legislative and executive posts is manifestly out of place,”¹¹⁶ and the Court should allow states to limit judicial campaign speech “by measures impermissible in elections for political office.”¹¹⁷ Justice Ginsburg also challenged Justice Scalia for belittling the distinction between statements made before a judicial candidacy and those made after. She noted that he had drawn precisely such a distinction when he appeared before the Senate in connection with his confirmation.¹¹⁸ She also quoted then-Justice Rehnquist acknowledging why judicial nominees should refrain from political statements:

[one must] distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.¹¹⁹

Though they did not carry the day, the *White* dissents were certainly correct that the decision “obscure[ed] the fundamental distinction between campaigns for the judiciary and the political branches.”¹²⁰ Al-

¹¹⁴ *Id.* (emphasis added).

¹¹⁵ *Id.* at 803-04 (Ginsburg, J., dissenting) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CH. L. REV. 1175, 1180 (1989)).

¹¹⁶ *See* 536 U.S. at 806.

¹¹⁷ *Id.* at 807.

¹¹⁸ *Id.* at 818 n.4. (Then-Judge Scalia said, “Let us assume that I have people arguing before me to do it or not to do it. I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of his confirmation hearings, and that is, by way of condition to his being confirmed, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter.” (quoting 13 R. MERSKY & J. JACOBSTEIN, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1986* (1989)).

¹¹⁹ *Id.* at 819 (quoting *Laird v. Tatum*, 409 U.S. 824, 836 n.5 (1972)).

¹²⁰ *Id.* at 797 (Stevens, J., dissenting); *See id.* at 821 (Ginsburg, J., dissenting) (the majority

most immediately, special interest groups began seeking to pack the judiciary with judges sympathetic to their political views. Conservative, anti-abortion groups in particular began distributing questionnaires to judicial candidates asking them to announce their views on abortion and other issues, such as homosexuality, public school graduation prayer, parental choice in education and assisted suicide.¹²¹ At least one even included the following question: “Which of the following former U.S. Presidents best represents your political philosophy?” and provided the following as an answer choice: “John F. Kennedy/Jimmy Carter/Ronald Reagan/George Bush (former)/Undecided/Decline to answer.”¹²²

Typically, the questionnaires would cite the *White* decision and insist that the group was seeking only the candidate’s views, not any pledge, promise or commitment (because the *White* court had allowed for states to prohibit pledges).¹²³ If a candidate answered the “wrong” way, the candidate would be denied the group’s support.¹²⁴ If the candidate “refused” to respond, the candidate’s views would be contrasted with cooperating candidates who had answered in accordance with the group’s views.¹²⁵ And if a candidate “declined” to respond on the ground that judicial ethics rules prohibited such announcements, the group often would sue the state judicial body to invalidate its code.¹²⁶

Indeed, *White* set in motion not just the use of judicial question-

fails to acknowledge the “fundamental tension between the ideal character of the judicial office and the real world of electoral politics”).

¹²¹ See Steven Pollak, *Declare Stands on Social Issues, Coalition Asks Court Hopefuls*, THE DAILY REPORT, May 14, 2004 at 1; *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 844 (9th Cir. 2007) (“In October 2002, the Alaska Right to Life Political Action Committee . . . circulated a questionnaire to the twelve Alaska state court judges who were seeking retention votes . . . solicit[ing] the judges’ views on a variety of legal and political issues such as abortion and assisted suicide.”); *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 547 (7th Cir. 2007) (“Indiana Right to Life sent questionnaires to judicial candidates in 2002 [that] covered topics such as abortion and physician-assisted suicide.”).

¹²² *Pennsylvania Family Inst., Inc. v. Black*, 489 F.3d 156, 160 (3d Cir. 2007).

¹²³ Penny J. White, *A New Perspective on Judicial Disqualification: An Antidote to the Effects of the Decisions, in White and Citizens United*, 46 IND. L. REV. 103, 107 & n.18 (2013).

¹²⁴ *Id.*

¹²⁵ *Id.* at 107-08.

¹²⁶ *Id.* (citing *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002)); *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209, 1218-19 (D. Kan. 2006), *vacated and question certified*, 519 F.3d 1107 (10th Cir. 2008); *Indiana Right to Life, Inc. v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind. 2006), *rev’d*, 507 F.3d 545 (7th Cir. 2007); *Family Trust Found. of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

naires, but a series of lawsuits aimed at dismantling virtually every ethical limitation on candidates designed to further judicial impartiality and depoliticize campaigns. In the last ten years, special interest groups have brought lawsuits challenging the codes' announcement,¹²⁷ pledges or promises,¹²⁸ non-solicitation,¹²⁹ non-endorsement¹³⁰ and non-affiliation¹³¹ clauses in more than half the federal circuits.¹³² These rul-

¹²⁷ The "announcement" clause struck down in *White*, see *supra* note 111 and accompanying text, appeared in the 1990 ABA Model Code of Judicial Conduct. It was deleted from the 2007 Model Code in response to the Supreme Court's decision in *White*. See also REPORTERS' NOTES, *supra* note 52, at 100.

¹²⁸ MODEL CODE of Judicial Conduct R. 4.1(A)(13) (what is commonly known as the "pledges or promises" clause in the 2007 Model Code states that "[A] judge or a judicial candidate shall not . . . in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office"). (R12.9.6 (citation of ABA Model Code)).

¹²⁹ MODEL CODE of Judicial Conduct R. 4.1(A)(8) (the "non-solicitation" clause in the 2007 Model Code states that "[a] judge or a judicial candidate shall not . . . personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4.>"). The Supreme Court granted certiorari in the October 2014 Term to hear *The Florida Bar v. Williams-Yulee*, 138 So. 3d 379 (Fla.), *cert. granted*, 135 S. Ct. 44 (2014). *Williams-Yulee* wrote a letter personally soliciting campaign funds, and was sanctioned by the Bar for violating Florida's Canon 7C(1), which prohibits personal solicitation. *Id.* at 382. The Florida Supreme Court rejected *Williams-Yulee's* claim that 7C(1) violated the First Amendment. *Id.* at 387. The case was argued before the Supreme Court on January 20, 2015, and as this article goes to press, a decision is expected anytime.

¹³⁰ MODEL CODE of Judicial Conduct R. 4.1(A)(3), R. 4.2(B). (the "non-endorsement" clause in the 2007 Model Code states that "[a] judge or a judicial candidate shall not . . . publicly endorse or oppose a candidate for public office," although he may endorse candidates for the same office within a window of time prior to the election, as described in Rule 4.2(B)).

¹³¹ MODEL CODE of Judicial Conduct R. 4.1(A)(6), 4.2(C) (the "non-affiliation" clause in the 2007 Model Code states that "[a] judge or a judicial candidate shall not . . . publicly identify himself or herself as a candidate of a political organization," except within a window of time prior to the election, as described in Rule 4.2(C)).

¹³² See, e.g., *Pennsylvania Family Inst., Inc. v. Black*, 489 F.3d 156, 169-70 (3d Cir. 2007) (political organization challenged Pennsylvania's pledges or promises clause and disqualification rule requiring recusal if impartiality can reasonably be questioned and was dismissed for lack of standing); *Carey v. Wolnitzek*, 614 F.3d 189, 210 (6th Cir. 2010) (candidate successfully challenged Kentucky's non-affiliation and non-solicitation clauses, and pledges or promises clause sent to lower court for further evaluation); *Bauer v. Shepard*, 620 F.3d 704, 718 (7th Cir. 2010) (political organization and candidate unsuccessfully challenged Indiana's pledges or promises and non-solicitation clauses and clauses prohibiting political activity for others); *Siefert v. Alexander*, 608 F.3d 974, 990 (7th Cir. 2010) (candidate challenged Wisconsin's non-affiliation clause, which court struck, and non-solicitation and non-endorsement clauses, which court upheld), *cert. denied*, 131 S. Ct. 2872 (2011); *Wersal v. Sexton*, 674 F.3d 1010, 1028-30 (8th Cir. 2012) (en banc) (candidate had successfully challenged Minnesota's announcement clause in *White*, and court on remand upheld non-endorsement clause and clause prohibiting solicitation

ings have not all gone against the states' judicial codes.¹³³ The lawsuits themselves, however, have presented a threat sufficient that many states have chosen to repeal the provisions rather than stand and fight.¹³⁴

In the midst of all these developments heading the judiciary down a decidedly political path—the prominence of popular election as the method of selecting judges, the vastly increased flow of money into judicial elections, and newly minted First Amendment protection for testing judicial candidates' political views—the Court stopped everything

for political organization or candidate), *cert. denied*, 133 S. Ct. 209 (2012); *Wolfson v. Concannon*, 750 F.3d 1145, 1157-60 (9th Cir. 2014) (candidate successfully challenged Arizona's non-endorsement clause, non-solicitation clause, and clauses prohibiting candidates from making speeches or soliciting funds for political organizations and from participating in the campaigns of others); *Sanders Cnty. Republican Party v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012) (Republican Party successfully challenged Montana law criminalizing party endorsement of judicial candidates); *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1248 (10th Cir. 2009) (political action committee and candidates challenged Kansas' pledges or promises clause and non-solicitation clause but claims were mooted when Kansas revised the former and eliminated the latter); *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007) (political organization challenged Alaska's pledges or promises clause and disqualification rule requiring recusal if impartiality can reasonably be questioned, and court found challenges not ripe); *Weaver v. Bonner*, 309 F.3d 1312, 1319, 1322 (11th Cir. 2002) (candidate and voter successfully challenged Georgia's non-solicitation clause and clause prohibiting false statements). The case of *O'Neill v. Coughlan*, 511 F.3d 638 (6th Cir. 2008), presents a certain irony. In *O'Neill*, the candidate was a sitting judge seeking elevation by election to the Ohio Supreme Court. *Id.* at 639. His campaign theme was "Money and judges don't mix," and to that end he supported campaign finance reform and refused any donation over \$10. His website included the statement: "The time has come to end the public's suspicion that political contributions influence court decisions. The election of Judge O'Neill is the best step toward sending the message, 'This Court is Not For Sale!'" *Id.* The Cuyahoga County Republican Party then brought a grievance against him, alleging that he had violated, *inter alia*, the Ohio Code's non-affiliation clause and a clause prohibiting statements that impugn the judiciary. *Id.* at 639-40. So Judge O'Neill brought suit challenging those clauses under the First Amendment, but the federal court ultimately found that it should abstain under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). *See id.* at 643-44.

