
RELINQUISHED RESPONSIBILITIES

*Penny J. White**

So if . . . it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then — quite simply — the practice of electing judges is itself a violation of due process.

— *Republican Party of Minnesota v. White*, 2002¹

These words were included in the Court’s opinion in *Republican Party of Minnesota v. White* not to endorse but to mock² the idea that judicial elections violate due process.³ The constitutionality of judicial elections was not the issue before the Court in *White*; nor was this issue directly before the Court in *Caperton v. A.T. Massey Coal Co.*,⁴ the topic of this Comment. Yet in both cases, and in others the Court has declined to hear,⁵ the lurking question that is being ignored is whether present-day judicial elections, with their untoward emphasis on campaign finances, can be reconciled with the due process guarantee of fundamental fairness.

White simply held that states that choose to elect judges may not prohibit judicial candidates from announcing their views on contested legal and political issues,⁶ but the decision has transformed state judi-

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¹ 536 U.S. 765, 782 (2002).

² “Jesters do oft prove prophets.” WILLIAM SHAKESPEARE, *KING LEAR* act 5, sc. 3, l. 83 (Barbara A. Mowat & Paul Werstine eds., Folger Shakespeare Library 1993) (1623).

³ 536 U.S. at 782. Justice Scalia was challenging Justice Ginsburg’s dissent. See *id.* at 813–17 (Ginsburg, J., dissenting); see also *id.* at 787–88 (majority opinion) (stating that although opposition to judicial elections may be “well taken,” *id.* at 787, states may not “leav[e] the principle of elections in place while preventing candidates from discussing what the elections are about,” *id.* at 788).

⁴ 129 S. Ct. 2252 (2009).

⁵ See *Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006) (mem.) (denying certiorari in case raising issue of judicial recusal in light of campaign contributions and expenditures from party); *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006) (mem.) (denying certiorari in case invalidating restrictions on partisan political activity by candidates for judicial office).

⁶ 536 U.S. at 788.

cial elections,⁷ attracting the attention and resources of special interest groups⁸ and prompting a financial arms race.⁹ To critics who feared *White*'s impact, the facts underlying *Caperton v. A.T. Massey Coal Co.* represent those fears realized.

I. INTRODUCTION: DIFFERENT PERSPECTIVES

I was teaching a course in comparative legal institutions in Brazil when the Supreme Court announced its decision in *Caperton*. The class included law students from United States law schools, two Brazilian lawyers, and a Brazilian federal judge. We compared judicial selection methods in our host country with those in the United States and discussed how selection methods affect both the legitimacy and the independence of the courts.

The American law students were not unlike Americans generally — many of them were unfamiliar with the vast array of judicial selection methods in place in state courts,¹⁰ and most were surprised with the content and price tag of recent state court elections.¹¹ Their surprise was overshadowed, however, by the reaction of our Brazilian hosts, best described as complete astonishment. In Brazil, judges are almost exclusively¹² chosen by “contest” — the Brazilians’ word for

⁷ Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 34 (Matthew J. Streb ed., 2007).

⁸ DEBORAH GOLDBERG ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT” — AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL* (Jesse Rutledge ed., 2005), available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf>; Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS*, *supra* note 7, at 73.

⁹ See GOLDBERG ET AL., *supra* note 8; JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS — AND HOW AMERICANS ARE FIGHTING BACK* (Jesse Rutledge ed., 2007), available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf>; Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS*, *supra* note 7, at 59.

¹⁰ The American Judicature Society maintains comprehensive information on state judicial selection, including details on selection methods, reform efforts, and diversity of the bench. See American Judicature Society, *Judicial Selection in the States*, <http://www.judicialselection.us> (last visited Oct. 3, 2009).

¹¹ See SAMPLE ET AL., *supra* note 9.

¹² One-fifth of the members of some Brazilian courts are chosen by an alternative method. C.F. [Constitution] art. 94 (Braz.), *translated in* CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL 74 (Istvan Vajda et al. trans., 2002) (“One-fifth of the seats of [these courts] shall be occupied by members of the Public Prosecution . . . and by lawyers of notable juridical learning and spotless reputation . . . nominated in a list of six names by the entities representing

examination.¹³ Even in this fervent, albeit new,¹⁴ democracy, the notion of electing judges was almost incomprehensible.¹⁵

A week after the *Caperton* decision was announced, I spoke to an audience of Brazilian citizens, scholars, students, and lawyers about comparative legal institutions. Despite our language barrier (I had mastered only a few words of Portuguese), the reactions to my comments — delayed laughter at my attempts at humor and endearing smiles when I expressed “muito obrigada”¹⁶ — convinced me that the translations were accurate. One reaction was particularly poignant: my description of the facts underlying *Caperton* was met with looks of disbelief and bewilderment accompanied by a few audible gasps. The Brazilians evidently lacked Americans’ fascination with electing judges.

Notwithstanding our countries’ different judicial selection methods, the reaction of the Brazilian audience to the *Caperton* facts was not unlike the reaction of most American journalists, scholars, and citizens. To most, the facts *are* alarming.¹⁷ Although commentators do not uniformly agree with the Court’s decision,¹⁸ most applaud the decision to disqualify Chief Justice Brent D. Benjamin as essential to preserving

the respective classes . . . [and appointed by the] Executive Power . . .”). *See generally* Keith S. Rosenn, *Judicial Reform in Brazil*, NAFTA L. & BUS. REV. AM., Spring 1998, at 19.

¹³ C.F. art. 93(I) (Braz.), translated in CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, *supra* note 12, at 73 (providing for “admission into the career, with the initial post of substitute judge, by means of a civil service entrance examination of tests and presentation of academic and professional credentials”).

¹⁴ For a short description of Brazil’s constitutional history, see Keith S. Rosenn, *Federalism in Brazil*, 43 DUQ. L. REV. 577, 577–88 (2005).

¹⁵ *See generally* Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 431 (2007) (explaining that “[t]he United States is almost unique in its use of elections in the judicial selection and retention process” with only Switzerland and Japan also electing some judges).

¹⁶ The translation from Portuguese is “thank you very much.” AMÉLIA P. HUTCHINSON & JANET LLOYD, PORTUGUESE 194 (2d ed. 2003).

¹⁷ *See, e.g.*, Robert Barnes, *Court Ties Campaign Largess to Judicial Bias*, WASH. POST, June 9, 2009, at A1; Joan Biskupic, *Court Says Judges Must Avoid Appearance of Bias with Donors*, USA TODAY, June 9, 2009, at 2A; *The Caperton v. Massey Case: Not for Sale*, ECONOMIST, June 13, 2009, at 36; Adam Liptak, *Justices Issue Recusal Rule for Judiciary*, N.Y. TIMES, June 9, 2009, at A1; David G. Savage, *Judges Can’t Be on Cases Involving Own Big Donors*, *High Court Rules*, L.A. TIMES, June 9, 2009, at A10; Tony Mauro, *Supreme Court Issues Landmark Ruling on Judicial Recusal*, NAT’L L.J., June 8, 2009, <http://www.law.com/jsp/article.jsp?id=1202431300835>; Posting of Nathan Koppel to The Wall Street Journal Law Blog, <http://blogs.wsj.com/law/2009/06/08/massey-coal-ruling-getting-thumbs-up-in-judicial-circles> (June 8, 2009, 14:47 EDT).

¹⁸ *See* Editorial, *Judges and ‘Bias’: The Supremes Trample on State Courts*, WALL ST. J., June 9, 2009, at A18. *Compare* Sean Parnell, *Don’t Chill Political Speech*, USA TODAY, Mar. 3, 2009, at 10A, with Editorial, *Mining Case Shows Sooty Side of Big-Money Judicial Elections*, USA TODAY, Mar. 3, 2009, at 10A.

the right to a fair trial before a fair tribunal.¹⁹ From their perspective, the fact that only five Justices joined the majority²⁰ is bewildering.

An ancient Indian fable offers one backdrop for understanding the polarized decision.²¹ Six blind men “inclined” to learning went to observe an elephant to “satisfy [their] mind[s].”²² The six men drew completely different conclusions about the beast after their tactual examination of separate parts of the elephant.²³ Each was steadfast in his belief that he was right. But in the end, “each was partly in the right, And all were in the wrong!”²⁴ By focusing on only the particular part of the elephant each examined rather than the whole, the men developed distorted perceptions, which hindered their complete comprehension.

The same can be said about the Supreme Court in *Caperton*. The majority and the dissent²⁵ approached the case from entirely different perspectives, which in the end produced an unsatisfactory result. The five Justices in the majority concluded that the “extraordinary”²⁶ facts in *Caperton* created a probability of bias sufficient to violate due proc-

¹⁹ See, e.g., Larry Dubin, *Disqualification Rules Serve Justice*, DETROIT NEWS, June 11, 2009, at 4B; Carl Hiaasen, *Judges and Justice Should Not Be for Sale*, MIAMI HERALD, June 14, 2009, at 1L; Waldo Proffitt, *Keeping the Judges Honest*, HERALD TRIB. (Sarasota, Fla.), June 20, 2009, at A13; Editorial, *Raising the Bar*, L.A. TIMES, June 9, 2009, at A18; Eliza Newlin Carney, *A Win for Fairer Courts*, NAT'L J. ONLINE, June 15, 2009, http://www.nationaljournal.com/njonline/rg_20090615_7680.php.

²⁰ From Justice Scalia's opening question, posed before petitioner's counsel had spoken three dozen words, it was apparent that the Justices would disagree. After his introduction, petitioner's counsel began: “A fair trial in a fair tribunal is a fundamental constitutional right. That means not only the absence of actual bias, but a guarantee against even the probability of an unfair tribunal. In short —” Justice Scalia interjected, “Who says? Have we ever held that?” Transcript of Oral Argument at 3, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf.

²¹ See THE UDĀNA & THE ITIVUTTAKA [INSPIRED UTTERANCES OF THE BUDDHA & THE BUDDHA'S SAYINGS] 81–84 (John D. Ireland trans., 2d prtg. 2007). The Indian fable was the basis for John Godfrey Saxe's poem *The Blind Men and the Elephant*. See JOHN GODFREY SAXE, *The Blind Men and the Elephant*, in THE POETICAL WORKS OF JOHN GODFREY SAXE 111, 111–12 (Boston, Houghton, Mifflin & Co. 1882) (1868).

²² SAXE, *supra* note 21, at 111.

²³ One man, touching the elephant's side, concluded that the elephant “is very like a wall”; the second, touching the tusk, concluded that the elephant is like a spear; the third, touching the trunk, concluded that the elephant is like a snake; the fourth, touching the knee, concluded that the elephant is like a tree; the fifth, touching the ear, concluded that the elephant is like a fan; and the sixth man, touching the tail, concluded that the elephant is like a rope. *Id.* at 111–12.

²⁴ *Id.* at 112.

