

3-1-2010

Judicial Recusal & Expanding Notions of Due Process

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JUDICIAL RECUSAL & EXPANDING NOTIONS OF DUE PROCESS

*Andrey Spektor & Michael Zuckerman**

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INTRODUCTION

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

Judicial elections began to gain popularity in the mid-nineteenth century “as part of the Jacksonian movement toward greater popular control of public office.”² By the Civil War, over half of the states elected their judges,³ and today thirty-nine states elect all or part of their judiciary.⁴ As many as 87% of all state judges face an election of some kind.⁵ As judicial elections have transformed from dignified low-key affairs into polarized political contests,⁶ critics, like Sandra Day O’Connor, have launched prominent efforts to persuade states to

¹ See *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2272 (2009).

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

³ See Day, *supra* note 2, at 365.

⁴ See, e.g., Randall T. Shepard, *Electing Judges and the Impact on Judicial Independence*, 42-JUN. TENN B.J. 23 (2006).

⁵ See Shepard, *supra* note 4, at 23.

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

eliminate the practice of judicial elections.⁷ Some states appear to be listening⁸—for good reason. Take the words of Richard Neely, an elected justice of West Virginia, for example, who once wrote, “[a]s long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away, but so is my job security.”⁹

Enter the 2009 Supreme Court decision, *Caperton v. A.T. Massey Coal Co.*¹⁰ At a minimum, *Caperton* exposes the pitfalls of judicial elections and calls into question the reach of the Due Process Clause in protecting a litigant’s right to a fair tribunal before a fair judge. Discussed in more detail below, the case involved the refusal of a state supreme court justice to recuse himself, where a litigant who later had an appeal pending before the justice spent over three million to support the justice’s campaign. The Supreme Court held that because there was an objective appearance of bias, due process required recusal. *Caperton* has reignited the debate over judicial elections and the circumstances where a judge must recuse himself to avoid violating the due process clause, with the media,¹¹ politicians,¹² academics,¹³ interest groups,¹⁴ judges,¹⁵ and lawyers¹⁶ all weighing in.

⁷ See Bill Mears, *Former Justice O’Connor Leads Push to End Judicial Elections*, CNN.COM, Dec. 15, 2009, <http://www.cnn.com/2009/CRIME/12/15/judicial.elections/index.html>.

⁸ See John Schwartz, *Efforts Begun to End Voting for Judges*, N.Y. TIMES, Dec. 23, 2009.

⁹ *Small Steps: The Road to Prosperity Runs Through the Judiciary*, THE ECONOMIST, Jan 21, 2010.

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

¹¹ See “*Caperton* Recourse Page,” Justice at Stake Campaign, http://www.justiceatstake.org/resources/in_depth_issues_guides/caperton_resource_page/index.cfm.

¹² See Erica Peterson, *WV Politicians React to Supreme Court*, WEST VIRGINIA PUBLIC BROADCASTING, June 8, 2009, available at <http://www.wvpubcast.org/newsarticle.aspx?id=9950>.

¹³ See “*Caperton v. Massey Coal* and the Recusal of State Court Judges,” Panel Discussion at Georgetown Univ. Law Center, Jan 26, 2010, available at <http://www.c-spanvideo.org/program/291663-1>.

¹⁴ See “*Caperton v. Massey*: Court Cases,” The Brennan Center for Justice, June 8, 2009, http://www.brennancenter.org/content/resource/caperton_v_massey/.

¹⁵ See Ed Brayton, *Michigan Leaders React to Caperton Ruling*, THE MICH. MESSENGER, June 19, 2009.

¹⁶ See Steve Foley, *WV Legal Experts React to Caperton v Massey Ruling*, The Minority Report, June 8, 2009, available at http://www.theminorityreportblog.com/blog_entry/steve_foley/2009/06/08/.