¹³³ *See, e.g., Bauer*, 620 F.3d at 718 (upholding pledges or promises and non-solicitation clauses); *Siefert*, 608 F.3d at 990 (upholding non-solicitation and non-endorsement clauses); *Wersal*, 674 F.3d at 1028-30 (upholding non-endorsement clause and clause prohibiting solicitation for political organization).

¹³⁴ *See White*, *supra* note 123, at 108; *see also Kansas Judicial Review v. Stout*, 562 F.3d at 1248 (noting that Kansas eliminated its non-solicitation rule); *Bauer*, 620 F.3d at 708-09 (noting that Indiana substantially modified its pledge or promises clause). A similar fear of litigation may explain why more states have not adopted the provisions of the Model Code—Rules 2.11(A)(4) and (5)—requiring a judge to disqualify herself or himself when a litigant has made a certain level of campaign contribution or when the judge has made statements that appear to have pre-committed the judge on a matter before the court. *See supra* notes 34-41 and accompanying text.

short.

III. CAPERTON'S IMPACT ON JUDICIAL IMPARTIALITY

A. *The Decision Itself*

In *Caperton v. A.T. Massey Coal Co.*,¹³⁵ a West Virginia jury found that Massey Coal Company had committed fraudulent misrepresentation, concealment and tortious interference, and awarded plaintiff Hugh Caperton \$50 million in damages.¹³⁶ Massey Coal filed post-trial motions challenging both the verdict and the damages award and seeking judgment as a matter of law.¹³⁷ While these were pending in the trial court, Massey Coal's CEO, Don Blankenship, contributed \$3 million to a candidate for the West Virginia Court Supreme Court of Appeals.¹³⁸ Blankenship's \$3 million contribution was more than all of his candidate's other contributions combined,¹³⁹ and Caperton alleged it exceeded the *combined* expenditures of both candidates' campaign committees by a full million dollars.¹⁴⁰

The candidate supported by Blankenship, Brent Benjamin, unseated the incumbent and shortly thereafter proceeded to take up the case of his largest campaign contributor.¹⁴¹ Caperton moved now-Justice Benjamin to recuse himself,¹⁴² but Benjamin denied the motion.¹⁴³ Ultimately, the jury verdict was overturned, on a vote of 3-2, with Benjamin voting in favor of the defendant, Blankenship's company.¹⁴⁴

¹³⁵ 556 U.S. 868 (2009).

¹³⁶ *Id.* at 872.

¹³⁷ *Id.*

¹³⁸ *Id.* at 873.

¹³⁹ *Id.*

¹⁴⁰ *Caperton*, 556 U.S. at 873.

¹⁴¹ *Id.* at 873-74. Of 716,337 votes cast, Benjamin won 53.3%, to 46.7% for the incumbent Justice McGraw. *Id.* at 873.

¹⁴² *Id.* at 873-74. Invoking both the due process clause and the West Virginia Code of Judicial Conduct, Caperton actually moved for Justice Benjamin to recuse himself before Massey Coal had even filed the appeal.

¹⁴³ *Id.* at 874.

¹⁴⁴ *Caperton*, 556 U.S. at 875. Massey Coal's appeal was actually heard twice. When the appeal was first heard, Caperton moved to disqualify the judge, Benjamin, and Benjamin himself denied the motion. *Id.* at 873-74. The court then voted 3-2 against Caperton. *Id.* at 874. Caperton moved for rehearing, and this time two judges other than Benjamin recused, one because he had vacationed with Blankenship and one because he had publicly criticized Blankenship's role in the election of Benjamin. *Id.* at 874-75. The step-aside caused Benjamin to assume the role of Chief Justice, so he appointed two substitute justices. *Id.* at 875. The vote,

Caperton brought the case to the United States Supreme Court on a due process claim.¹⁴⁵ While the case was pending in the Supreme Court, four months after the opinion below had issued, Benjamin filed a concurring opinion in the West Virginia court.¹⁴⁶ The judge stated that he had no “‘direct, personal, substantial, pecuniary interest’ in the case.”¹⁴⁷ He refused to consider whether he should recuse under an “‘appearance of propriety” standard, on the ground that such a standard would allow judges to be challenged too easily.¹⁴⁸

The Supreme Court reversed, holding that Benjamin’s failure to recuse himself violated Caperton’s right to due process.¹⁴⁹ The Court split 5-4.¹⁵⁰ Justice Kennedy wrote for the majority and was joined by Justices Stevens, Souter, Breyer and Ginsburg.¹⁵¹ Chief Justice Roberts wrote a dissent joined by Justices Scalia, Thomas and Alito, and Justice Scalia additionally filed his own.¹⁵²

The majority reviewed the Court’s precedent on the due process requirement of an impartial tribunal.¹⁵³ That precedent fell into three categories. The first, and oldest, was drawn from *Tumey v. Ohio*,¹⁵⁴ and called for a judge’s disqualification whenever the judge had a “‘direct personal, substantial, pecuniary interest” in a case or one of its parties. These cases, Justice Kennedy wrote, derived from the common law principle that a man could not “‘be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”¹⁵⁵ They were about a judge’s immediate and direct gain, and not at all about relational bias or prejudice, because under the common law, “‘matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters of legislative discre-

however, remained 3-2. *Caperton*, 556 U.S. at 875. The opinion issued was a modified version of the original, and was written by a judge other than Benjamin. *Id.*

¹⁴⁵ *See id.* at 876.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (quoting *A.T. Massey Coal Co. v. Caperton*, 679 S.E.2d 223 (2008)).

¹⁴⁸ *Caperton*, 556 U.S. at 876.

¹⁴⁹ *See id.* at 890.

¹⁵⁰ *See id.* at 871, 890.

¹⁵¹ *See id.* at 871.

¹⁵² *See id.* at 890, 902.

¹⁵³ *Caperton*, 556 U.S. at 876-81.

¹⁵⁴ 273 U.S. 510 (1927).

¹⁵⁵ *Caperton*, 556 U.S. at 876-77 (quoting THE FEDERALIST NO. 10, at 59 (J. Madison)) (J. Cooke ed. 1961).

tion.”¹⁵⁶

The other two categories of cases the Court identified had arisen since *Tumey*, and were, in the majority’s view, distinct from *Tumey*’s “direct interest” precedent. They reflected “new problems” that were not discussed at common law, and they involved “circumstances ‘in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”¹⁵⁷ In the first of these “probability-of-bias” categories, a judge had a financial interest in the outcome of a case that would not have risen to the level of a “direct” interest at common law but would still present the likelihood of bias.¹⁵⁸ In the second category, the concern with the judge’s bias was not financial in any way. The cases involved criminal contempt citations in situations where the judge had suffered a personal challenge incompatible with neutrality.¹⁵⁹ From its survey of this precedent, the *Caperton* majority concluded that the Court had long concerned itself with an objective appearance of fairness: “the inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”¹⁶⁰

In the majority’s view, even apart from the precedent, an objective approach was the wisest. The Court noted that actual bias was not only very difficult for a litigant to prove but very hard even for a judge to root out on his or her own.¹⁶¹ An objective standard protected litigants against judges who could not or would not acknowledge their own prejudicial motives.¹⁶² Thus, the courts should ask “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 ade-

¹⁵⁶ *Id.* at 877.

¹⁵⁷ *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

¹⁵⁸ *See id.* at 877-79 (Part II.A). An example was *Ward v. Monroeville*, 409 U.S. 57 (1972), in which the judge was also the mayor, and as mayor stood to benefit from the fact that the fines the court levied went into the village’s coffers.

¹⁵⁹ *See id.* at 880-81 (Part II.B).

¹⁶⁰ *Caperton*, 556 U.S. at 881 (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971)).

¹⁶¹ *Id.* at 883.

¹⁶² *Id.*

quately implemented.”¹⁶³

With that established, the Court concluded that Justice Benjamin violated Caperton’s right to due process by failing to recuse himself from the case. Justice Kennedy wrote: “We conclude 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.”¹⁶⁴ The Court indicated that it had considered a number of factors: the size of the contribution, both in itself and in relative terms, and the timing of the contributions, the election, and the case appeal.¹⁶⁵ In the end, notwithstanding Benjamin’s insistence that he was not influenced in the case, he should have withdrawn: “Due process ‘may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.’”¹⁶⁶

The Chief Justice’s dissent objected strenuously to the majority’s adoption of a “probability of bias” standard for due process violations.¹⁶⁷ The Chief Justice agreed that there was a need “to maintain a fair, independent and impartial judiciary—and one that appears to be such,” but felt that doing so was best left to legislation and court rules.¹⁶⁸ According to the Chief Justice, the Court had previously recognized only two exceptions to the showing of actual bias normally required for a due process violation—those reflected in the financial interest and criminal contempt cases—and had “never” relied on the “vaguer notions of bias or the appearance of bias” employed by the majority.¹⁶⁹

In a particularly pointed section, the Chief Justice criticized the breadth and ambiguity of the majority’s standard.¹⁷⁰ To illustrate the majority’s failure “to provide clear, workable guidance for future cases,”¹⁷¹ he set forth forty questions a court might have to resolve in or-

¹⁶³ *Id.* at 883-84 (quoting *Withrow*, 421 U.S. at 47).