²⁵ Chief Justice Roberts's dissenting opinion was joined by Justices Scalia, Thomas, and Alito. *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting). Justice Scalia also wrote a short, separate dissenting opinion. *Id.* at 2274 (Scalia, J., dissenting). This Comment uses the phrases “the dissenting opinion,” “the dissent,” or “the dissenters” to refer to the Chief Justice's dissenting opinion and the three Justices who joined it. When the Comment refers to Justice Scalia's dissenting opinion, it does so specifically.

²⁶ *Id.* at 2265 (majority opinion).

ess and required the judge's recusal. The result reached by the majority is correct, yet by repeatedly focusing on the egregious facts of the case, the majority overlooked the broader implications that financial and political influence have for all judicial elections.

The dissenting Justices, similarly, focused too narrowly, but with an altogether different perspective. To the dissenters, the majority has created an uncertain and unworkable rule, which must be administered by unsophisticated judges who will be continually taunted by unethical lawyers.²⁷ The dissenters' confidence in their perspective caused the dissenters to overstate the rule's uncertainties while exaggerating its implications. In the end, their perspective leads the dissent to favor abstention over court intervention,²⁸ to the detriment of the justice system. Like the Justices in the majority, the dissenting Justices are partly right — the opinion created some uncertainty; but they are also “all in the wrong.”

The mere existence of unanswered and complicated questions should not thwart the application of due process of law. Rather, the essential purpose of the Due Process Clause is to promote fundamental fairness in the most difficult circumstances.²⁹

How can a singular, glaring set of undisputed facts produce such divergent opinions? The answer to this question (and to most of the questions posed by the dissenting Justices³⁰), like the answer to the blind men's dilemma, lies in the perspectives from which the various Justices view the case.³¹ The case raises many questions not only about when judicial campaign contributions interfere with fair trial

²⁷ See *id.* at 2272 (Roberts, C.J., dissenting) (“[I]nability to formulate a ‘judicially discernible and manageable standard’ strongly counsels against the recognition of a novel constitutional right.” (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion))); *id.* at 2275 (Scalia, J., dissenting) (“Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not.”).

²⁸ See *id.* at 2274 (Roberts, C.J., dissenting).

²⁹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring) (“The requirement of ‘due process’ is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble Due process is not a mechanical instrument. It is not a yardstick. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.”).

³⁰ *Caperton*, 129 S. Ct. at 2269–72.

³¹ I have suggested that *White* was driven by the distorted perspective of life-tenured Justices unfamiliar with the realities of state judicial campaigns and insensitive to the effects that those campaigns have on state courts' integrity and legitimacy. Penny J. White, *A Matter of Perspective*, FIRST AMENDMENT L. REV. 5, 13–14 (2004). Based on due process standards, I urged lawyers to seek recusal of judges who had accepted campaign contributions from parties or organizations or who had curried the favor of special interest groups by professing adherence to the groups' views. *Id.* at 78–86 (“If the cases are bound by their facts, then a violation of due process, based on judicial bias, will rarely be found. . . . But if the underlying themes espoused in those cases may be applied generally to much different facts, then due process violations based on judicial bias should be found in the post-*White* landscape far more frequently.” *Id.* at 82, 85.).

rights, but also about the Justices' perspectives on the judiciary, the legal profession, and the role of the courts.

II. THE OPINIONS

A. The Majority's Perspective — New Category, Existing Constitutional Right

A more compelling collection of facts is hard to imagine. A newly elected judge on the state's highest court votes to reverse a \$50 million jury verdict against a company whose chair, president, and chief executive officer donated more than two-thirds of the campaign's total funds and spent an additional half-million dollars supporting the judge's candidacy.³² If the Due Process Clause prevents the "probability of unfairness"³³ by prohibiting judges from deciding cases in which they might be tempted "not to hold the balance nice, clear, and true,"³⁴ then the case should be easily resolved: the refusal to recuse violated due process of law.

That, of course, is what the *Caperton* majority decided. Although the majority viewed the facts in *Caperton* as "extreme" and the case as "extraordinary,"³⁵ the outcome was predetermined by existing precedent. Beginning with the fundamental principle that due process requires a fair trial before a fair tribunal, the majority used *Tumey's*³⁶ bricks and *Murchison's*³⁷ and *Lavoie's*³⁸ mortar to cobble together a new category of judicial disqualification necessitated by emerging problems³⁹ but based upon an existing constitutional right.

The majority relied upon basic principles from prior decisions to craft a standard tailored to the facts of the case. From *Tumey v. Ohio*, the Court observed that due process requires judicial recusal when the circumstances "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."⁴⁰ Thus

³² *Caperton*, 129 S. Ct. at 2257.

³³ *In re Murchison*, 349 U.S. 133, 136 (1955).

³⁴ *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

³⁵ *Caperton*, 129 S. Ct. at 2265.

³⁶ 273 U.S. 510.

³⁷ 349 U.S. 133.

³⁸ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

³⁹ *Caperton*, 129 S. Ct. at 2259 ("As new problems have emerged . . . the Court has identified additional instances which, as an objective matter, require recusal."); *id.* at 2262 ("This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.")

⁴⁰ *Id.* at 2261 (omission in original) (quoting *Tumey*, 273 U.S. at 532) (internal quotation marks omitted).

“no man is permitted to try cases where he has an interest in the outcome.”⁴¹ Extrapolating from these principles, the Court concluded:

[T]here is a serious risk of actual bias — based on objective and reasonable perceptions — when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.⁴²

In evaluating whether recusal is required, proof of actual bias is neither necessary nor likely to exist. A judge’s promise of fairness and neutrality, even after a probing, personal inquiry, is insufficient to satisfy the due process standard. Instead, the judge’s self-assessment of actual bias is but one factor in a multi-inquiry process, which requires an objective evaluation of the *probability* of actual bias conducted from the perspective of an average person knowing all of the attendant facts and circumstances.⁴³ The inquiry, which includes an appraisal of “psychological tendencies and human weakness,”⁴⁴ as well as unconscious judgments,⁴⁵ is by its very nature imprecise.

The focus of the inquiry is whether the risk of probable bias on the part of the judge is constitutionally intolerable.⁴⁶ Probable bias exists when a judge has a direct, personal, and substantial interest in the outcome of the case.⁴⁷ But less substantial interests, and interests other than pecuniary ones, may also produce a probability of bias.⁴⁸ Similarly, indirect interests⁴⁹ that nonetheless “tempt adjudicators to disregard neutrality” are equally intolerable.⁵⁰

⁴¹ *Id.* (quoting *Murchison*, 349 U.S. at 136) (internal quotation marks omitted).

⁴² *Id.* at 2263–64.

⁴³ See *id.* at 2263 (citing *Lavoie*, 475 U.S. at 825; *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971); *Tumey*, 273 U.S. at 532).

⁴⁴ *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (internal quotation mark omitted).

⁴⁵ See THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in 1 THE WRITINGS OF THOMAS JEFFERSON 1, 121 (Andrew A. Lipscomb ed., 1903) (“It is not enough that honest men are appointed Judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence.”).

⁴⁶ See *Caperton*, 129 S. Ct. at 2264 (stating that when the risk of actual bias “is sufficiently substantial . . . it ‘must be forbidden if the guarantee of due process is to be adequately implemented’” (quoting *Withrow*, 421 U.S. at 47)).

⁴⁷ See *id.* at 2259–60 (relying on *Lavoie*, 475 U.S. 813; *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); *Tumey*, 273 U.S. 510).

⁴⁸ See *id.* at 2261–62 (discussing *In re Murchison*, 349 U.S. 133 (1955), in which a “conflict arising from [a judge’s] participation in an earlier proceeding,” *Caperton*, 129 S. Ct. at 2261, created a potential for bias requiring disqualification).

⁴⁹ *Id.* at 2260 (quoting *Gibson*, 411 U.S. at 578–79 (holding that due process was violated by a procedure wherein members of a state board of optometry, which determined license revocations, stood to personally benefit if licenses were revoked)).

⁵⁰ *Id.* The fundamental right to a fair trial before a fair tribunal has been applied to judges, quasi-judicial officers, arbitrators, and administrative boards and agencies. See, e.g., *Gibson*, 411 U.S. at 579 (administrative agencies); *Ward*, 409 U.S. at 57–58, 62 (mayor who performs judicial

Although the *Caperton* majority reached the right result, its emphasis on the extreme facts of the case obscures the underlying problem and ultimately neglects the more profound constitutional dimension: judicial elections threaten the basic promise of fundamental fairness. If we are serious about providing a fair trial before a fair tribunal, then we should recognize forthrightly that the Due Process Clause perhaps should have a nullifying, or at least a limiting, effect on judicial elections.

Despite clear documentation that judicial elections erode public trust and confidence in the judiciary,⁵¹ we persistently avoid a discussion about the constitutionality of judicial elections and view such a discussion as counterproductive because surveys suggest that most Americans want to elect their judges.⁵² But it is equally true that most Americans (arguably *all* Americans) want fair, independent, and impartial courts.⁵³ What has led us to this juncture at which we consistently endorse the importance of elections over other, core constitutional rights?

The current tendency to liken judicial elections to other elections is neither historically accurate nor constitutionally sound.⁵⁴ It is a tendency animated by an uncritical fondness for elections and an unthinking linkage to the First Amendment, at the expense of the surpassingly important right to a fair trial before a fair tribunal. The Due Process

and executive functions); *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149–50 (1968) (arbitrators under United States Arbitration Act).

⁵¹ ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA., PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS (2007), available at <http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDINGSoc1707.pdf>; CHRISTIAN W. PECK, ZOGBY INT'L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES (2007), available at <http://ced.org/images/content/events/judicial/zogby07.pdf>.

⁵² See, e.g., AM. JUSTICE P'SHIP FOUND., VOTER OPINION ON THE ELECTION OR APPOINTMENT OF STATE SUPREME COURT JUSTICES (2008), available at http://www.legalreforminthenews.com/2008PDFS/State_Supreme_Court_Elected_vs._Appointed_7-8-08.pdf (finding that most Americans support electing state supreme court justices); HARRIS INTERACTIVE, MOST AMERICANS WANT STATE JUDGES TO BE ELECTED (2008), http://www.harrisinteractive.com/harris_poll/index.asp?PID=960. But see Tony Mauro, Op-Ed., *Judges Shouldn't Have To Please Voters*, USA TODAY, Oct. 18, 2000, at 17A (“[A]s undemocratic as it seems to say it, electing judges is the evil that needs to be reformed.”).

⁵³ See generally M/A/R/C RESEARCH, AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM (1999), available at <http://www.abanet.org/media/perception/perceptions.pdf>.