A review of the Supreme Court's recusal jurisprudence reveals the need for a due process test that balances constitutional concerns while taking into account the expanding role of the due process clause in mandating recusals. Beginning from the common-law, which required a direct pecuniary interest, the Court has gradually extended the requirement of recusal to include cases with less than direct financial interests, cases where previous judicial appearances had created a conflict, and most recently where there is an objective appearance of bias.

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

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

alleviating the dissenter’s concerns, while taking into account the concerns that drove the majority’s decision.

I. WHEN DUE PROCESS DEMANDS RECUSAL

a. Overview of Due Process

The Fourteenth Amendment to the U.S. Constitution provides that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁷ This language has been interpreted to protect both the substantive and procedural rights of individuals.¹⁸ Specifically, as one federal court recently explained, the Due Process Clause operates in three primary ways:¹⁹ (1) it incorporates many provisions of the Bill of Rights against the States;²⁰ (2) it bars certain government action that affects certain substantive rights “regardless of the fairness of the procedures used to implement them”²¹; and (3) it guarantees fair procedures.²²

¹⁷ U.S. CONST. amend. XIV § 1; *see also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976). The Due Process Clause is derived from the Magna Carta, which read in relevant part: “No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by lawful judgment of his peers and by the law of the land.” MAGNA CARTA, § XXXIX (1215); *see also* Bank of Columbia v. Okely, 4 (Wheat.) 235, 244 (1819) (“As to the Magna Carta, incorporated into the constitution . . . , after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government.”).

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

¹⁹ *See* Fieger v. Ferry, No. 04 CV 60089, 2007 U.S. Dist. LEXIS 71274, at 16-18 (E.D. Mich. 2007); *see also* Daniels v. Williams, 474 U.S. 327, 336-37 (1986) (Stevens, J., concurring).

²⁰ This is the rationale behind Section 1983 claims. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990).

²¹ Zinermon v. Burch, 494 U.S. 113, 125. This substantive guarantee extends to many areas of law. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); Meyer v. Nebraska, 262 U.S. 390 (1923) (education in foreign languages).

²² *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

With regard to the guarantee of fair procedures—commonly referred to as procedural due process—courts closely scrutinize state action that has the effect of depriving an individual of “life, liberty, or property.”²³ The Supreme Court has found such violations in many contexts,²⁴ including administrative action,²⁵ the reach of a state’s extraterritorial jurisdiction,²⁶ and the procedures accompanying the issuance of a writ of garnishment.²⁷ Regardless of the context in which a procedural due process violation is alleged, the Court applies a two-step analysis. The first step is determining whether the state has in fact deprived an individual of a protected interest – life, liberty, or property.²⁸ A deprivation of a protected interest, however, is not itself unconstitutional;²⁹ rather, once the court has found a deprivation of a protected interest, the second step is to determine whether the state deprived the individual of that interest without due process of law.³⁰ Put another way, a constitutional violation will arise only if the court finds that

²³ An interesting question of state action arises in the context of prison facilities operated by private contractors. In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), for example, the Court assumed that due process applies in privatized correctional institutions, but did not decide the question. See also *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

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

²⁵ Compare *Londoner v. City and County of Denver*, 210 U.S. 373 (1908) with *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

²⁶ See, e.g., *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁷ See, e.g., *North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

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

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

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

the state deprived the individual of that interest without due process of law.³¹ Therefore, a procedural due process violation is independent of the merits of the underlying claim.³²

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

The *Mathews* test requires courts to balance three factors: “First, the private interest that will be affected by official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural

³¹ *Zinermon v. Burch*, 494 U.S. 113, 125.

³² *Mathews*, 424 U.S. 319, 330-01 (1976) (noting that the respondent’s “constitutional challenge is entirely collateral to his substantive claim of entitlement.”).