¹⁶⁴ *Id.* at 884.

¹⁶⁵ See *Caperton*, 556 U.S. at 884-86.

¹⁶⁶ *Id.* at 881 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

¹⁶⁷ See *id.* at 890 (Roberts, C.J., dissenting).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See *Caperton*, 556 U.S. at 893-99.

¹⁷¹ *Id.* at 893.

der to determine whether a probability of bias existed, and many of the questions suggested that the endeavor could become arbitrary.¹⁷² In the end, the dissent warned, the majority's expansion of due process would result in a flood of groundless allegations that judges are biased and thereby "do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case."¹⁷³

The majority downplayed the dissent's alarm. The Court pointed out that the earlier due process cases "raised questions similar to those that might be asked after our decision today," and yet the Court was not "flooded" with motions based on those cases.¹⁷⁴ Further, the facts in *Caperton* were "extreme by any measure,"¹⁷⁵ and so would ordinarily end up being addressed by judicial codes and disqualification statutes without ever rising to constitutional adjudication.¹⁷⁶ Justice Kennedy wrote that "[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances."¹⁷⁷

¹⁷² See *id.* at 893-98.

¹⁷³ *Id.* at 891. Justice Scalia's dissent echoed this point by the Chief Justice, asserting that the public is tired of never-ending litigation and that by constitutionalizing recusal decisions, the majority added weight to that complaint. *Id.* at 2274 (Scalia, J., dissenting). He wrote: "Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution." *Caperton*, 556 U.S. at 903.

¹⁷⁴ *Id.* at 888. Justice Kennedy appears to have had the better of this argument. In five years, all across the country, the case has been cited in fewer than 350 cases, and discussed at any meaningful length in only about 100 of those. For a frame of reference drawn from WestlawNext, *Arizona v. Johnson*, 555 U.S. 323 (2009), was decided at the same time as *Caperton* and held that police could subject passengers in a vehicle stopped for a traffic infraction to a Terry "stop and frisk." It has been cited since 2009 over 700 times. Perhaps more to the point, one might consider *Withrow v. Larkin*, 421 U.S. 35 (1975), itself a due process case based on judicial bias. In 39 years, it has been cited in 2009 cases. Or one might consider *Citizens United v. FEC*, 558 U.S. 310 (2010). Decided nine months after *Caperton*, it has been cited in 10,000 cases. So it hardly seems that the 300-plus cases that have invoked *Caperton* are excessive.

¹⁷⁵ *Caperton*, 556 U.S. at 887.

¹⁷⁶ See *id.* at 890. The majority's idea that a flood of cases would not be brought because they would previously have been resolved by resort to codes of conduct and disqualification statutes was limited conceptually. Certainly some due process cases would fall to the wayside when a litigant succeeded in disqualifying a judge because a state or the federal system had adopted more rigorous standards. This would not work the other way, however: when a judge is *not* disqualified, if there is a due process possibility available, presumably the litigant will not quit but will keep litigating the question into a due process posture.

¹⁷⁷ *Id.*

B. *Caperton's Impact on State Disqualification Procedures*

Theoretically, *Caperton* should not have had that much of an impact. As the majority noted, virtually every state had adopted the ethical directive that a judge avoid not just impropriety, but the appearance of impropriety.¹⁷⁸ More specifically, in virtually every state—including West Virginia—disqualification rules *already* required judges to disqualify themselves whenever “the judge’s impartiality might reasonably be questioned.”¹⁷⁹ So if these constraints had been functioning properly, there would have *been* no *Caperton* case, and no need for a due process violation lying atop a jurisdiction’s ethical rules.¹⁸⁰

¹⁷⁸ *Id.* at 888.

¹⁷⁹ See *supra* notes 31-33 and accompanying text. Indeed, the fact that the states already had experience with the standard announced in *Caperton* belied the Chief Justice’s remark that the majority’s standard did not provide “clear, workable guidance.” *Caperton*, 556 U.S. at 893 (Roberts, C.J., dissenting). A few courts have given the decision what can only be called a cramped reading. See, e.g., *State v. Shackleford*, 314 P.3d 136, 140-41 (Idaho 2013) (limiting *Caperton* to campaign contribution context); *State v. Munguia*, 253 P.3d 1082, 1088 n.13 (Utah 2011) (suggesting that *Caperton* would not reach personal bias or prejudice). But for the most part, the courts have smoothly accepted that a due process claim lies alongside their state rules and proceeded to evaluate the probability of bias. See, e.g., *Hurles v. Ryan*, 752 F.3d 768, 792 (9th Cir. 2014) (“We must ask whether the average judge, in Judge Hilliard’s position, was likely to sit as a neutral, unbiased arbiter or whether there existed an unconstitutional risk of bias.”) (citing *Caperton*, 556 U.S. at 881); *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013) (“The bias inquiry is objective, asking ‘whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.’”) (quoting *Caperton*, 556 U.S. at 872, 881) (citing *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964)); *South Dakota v. United States Dep’t of Interior*, 775 F. Supp. 2d 1129, 1138 (D.S.D. 2011) (“an unconstitutional probability of bias involves an objective inquiry, based on 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.’”) (quoting *Caperton*, 556 U.S. at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *Today’s Fresh Start, Inc. v. Los Angeles Cnty. Office of Educ.*, 303 P.3d 1140, 1152 (Cal. 2013) (“Conclusive proof of actual bias is not required; an objective, intolerably high risk of actual bias will suffice.”). Two have even remarked that the *Caperton* standard is not especially different from the due process standard in place for some time. See *First Bank of Tennessee v. Hill*, 340 S.W.3d 398, 405 (Tenn. 2010) (“*Caperton* adds nothing to Tennessee law—well-established Tennessee law recognizes’ recusal is also appropriate “when a person of ordinary prudence in the judge’s position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality.”) (quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001) (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)); *Henry v. Jefferson Cnty. Comm’n*, No. 3:06-CV-33, 2009 WL 2857819, at *3 (N.D. W.Va. Sept. 2, 2009) (“this Court finds that while the Supreme Court may have found it appropriate to clarify the law in light of the extreme circumstances *Caperton* presented, it did not alter the substantive law as applied by this Court in evaluating plaintiffs’ claims”).

¹⁸⁰ See *State v. Allen*, 778 N.W.2d 863, 882 (Wis. 2010) (opinion of Abrahamson, C.J., and Bradley, Crooks, JJ.) (“[I]f the West Virginia court had been willing to keep its own house in

As the egregiousness of the case shows, however, the constraints were *not* functioning properly, primarily because West Virginia and numerous other states had been allowing judges to decide individually, without any full court back-up, whether their impartiality might reasonably be questioned.¹⁸¹ Presumably, had there been full court review at the state supreme court level in the *Caperton* case, the other justices would not have limited their consideration to Justice Benjamin's actual prejudice, as he did.¹⁸² And applying the proper, "reasonable question" standard, they might well have found that he should not sit.

Thus, just by constitutionalizing the disqualification issue, and without even expressly addressing the specific problem, the Court addressed this state court dysfunction. By making impartiality more broadly a matter of due process, the Court set up potential federal review of every disqualification decision, review that would not exist if impartiality were left solely to state disqualification statutes and state codes of conduct. Further, even without the possibility of federal review looming, the states would essentially *have* to change their procedure: there was no precedent for leaving what was now a *constitutional* decision in the hands of a single justice who was actually the subject of the constitutional complaint.¹⁸³

So this aspect of *Caperton*—even as it went unspoken—has provided a powerful impetus for the states to alter the way disqualification decisions are made on their highest courts and allow for full court review. Michigan has already made the change, specifically in response to *Caperton*.¹⁸⁴ And in August 2014, the ABA House of Delegates adopted

order, no due process violation would have occurred and review by the United States Supreme Court would not have been necessary.”).

¹⁸¹ See *supra* note 79 and accompanying text.

¹⁸² See *supra* note 148 and accompanying text.

¹⁸³ See *State v. Allen*, 778 N.W.2d at 908 (opinion of Abrahamson, C.J., and Bradley, Crooks, JJ.) (“Those high courts which have, in the past, chosen not to review the recusal decisions of individual justices must now contend with how they will guarantee due process in the wake of *Caperton*.”); Todd C. Berg, *MSC Recusal Rule May Not be Constitutional*, MICH. LAWYERS WEEKLY, June 15, 2009, at 23 (quoting former Michigan Supreme Court Justice Clifford Taylor as saying *Caperton* “has to mean that the challenged justice can’t make the recusal decision alone”), available at <http://milawyersweekly.com/news/2009/06/15/msc-recusal-rule-may-not-be-constitutional>; see also *U.S. Fidelity Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass’n*, 773 N.W.2d 243, 246 (Mich. 2009) (discussing the ramifications of *Caperton*).

¹⁸⁴ See MICH. COMP. LAWS, MICH. COURT RULE 2.003(D)(3)(b) (as amended November 2009). The Michigan Rules allow the challenged justice to address the motion first, but if it is denied, the movant can ask for full court consideration. *Id.* The state’s new substantive standard actually incorporates *Caperton* by reference. *Id.*, Rule 2.003(C)(1)(b) (“Disqualification of a judge

a resolution urging states to adopt disqualification rules that both address campaign contributions and include procedures by which decisions are made “independent of the subject judge.”¹⁸⁵

C. *The Decision as a Limit on Politicized Judges*

Apart from this procedural ramification, *Caperton* placed a substantial block in the path of those who would intentionally convert the judiciary into another political branch. Particularly in light of its timing, the decision was a powerful response to the First Amendment latitude the Court had given judicial campaigning. For the decision brought under the microscope not only the issue of campaign contributions, but any campaign activity that might make a judge appear less than impartial. It was as though the Court said: the First Amendment may allow you to politick all you wish outside the courtroom, but once here, you will face the consequences for what your politicking says about your ability to be impartial.