⁵⁴ Judicial elections were intended to be unique, subject to special limitations that would preserve the courts' integrity and assure impartiality while accommodating the public's desire for accountability. See Kermit L. Hall, *Judicial Independence and the Majoritarian Difficulty*, in *THE JUDICIAL BRANCH* 60, 60–66 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

Clause, at the very least, provides a check on judicial election practices that are likely to impair the fundamental fairness of the courts.⁵⁵

The Supreme Court in *Caperton* missed an opportunity to kindle a needed debate on how to reconcile the mandates of the Due Process Clause with the escalating effects of money and influence on state judicial elections. Unwilling to confront that prospect, the Court, at best, plugged a gaping hole with a tiny straw. In its minimalist opinion, the majority tied the *Caperton* holding unnecessarily to the facts of the case, but the precedents on which the holding is based are not so confined. Rather, these underlying precedents, if not *Caperton*'s narrow holding, provide guidance for future cases involving less extreme or different facts.

By declining to recognize a more rigorous due process limitation, the Court relinquished the responsibility for curbing the continued growth of interest-controlled judiciaries to the states. This endorsement of the states' prerogative is perhaps the only issue on which the *Caperton* majority and dissent agree.⁵⁶ As a result, *Caperton*'s success as a stopgap will depend on state courts' willingness to value and apply its underlying principle,⁵⁷ while endorsing more rigorous standards to assure the integrity of the judiciary.⁵⁸

*B. The Dissents' Perspectives —
New, Unworkable Constitutional Rule*

The dissenting Justices offered conflicting and confusing bases for their opinions: the majority has interfered in a dispute better resolved

⁵⁵ See THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of . . . designing men . . .").

⁵⁶ Compare *Caperton*, 129 S. Ct. at 2267 (stating that Congress and states "remain free to impose more rigorous standards for judicial disqualification" (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986))), with *id.* (Roberts, C.J., dissenting) (noting that disqualification issues were traditionally left to legislation or court rules).

⁵⁷ "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." *Id.* (majority opinion) (quoting *Lavoie*, 475 U.S. at 828); see also *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (referring to "the floor established by the Due Process Clause").

⁵⁸ Many states have accepted this invitation, first issued by Justice Kennedy in his concurring opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), in which he stated that "[states] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards," *id.* at 794 (Kennedy, J., concurring). See, e.g., ALA. CODE §§ 12-24-1 to -2 (2006) (setting recusal rules related to campaign contributions); MISS. CODE OF JUDICIAL CONDUCT Canon 3(E)(2) (2002) (including campaign contributions among factors for consideration in recusal decision); WASH. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) cmt. (1995) (stating that campaign contributions are a factor to consider in recusal decisions).

by the states⁵⁹ and in doing so has created a new,⁶⁰ unworkable rule. By conflating the recognition of the due process right with its application, the dissenters created their own uncertainty. Is the right not cognizable because it does not yield an easy-to-apply, bright-line rule? Or is due process not violated by the probability of actual bias? To what extent does the dissenters' concern about the rule's imprecision affect their willingness to accept the rule's existence? If the majority's rule were new but workable, would the four have dissented nonetheless? The dissent ignored this conundrum, reserving their rhetoric for their most robust contention that the majority's rule will "inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be,"⁶¹ filed before, during, and after trial,⁶² making legal proceedings "interminable,"⁶³ and further "erod[ing] public confidence" in the fairness and integrity of the courts.⁶⁴

The gulf that looms between the majority's and the dissent's positions is the Justices' relative perspectives about and confidence in the bench and the bar. Justice Kennedy, in the manner of Benjamin Cardozo,⁶⁵ described a painstaking judicial process in which judges review

⁵⁹ See *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

⁶⁰ See *id.* at 2272 ("novel constitutional right"); *id.* at 2275 (Scalia, J., dissenting) ("expansion of our constitutional mandate"). Although the positions seem irreconcilable, perhaps, in the words of the Indian parable, both are "partly in the right." See *supra* notes 21–24 and accompanying text. The Court has never determined whether campaign contributions constitute an "interest" sufficient to require judicial disqualification under the Due Process Clause. In that sense, the issue was novel and unrecognized, *Caperton*, 129 S. Ct. at 2267, 2272 (Roberts, C.J., dissenting), but the deeply rooted and largely undisturbed precedent at the core of the holding led to the application of an existing constitutional rule. Fundamental constitutional rules must be broad enough to accommodate changing facts and, as here, emerging problems. Notably, the dissenters' dogged characterization of *Caperton* as a new constitutional rule was unnecessary to a holding favoring the respondent. The dissenting Justices could have proposed a different standard, perhaps giving greater weight to the presumption of judicial impartiality. See *id.* at 2267–68. They could have required a proven nexus between the contribution and the outcome of the election. See *id.* at 2270. They could have found that the facts of the case were not sufficiently extreme to give rise to a probability of bias as the Chief Justice suggested. See *id.* at 2273–74. The dissent mentions all of these points, but harps on the creation of a new, unworkable constitutional rule. By characterizing the rule as "new," the dissenters cabin the *Caperton* principle into the nonretroactivity jurisprudence of *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). While the remaining members of the majority would presumably see the rule as "existing," *id.* at 301, when asked to apply it retroactively, Justice Souter's retirement leaves the issue of retroactivity an open question.

⁶¹ *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

⁶² See *id.* at 2274 (Scalia, J., dissenting). Justice Scalia predicts that the public's view of the profession will become as cynical as his own. See *id.*

⁶³ *Id.*

⁶⁴ *Id.* at 2267 (Roberts, C.J., dissenting).

⁶⁵ *Id.* at 2263 (majority opinion) ("The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth." (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 9 (1921))).

relevant precedent, text, and scholarship; apply principles of construction and stare decisis; and reflect upon common sense, experiences, and fairness in order to assure that decisions warrant public respect and compliance.⁶⁶ He perceives state court judges as “quite capable” of deliberating upon and applying the standard the Court set out.⁶⁷

The dissenting Justices demonstrated an entirely different perspective. They emphasized the uncertainties that “[j]udges and litigants will surely encounter . . . when they are forced to, or wish to, apply the majority’s decision in different circumstances.”⁶⁸ The dissenters believe the Court unfairly expects judges to be political scientists,⁶⁹ economists,⁷⁰ and psychologists.⁷¹ Moreover, both dissenting opinions envisioned judges as at the mercy of unscrupulous lawyers,⁷² described by Justice Scalia as playing the litigation “game” by “contesting nonrecusal decisions through every available means.”⁷³ Thus, in the dissenters’ view,⁷⁴ judges are unsophisticated and in need of absolute standards and bright-line rules in order to resist lawyers, who are viewed as unethical warriors, hungry for new weapons⁷⁵ that will produce larger fees and undeterred by moral conscience or ethical requirements.

The dissenters’ unenthusiastic appraisal of the resourcefulness of state court judges, coupled with their disrespect for lawyers (and the adversary process itself), led them to an exaggerated conclusion that

⁶⁶ *Id.*

⁶⁷ *Id.* at 2266.

⁶⁸ *Id.* at 2272 (Roberts, C.J., dissenting).

⁶⁹ *Id.* Arguably, judges are already fulfilling this role. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *In re Contest of Gen. Election*, 767 N.W.2d 453 (Minn. 2009). In addition, in those states that elect or retain judges, judges must be familiar with the theory and practice of politics and political behavior. See generally Caufield, *supra* note 7 (discussing how the *White* decision led to the rise of issue-based judicial campaigns).

⁷⁰ *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting). Judges frequently apply economic principles. See, e.g., *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 300–34 (2d Cir. 2008). See generally Robert M. Lloyd, *Proving Lost Profits After Daubert: Five Questions Every Court Should Ask Before Admitting Expert Testimony*, 41 U. RICH. L. REV. 379 (2007) (discussing tasks judges must consider when determining admissibility of expert testimony on issue of lost profits).

⁷¹ *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting). Judges often resolve complicated issues involving human behavior. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). See generally Richard J. Bonnie, *The American Psychiatric Association’s Resource Document on Mental Retardation and Capital Sentencing: Implementing Atkins v. Virginia*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2004) (discussing numerous issues that must be resolved in evaluating claims of mental retardation).

⁷² *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting) (predicting that “groundless” charges of judicial bias will be filed); *id.* at 2274 (Scalia, J., dissenting).

⁷³ *Id.* at 2274 (Scalia, J., dissenting).

⁷⁴ See *id.* at 2272 (Roberts, C.J., dissenting); *id.* at 2274 (Scalia, J., dissenting).

⁷⁵ The war analogy is Justice Scalia’s, who views the majority opinion as “adding to the vast arsenal of lawyerly gambits.” *Id.* at 2274 (Scalia, J., dissenting) (“Many billable hours will be spent in poring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.”).

“[e]very one of the ‘*Caperton* motions’ or appeals or § 1983 actions will claim that the judge is biased, or probably biased And all future litigants will assert that their case is *really* the most extreme thus far.”⁷⁶ These unsubstantiated conclusions, like the blind men’s inaccurate assumptions about the elephant, emanate from distorted perceptions — and unfounded fears — about state court judges and the legal profession.

State court judges frequently apply broad legal principles to a variety of facts. They analyze proximate cause and cause in fact in complex tort cases, weigh the best interests of the child in matters of child custody, and determine the existence of aggravating and mitigating circumstances in setting criminal penalties. They routinely assess probabilities and apply objective standards.

In a staggering number of cases, on a daily basis, state court judges *judge* — by carefully examining the facts and deliberately applying the law. They neither need nor desire bright-line rules⁷⁷ or simple checklists. Rather, their daily exercise of informed discretion — the very essence of judging — has provided ample on-the-job training to prepare state court judges to apply the *Caperton* principle.⁷⁸ The dissenters should neither question nor fear state court judges’ abilities to do so.

In addition to the dissenters’ unfair assessment of state court judges’ aptitude for resolving complex legal questions, they also miscomprehended the nature of recusal motions as well as the likely judicial reaction. In my experience, when legitimate recusal issues are raised, judges err in favor of granting the motions, except in those rare cases in which it appears that lawyers are acting in bad faith.⁷⁹ Judges recognize that they have no vested interest in presiding in any particu-

⁷⁶ *Id.* at 2272 (Roberts, C.J., dissenting).

⁷⁷ *Cf.* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring); Gretchen Mae Stone, *NEW: Supreme Court Says Benjamin Should Have Recused Himself*, ST. J. (Charleston, W. Va.), June 8, 2009, <http://www.statejournal.com/story.cfm?func=viewstory&storyid=60563> (quoting Justice Benjamin as describing the majority opinion as recognizing that “there is no ‘white line’ to guide judges like me”).

⁷⁸ These observations are based on my experience as a state trial and appellate judge and my interaction as a judicial educator with judges from all fifty states. I have found that most judges frequently attend continuing judicial education programs to remain abreast of legal developments and to improve their judicial skills.