³³ *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *see also* *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue Process is flexible and calls for such procedural protections as the particular situations demands.”); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-63 (Frankfurter, J., concurring) (“The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”). Nonetheless, note that it is clear that at its core, procedural due process requires notice and opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also* *People v. David W.*, 733 N.E. 2d 206 (N.Y. 2000) (noting that the “bedrock of due process is notice and opportunity to be heard” (citing, *inter alia*, *Mathews*, 424 U.S. at 333; *Goldberg v. Kelly*, 397 U.S. 254, 265-68; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950))).

³⁴ *See* discussion *supra* notes ___ and accompanying text.

³⁵ *Mathews*, 424 U.S. at 333.

³⁶ *See* Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental ‘States’ Rights*, 46 WM & MARY L. REV. 213, 252 n. 177 (2004); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975) (noting that “we have witnessed a greater expansion of procedural due process in the last years than in the entire period since ratification of the constitution.”).

³⁷ 397 U.S. 254 (1970).

³⁸ *Id.* at 261-72.

safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”³⁹

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

b. Early Recusal Challenges

The Due Process Clause does not “impose a constitutional requirement that the states adopt statutes that permit disqualification for bias or prejudice.”⁴⁴ In fact, as the Supreme Court has stated, “only in the most extreme cases would disqualification” be constitutionally mandated.⁴⁵ At its most basic level, the Due Process Clause incorporates the common-law rule

³⁹ *Mathews*, 424 U.S. at 335.

⁴⁰ See *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009) (citing, *inter alia*, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Winthrow v. Larkin*, 421 U.S. 35, 47 (1975)).

⁴¹ See generally Richard E. Flamm, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES (2007).

⁴² See *Caperton*, 129 S.Ct. at 2257 (“Under our precedents there are objective standards that require recusal when ‘the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.’”) (quoting *Winthrow*, 421 U.S. at 47)).

⁴³ *In re Murchinson*, 349 U.S. 133, 136 (1955); see also *Caperton*, 129 S.Ct. at 2259; *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980) (“[T]he requirement of neutrality has been jealously guarded by this Court.”); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (noting that an unbiased tribunal is essential to a fair hearing). The Supreme Court has further observed that “[t]he theory of the law is that any juror who has formed an opinion cannot be impartial.” *Reynolds v. United States*, 98 U.S. 145, 155 (1878). Put another way, an accused has the right to be tried by “a public tribunal free from prejudice, passion, excitement and tyrannical power.” *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940).

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

⁴⁵ See *Lavoie*, 475 U.S. at 820 (requiring disqualification of a state supreme court justice where the disposition of the matter before the court would affect that justice’s interest in a separate legal action).

that recusal is required when a judge has a “direct, personal, substantial, pecuniary interest” in a case.⁴⁶ As the Supreme Court once noted, this common-law rule is derived from the maxim that “[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”⁴⁷ Yet as discussed in the text that follows, the Supreme Court has gradually expanded this common-law rule over the last century to require recusal based on due process in new situations.

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

Specifically, the Court held:

Every procedure which would offer a possible temptation to the average man as a judgment to forget the burden of proof required to convict the defendants, or which might lead him not to hold the balance nice, clear and true between the States and the accused, denies the latter due process of law.⁵⁰

In so holding, the Court departed from the narrow common-law focus on direct pecuniary interest. Instead, the decision sought to protect against those interests that might attempt adjudicators to “disregard neutrality.”⁵¹ Indeed, as the Supreme Court recently explained, the due process violation in *Tumey* “was less than what would have been considered personal or direct at

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

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 535.

⁵⁰ *Id.* at 532.

⁵¹ See *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2260 (2009).

common law”⁵² In a number of subsequent decisions, the Supreme Court further defined and expanded the reach of *Tumey*.⁵³

In a second series of cases, the Supreme Court further expanded the reach of the due process clause, once again departing from the common-law of recusal. These cases “emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding.”⁵⁴ In *In re Muchinson*,⁵⁵ a trial judge charged a defendant with contempt after the defendant refused to answer the judge’s questions; the judge also charged another individual with perjury for failing to answer the judge’s questions truthfully.⁵⁶ After the trial, the very judge that charged both individuals also convicted them.⁵⁷ The defendants appealed, and the Supreme Court set aside their convictions as violative of Due Process.⁵⁸

Although recognizing that the standard for disqualification “cannot be defined with precision,” the Court held that in this case, “[h]aving been a part of a [one-man grand jury process] a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.”⁵⁹ The Court reasoned that, “[a]s a practical matter it is difficult if

⁵² *Id.* at 2259-60.