Had the decision gone the other way, the new, *political* judiciary would have been fully constructed. Justices would be able to campaign entirely on their political positions, raise enormous amounts from special interest groups, endorse slates of like-minded candidates and as-

is warranted [if the judge], based on objective and reasonable perceptions, has . . . (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton*”). With that said, at least one of the Michigan judges is refusing to follow the new rule, claiming that it is unconstitutional and pointing to the United States Supreme Court practice. *See Pellegrino v. Ampco Sys. Parking*, 807 N.W.2d 40, 41 (Mich. 2009) (Young, J.).

¹⁸⁵ ABA House of Delegates Resolution 105C (adopted August 12, 2014), http://www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/105c.pdf. The Resolution reads:

RESOLVED, That the American Bar Association urges that states and territories adopt judicial disqualification and recusal procedures which: (1) take into account the fact that certain campaign expenditures and contributions, including independent expenditures, made during judicial elections raise concerns about possible effects on judicial impartiality and independence; (2) are transparent; (3) provide for the timely resolution of disqualification and recusal motions; and (4) include a mechanism for the timely review of denials to disqualify or recuse that is independent of the subject judge; and

RESOLVED FURTHER, That the American Bar Association urges all states and territories to provide guidance and training to judges in deciding disqualification/recusal motions.

Id.

sume the bench together, and then, once on the bench, use their majority to find that their political leanings, no matter how extreme, did not establish that they were biased.

A recent criminal case demonstrates this potential well. In *People v. Navoy*,¹⁸⁶ the defendant was charged with possession of marijuana and planned to defend on the ground that his possession was legal under the Michigan Medical Marijuana Act.¹⁸⁷ The judge assigned to his case, however, had been very vocal about his opposition to the Act. He had referred to marijuana on multiple occasions as “the devil’s weed,” “Satan’s surge,” and “Satan’s weed.”¹⁸⁸ He had repeatedly lectured defendants that they were supporting drug cartels and murders in Mexico.¹⁸⁹ In a prior case, he had declared the Act unconstitutional in its entirety and foreclosed the defendant’s defense, and he had appeared on television discussing his belief in that regard, calling the law “unfavorable and problematic.”¹⁹⁰ On appeal, the court held that allowing the judge to hear the case would violate due process under *Caperton*: “Although [the judge] may still allow defendant to present evidence in support of his defense under the MMMA, this predisposed belief regarding the unconstitutionality of this law creates a serious risk that actual bias exists, and will, in effect, hamper defendant’s due process rights.”¹⁹¹ In the absence of *Caperton*, a defendant such as Navoy would have no federal constitutional claim, and in the event of a recalcitrant, politically zealous state bench, would have no recourse.

D. *The Courts’ Increased Candor About Bias*

Of course, just as *Caperton* rebuffed the overtly political, it spoke as well to an altogether different audience. Specifically, the decision drove home the idea that judges might well be biased even when they did not think so. In so doing it depersonalized the disqualification issue, and in turn gave greater value to the public’s perception of the bench.

In the years prior to *Caperton*, most states already had laws calling for recusal when a judge’s impartiality could reasonably be questioned. Further, the cases from which *Caperton*’s holding ultimately would be

¹⁸⁶ No. 311069, 2013 WL 6037167 (Mich. App. Nov. 14, 2013).

¹⁸⁷ *Id.* at *3.

¹⁸⁸ *Id.* at *1.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *People v. Navoy*, No. 311069, 2013 WL 6037167 *4 (Mich. App. Nov. 14, 2013).

drawn were already on the books. Yet in *applying* the probability of bias standard as it existed, the lower courts seemed to look for most any reason not to find disqualifying bias.

Some of the results were simply shocking. In *Dyas v. Lockhart*,¹⁹² the judge presided over a capital murder trial in which the three prosecuting attorneys were the judge's nephew, brother, and son.¹⁹³ The Eighth Circuit applied the proper standard, asking whether there was an "unconstitutionally high probability of actual bias,"¹⁹⁴ and just somehow found there was not. The court wrote:

the Prosecuting Attorneys were acting in the interest of the State of Arkansas, not in their own personal, financial interests. Furthermore, the relationship here does not necessarily suggest that Judge Steele had such a strong personal or financial interest in the outcome of the trial that he was unable to hold the proper balance between the state and the accused.¹⁹⁵

In *Fero v. Kerby*,¹⁹⁶ the judge's son worked as a law clerk for the prosecution during the trial, the judge's brother-in-law filed a wrongful death action against the defendant on behalf of the victim's family two weeks before trial began, and the judge's wife was a school nurse allegedly under the supervision of the victim.¹⁹⁷ On these facts, the trial judge refused to recuse himself, and so did every single court up the direct appeal and habeas corpus chain,¹⁹⁸ including the Tenth Circuit. The court held that those circumstances were not such as would "lead the average judge not to hold the balance nice, clear and true."¹⁹⁹

In *Richardson v. Quarterman*,²⁰⁰ the judge's wife was also a judge, and she knew the murder victim from their mutual membership in the Junior League.²⁰¹ The judge and his wife had once been to a party along with the victim and the defendant, and had had discussions about the

¹⁹² 705 F.2d 993 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983).

¹⁹³ *Id.* at 995.

¹⁹⁴ *See id.* at 996-97.

¹⁹⁵ *Id.* at 997.

¹⁹⁶ 39 F.3d 1462 (10th Cir. 1994), *cert. denied*, 515 U.S. 1122 (1995).

¹⁹⁷ *Id.* at 1475.

¹⁹⁸ *See id.* at 1475, 1477.

¹⁹⁹ *Id.* at 1480 (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

²⁰⁰ 537 F.3d 466 (5th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009). Notably, the petition for writ of certiorari was pending with the Supreme Court while the *Caperton* case was under consideration.

²⁰¹ *See id.* at 468-69.

amount of the bond set by an earlier judge.²⁰² The wife had received numerous calls from friends of the victim complaining about the amount of the bond, and the wife had attended the victim's funeral.²⁰³ Despite all this, the trial judge declined to recuse himself, an administrative judge declined to disqualify him,²⁰⁴ and the Fifth Circuit ultimately held that the circumstances were not such as to tempt the average judge to be biased.²⁰⁵

Justice Kennedy's opinion in *Caperton* almost necessarily called these cases into question, because it spoke candidly about the process of judging, and emphasized that judges are not superhuman. Judges "often inquire into their subjective motives and purposes in the ordinary course of deciding a case," Justice Kennedy wrote, but "[t]his does not mean the inquiry is a simple one."²⁰⁶ And judges may simply "misread[] or misapprehend[] the real motives at work in deciding" a case.²⁰⁷ For this reason, an objective inquiry is necessary, and it must include "a realistic appraisal of psychological tendencies and human weakness."²⁰⁸

In the cases that have been handed down since *Caperton*, it seems that at least some courts have begun to adopt this more realistic, and honest, approach to judging. In *Florida Parishes Juvenile Justice Commission ex rel. Florida Parishes Juvenile Justice District v. Hannis T. Bourgeois, LLP*,²⁰⁹ the court disqualified the judges from an entire judicial district from hearing a case because those judges had appointed two of the members of the commission who was a party.²¹⁰ Applying *Caperton*, the appellate court was matter-of-fact and impersonal: "it is logical to conclude that the judges of the 21st JDC would be biased in favor of witnesses they appointed to the Commission, and whose actions are now at issue."²¹¹

The court in *State v. Sawyer*²¹² was similarly businesslike. The defendant in *Sawyer* had been assigned the trial judge twice previously,

²⁰² See *id.* at 469.

²⁰³ *Id.*

²⁰⁴ *Id.* at 468.

²⁰⁵ *Richardson*, 537 F.3d at 476 ("this is not the type of 'possible temptation' that would lead the average judge 'not to hold the balance nice, clear and true'") (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)).

²⁰⁶ *Caperton*, 556 U.S. at 882.

²⁰⁷ *Id.* at 883.

²⁰⁸ *Id.* at 883-84 (quoting *Withrow*, 421 U.S. at 47).

²⁰⁹ 102 So. 3d 860 (La. App.), *writ denied*, 104 So. 3d 442 (La. 2012).

²¹⁰ See *id.* at 862.

²¹¹ *Id.*

²¹² 305 P.3d 608 (Kan. 2013).

first for a jury trial and then for a bench trial. The judge had presided over the first, but recused from the second, on the ground that he could retain an impartiality in a jury trial that would not be possible as the trier of fact. On this third occasion, again a jury trial, the judge declined to recuse himself, and the chief trial court judge upheld his decision.²¹³ The Kansas Supreme Court disagreed. The court noted that the judge had displayed an intemperate demeanor in the defendant's original sentencing²¹⁴ and simply rejected the idea that a judge could step out of that mindset for a jury trial even as he knew he could not for a bench trial.²¹⁵ The court wrote: "Our experience teaches us that the probability of actual bias in this case was 'too high to be tolerable' under the Due Process Clause. The proceeding sank 'beneath the constitutional floor.'"²¹⁶

At the federal level, one can see *Caperton's* effect in *Hurles v. Ryan*.²¹⁷ In *Hurles*, an Arizona judge denied motion for co-counsel in capital murder case in which the death penalty was being sought. The trial lawyer took an immediate appeal from that decision, and as a formality named the judge as the opposing party, whereupon the judge contacted the state attorney general's office and ultimately filed a brief defending her decision.²¹⁸ After the Arizona appellate court scolded the judge for attempting to participate personally in the appeal,²¹⁹ the judge sat on every aspect of *Hurles'* case: the trial (at which she personally performed the sentencing function and sentenced *Hurles* to death), and the first and second postconviction reviews. *Hurles* raised the issue of judicial bias on postconviction review, but the Arizona Supreme Court summarily affirmed the judge's rulings both times.²²⁰

On federal habeas review, the Ninth Circuit not only remanded the case for an evidentiary hearing, but held flatly that once *Hurles'* al-

²¹³ *Id.* at 610.