⁷⁹ In addition to personal observations made while serving as a judge, I note that Justices Starcher and Maynard recused themselves in the case at bar under circumstances that were less compelling than those involving Justice Benjamin. *See* Editorial, *Bravo: Starcher, Maynard Acts*, CHARLESTON GAZETTE, Feb. 16, 2008, <http://www.wvgazette.com/Opinion/Editorials/200802150735>. Massey Energy Company and Marfork Coal Company sued the West Virginia Supreme Court of Appeals based upon Justice Starcher’s refusal to grant recusal. *See* Complaint for Declaratory and Injunctive Relief, *Massey Energy Co. v. W. Va. Supreme Court of Appeals*, No. 2:06-0614 (S.D. W. Va. Aug. 8, 2006), available at <http://www.huntingtonnews.net/state/massey.pdf>.

lar case.⁸⁰ Most prefer to transfer the case to another judge, eliminating the basis for criticism (and appeal) in favor of promoting “public confidence in the integrity and impartiality of the judiciary.”⁸¹

The dissenters’ dire prediction of *Caperton*’s effects is based not only on an underappreciation of the bench, but also on an exaggeration of the bar’s willingness to flout professional and ethical standards. Both dissenting opinions overstated the decision’s likely effect by predicting an onslaught of judicial recusal motions.⁸² The dissenters’ fear is based upon a most unfavorable opinion of lawyers, an opinion that disregards the fact that the vast majority of lawyers strictly adhere to the rules of professional conduct and norms of ethical behavior.⁸³ Lawyers do not assert frivolous claims in order to delay proceedings, disparage the judge, or bilk the client.⁸⁴ Rather than filing recusal motions as a matter of course, most lawyers request recusal only after serious consideration and as a matter of last resort.

Ethical and procedural rules,⁸⁵ as well as practical considerations,⁸⁶ provide adequate protection against those lawyers who attempt to abuse the *Caperton* holding. The Model Rules of Professional Conduct prohibit the filing of motions without a sufficient factual and legal basis⁸⁷ and require that lawyers and judges report professional misconduct.⁸⁸ Under applicable procedural rules, counsel’s presentation of a

⁸⁰ See, e.g., *Berger v. United States*, 255 U.S. 22, 35 (1921) (“And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?”).

⁸¹ MODEL CODE OF JUDICIAL CONDUCT Canon 2A (2004).

⁸² See *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting); *id.* at 2274 (Scalia, J., dissenting). The majority noted that although *In re Murchison*, 349 U.S. 133 (1955), and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), created similar opportunities, the courts did not suffer the deluge the dissent predicts. *Caperton*, 129 S. Ct. at 2265–66.

⁸³ For example, the 2007 American Bar Association *Survey on Lawyer Discipline Systems* indicates that out of over 100,000 complaints filed, fewer than 5000 lawyers were charged with disciplinary violations. Given the number of actively licensed lawyers (more than 1.4 million), the rate of complaints is barely one-third of one percent. AM. BAR ASS’N, 2007 SURVEY ON LAWYER DISCIPLINE SYSTEMS, chart I (2007), available at <http://www.abanet.org/cpr/discipline/sold/full.pdf>.

⁸⁴ Cf. *Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting) (asserting that the Court’s decision will reinforce widely held perceptions about lawyers’ eagerness to draw out legal proceedings for their own gain).

⁸⁵ See, e.g., *Berger*, 255 U.S. at 35 (recognizing that a lawyer who files a frivolous motion for recusal supported by a fraudulent affidavit is subject to a perjury charge).

⁸⁶ In the event of a successful motion, counsel is unlikely to have any input into who is designated to replace the disqualified judge.

⁸⁷ MODEL RULES OF PROF’L CONDUCT R. 3.1 (2007) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

⁸⁸ Rule 8.3(a) of the Model Rules of Professional Conduct requires a lawyer who knows that “another lawyer has committed a violation of the Rules of Professional Conduct that raises a sub-

motion certifies that the claims have, or are likely to have, evidentiary support.⁸⁹ When frivolous motions are filed, courts may impose sanctions and award fees.⁹⁰ In addition to the risks of ethics complaints and sanctions,⁹¹ practical considerations guard against frivolous recusal litigation: such conduct may diminish a lawyer's reputation and risk a trial before a judge who declines recusal.

On a deeper level, the dissenters' jaundiced perception of judges and lawyers, justified or not, leads them to the most profound flaw in their position — the failure to embrace the value of applying an existing due process analysis to judicial recusal. At its core, the Due Process Clause protects the people's liberty by assuring a fair trial in a fair tribunal. That has been its history,⁹² and that must be its future. If that core guarantee is ignored, or neglected, all other rights in a civilized society lose much of their meaning. In simpler times, the Court enthusiastically endorsed this due process premise, requiring recusal when insubstantial benefits were at stake.⁹³ The Court should not now shirk its responsibility because the enforcement of the right to a fair trial in a fair tribunal has become more complex judicially or less popular politically. Neither public antipathy, complexity, costs, inefficiency, nor even the potential for abuse can justify failing to enforce robustly this longstanding, fundamental right. The transformation of judicial elections after *White* undoubtedly has complicated the due process analysis, but it has also underscored the obligation of the

stantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" to report the misconduct. *Id.* R. 8.3(a). Canon 3D(2) of the Model Code of Judicial Conduct requires similar reporting by judges. MODEL CODE OF JUDICIAL CONDUCT Canon 3D(2) (2004).

⁸⁹ For example, Rule 11(b) of the Federal Rules of Civil Procedure, the source for many comparable state rules, provides:

By presenting to the court a pleading, written motion, or other paper . . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

. . . .
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery

FED. R. CIV. P. 11(b).

⁹⁰ *See id.* 11(c).

⁹¹ A lawyer who filed a frivolous recusal motion likely would violate multiple ethics rules. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2007) (forbidding "conduct involving dishonesty, fraud, deceit or misrepresentation"); *id.* R. 8.4(d) (forbidding "conduct that is prejudicial to the administration of justice"); *id.* R. 3.3(a)(1) (declaring that lawyers shall not "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law that was previously made to the tribunal by the lawyer").

⁹² *See, e.g.*, *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927).

⁹³ *See Ward*, 409 U.S. 57.

Court to triumph over the difficulty in order to preserve a fair and impartial justice system.

III. OVERSTATED UNCERTAINTIES

A. *Uncertainties and Inconsistencies*

The dissenters' confidence in the validity of their position leads them to overstate the magnitude of the uncertainty created by the majority's rule. Rather than extraordinary, as the dissent suggested, it is almost commonplace for the Court to issue holdings that raise as many questions as are answered. The Chief Justice has heralded judicial minimalism,⁹⁴ and the remaining dissenters frequently have endorsed constitutional rules despite equivalent uncertainties that were likely to (and did) produce considerable litigation. Examples provide the best illustration.⁹⁵

Beginning in 2004, the Court, led by Justice Scalia, upset more than a century of case law⁹⁶ and began to redefine the Sixth Amendment right to confrontation in *Crawford v. Washington*.⁹⁷ The lack of clarity in that decision⁹⁸ led to a hodgepodge of inconsistent lower court decisions⁹⁹ that has required the Court to revisit and address the issue frequently.¹⁰⁰ The Court has done so in piecemeal fashion, while lower court judges toil to apply the rules amidst the uncertainty.

The Court forged a similar path in relation to a different Sixth Amendment right, the right to trial by jury. In a series of cases, beginning with *Apprendi v. New Jersey*,¹⁰¹ the Court held that a jury must

⁹⁴ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 229, 256 (2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301838.html>; cf., e.g., *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (restricting student's free speech rights in a majority opinion written by Chief Justice Roberts).

⁹⁵ These examples are chosen from an almost limitless list that includes cases interpreting the Fourth Amendment's "reasonableness standard," see, e.g., *Arizona v. Gant*, 129 S. Ct. 1710 (2009), and good faith exception, see, e.g., *Herring v. United States*, 129 S. Ct. 695 (2009), as well as the Sixth Amendment's right to counsel, see, e.g., *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009); *Kansas v. Venstris*, 129 S. Ct. 1841 (2009).

⁹⁶ See, e.g., *Kirby v. United States*, 174 U.S. 47 (1899); *Mattox v. United States*, 156 U.S. 237 (1895).

⁹⁷ 541 U.S. 36 (2004); see *id.* at 60–63.

⁹⁸ See *id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

⁹⁹ See, e.g., *State v. Maclin*, 183 S.W.3d 335, 346 nn.10 & 12, 347 n.13 (Tenn. 2006) (citing numerous cases); *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *rev'd and remanded*, 547 U.S. 813 (2006); *State v. Davis*, 111 P.3d 844 (Wash. 2005), *aff'd*, 547 U.S. 813 (2006).

¹⁰⁰ See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Giles v. California*, 128 S. Ct. 2678 (2008); *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008); *Whorton v. Bockting*, 127 S. Ct. 1173 (2007); *Davis v. Washington*, 547 U.S. 813 (2006).

¹⁰¹ 530 U.S. 466 (2000).

find all facts beyond a reasonable doubt that are necessary to increase a defendant's authorized punishment.¹⁰² The decision produced a laundry list of questions that lower courts,¹⁰³ and the Supreme Court,¹⁰⁴ continue to address.

In perhaps the most comparable context, two of the *Caperton* dissenters, Chief Justice Roberts and Justice Alito, have applied a due process overlay to state court punitive damage awards. In a series of cases beginning in 1996,¹⁰⁵ the Supreme Court has established a rigorous due process review for punitive damage awards.¹⁰⁶ As a matter of substantive due process, the Court originally required that punitive damage awards be evaluated based on three criteria: the reprehensibility of the defendant's conduct, the ratio between the punitive and compensatory damages, and a comparison between the punitive damage award and any applicable civil or criminal penalties that could be imposed for similar misconduct.¹⁰⁷ In subsequent decisions, the Court embellished upon the criteria¹⁰⁸ and created a presumptive cap.¹⁰⁹ This application of due process standards to check punitive damage awards is at least as uncertain and inefficient as is applying a probability-of-bias standard to determine judicial recusal. Yet consistently, Chief Justice Roberts and Justice Alito have applied the Due Process Clause in punitive damage awards cases.¹¹⁰

¹⁰² *Id.* at 477.

¹⁰³ *See, e.g.*, *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *aff'd and remanded*, 543 U.S. 220 (2005); *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), *vacated and remanded*, 127 S. Ct. 1209 (2007); *State v. Blakely*, 47 P.3d 149 (Wash. Ct. App. 2002), *rev'd*, 542 U.S. 296 (2004).

¹⁰⁴ *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005) (federal sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296 (2004) (state court sentencing); *Ring v. Arizona*, 536 U.S. 584 (2002) (aggravating circumstances in death penalty case).