⁵³ In *Ward v. Village of Monroeville*, for instance, the Court, in facts similar to *Tumey*, invalidated a system whereby a town mayor would impose fines that went not the town’s general treasury. See 409 U.S. 57 (1972). Although the mayor had no direct, personal interest in assessing a fine, the Court reasoned that a “judge’s financial stake need not be as direct or positive as . . . in *Tumey*.” *Caperton*, 129 S.Ct. at 2260. In a later series of cases, the Court has held that it is permissible for the trial judge to have been involved in some earlier proceedings in the case. See, e.g., *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (noting that issuing arrest warrants and presiding over arraignments does not preclude the trial judge from ultimately hearing the case, even though the judge had to make a preliminary determination of probable cause). Cf. *Lavoie*, 475 U.S. at 822-23 (holding that a justice casting the deciding vote on a state high court to uphold high punitive award while acting as lead plaintiff in identical case below violated due process, although noting that “the degree or *kind* of interest is sufficient to disqualify a judge from sitting ‘cannot be defined with precision’”) (internal citation omitted).

⁵⁴ See *Caperton*, 129 S.Ct. at 2261.

⁵⁵ 349 U.S. at 133.

⁵⁶ *Id.* at 134-35.

⁵⁷ *Id.* at 135.

⁵⁸ *Id.* at 139.

⁵⁹ *Id.* at 137.

not impossible for a judge to free himself from the influence of what took place in his ‘grand-jury’ secret session.”⁶⁰ The Court distinguished this from ordinary grand jury proceedings, because here the jury was part of the accusatory process.⁶¹

Next, the Court in *Mayberry v. Pennsylvania*⁶² considered whether the trial judge who would be sentencing convicted defendants may also preside over their criminal contempt charges, for contempt committed against the same trial judge. The Court held that “a defendant in a criminal contempt proceeding should be given a public trial before a judge other than the one reviled by the contemnor.” As the Court reasoned, a judge in these circumstances “necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.”⁶³

c. Recent Expansion of Due Process

i. *Caperton v. A.T. Massey Coal Co., Inc.*

Perhaps the most significant expansion of due process with respect to judicial recusals came in 2009.⁶⁴ In *Caperton*, the Court held that due process requires a judge to recuse herself when, based on “objective and reasonable perceptions,” there is a “probability of bias” by the judge towards one of the litigants.⁶⁵ The facts leading up to the Supreme Court case began in 2002, when a West Virginia state jury returned a verdict against A.T. Massey Coal Co., Inc.

⁶⁰ *Id.* at 138.

⁶¹ *Id.* at 137.

⁶² 400 U.S. 455 (1971).

⁶³ *Id.* at 465.

⁶⁴ *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2262 (2009) (“This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.”). This latest modification to the Due Process recusal inquiry comes on the heels of *White*, which considered the First Amendment rights of judicial candidates to announce their views during a campaign for judicial office. *See supra* Section II

⁶⁵ *Id.* at 2263

(“Massey”), finding it liable to Hugh Caperton, for \$50 million in compensatory damages on a variety of tort theories.⁶⁶ The trial court denied Massey’s post-verdict motions in 2004.⁶⁷