²¹⁴ *See id.* at 614.

²¹⁵ *Id.* ("The bottom line is this: No distinction between the role of a trial judge in a criminal jury trial versus his or her role in a criminal bench trial mitigates an acknowledged preexisting bias or prejudice.")

²¹⁶ *Id.* at 614-15 (quoting *Caperton*, 556 U.S. at 889).

²¹⁷ 752 F.3d 768 (9th Cir.), *cert. dismissed*, 134 S. Ct. 2722 (2014).

²¹⁸ *See id.* at 775-76.

²¹⁹ *Id.* at 776 (the Arizona Court of Appeals wrote "at every level of the judiciary, judges are presumed to recognize that they must do the best they can, ruling by ruling, with no personal stake—and surely no *justiciable* stake—in whether they are ultimately affirmed or reversed") (quoting *Hurles v. Superior Court*, 849 P.2d 1, 4 (Ariz. App. 1993)).

²²⁰ *See id.* at 777.

legations of judicial bias were formally proved, he would be entitled to relief.²²¹ Citing *Caperton*, the court asked whether “the average judge, in [this] position, was likely to sit as a neutral, unbiased arbiter,” and found that the average judge could not.²²² In the Ninth Circuit’s view, the judge’s filing of the brief, the brief’s tone, and the judge’s involvement with the state attorney general’s office all suggested that the judge had become sufficiently personally embroiled in controversy with Hurles that the risk of bias was too high.²²³

These cases seem to indicate that *Caperton* has helped renew the courts’ commitment to impartiality. The judges involved were not approached from a place of criticism. Rather it is becoming understood—treated as “logical,” as the *Florida Parishes* court so succinctly said²²⁴—that judges will be tempted to bias by their personal, social and business relationships no matter their desire not to be, and that it is better to be forthright about that than continue to pretend.

Indeed, a few of the courts since *Caperton* have stepped out even further in advancing judicial impartiality. In these cases, not only have the courts asked the operative question—whether the average judge was likely to be impartial—but they have chosen in close cases to err on the side of substitution. In *Tatham v. Rogers*,²²⁵ for example, the court reversed a judgment where one of the attorneys was the judge’s former law partner, and the judge held a durable power of attorney for her.²²⁶ The court concluded that there was “a greater risk of unfairness in upholding the judgment in this case than there is in allowing a new judge to take a look at the issues.”²²⁷ Similarly, in *People v. Houthoofd*,²²⁸ the court overturned a sentence because the judge had been expressly, rather than randomly, reassigned to the case after her first sentence had been overturned on appeal.²²⁹ Citing *Caperton*, the court held that “the

²²¹ See *id.* at 792.

²²² *Id.*

²²³ See *id.*

²²⁴ *Florida Parishes v. Hannis T. Bourgeois, L.L.P.*, 102 So. 3d 860, 862 (La. Ct. App. 2012).

²²⁵ 283 P.3d 583 (Wash. App. 2012).

²²⁶ See *id.* at 598-99. *Tatham* was not decided technically as a due process case because the court did not find the violation sufficiently extreme to warrant such a finding, but the court discussed *Caperton* and employed Washington’s appearance of fairness doctrine, which is identical to the standard in *Caperton*. See *id.* at 594-95.

²²⁷ *Id.* at 600.

²²⁸ No. 312977, 2014 WL 667802 (Mich. App. 2014), *appeal denied*, 849 N.W.2d 376 (Mich. 2014).

²²⁹ See *id.* at 5.

interests of impartiality” could be served only by random assignment.²³⁰

These decisions reflect a simple but appealing proposition: if there is any question, the courts should err, from the beginning, on the side of recusal. It is a notion that fairly jumps out at the reader in so many of these cases: “why didn’t the judge just recuse in the first place? It would have been so simple just to step out.” Hopefully, *Caperton* will move the courts further in that direction.

IV. THE NEED FOR TOP-DOWN, SUPREME COURT REFORM BEYOND *CAPERTON*

Caperton has acted as a substantial counter to the politicization of the judiciary. By clarifying that due process requires recusal *whenever* there is a high probability that a judge is biased—not just in a few isolated fact settings—the Court has made states look at their disqualification law both procedurally and substantively. And the trend seems to bode well for judicial impartiality. It appears that the states who do not already have it may turn increasingly to full court review of disqualification decisions. There has already been, and will surely continue to be, greater scrutiny of campaign contribution influence. There are indications that with a broad due process standard as back-up, the courts may become less tolerant of political rigidity on the bench, and adopt a more honest approach to judicial bias.

But whatever positive changes *Caperton* has wrought thus far, the American people remain decidedly unhappy with the judiciary. At the state level, a number consistently upward of 70% say campaign contributions influence the decision of cases.²³¹ For the last eight years, less than 40% of the American public has reported confidence in the Supreme Court,²³² and in just the last three years, that number has dropped from 37% to 30%.²³³ 60% of Americans believe that Supreme Court justices act on their own political agenda rather than impartially apply the law.²³⁴

²³⁰ *Id.*

²³¹ See *supra* note 104 and accompanying text.

²³² Justin McCarthy, *Americans Losing Confidence in All Branches of Government*, June 30, 2014, available at http://www.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=Politics at 3 (visited July 21, 2014). (From 1973-2006, confidence levels in the Court ranged from 40-56%. They have not broken 40% since that time.) *Id.*

²³³ *Id.*

²³⁴ Rasmussen Reports, *60% Think Supreme Court Justices Have Political Agenda*, Sept. 28, 2013,

This public perception that the courts do not behave impartially—are not fair, as institutions—is dangerous. We have always depended upon the judiciary’s legitimacy to enforce the most controversial decisions that have been made—*Brown v. Board of Education*,²³⁵ *United States v. Nixon*,²³⁶ *Roe v. Wade*,²³⁷ *Bush v. Gore*²³⁸—and that legitimacy depends on the country’s sense that its top court is committed to fairness. This would seem especially true given our current hyperpolarized state politically.²³⁹

In the face of this crisis in public confidence, it cannot escape notice that the Supreme Court itself has not risen to the bar of impartiality that its own decision set.

A. *The Court’s Recent History on Disqualification*

As described above, the Supreme Court follows an internal practice of letting each justice decide individually whether 28 U.S.C. § 455 requires his or her disqualification.²⁴⁰ Beyond that policy, there does not appear to be any requirement that a justice explain his or her decision to remain on a case in the face of objection. As a result, there are only three recent statements offering insight into the justices’ approach to disqualification, one from Chief Justice Rehnquist in 2000, one from Justice Scalia in 2004, and one from Chief Justice Roberts in 2011.

In *Microsoft Corporation v. United States*,²⁴¹ Microsoft asked the Court for immediate review of a district court decision finding that the company had violated the antitrust laws and ordering it to reorganize and divest itself of certain divisions.²⁴² At the time, Chief Justice Rehnquist’s

available at http://www.rasmussenreports.com/public_content/politics/general_politics/september_2013/60_think_supreme_court_justices_have_political_agenda (“Most Americans continue to believe the justices of the U.S. Supreme Court let their own political beliefs guide their decisions.”).

²³⁵ 348 U.S. 886 (1954).

²³⁶ 418 U.S. 683 (1974).

²³⁷ 410 U.S. 113 (1973).

²³⁸ 531 U.S. 98 (2000).

²³⁹ See Pew Research Center for the People & the Press, *Political Polarization and the American Public*, June 12, 2014, at 1 (“Republicans and Democrats are more divided among ideological lines—and partisan animosity is deeper and more extensive—than at any point in the last two decades.”), available at <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public>.

²⁴⁰ See *supra* notes 76-78 and accompanying text.

²⁴¹ 530 U.S. 1301 (2000).

²⁴² See *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64-74 (D.D.C. 2000).

son was a partner in the Boston firm of Goodwin, Procter & Hoar, which had been retained by Microsoft “in Boston as local counsel in private antitrust litigation.”²⁴³ When the Court denied Microsoft’s motion for immediate review, the Chief Justice attached to the one-sentence denial a statement explaining that he had participated in the decision.²⁴⁴

Chief Justice Rehnquist concluded that he need not recuse because “a well-informed individual would [not] conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also party to litigation pending in this Court.”²⁴⁵ He acknowledged that “[a] decision by this Court as to Microsoft’s antitrust liability could have a significant effect on Microsoft’s exposure to antitrust suits in other courts,” but did not find that good enough reason to recuse.²⁴⁶ Instead, it was a natural byproduct of being the nation’s highest court—“by virtue of this Court’s position atop the Federal Judiciary, the impact of many of our decisions is quite broad”—and so a “reasonable” observer would not find any appearance of impropriety in his sitting.²⁴⁷ The Chief Justice also noted the “negative impact” if a justice unnecessarily recuses himself or herself: “Not only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.”²⁴⁸

Four years later, in *Cheney v. United States District Court*,²⁴⁹ Justice Scalia opted to respond in writing to the Sierra Club’s request that he recuse himself. In the underlying suit, Sierra Club and Judicial Watch had sued the Vice-President and members of the National Energy Policy Development Group for violations of the Federal Advisory Com-

²⁴³ *Microsoft*, 530 U.S. at 1301 (statement of Rehnquist, C.J.).