¹⁰⁵ In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), Justices Scalia and Thomas dissented from this application of the Due Process Clause. *Id.* at 598–99 (Scalia, J., dissenting, joined by Thomas, J.). They have adhered to their disagreement in subsequent cases.

¹⁰⁶ *See, e.g.*, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

¹⁰⁷ *Gore*, 517 U.S. at 574–75.

¹⁰⁸ *See State Farm*, 538 U.S. at 419–25 (adding as indicators of reprehensibility: presence of physical as opposed to economic harm, reckless disregard for health or safety of others, financial vulnerability of the victim, and repetitiveness or maliciousness of defendant's conduct).

¹⁰⁹ *See id.* at 425 (“We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”).

¹¹⁰ Chief Justice Roberts and Justice Alito were in the majority in *Philip Morris*, 127 S. Ct. at 1060. Justice Alito recused himself due to stock ownership in *Exxon Shipping Co.*, *see* Linda Greenhouse, *Justices To Hear Exxon's Challenge to Punitive Damages*, N.Y. TIMES, Oct. 30, 2007, at C5, but Chief Justice Roberts was in the majority, 128 S. Ct. at 2611. Justices Scalia and Thomas joined the majority, but adhered to their previous views. *Id.* at 2634 (Scalia, J., concurring, joined by Thomas, J.).

B. Uncertainties and Perspectives

Just as the import of uncertainty was overstated by the dissent, so too was the extent of uncertainty. If the goal was to emphasize the uncertainties left unresolved by the majority decision, the dissent's forty-question methodology arguably succeeded, but the method also created a handy, albeit repetitious, checklist for lawyers whom the dissenters predict will file frivolous recusal motions with "little chance of success."¹¹¹ What the dissent's list of questions does best is underscore the divergent perspectives of the majority and dissent.

The majority emphasized preserving the integrity of the system. The justice system must not only *be* fair, it also must *appear* fair.¹¹² Thus, the majority evaluated the circumstances from multiple perspectives, considering the impressions of the parties, the lawyers, the general public, and the judge. Taking a systemic approach, the majority regarded the way the judicial action appears to an objective outsider as more important than whether the judge personally believes she can be impartial. A decision rendered by an apparently biased judge is unacceptable, even if the decision is legally correct and the judge is not, in fact, actually biased.

When viewed from this perspective, the purpose of recusal motions is to enforce the right to a fair trial, thereby assuring the integrity of the justice system. Recusal motions are not pejorative. A lawyer who requests judicial recusal is alleging only that the circumstances suggest to neutral observers a probability of bias; he or she is not accusing the judge of any wrongdoing.

The majority opinion is not, however, without its flaws; Justice Kennedy gave too much weight to the outlier facts of *Caperton*. Yet the dissent took an even more confined viewpoint. The dissenting Justices viewed the issue predominantly from the perspective of the judicial officer.¹¹³ This narrow view of the due process protection is tied to the presumption that judges "apply the law impartially"¹¹⁴ and serve with "honesty and integrity."¹¹⁵ This view neglects any consideration of the perspectives of the parties, the lawyers, or the public. By focusing exclusively on the judge, the dissenters reflexively favored

¹¹¹ *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting).

¹¹² *Id.* at 2266–67 (majority opinion); *see, e.g.*, *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of evenhanded justice . . . is at the core of due process."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))).

¹¹³ *Caperton*, 129 S. Ct. at 2268–69, 2272 (Roberts, C.J., dissenting).

¹¹⁴ *Id.* at 2267 (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring)).

¹¹⁵ *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

a subjective analysis of bias and overlooked the importance of objective appearances.¹¹⁶

The dissenters' restrictive view might have been driven by another underlying, but unsubstantiated assumption: that an increase in recusal motions will tarnish a judge's reputation and diminish respect for the system.¹¹⁷ Notwithstanding the dissenters' stated concern about the integrity of the system, they ultimately focused their attention on how recusal motions may affect the individual judge. Thus, the dissenters considered a recusal motion based on probable bias to be an affront to judicial dignity.¹¹⁸ They concerned themselves with whether the judge "get[s] to respond to the allegation that he is probably biased, or [whether] his reputation [is] solely in the hands of the parties to the case."¹¹⁹ If the parties settle the *Caperton* claim, the dissenters asked, "Does that leave the judge with no way to salvage his reputation?"¹²⁰

This fixation on the judge's reputation led the dissenters to favor a standard that discourages recusal motions.¹²¹ This approach ultimately skewed their perspective, thus rendering the system more vulnerable to political and financial domination.

IV. ADDRESSING THE UNCERTAINTIES

Most of the concerns set out in the dissent can be allayed by applying the majority's rationale¹²² or preexisting precedent. A few concerns cannot be answered in the abstract,¹²³ but will require an evolution of principle based on a case-by-case, fact-specific inquiry. Some uncertainty will persist, but it is unproductive to fret about the "vast

¹¹⁶ I am using the phrase "objective appearances" to capture whether bias appears to exist to an objective observer, in recognition of the importance of the appearance of justice. See *supra* cases cited note 112 and accompanying text.

¹¹⁷ *Caperton*, 129 S. Ct. at 2272, 2274 (Roberts, C.J., dissenting); *id.* at 2274 (Scalia, J., dissenting).

¹¹⁸ *Id.* at 2274 (Roberts, C.J., dissenting); *id.* (Scalia, J., dissenting); see also *Liteky v. United States*, 510 U.S. 540, 549 (1994) ("Bias and prejudice seem to us not divided into the 'personal' kind, which is offensive, and the official kind, which is perfectly all right. As generally used, these are pejorative terms, describing dispositions that are *never* appropriate.")

¹¹⁹ *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting) (question 39).

¹²⁰ *Id.* (question 40).

¹²¹ *Id.* at 2267 (advocating retention of the standard that "[u]ntil today . . . recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge").

¹²² For example, the dissent asked, "[D]o we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?" *Id.* at 2270 (question 24). Compare *id.* (question 24), with *id.* at 2266 (majority opinion) (applying a reasonable person standard by focusing on the importance of public confidence in the judiciary).

¹²³ For example, the dissent asked, "Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?" *Id.* at 2270 (Roberts, C.J., dissenting) (question 21).

arsenal of lawyerly gambits”¹²⁴ the decision has created while adding to the stockpile with a lengthy list of questions emanating from a jaded perspective. This approach serves only to magnify the uncertainties, while obscuring the many ways in which state courts can harmonize the demands of due process with the growing problem of electing judges. In an effort to be more constructive, I offer some suggestions to state courts for resolving the uncertainties. For ease of analysis, I have divided the dissent’s questions into seven categories.¹²⁵

A. *General Application of Caperton: Prefatory Question*

As a preface to its list of questions, the dissent asked whether the Court’s rule “is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.”¹²⁶ This first broad question is a good example of how the questions were spawned by the dissenters’ perspective, yet can be readily analyzed by reference to the majority’s rationale. When one considers the integrity of the justice system itself, instead of the reputation of a single judicial officer, it becomes obvious that interests other than financial ones can create a probability of bias that violates due process.

Actual bias on the part of a judge, regardless of the cause, requires judicial recusal.¹²⁷ Because our adversary system is based on the premise that decisionmakers must be, and must appear to be, fair and impartial,¹²⁸ probable bias also requires recusal, regardless of the cause. The existence of circumstances suggesting a probability of bias, not the source of the bias, is the determining factor.

Preexisting Supreme Court precedents support the application of the *Caperton* rule to judicial recusal motions based on indirect pecuniary as well as nonpecuniary interests. The cases scrutinized the *existence* of a disqualifying *interest*, not its *source*. The presence of a disqualifying interest sufficient to produce a probability of bias, thereby undermining fairness, is the common thread that connects the Court’s

¹²⁴ *Id.* at 2274 (Scalia, J., dissenting).

¹²⁵ I categorize the questions as follows: questions concerning the (1) general application of *Caperton* to nonpecuniary interests (prefatory question); (2) amount of contribution (questions 1 and 2); (3) type of contribution (questions 3, 18, 20, 31, and 32); (4) nature of contributor (questions 4, 8, 10, 11, 21, 22, and 29); (5) nature and posture of case (questions 5, 9, 12, 14, 15, 27, 28, 34, 36, and 38) and issues of cause and effect (questions 7, 13, and 25); (6) judge, judicial selection method, and judicial decision (questions 6, 16, 17, 26, and 30); and (7) applicable procedure (questions 19, 33, 35, 37, 39, and 40). A few questions admittedly do not fall neatly into any of these categories (questions 23 and 24).

¹²⁶ *Caperton*, 129 S. Ct. at 2269 (Roberts, C.J., dissenting).

¹²⁷ See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (“Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’” (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))); *Murchison*, 349 U.S. at 136 (“Fairness of course requires an absence of actual bias in the trial of cases.”).

¹²⁸ See cases cited *supra* note 112.

two lines of constitutional recusal cases — the *Tumey* cases that involve pecuniary interests and the *In re Murchison* cases that involve criminal contempt.

In the *Tumey* cases, the Court initially focused on financial interests, holding that a judge with a “direct, personal, substantial, pecuniary interest” in a case, no matter how slight, must recuse.¹²⁹ But in subsequent cases, the Court extended the rule to pecuniary interests that were indirect and less certain.¹³⁰ For example, in *Ward v. Village of Monroeville*,¹³¹ a mayor’s interest in producing revenue for the village’s general coffers — not for himself — was sufficient to produce a disqualifying interest.¹³² In *Bracy v. Gramley*,¹³³ a judge’s alleged interest in convicting and harshly sentencing the defendant, in order to camouflage his acceptance of bribes in other cases, was a sufficient disqualifying interest to entitle the defendant to discovery.¹³⁴ Similarly in *Gibson v. Berryhill*,¹³⁵ an adjudicative body’s interest in eliminating competing professionals was sufficient to constitute a disqualifying interest, although financial benefit was uncertain and indirect.¹³⁶ While the mayor in *Tumey* received a personal and direct financial gain each time he convicted a defendant,¹³⁷ the judicial officers in *Ward*¹³⁸ and *Gibson*¹³⁹ had less direct and far less certain pecuniary interests. Nonetheless, their interests were sufficient to disqualify them from participating in the matters.

¹²⁹ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (noting that “the slightest pecuniary value” rendered a decision voidable at common law, *id.* at 525). At common law there was the “greatest sensitiveness over the existence of any pecuniary interest, however small or infinitesimal.” *Id.* at 525. This aversion was the precursor of modern-day recusal statutes. See 28 U.S.C. § 455(d)(4) (2006) (defining a “financial interest,” which requires disqualification, *id.* § 455(b)(4), as “ownership of a legal or equitable interest, however small”).

¹³⁰ See, e.g., *Bracy v. Gramley*, 520 U.S. 899 (1997); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972).