²⁴⁴ *See id.*

²⁴⁵ *Id.* at 1302. (Before evaluating recusal under the broad appearance standard of subsection 455(a), the Chief Justice addressed and rejected the application of subsection 455(b)(5)(iii), which requires disqualification whenever a judge’s child “[i]s known . . . to have an interest that could be substantially affected by the outcome of the proceeding.”) *See id.* at 1302 (quoting 28 U.S.C. § 455(b)(5)(iii)). (He noted that his son neither his son nor his son’s law firm had done any work on the case before the Court, and were being paid an hourly rate for their work on the private antitrust case). *See id.*

²⁴⁶ *Id.* at 1302-03.

²⁴⁷ *Microsoft v. United States*, 530 U.S. 1301, 1302-03 (2000)

²⁴⁸ *Id.* at 1303.

²⁴⁹ 541 U.S. 913 (2004).

mittee Act (FACA).²⁵⁰ The district court denied the defendants' motions to dismiss and ordered discovery to proceed,²⁵¹ and when the court of appeals would not hear the defendants' mandamus petition to reverse the district court,²⁵² they sought review in the Supreme Court. The Sierra Club moved Justice Scalia to recuse himself for two reasons. First, while the case was in the Supreme Court—literally less than a month after certiorari had been granted—Justice Scalia went on a duck-hunting trip to Louisiana with the Vice-President aboard Air Force Two.²⁵³ Second, Justice Scalia had recused himself from an earlier FACA case, and that was thought to be because he had taken a position as Assistant Attorney General that FACA was unconstitutional as applied to presidential advisory groups.²⁵⁴ In moving Justice Scalia to recuse, the Sierra Club was able to marshal an extraordinary array of disapproving parties: twenty of the nation's thirty largest newspapers had called on Justice Scalia to step aside, and none had spoken in support of his remaining on the case.²⁵⁵

Justice Scalia denied the motion in typically passionate style. After a long recitation of the events of the trip, he treated the concern for his impartiality as virtually preposterous: "Why would [my impartiality be questioned] from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation?"²⁵⁶ His exasperation at being questioned was palpable. "Washington officials know the rules, and know that discussing with judges pending cases—their own or anyone else's—is forbidden."²⁵⁷

The charge was especially inappropriate, according to Justice Scalia, because the Vice-President was being sued only in his official capacity.²⁵⁸ It did not matter that whatever his capacity as a defendant, the al-

²⁵⁰ *In re Richard B. Cheney*, 334 F.3d 1096, 1099-1100 (D.C. Cir. 2003).

²⁵¹ *See id.* at 1100.

²⁵² *See id.* at 1109.

²⁵³ Motion To Recuse at 1-12, *Cheney v. United States Dist. Court*, 541 U.S. 913 (2004), No. 03-475, 2004 WL 397220.

²⁵⁴ *Id.* at 12.

²⁵⁵ *Id.*

²⁵⁶ *Cheney*, 531 U.S. at 916.

²⁵⁷ *Id.* at 923.

²⁵⁸ *Id.* at 916 ("[W]hile friendship is a ground for recusal of a Justice where the personal fortune or freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to ambitions or reputation of the Governmental officer.") (emphasis in original). No case was cited for this proposi-

legations could be seen as challenging the Vice-President's reputation and integrity.²⁵⁹ Nor did it matter that a significant portion of the press considered Scalia's actions to raise an appearance of impropriety.²⁶⁰ In language hard not to find insulting, Scalia concluded these critics could not be considered reasonable observers:

[Even those who understand the idea of official action] facily assume, contrary to all precedent, that in such suits mere political damage (which they characterize as a destruction of Cheney's reputation and integrity) is ground for recusal. Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question. It is well established that the recusal inquiry must be "made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances.*"²⁶¹

At no point did it seem to occur to Justice Scalia that he or the Vice-President might just have chosen to forego this one duck hunting trip while Cheney's case was before the Court. Nor did he give serious thought to the Sierra Club's proposition that any doubt should be resolved in favor of recusal:

That might be sound advice if I were sitting on a Court of Appeals. . . . There my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.²⁶²

Eight years after *Cheney*, during the term in which the Supreme Court considered the constitutionality of the Affordable Care Act, numerous political commentators called for the recusal of two of the justices.²⁶³ Seventy-four Democratic members of Congress signed a letter

tion.

²⁵⁹ See *id.* at 918-19. Perhaps somewhat presaging his views on the merits, Justice Scalia adamantly refused to see the suit as anything but a "run-of-the-mill legal dispute about an administrative decision," or as having "any bearing on the reputation and integrity of Richard Cheney." *Id.*

²⁶⁰ See *id.* at 923.

²⁶¹ *Id.* at 924 (emphasis in original).

²⁶² *Id.* at 915.

²⁶³ See John Gibeaut, *Sitting This One Out: Health Care Case Again Raises the Controversy of Justices' Recusal*, ABA J., Mar. 2012, available at http://www.abajournal.com/magazine/article/sitting_this_one_out_health_care_case_again_raises_recusal_controversy. One of the parties or nu-

addressed to Justice Clarence Thomas complaining that he had a conflict of interest inasmuch as his wife worked as a lobbyist seeking to overturn the law and he had failed to disclose substantial income the couple had received as a result of that work.²⁶⁴ Republican Senators argued publicly that Justice Elena Kagan should recuse herself because she was Solicitor General when the first legal challenges to the Act were being raised and e-mails suggested she may have been involved in strategizing about defending it.²⁶⁵

Notwithstanding the political commentary, none of the parties or numerous amici in the case actually moved either justice to recuse,²⁶⁶ so there was no order concerning the allegations. Chief Justice Roberts did essentially respond, though, in a rather unusual forum: his 2011 Year-End Report to the Judiciary.²⁶⁷ In that Report, he described the Supreme Court's recusal process, and ultimately dismissed the critics:

I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court's vital role as an impartial tribunal governed by the rule of law.²⁶⁸

He explained that the individual justices "decide for themselves whether recusal is warranted under Section 455."²⁶⁹ They do so without

merous amici in the case actually moved either justice for recusal. *Id.*

²⁶⁴ Felicia Somnez, *House Democrats say Justice Thomas Should Recuse Himself in Health-Care Case*, WASH. POST, Feb. 9, 2011, available at <http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html>.

²⁶⁵ See Jeff Sessions, *Kagan Must Recuse Herself from Obamacare Case*, NATIONAL REVIEW ONLINE, Feb. 23, 2012, <http://www.nationalreview.com/bench-memos/291832/kagan-must-recuse-herself-obamacare-case-sen-jeff-sessions>; Michael O'Brien, *Hatch: Kagan Should Recuse Herself from Any Challenge to Healthcare Reform*, THE HILL (Feb. 3, 2011), <http://thehill.com/blogs/blog-briefing-room/news/141897-hatch-kagan-should-recuse-herself-from-any-challenge-to-healthcare>.

²⁶⁶ Gibeaut, *supra* note 263.

²⁶⁷ Adam Liptak, *Chief Justice Defends Peers' Hearing case on Health Law*, N.Y. TIMES, Dec. 31, 2011, available at <http://www.nytimes.com/2012/01/01/us/chief-justice-backs-peers-decision-to-hear-health-law-case.html>; see also James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 99 (2013).

²⁶⁸ 2011 Year-End Report, *supra* note 73, at 10.

²⁶⁹ *Id.* at 8.

review, because there is “no higher court to review a Justice’s decision not to recuse.”²⁷⁰ And the other justices do not sit in judgment on another justice’s decision, the Chief Justice wrote, because that “would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.”²⁷¹

At first blush, the Chief Justice’s explanation makes sense. There are only nine justices. Eliminating one of them, particularly as the Court happens to be constituted at the moment, raises a substantial possibility of a tie vote, which in turn results in an automatic affirmance of the decision below. So, the thinking goes, one would not want to give the justices the power to manipulate recusal in such a way as to manipulate the ultimate substantive outcome.

On deeper evaluation, however, the Chief Justice’s explanation is seriously troubling. It actually suggests that the justices of the Supreme Court cannot be expected to approach a recusal motion of one of their fellows impartially. It implies that they would approach the recusal motion *itself* with a bias in favor of whichever position best advances their preference in the underlying case!

That is surely not what the Chief Justice intended to convey. More likely, the observation was intended to mean only that the justices’ individual consideration of recusal motions prevents any *impression* that a recusal ruling was manipulated to secure an outcome. But even so, it reflects a way that the Justices think about themselves that needs serious examination.

B. *The Court’s False Rationale for Approaching Recusal Differently from Others*

In all three of the statements described here, the justices invoke the notion that they must consider recusal differently because they serve on the nation’s highest court. All three men point to the potential for a tie, which would result in an automatic affirmance, if a justice recuses and only eight members are left. If that happens, as Justice Scalia characterizes it, the Court will find itself “unable to resolve the significant legal issue presented by the case.”

In reality, nothing suggests that a tie outcome is markedly more

²⁷⁰ *Id.*

²⁷¹ *Id.* at 9.

likely. In the last term, five cases were decided by only eight justices, and none resulted in a tie or even a 5-3 vote.²⁷² Only ten cases, or 14% of the term's caseload, were decided by a 5-4 vote.²⁷³ (In fact, the decision in the *Microsoft* case itself was at least 6-3,²⁷⁴ and the ultimate decision in the *Cheney* case was 7-2.²⁷⁵) So this concern about a split court seems a bit of a straw man, and certainly not a strong reason for a justice to err on the side of remaining in a case in spite of a controversial association.