¹³¹ 409 U.S. 57.

¹³² *Id.* at 60–61.

¹³³ 520 U.S. 899.

¹³⁴ *Id.* at 909–10. So-called “compensatory bias” is also recognized as a basis for judicial disqualification under 28 U.S.C. § 455(a), a federal judicial disqualification statute, which, while not setting forth a constitutional rule, provides for disqualification when a judge’s “impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Some federal circuits interpret the statute to support disqualification of a judge who is biased in favor of a party, on motion filed by the favored party, under the theory that the judge may actually overcompensate and inadvertently favor the other side. See, e.g., *Guest v. McCann*, 474 F.3d 926, 931 (7th Cir. 2007); *Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 81–83 (2d Cir. 1996) (holding alleged compensatory bias sufficient to give party standing to move for judicial recusal); see also *State v. Benson*, 973 S.W.2d 202 (Tenn. 1998) (holding that allegation that judge solicited bribe should be considered in postconviction case).

¹³⁵ 411 U.S. 564.

¹³⁶ *Id.* at 578–79.

¹³⁷ *Tumey v. Ohio*, 273 U.S. 510, 520 (1927).

¹³⁸ *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972).

¹³⁹ *Gibson*, 411 U.S. at 571.

Even more uncertain and remote was the interest of the disqualified Alabama Supreme Court justice in *Aetna Life Insurance Co. v. Lavoie*.¹⁴⁰ Justice Embry's vote on an unrelated case enhanced his legal claims and improved the settlement value of his own pending lawsuit, but he would benefit only if he successfully negotiated a settlement or won at trial.¹⁴¹ Nonetheless, the Court concluded that his participation in the unrelated case violated "due process rights as explicated in *Tumey, Murchison, and Ward*."¹⁴²

In addition to applying the due process analysis to cases involving indirect and uncertain pecuniary interests, the Court also has applied the analysis to cases involving nonpecuniary interests. In the *Murchison* line of cases, the Court focused on the existence of a disqualifying interest sufficient to create a probability of bias, rather than on the source of the interest.¹⁴³ In *Murchison*, for example, the Court disqualified a judge involved in the accusatory process from adjudicating a criminal contempt citation arising out of that process.¹⁴⁴ The Court explained that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."¹⁴⁵ Based on this due process analysis, the Court has required disqualification when a judge "has become so 'personally embroiled' . . . as to make the judge unfit to sit in judgment on [a] contempt charge."¹⁴⁶ Since *Murchison*, the Court has consistently applied the "possible temptation" test regardless of the nature of the temptation.¹⁴⁷

Having adopted this broad construction of disqualifying interests, the majority's perspective reflects an appreciation for the complexity of bias — an appreciation that is essential to a constitutionally appropriate application of the *Caperton* rule.

¹⁴⁰ 475 U.S. 813, 817 (1986).

¹⁴¹ *Id.* at 824–25.

¹⁴² *Id.* at 825.

¹⁴³ See, e.g., *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Offutt v. United States*, 348 U.S. 11 (1954); cf. *Ungar v. Sarafite*, 376 U.S. 575 (1964). These cases include those in which the judge was the target of personal abuse or criticism that resulted in a citation for criminal contempt.

¹⁴⁴ *In re Murchison*, 349 U.S. 133 (1955).

¹⁴⁵ *Id.* at 136. The principle quoted in *Murchison* comes from the ancient maxim "*aliquis non debet esse Judex in propria causa*," which was one basis of the decision in *Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610). *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2513 n.* (2007) (Scalia, J., concurring in the judgment) (quoting *Dr. Bonham's Case*, 8 Co. Rep. at 118a, 77 Eng. Rep. at 652). The case, authored by Lord Coke, also concluded that a medical board that would benefit from the fine imposed could not hear the case against Dr. Bonham. *Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638.

¹⁴⁶ *Mayberry*, 400 U.S. at 465 (quoting *Offutt*, 348 U.S. at 17).

¹⁴⁷ See, e.g., *Lavoie*, 475 U.S. at 825; *Gibson v. Berryhill*, 411 U.S. 564, 571 (1973); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972).

Financial, political, or emotional interests may create a probability of bias sufficient to require judicial disqualification.¹⁴⁸ While pecuniary interests, including financial support in judicial elections, may create a disqualifying probability of bias, political influence or intimidation and emotional reactions such as anger, hostility, or resentment may do so as well.¹⁴⁹ State courts analyzing recusal motions must focus on the probable impact of the interest as adjudged by an objective observer, not on the source of the interest. Any interest that produces a probability of bias violates due process and requires disqualification.

*B. Amount and Type of Contribution:
Questions 1–3, 18, 20, 31, and 32*

The dissenting Justices asked “[h]ow much money is too much,” “[w]hat level of contribution or expenditure gives rise to a ‘probability of bias,’” and “[h]ow do we determine whether a given expenditure is ‘disproportionate?’”¹⁵⁰ These questions, which are resolved by adhering to the majority’s rule and applying precedent, reflect the dissenters’ perspective and their desire for a bright-line, one-size-fits-all rule.¹⁵¹ But the *Caperton* rule is not a rule of absolutes. Neither is it quantifiable. Due process requires judicial disqualification when “a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case.”¹⁵²

Disqualification does not hinge necessarily upon a particular level or type of contribution or expenditure. The Justices in the majority acknowledged that not every campaign contribution will require disqualification,¹⁵³ but rather than specify a triggering amount, they endorsed a balancing approach that emphasizes the “relative size [of the contribution] in comparison to the total amount of money contributed

¹⁴⁸ A judge’s political interest in remaining in office or securing another office may tempt the judge to issue decisions that curry favor with or avoid disfavor of campaign contributors, political party leaders, and special interest groups.

¹⁴⁹ For example, in *Mayberry v. Pennsylvania*, 400 U.S. 455, in what Justice Douglas described as “tactics taken from street brawls and transported to the courtroom,” a pro se defendant repeatedly insulted the trial judge. *Id.* at 462. The insults included calling the judge a “hatchet man for the State,” *id.* at 456; a “dirty, tyrannical old dog,” *id.* at 466; a “stumbling dog,” *id.* at 467; a “nut,” *id.* at 460; and a “bum,” *id.* at 458, and referring to the proceeding as “the Spanish Inquisition,” *id.* at 460; a “kowtow[ing],” *id.* at 458; and a “railroad[ing],” *id.* See also *Bean v. Bailey*, 280 S.W.3d 798 (Tenn. 2009) (holding that trial judge should have recused himself based on past acrimony between judge and law firm, which included reciprocal ethics complaints and judge’s initiation of criminal investigation of lawyer).

¹⁵⁰ *Caperton*, 129 S. Ct. at 2269 (Roberts, C.J., dissenting) (questions 1–2).

¹⁵¹ Justice Benjamin also craved a bright-line rule, although he referred to it as a “white[-]line” rule. See Stone, *supra* note 77 (internal quotation marks omitted).

¹⁵² *Caperton*, 129 S. Ct. at 2263–64.

¹⁵³ *Id.* at 2263.

to the campaign” and “the total amount spent in the election.”¹⁵⁴ This approach is sound. By linking disqualification with the proportion of the contribution rather than the size, the majority assures that the rule can be applied in small-dollar as well as large-dollar campaigns.

Chief Justice Roberts’s dissenting opinion pondered the effects of “independent, non-coordinated expenditures,” “contributions to independent outside groups supporting a candidate,”¹⁵⁵ and campaigns that invest in efforts to defeat a judge or to get out the vote rather than in advertisements.¹⁵⁶ But the proper focus is on the financial stake, as indicated in *Ward*,¹⁵⁷ *Gibson*,¹⁵⁸ and *Lavoie*,¹⁵⁹ not on the judge’s direct receipt of a financial benefit. Otherwise, the rule would be easily circumvented by channeling contributions into outside groups and in-kind expenditures.

A judge’s disqualification is required when independent contributions or expenditures or in-kind efforts create a probability of bias in favor of or against a person or party with a stake in a particular case.¹⁶⁰ State courts analyzing recusal motions must evaluate whether contributions, expenditures, or campaign efforts, regardless of their source or nature, pose a risk of bias that is constitutionally intolerable.¹⁶¹

*C. Nature of Contributor:
Questions 4, 8, 10, 11, 21, 22, and 29*

The dissenting Justices also inquired about the nature of the contributor, including whether the rule applies to parties, attorneys, and

¹⁵⁴ *Id.* at 2264. The balancing approach also includes the “apparent effect such contribution had on the outcome of the election.” *Id.*

¹⁵⁵ *Id.* at 2269 (Roberts, C.J., dissenting) (question 3).

¹⁵⁶ *Id.* at 2270–71 (questions 18 and 31).

¹⁵⁷ *Ward v. Vill. of Monroeville*, 409 U.S. 57, 59–60 (1972).

¹⁵⁸ *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

¹⁵⁹ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824–25 (1986).

¹⁶⁰ These were the *Caperton* facts: Don Blankenship contributed the \$1000 statutory maximum directly to Justice Benjamin’s campaign committee, but donated \$2.5 million to a section 527 political organization whose purpose was to oppose incumbent Justice McGraw as well as to promote Justice McGraw’s opponent, Justice Benjamin. *Caperton*, 129 S. Ct. at 2257. The additional \$500,000 that Blankenship invested was in the form of direct expenditures for mail, newspaper, and television advertisements. *Id.* These circumstances required Justice Benjamin’s recusal, making it clear that a probability of bias may be created not only by direct contributions, but also by “independent, non-coordinated expenditures” and contributions to “outside” groups. *Id.* at 2269 (Roberts, C.J., dissenting).

¹⁶¹ See *Gibson*, 411 U.S. at 579 (holding possible financial benefit inuring from disqualifying competing optometrists sufficient to disqualify board members although there was no certain financial benefit); *Ward*, 409 U.S. at 59–60 (holding mayor’s executive responsibilities for village finances sufficient to disqualify mayor as judge although mayor did not reap any direct, personal benefit).

groups;¹⁶² whether a probability of bias may be imputed;¹⁶³ and whether the contributor's donation history is relevant.¹⁶⁴ Because the rule emphasizes the probability of bias, neither the identity of the contributor nor the contributor's donation history is a controlling factor. What is more relevant, and what state courts should assess, is whether the contributor's support was visible, identifiable, and ascertainable by the general public. Similarly, the fact that a contributor generously donates to many candidates for public office does not eliminate the potential for bias based on donations in a particular judicial campaign if those contributions create a probability of bias in the view of an objective observer.¹⁶⁵

*D. Nature and Posture of Case and Issues of Cause and Effect:
Questions 5, 7, 9, 12–15, 25, 27, 28, 34, 36, and 38*

Ten of the questions set out in the Chief Justice's dissenting opinion concern the nature and procedural posture of the case. They ask whether the amount at issue, type of relief, or nature of relief (ideological as opposed to financial) affect the *Caperton* inquiry and whether the rule applies to pending cases, cases on appeal, and collateral claims.¹⁶⁶

A focus on the nature of the case or the type of relief sought is misdirected. Because this perspective emphasizes the litigant's stake in the case, rather than the judge's stake in ruling a particular way, it misses the essential vice presented by judicial elections. State courts

¹⁶² *Caperton*, 129 S. Ct. at 2269–70 (Roberts, C.J., dissenting) (questions 10 and 22).

¹⁶³ *Id.* at 2271 (question 29) (“Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members?”).

¹⁶⁴ The dissent asked, “Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?” *Id.* at 2269 (question 4). Blankenship, the contributor in this case, regularly and generously contributed to candidates for elected office in West Virginia. He is reported to have said, “I’ve been around West Virginia long enough to know that politicians don’t stay bought, particularly ones that are going to be in office for 12 years,” referring to the terms of the justices of West Virginia’s highest court. Adam Liptak, *Case May Alter the Election of Judges*, N.Y. TIMES, Feb. 15, 2009, at A29. The *Lincoln Journal* reports that fifty years ago, “West Virginia politicians used half-pints of whiskey to buy votes under the bi-partisan belief that ‘it ain’t wrong to pay a man to do right.’” *Lottery Commission Likely To Revoke Ferrell Gambling Licenses*, LINCOLN J., June 17, 2009, <http://www.lincolnjournalinc.com> (search archives for “Lottery Commission Likely To Revoke Ferrell Gambling Licenses”; then follow “17.JUN.09” hyperlink).

¹⁶⁵ Notably, this discussion concerns situations of *probable* bias; actual bias on the part of a judicial decisionmaker is an automatic due process violation, regardless of whether it is visible to the general public. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

¹⁶⁶ See *Caperton*, 129 S. Ct. at 2269–72 (Roberts, C.J., dissenting); *id.* at 2269 (question 5, amount at issue and type of relief); *id.* at 2269–70 (questions 9, 12 and 14, nature of relief); *id.* at 2270–71 (questions 15 and 36, status of cases); *id.* at 2271 (questions 27 and 28, pending cases); *id.* at 2270–71 (questions 27 and 38, cases on appeal); *id.* at 2271 (question 34, collateral claims).

should consider whether an objective observer could reasonably believe that the case, regardless of its nature, presents a potential for the judge to attain some desired personal goal in contravention of the integrity of the court. The inquiry concerns the judge's potential interest, not whether the litigants were seeking damages or attempting to raise social awareness.¹⁶⁷

The questions concerning cause and effect and the duration of a *Caperton* claim¹⁶⁸ can be resolved by shifting appropriately from the perspective of the challenged judge to that of an objective observer. The due process deprivation occurs when — and persists so long as — the probability of bias exists. The deprivation does not depend on whether the probability of bias influences the decision or leads the court to an incorrect result. The taint flows from the judge's participation in the case; it does not depend on the judge's succumbing to the tempting influence.¹⁶⁹ Therefore, a due process deprivation occurs despite a correct decision or an affirmance by a neutral appellate panel.

*E. Judge, Judicial Selection Method, and Judicial Decision:
Questions 6, 16, 17, 26, and 30*

The Chief Justice's dissenting opinion questioned whether the *Caperton* "analysis change[s] depending on whether the judge . . . sits on a trial court, appeals court, or state supreme court."¹⁷⁰ The due process right to a fair trial before a fair tribunal applies to all judges, as well as to quasi-judicial decisionmakers, including arbitrators and regulatory boards.¹⁷¹ It is not the nature of the judicial office, but the opportunity to adjudicate claims that makes the right applicable; and it is the existence of a probability of bias in making those adjudicatory choices that mandates disqualification.

¹⁶⁷ For example, had *Caperton* sought only to *enjoin* A.T. Massey Coal Company from interfering with contractual rights, Justice Benjamin's participation in the appeal nonetheless would have violated due process.

¹⁶⁸ *Caperton*, 129 S. Ct. at 2269–71 (Roberts, C.J., dissenting); *id.* at 2269, 2271 (questions 7, 28, and 34, duration of claim); *id.* at 2270–71 (question 25, causation); *id.* at 2270 (question 13, effect).

¹⁶⁹ *See* *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, J., concurring) ("The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process."); *id.* at 833 (Blackmun, J., concurring) ("The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest . . . , would influence the votes and views of his colleagues."); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972) ("Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance."); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge.")

¹⁷⁰ *Caperton*, 129 S. Ct. at 2269 (Roberts, C.J., dissenting) (question 6).

¹⁷¹ *See supra* note 50.

The disqualification analysis applies to both trial and appellate judges. While trial judges deliberate and decide cases on their own, appellate judges are engaged in a “collective process of deliberation.”¹⁷² The very purpose of appellate deliberation is to allow for an uninhibited exchange of ideas. Regardless of whether an appellate judge authors or joins an opinion, the judge articulates his or her point of view to persuade or dissuade colleagues. It is not rare for a judge to change her mind based on the viewpoints expressed by a colleague either in conference or in a draft opinion. “[T]he influence of any single participant in th[e] process can never be measured with precision, [but] experience teaches . . . that each member’s involvement plays a part in shaping the court’s ultimate disposition.”¹⁷³ To try to discern whether a particular judge made a difference ignores the dynamics of “the collegial decisionmaking process that is the hallmark of multimember courts.”¹⁷⁴

Appellate judges shape judicial outcomes in ways other than by authoring or joining a majority opinion. The tone of an appellate opinion is often a product of compromise or concessions offered in order to reach unanimity. The very nature and complexity of appellate deliberations would make an outcome-determinative test impossible to apply. Thus, in response to the dissenters’ inquiry whether the judge’s vote must be “outcome determinative in order for his nonrecusal to constitute a due process violation,”¹⁷⁵ the answer is clearly “no.”

Continuing with their blinkered loyalty to the judge’s perspective, the dissenters speculated whether the nature of the judicial selection process alters the due process standard.¹⁷⁶ Does it matter if the election is partisan or nonpartisan or if the judge is subject to popular election or retention? Again, the answer is “no.” A judge who is subject to a retention election must nonetheless secure the vote of more than half of the electorate in order to retain her position.¹⁷⁷ Groups or individuals may wage a “just say no” campaign, in an effort to unseat the judge.¹⁷⁸ If the “just say no” campaign fails, the attacked judge may be as tempted to rule against her detractors as the judge who received direct contributions in a partisan election would be to rule in favor of her contributors.¹⁷⁹ Moreover, the deprivation of a fair trial

¹⁷² *Lavoie*, 475 U.S. at 831 (Brennan, J., concurring).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 833 (Blackmun, J., concurring).

¹⁷⁵ *Caperton*, 129 S. Ct. at 2270 (Roberts, C.J., dissenting) (question 13).

¹⁷⁶ *Id.* at 2271 (question 30).

¹⁷⁷ See generally B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429 (2001).

¹⁷⁸ See *id.* at 1431–36 (describing several bitter retention campaigns).

¹⁷⁹ A more complex question is raised when the “just say no” campaign is successful. In retention states, when a judge is not retained, the state’s appointment mechanism is triggered. In most

does not dissipate simply because the judge decides not to seek reelection.¹⁸⁰ The inquiry does not change; it is still a question of the probability of bias.

The dissent also questioned whether a judge's vote in other cases involving the judge's backers should be considered.¹⁸¹ The judge's vote in other cases, like the judge's express disclaimer of support,¹⁸² is a factor that the judge might consider when conducting a self-assessment.¹⁸³ But the fact that a judge has voted in favor of or against a party in other cases or disclaimed political support does not replace the comprehensive inquiry into probable bias. In *Bracy v. Gramley*, the Court recognized that a judge might camouflage bias or attempt to compensate for it in order to disguise actual corruption in other cases.¹⁸⁴ A judge who receives campaign contributions from a donor with many cases before the court could use this strategy by ruling against the donor in a few small cases, but favoring the donor in large cases that really matter.

F. Applicable Procedure: Questions 19, 33, 35, 37, 39, and 40

The dissenters' questions about procedure — including “[w]hat procedures must be followed to challenge a state judge's failure to recuse?”¹⁸⁵ — highlight a somewhat feigned, and ultimately diversionary approach.¹⁸⁶ Despite their perspective, the dissenters surely understand that the Due Process Clause contemplates fair, but not necessarily uniform state procedures.¹⁸⁷

states, the vacant position is filled by the governor. *See id.* at 1442 app. The governor may have been openly supportive of the special interest groups' efforts and may commit to appoint a judge based on philosophical consistencies between the appointee and the special interest groups. This occurred in Tennessee in 1996 when Governor Don Sundquist pledged to appoint only judges who supported capital punishment. *See* Tom Humphrey, *White Ouster Signals New Political Era*, KNOXVILLE NEWS SENTINEL, Aug. 4, 1996, at A1. This situation would raise a serious question of probable bias.

¹⁸⁰ *See Caperton*, 129 S. Ct. at 2269 (Roberts, C.J., dissenting) (question 7).

¹⁸¹ *Id.* at 2270 (question 16). Notably, the respondents in *Caperton* filed a supplemental brief on the day after oral argument detailing Justice Benjamin's votes in other cases involving A.T. Massey Coal Company based on statistics that were compiled by a state office. Gretchen Mae Stone, *Lawyers Want High Court To Consider Voting Record*, ST. J. (Charleston, W. Va.), Mar. 13, 2009, at 21.

¹⁸² *See Caperton*, 129 S. Ct. at 2270 (Roberts, C.J., dissenting) (question 17).

¹⁸³ *See id.* at 2263 (majority opinion).

¹⁸⁴ 520 U.S. 899, 905 (1997).

¹⁸⁵ *Caperton*, 129 S. Ct. at 2271 (Roberts, C.J., dissenting) (question 33).

¹⁸⁶ *See id.* at 2270–72 (questions 19, 33, 35, 37, 39, and 40).

¹⁸⁷ *See, e.g., Panetti v. Quarterman*, 127 S. Ct. 2842, 2856 (2007) (recognizing that as long as due process is satisfied, states may develop requirements for determining insanity in capital cases); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (recognizing that as long as due process is satisfied, states may develop requirements for determining mental retardation in capital cases).

States must feel free to develop their own procedures, as they accept the majority's invitation to revise, and, hopefully, fortify recusal standards. An existing federal statute¹⁸⁸ and revised state recusal rules¹⁸⁹ provide some guidance, as does the draft proposal from the ABA's Judicial Disqualification Project,¹⁹⁰ but most of that guidance relates to the substantive, rather than the procedural, aspects of recusal challenges.¹⁹¹ Therefore, I offer below some suggestions strictly about procedure, as I address the dissenters' concerns.