Further, if the United States Supreme Court is not a political body, it is difficult to understand why it would matter so much if there *were* one more 4-4 vote, one more automatic affirmance. The nature of the judiciary is that appellate courts speak with one voice. The country awaits, and accepts, the Court's outcomes whether the vote is 9-0, 5-4, or 4-4 and therefore an automatic affirmance. So unless one views the Supreme Court as a political, ideological battleground, the existence of some automatic affirmances is not that troubling, and certainly does not seem too high a price to pay to ensure that cases are not being heard when the justices appear to the public not to be impartial. As far as the duty Scalia invokes to "resolv[e] the significant legal issue,"²⁷⁶ that can certainly wait until a future day, when the justices hearing the case can readily say they are free from bias.

If the difficulty the Court claimed were real, there are solutions short of hedging on disqualification. At the lower court levels, district court judges frequently sit "by designation" on the courts of appeal under 28 U.S.C. § 292(a).²⁷⁷ If there is actually a substantial fear of that

²⁷² See *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (June 16, 2014) (decided 7-1, Justice Sotomayor not participating); *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (June 12, 2014) (decided 8-0, Justice Breyer not participating); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (Apr. 29, 2014) (decided 6-2, Justice Alito not participating); *Schuette v. BAMN*, 134 S. Ct. 1623 (Apr. 22, 2014) (decided 6-2, Justice Kagan not participating); *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395 (Mar. 25, 2014) (decided 8-0, Justice Kagan not participating).

²⁷³ *End-of-Term Statistical Analysis for the Supreme Court's October Term 2013, 5-4 Cases*, http://news.bna.com.lawresearch.tamu.edu/lwln/core_adp/get_object/im226446.pdf (last visited August 23, 2014) (compiled originally by SCOTUSBlog.com). This last term did see fewer 5-4 decisions than any term in the last nine years, but even over that nine-year period, the average number of 5-4 decisions is 17, or 21% of the total. *Id.*

²⁷⁴ The *Microsoft* decision denied review, which means that the company was unable to get four votes. *Microsoft*, 530 U.S. at 1301.

²⁷⁵ See *Cheney v. Dist. Court*, 542 U.S. 367, 371 (2004).

²⁷⁶ See *supra* note 262 and accompanying text.

²⁷⁷ See 28 U.S.C. § 292(a) ("The chief judge of a circuit may designate and assign one or

split 4-4 Court, then a procedure could be adopted under which a judge from the circuit courts could be named at the beginning of every term (before any recusals are decided) to sit in place of any justice who later finds a need to recuse.²⁷⁸

The sense that they are irreplaceable may cause some of the justices to gasp at the thought. But with all respect, they should not consider themselves irreplaceable to the point of applying the federal disqualification statute differently to themselves without any language authorizing them to do so. In truth, they are supposed to serve as decidedly non-political administrators of the law—calling balls and strikes, to borrow the Chief Justice’s own metaphor, at least as often as that is possible²⁷⁹—and so it should not be unreasonable to allow substitution of another such administrator when the impartiality of a justice is placed in issue. Whatever the justices’ reverence for it, it bears remembering that the nine-justice model of the Court does not even come from the Constitution. It comes from *Congress*,²⁸⁰ which has changed the number of justices five times,²⁸¹ from the original *six*.²⁸² An *even* number

more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.”).

²⁷⁸ An alternative proposal would have had retired Supreme Court justices sit. Then Senate Judiciary Committee Chair Patrick Leahy introduced legislation to that effect in 2010. S. 3871, 111th Cong., 2d Sess. (2010); Press Release, Patrick Leahy, United State Senator from Vermont, Leahy Proposes Bill To Allow Retired Justices To Sit on Court by Designation (Sept. 29, 2010), <http://www.leahy.senate.gov/press/leahy-proposes-bill-to-allow-retired-justices-to-sit-on-court-by-designation>. Senator Leahy apparently got the idea from retired Justice Stevens, who had years earlier discussed the idea with then-Chief Justice Rehnquist. Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals To Allow Retired Justices To Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 83 n.7 (2011). It was never reported out of the Judiciary Committee. See Bill Summary & Status, 111th Cong. (2009-2010), S. 3871, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s3871>: (last visited Aug. 24, 2014).

²⁷⁹ Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit) (“it’s my job to call balls and strikes”).

²⁸⁰ See 28 U.S.C. § 1 (2012) (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”).

²⁸¹ The Federal Judicial Center provides a succinct summary on its website: (“The size of the Supreme Court grew to accommodate the establishment of new circuits as the nation expanded. In 1807 a seventh justice was added to the court, and in 1837 an eighth and ninth justice joined the Supreme Court. The size of the Court reached its highest point in 1863 with the creation of a Tenth Circuit on the west coast and the appointment of a tenth justice. In 1866, Congress reduced the size of the Court to seven justices and provided that no vacant seats be filled until that number was reached. The number of sitting justices fell to eight before an act of 1869 provided for nine justices, one for each of the judicial circuits established in 1866. The

of justices.

In the end, impartiality would be much better served if the Court applied the disqualification statute as written. Better yet, it would serve as a powerful example for the rest of the country if in cases of doubt, the justices erred on the side of recusal. As described above, the lower courts already seem to be seeing the wisdom of that approach.²⁸³

C. *The Need for Full Court Review of Disqualification Decisions*

The Court should also adopt a procedure providing for additional review whenever a justice declines to recuse under 28 U.S.C. § 455(a). Given that the question under subsection (a) is whether a judge's impartiality might "reasonably" be questioned—an objective inquiry—there simply is no reason that the decision cannot be reached by the full bench on the merits just as any other decision is. Before *Caperton*, perhaps it made sense to allow each justice to make his or her own decision, just as a matter of avoiding awkwardness. But it is hard to see how what is now a constitutional question should be left in the hands of a single justice.

Moreover, by opening disqualification decisions to the full bench, the Court would set a powerful example of depersonalizing the disqualification issue. The Court would give full recognition to the principle that judges are human and will never reach perfect impartiality, but still aspire to the ideal and care whether the public sees them as doing so. This would seem especially important in light of emerging studies that suggest in-group ideological bias in the Supreme Court justices' decisions over a long period.²⁸⁴ Indeed, in cases like *Florida Parishes*, the low-

size of the Court has since remained the same.”).

Federal Judicial Center, History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf/page/courts_supreme.html (last visited Aug. 23, 2014).

²⁸² See Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1) (“the supreme court of the United States shall consist of a chief justice and five associate justices”).

²⁸³ See *supra* notes 225-30 and accompanying text. The idea of erring against all doubt would not be new. In *State ex rel. Short v. Martin*, 125 P. 681 (Okla. 1927), the court quoted a decision fifty years earlier from Indiana: “Judges are by no means free from the infirmities of human nature, and therefore it seems to us that a proper respect for the high positions they are called upon to fill should induce them to avoid even a cause for suspicion of bias or prejudice, in the discharge of their judicial duties.” *Id.* at 690 (quoting *Joyce v. Whitney*, 57 Ind. 550, 554 (1877)).

²⁸⁴ See Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate?: In-Group Bias, Opportunism and the First Amendment*, American Political Science Association

er courts are acknowledging that subconscious bias, and the public's concern over it, are facts of life, such that judges challenged for probable bias need not take it as a character attack.²⁸⁵

Perhaps if his colleagues had advised him on what his duck hunting trip might look like, there might not be such a gap between Justice Scalia's views and the uniform opinion of national newspapers.

D. *The Justices' Political Activity: Pretending Impartiality While Fanning the Flames of Partisanship*

Of course, when one surveys the Court's actions over the years, one cannot help but wonder whether the bigger problem is that the justices do not truly care. Their actions suggest an embedded sense that they are political actors, and that at least some of them actually *support* the politicization of the judiciary. The *Caperton* decision was—despite its universally appalling facts—only a 5-4 decision.²⁸⁶ In the *White* case, seven years before *Caperton*, five justices concluded that judicial elections were not sufficiently different from political elections to warrant modified first amendment treatment.²⁸⁷ In *Citizens United v. FEC*,²⁸⁸ one year after *Caperton*, and a series of cases thereafter, the Court has concluded that political influence was an insufficient interest to allow for limiting corporate campaign contributions,²⁸⁹ and that case has already been invoked by lower courts to strike down public financing of judicial campaigns.²⁹⁰

More persuasive than any of that, however, is the political conduct

Annual Meeting Paper, at 13, available at <http://ssrn.com/abstract=2300572> (posted Aug. 6, 2013) (“justices are much less apt to defend the speech (and speakers) they dislike than the expression they like,” and this “traces at least back to the Warren years”).

²⁸⁵ See *supra* note 209-11 and accompanying text.

²⁸⁶ See *supra* note 150 and accompanying text.

²⁸⁷ See *supra* notes 110-11 and accompanying text.

²⁸⁸ 558 U.S. 310 (2010).

²⁸⁹ See *id.* at 356-61; *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825-28 (2011) (striking Arizona's law providing matching funds in statewide elections as violative of the First Amendment); *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (summarily striking Montana ban on corporate campaign contributions in light of *Citizens United*).