Regardless of their existing recusal framework, states should adopt specific procedural rules applicable to judicial recusal motions. The rules should require that recusal motions be in writing and include a concise, particularized statement of the reasons supporting the motion.¹⁹² The motion should be supported by affidavit, satisfying evidentiary requirements, and should include specific facts sufficiently definite and particular to convince a reasonable person that recusal is required.¹⁹³ Motions that fail to include specific grounds or that are based on unconfirmed rumors or unsubstantiated opinions should be denied. The motion should include counsel's certification that counsel has conducted a factual and legal inquiry and reasonably believes the motion to be factually based and legally authorized.

The state's rule should require prompt filing. For example, the rule might provide that the motion must be filed "at the earliest possible time after counsel acquires knowledge of and verifies the underlying facts." When the information that underlies the motion is known, counsel's failure to file the motion within a reasonable time of the judicial designation and at least thirty days before trial should result in waiver.

¹⁸⁸ 28 U.S.C. § 144 (2006) (setting forth procedure for alleging that a federal judge has personal bias or prejudice).

¹⁸⁹ See *supra* note 58.

¹⁹⁰ This is a project of the American Bar Association Standing Committee on Judicial Independence. For a draft of proposed Rule 2.11 and a report, see JUDICIAL DISQUALIFICATION PROJECT, DRAFT: REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT (2008), available at <http://www.ajs.org/ethics/pdfs/ABAJudicialdisqualificationprojectreport.pdf>. The report has not been considered officially by the ABA.

¹⁹¹ See *id.*; see also Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 525–34 (2007) (suggesting both substantive and procedural reforms).

¹⁹² The motion should be filed in the case in which recusal is sought.

¹⁹³ Motions filed without sufficient evidentiary support should be summarily denied unless supported by counsel's certificate that evidentiary support is likely to be discovered provided counsel is given a reasonable opportunity for further investigation. The rule should require that counsel certify and detail the investigative efforts that have been and will be undertaken to provide the evidentiary support for the motion.

Once the motion, certificate, and affidavits are filed, opposing counsel should be provided an opportunity to respond.¹⁹⁴ Discovery should be allowed only upon a showing of extraordinary circumstances.

The challenged judge may grant the motion. If the judge does not, he or she should be required to transfer the motion to an assigned judge¹⁹⁵ or recusal panel for decision.¹⁹⁶ The challenged judge may include a statement denying or clarifying the factual allegations, which must be provided to both sides.

In most cases, the assigned judge or panel should conduct a hearing on the motion, then issue a prompt written ruling explaining the result. By requiring a written explanation of recusal rulings, states enhance public respect for the judicial system, while establishing a body of precedent and facilitating meaningful appellate review. The standard for appellate review should be de novo with no presumption of correctness.¹⁹⁷

V. ACCEPTING RESPONSIBILITIES

In addition to enacting these modest procedural reforms, states should also strengthen judicial recusal standards, enforce campaign finance regulations, and expand disclosure requirements.¹⁹⁸ A state's recusal standards must address disqualification based on campaign contributions and campaign conduct. For example, a state's financial recusal rule might disqualify a judge based on the aggregate contributions to the judge's campaign during a specified time period.¹⁹⁹ Likewise, a state's conduct recusal rule might disqualify a judge who, dur-

¹⁹⁴ Although the parties' interests will not always be adversarial, fairness dictates that both sides should have an opportunity to be heard.

¹⁹⁵ States may choose to use special, senior, or retired judges, or active judges from other jurisdictions, but should not appoint judges who are associated closely with the judge whose recusal is sought. Judges who have served together on multi-judge courts or on statewide judicial committees may be influenced by their friendship or association or by the prospect of reciprocity.

¹⁹⁶ Some have suggested that judicial panels, rather than individual judges, make the recusal decision. Others suggest that the challenged judge on a state's high court consult with others before deciding whether to recuse. See Roy A. Schotland, *A Plea for Reality*, MO. L. REV. (forthcoming 2009). Others have suggested that states create recusal advisory boards to counsel judges about difficult recusal issues. See Goldberg et al., *supra* note 191, at 533-34.

¹⁹⁷ See JUDICIAL DISQUALIFICATION PROJECT, *supra* note 190. States must decide whether to allow an immediate appeal of the recusal ruling. Courts have reached different results on this issue, but the more persuasive approach favors an immediate appeal. An immediate appeal allows the state to honor the fundamental importance of the right to a fair tribunal and promote finality of decisions. See cases cited *supra* note 169. The filing of frivolous appeals can be discouraged by enforcing rules that impose fees and costs.

¹⁹⁸ These topics are discussed fully by others. See, e.g., Goldberg et al., *supra* note 191, at 527-30.

¹⁹⁹ See MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2008).

ing a campaign, indicated a willingness to rule a specific way on a particular issue or to reach a certain result in a case.²⁰⁰

Because rigorous recusal provisions alone are insufficient, states also must invigorate campaign finance regulations and disclosure requirements, particularly as they apply to judicial campaigns. States may choose to limit individual campaign contributions²⁰¹ and should adopt and enforce campaign contribution and expenditure disclosure requirements. In addition, states should require all judicial candidates to file copies of written campaign materials and transcripts of oral campaign advertising. Candidates also should be required to disclose their responses to special interest questionnaires and solicitations of group support and endorsements. Limiting individual contributions and invigorating disclosure requirements will not prevent or reveal the kinds of contributions and expenditures that were at issue in *Caperton*, but both measures would, in the absence of a more robust decision in *Caperton*, demonstrate a state's commitment to promoting integrity in judicial elections.

As a complementary component of recusal reform, states should enact statutes allowing for peremptory judicial challenges. Judicial peremptory challenge statutes, already in existence in several states,²⁰² allow parties to substitute one judge without stating a reason.²⁰³ By allowing each side to recuse a judge as a matter of course, litigants would be insulated against an overly strict application of *Caperton*'s constitutional disqualification rule.

As a supplement to these rule-based suggestions, independent citizen groups should encourage judicial candidates to agree to voluntary measures — for example, candidates can make broader disclosures of political and campaign activity than state law requires; sign pledges agreeing not to accept donations that exceed a limited amount; agree in advance to recusal in cases involving donors as parties or attorneys; and refuse to respond to special interest questionnaires. Such initiatives would thwart the untoward efforts of special interest groups to

²⁰⁰ I am aware that many states restrict judges from making “commitments” and “pledges and promises,” as does the ABA's Model Code of Judicial Conduct. See MODEL CODE OF JUDICIAL CONDUCT Canon 3B(10) (2004) (“A judge shall not, with respect to 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 the office.”). My suggestion is that the rule be tied to requirements for the disclosure of campaign conduct discussed in the subsequent paragraph.

²⁰¹ See, e.g., TEX. ELEC. CODE ANN. § 253.155 (Vernon Supp. 2008).

²⁰² See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 26.1, at 753 (2d ed. 2007) (stating that a “substantial minority” of states have judicial peremptory challenge statutes).

²⁰³ See JUDICIAL DISQUALIFICATION PROJECT, *supra* note 190. Montana, for example, refers to the procedure as a “substitution.” MONT. CODE ANN. § 3-1-804 (2007). The use of this term might address concerns that the practice is disparaging to judges. See *supra* p. 37.

identify candidates perceived to be sympathetic to their agendas, and thus worthy of their campaign largesse.

VI. CONCLUSION

Following the decision in *Republican Party of Minnesota v. White*, states faced difficult questions about *White*'s impact on judicial ethics provisions that restricted political speech and conduct.²⁰⁴ Many scholars urged courts to read *White* narrowly and limit it to its facts,²⁰⁵ while others pressed for an expansive reading, one that would eliminate other restrictions on speech and conduct in judicial elections.²⁰⁶ Success by advocates in post-*White* litigation led some states to eliminate political restrictions and others to soften restrictions considerably, resulting in a largely unchecked and unsavory financial arms race in judicial elections.²⁰⁷

Courts now face an eerily similar set of circumstances. Some observers urge a restrictive view of *Caperton*. Fortified by the majority's timid opinion, they argue that the decision is *sui generis* and must be confined to its extreme facts. They demand a circumscribed reading of *Caperton* and, taking the broadest hints from the *Caperton* dissenters, warn that any attempt to apply the case beyond its facts will be challenged.²⁰⁸

The Supreme Court in *White* and *Caperton* declined to preserve in the most straightforward and effective fashion the independence, im-

²⁰⁴ See, e.g., *Kan. Judicial Review v. Stout*, 519 F.3d 1107 (10th Cir. 2008) (challenging prohibitions on personal solicitation of political contributions and candidates' pledges, promises, and commitments); *Ind. Right to Life, Inc. v. Shepard*, 507 F.3d 545 (7th Cir. 2007) (challenging prohibition of candidates' pledges, promises, and commitments); *Pa. Family Inst., Inc. v. Black*, 489 F.3d 156 (3d Cir. 2007) (per curiam) (challenging prohibitions on candidates' responses to questionnaires eliciting candidates' views); *Republican Party of Minn. v. White*, 416 F.3d 738 (8th Cir. 2005) (challenging prohibition on candidates' partisan political activity and personal solicitation of political contributions); *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224 (6th Cir. 2004) (challenging prohibition of candidates' pledges); *Christian Coal. of Ala. v. Cole*, 355 F.3d 1288 (11th Cir. 2004) (challenging restrictions on responses to questionnaires); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65 (2d Cir. 2003) (challenging prohibitions on partisan political activity); *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005) (challenging prohibitions on candidates' promises, pledges, and commitments).

²⁰⁵ See, e.g., Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 233–38 (2004); Katherine A. Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After Republican Party of Minnesota v. White*, 48 S.D. L. REV. 262, 294–312 (2003).

²⁰⁶ See, e.g., Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 605–13 (2004).

²⁰⁷ See *White*, *supra* note 31, at 28–47.

²⁰⁸ James Bopp, attorney for the plaintiffs in *Republican Party of Minnesota v. White*, warns that “[i]f anybody tries to draw a rule from this that is generally applicable, they’re wrong They’re distorting the [C]ourt’s decision. It would be challengeable.” Amanda Bronstad, *Stage Set for Lawsuits over Judicial Recusal*, NAT’L L.J., June 22, 2009, at 8.

partiality, and integrity of state courts. Instead, in both cases, the Court relinquished responsibility for enforcing the guarantees of the Due Process Clause to the states. As this Comment argues, even if states are unwilling to reconsider the wisdom of electing judges, they may yet serve the worthy cause of assuring evenhanded justice by acting decisively in enforcing the due process promise. If states focus solely on the outlier facts, *Caperton*'s effect will be minimal, but if they adhere to elemental due process requirements, states may fulfill the responsibility thrust upon them and reinvigorate the fundamental right to a fair trial in a fair tribunal.