²⁹⁰ See *State ex rel. Loughry v. Tennant*, 732 S.E.2d 507, 516 (W. Va. 2012) (“We find nothing in *Bennett*, nor in the relevant cases leading up to or decided after *Bennett* (*Davis*, *Caperton*, *Citizens United* and *Bullock*), that supports Petitioner Loughry's position that the Supreme Court has recognized or is inclined to find a judicial-election exception to its political speech jurisprudence generally or to its matching funds analysis specifically.”).

of the justices themselves. Several of the justices regularly engage in activities that very arguably would violate both the federal code of ethics and the codes of most of the states, were the justices subject to such rules. To cite only a few of the numerous, well-documented examples, (1) Justice Ginsburg was the featured speaker at the 2012 annual meeting of the American Constitution Society,²⁹¹ and in 1998, she reportedly contributed to the National Organization for Women for auction an autographed copy of her decision in *United States v. Virginia*,²⁹² (2) Justice Alito was the featured speaker at the 2008 fundraising dinner of the Republican political magazine *The American Spectator*, the highlight of which reportedly was his send-up of Vice-President Elect Joe Biden,²⁹³ (3) Justices Scalia and Thomas were featured speakers at the 2011 Federalist Society National Lawyers Convention, under the title, “A Celebration of Service,”²⁹⁴ and (4) Justice Scalia frequently speaks at local Federalist Society events,²⁹⁵ holding private audiences with law student

²⁹¹ See Nicole Flatow, *At ACS Convention, Justice Ginsburg Demonstrates Humor, Touts Power of Dissents*, (June 16, 2012), <http://www.acslaw.org/acsblog/at-ac-convention-justice-ginsburg-demonstrates-humor-touts-power-of-dissents> (last visited Aug. 23, 2014). The organization’s website describes it as working for “positive change” by “shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values.” *About ACS*, AMERICAN CONSTITUTION SOCIETY, <https://www.acslaw.org/about> (last visited Aug. 24, 2014). Further, “ACS generates ‘intellectual capital’ for ready use by progressive allies and shapes debates on key legal and public policy issues.” *Id.* Thus, there is hardly any question but that the organization is political in nature.

²⁹² See James Sample, *supra* note 267, at 124 (citing 1998 Women’s Rights Convention and Vision Summit, NOWPACS, <http://www.nowpacs.org/events/auction98.html> (last visited Feb. 24, 2012)). The page to which Professor Sample cited is no longer available.

²⁹³ See Jay Homnick, *Justice Alito Pokes Fun of Biden at Dinner*, HUMAN EVENTS (Dec. 5, 2008), <http://humanevents.com/2008/12/05/justice-alito-pokes-fun-of-biden-at-dinner> (last visited Aug. 23, 2014).

²⁹⁴ *2011 National Lawyers Convention Schedule*, THE FEDERALIST SOCIETY, <http://www.fed-soc.org/events/page/2011-national-lawyers-convention-schedule> (last visited Aug. 23, 2014) (noting that the justices would be introduced by the Hons. Edwin Meese III and C. Boyden Gray, and that audio/video would not be available). The Federalist Society’s website describes itself as seeking to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law.” *About Us*, THE FEDERALIST SOCIETY, <http://www.fed-soc.org/aboutus/> (last visited Aug. 24, 2014). “In working to achieve these goals,” the website states, “the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.” *Id.* Thus, there is hardly any question but that the organization is political in nature.

²⁹⁵ See Mike Dennison, *Scalia to Federalist Society: Court Shouldn’t ‘Invent New Minorities.’*

Federalist Society members during such trips.²⁹⁶

When the justices engage in these activities, it as though they have utterly abandoned the judicial ideal dating from the Constitution and embodied in both the ABA Model Code and the Code of Conduct for United States Judges. The justices know they are engaging in political activity, they are undoubtedly aware of the criticism, they choose to do it anyway, and they choose not to place any limitations on themselves. So it becomes difficult to understand how they imagine *any* of their decisions cannot reasonably be questioned as partial, at least in the sense of openmindedness. Indeed, their political behavior has now turned the notion of impartiality on its head: the public is more surprised when a justice does something politically *unexpected*. The Court itself has become a walking, talking, daily violation of *Caperton*.

This should change. The Supreme Court's behavior in this respect gives license to courts who would behave politically, judge politically, and then simply pretend otherwise when the public complains that they are not impartial.²⁹⁷ And if there is any doubt whether the state and

MISSOULIAN, Aug. 19, 2013, available at http://missoulian.com/news/state-and-regional/scalia-to-federalist-society-court-shouldn-t-invent-new-minorities/article_083f2eb6-0922-11e3-850c-001a4bcf887a.html.

²⁹⁶ See E-mail from Faculty Advisor to Texas A&M University School of Law Federalist Society, to faculty (May 3, 2013, 11:47 CST) (on file with author) (“ten of our Federalist Society students have been invited to an informal tete-a-tete with Justice Antonin Scalia during his visit to Fort Worth this week. The students (and I) will be part of a fairly small group that will have a chance to chat with the Justice during a two-hour hors d’oeuvre session at the Fort Worth Club. This will be a press-free event so the students will get a chance to hear candidly from the justice about any number of things.”). More recently, Justices Scalia and Ginsburg have been giving speeches and interviews touching directly on issues highly likely to reach the Court. See Valerie Richardson, *Scalia Defends Keeping God, Religion in Public Square*, THE WASH. TIMES, Oct. 1, 2014, available at <http://www.washingtontimes.com/news/2014/oct/1/justice-antonin-scalia-defends-keeping-god-religio/?page=1> (quoting Justice Scalia as saying in speech at Colorado Christian University that “secularists” are wrong when they argue “that the separation of church and state means that the government cannot favor religion over non-religion”); Cristian Farias, *Will Congress Accept Ruth Bader Ginsburg’s Challenge?*, THE NEW REPUBLIC, Feb. 18, 2015, available at <http://www.newrepublic.com/article/121088/ruth-bader-ginsburg-our-congress-not-functioning-very-well> (reporting Justice Ginsburg’s criticism of those relying on the “color-blindness” concept in affirmative action); Jeffrey Rosen, *Ruth Bader Ginsburg is an American Hero*, THE NEW REPUBLIC, Sept. 28, 2014, available at <http://www.newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise> (quoting Justice Ginsburg as saying Texas’ abortion statute (that is being challenged in pending federal litigation) limits women’s access to abortion and thus shows that state legislatures cannot be trusted with reproductive rights).

²⁹⁷ Charles Gardner Geyh, *The Political Transformation of the American Judiciary*, in POUND INST., THE WAR ON THE JUDICIARY: CAN INDEPENDENT JUDGING SURVIVE? REPORT OF THE 2013

lower courts turn to the Supreme Court as an example, one need look only to the judges in Wisconsin and Michigan who are feverishly invoking the Supreme Court's policies to avoid fuller review.²⁹⁸ Or perhaps at the senior federal district judge who thought it appropriate on his blog to suggest the Justices "shut the fuck up."²⁹⁹

In the meantime, there are judges all across the country who, every day, adapt their lives to their professional call and refrain from political activity that might otherwise appeal to them because to do otherwise would reflect poorly on the judiciary as an institution. Not only do they not attend pricey dinners, accept "achievement" awards from political organizations, go on book tours, and vacation with parties appearing before them, but they actively avoid becoming enmeshed in such situations. With *Caperton* those judges accept an additional limitation that has been given constitutional dimension: that they conduct themselves in such a way that their impartiality cannot reasonably be questioned. But if the high Court itself cannot show some humility and rein itself

FORUM FOR STATE APPELLATE COURT JUDGES (2014) (judicial ethics expert, Charles Gardner Geyh, recently warned of the judiciary's tendency to pretend its impartiality, "If the legal establishment persists in making arguments the public regards as counter-factual, it could erode public support for an independent judiciary over the long term."). More recently, Justices Scalia and Ginsburg have been giving speeches and interviews touching directly on issues highly likely to reach the Court. See Valerie Richardson, *Scalia Defends Keeping God, Religion in Public Square*, THE WASH. TIMES, Oct. 1, 2014, available at <http://www.washingtontimes.com/news/2014/oct/1/justice-antonin-scalia-defends-keeping-god-religio/?page=1> (quoting Justice Scalia as saying in speech at Colorado Christian University that "secularists" are wrong when they argue "that the separation of church and state means that the government cannot favor religion over non-religion"); Cristian Farias, *Will Congress Accept Ruth Bader Ginsburg's Challenge?*, THE NEW REPUBLIC, Feb. 18, 2015, available at <http://www.newrepublic.com/article/121088/ruth-bader-ginsburg-our-congress-not-functioning-very-well> (reporting Justice Ginsburg's criticism of those relying on the "colorblindness" concept in affirmative action); Jeffrey Rosen, *Ruth Bader Ginsburg is an American Hero*, THE NEW REPUBLIC, Sept. 28, 2014, available at <http://www.newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise> (quoting Justice Ginsburg as saying Texas' abortion statute (that is being challenged in pending federal litigation) limits women's access to abortion and thus shows that state legislatures cannot be trusted with reproductive rights).

²⁹⁸ See *supra* notes 80-81 and accompanying text; see also *Peterson v. Borst*, 784 N.E.2d 934, 937 (Ind. 2003) (Boehm, J.) (quoting Chief Justice Rehnquist in *Laird v. Tatum*, 409 U.S. 824, 837-38 (1972), on purported "duty to sit"); *Noriega Rodriguez v. Hernandez Colon*, 20 P.R. Offic. Trans. 285, 293-94 (P.R. 1988) (discussing United States Supreme Court practice).

²⁹⁹ Richard G. Kopf, *Remembering Alexander Bickel's Passive Virtues and the Hobby Lobby cases*, HERCULES AND THE UMPIRE July 5, 2014 available at <http://herculesandtheumpire.com/2014/07/05/remembering-alexander-bickel-passive-virtues-and-the-hobby-lobby-cases> ("the Court is now causing more harm (division) to our democracy than good by deciding hot button cases that the Court has the power to avoid. As the kids say, it is time for the Court to stfu.").

in, the lower courts are unlikely to as well.

CONCLUSION

The *Caperton* decision landed just as a number of politicizing events—particularly the influx of special interest money and the elimination of campaign restrictions—converged on the judiciary. In its first five years, it has proved a capable counter, giving rise to stricter recusal rules and holding judges to a more objective and honest look at their potential for bias. For that trend to continue, however—and the public’s disapproval to turn around—the nation’s highest court must commit to the *Caperton* ideal. The justices should begin treating themselves as every other judge in the nation is treated: recusing themselves whenever their impartiality is in question, allowing an objective review of their recusal decisions, and avoiding political activity that inflames the public sense of bias rather than relieves it.