Having failed to receive relief at the trial court, Don Blankenship, Massey’s chairman, resorted to politics in an attempt to reverse the judgment against his company. Before the Supreme Court of Appeals of West Virginia heard Massey’s appeal, Blankenship decided to support a local attorney, Brent Benjamin, who was campaigning to replace Justice McGraw of the Supreme Court.⁶⁸ Blankenship not only contributed \$1,000 to Benjamin’s campaign committee, but he also donated more than \$2.5 million to a so-called 527 organization that opposed McGraw and supported Benjamin;⁶⁹ this significant donation constituted more than two-thirds of the organization’s total fund-raising.⁷⁰ Blankenship also gave over \$500,000 in independent expenditures in support of Benjamin’s candidacy.⁷¹ As the Supreme Court noted, Blankenship’s contributions and expenditures “were more than the total amount spent by all other Benjamin’s supporters and three times the amount spend by Benjamin’s own committee.”⁷² In the end, Benjamin won the 2004 judicial election, receiving 53.3% of the vote, defeating incumbent Justice McGraw who received 46.7% of the vote.⁷³

As Massey’s appeal reached the Supreme Court of Appeals of West Virginia, Massey filed a motion to disqualify the newly-elected Justice Benjamin under both a state statute and the

⁶⁶*Id.* at 2257. The other defendants included Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales.

⁶⁷*Id.* at 2265.

⁶⁸ *Id.* at 2257.

⁶⁹ *Id.*

⁷⁰ *Id.* The organization was called “And For the Sake of Kids,” and was organized under 26 U.S.C. § 527. For background on so-called 527s, see generally Richard Kornylak, Note, *Disclosing the Election-Related Activities of Interest Groups Through 527 of the Tax Code*, 87 CORNELL L. REV. 230 (2001).

⁷¹ *Caperton*, 129 S.Ct. at 2258.

⁷² The petitioner in the Supreme Court further contends that “Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.” *Id.* at 2257.

⁷³ *Id.*

due process clause of the U.S. Constitution.⁷⁴ The Court denied the motion.”⁷⁵ The appeal reached the high court in November 2007, and in a 3-2 ruling, the Court reversed the \$50 million verdict against Massey in an opinion joined by Justice Benjamin.⁷⁶

The defendants sought a rehearing and moved for disqualification of three of the five justices who ruled on the appeal.⁷⁷ Two of the justices agreed to recuse themselves, while Justice Benjamin declined to do so,⁷⁸ with one justice warning that “Blankenship’s bestowal of his personal wealth, political tactics, and ‘friendship’ have created a cancer in the affairs of this Court.”⁷⁹ At the rehearing, Justice Benjamin was acting as Chief Justice and selected two additional justices to hear the appeal.⁸⁰ In April 2008, the high court once again reversed the jury verdict, relieving Massey of its \$50 million tort liability.⁸¹ Justice Benjamin found himself in the 3-2 majority again with two justices writing a scathing dissent: “Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored or served by the majority.”⁸² The U.S. Supreme Court granted *certiorari* and reversed.

After noting that the U.S. Supreme Court had not previously considered a recusal challenge in the context of judicial elections, the Court reiterated that the test is an objective

⁷⁴ *Id.* at 2258.

⁷⁵ *Id.* (finding “no objective information . . . to show that this Justice has a bias for or against any litigant, that this justice has prejudged the matters which compromise this litigation, or that this Justice will be anything but fair and impartial.”).

⁷⁶ The opinion was not unanimous. For instance, Justice Starcher dissented, opining that the “‘majority’s opinion is morally and legally wrong.’” *Id.* (quotation and citation omitted).

⁷⁷ *Id.* at 2254.

⁷⁸ As the Court points out, Justice Benjamin wrote four separate opinions during the course of the appeal detailing why no actual bias exists. *Id.* at 2262-63.

⁷⁹ *Id.* at 2258.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2259.

one.⁸³ That is, “the Due Process Clause . . . do[es] not require proof of actual bias.”⁸⁴ In the context of judicial elections, the Court held that “there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judges election campaign when the case was pending or imminent.”⁸⁵ To define this test, the Court asked “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantees of due process is to be adequately implemented.’”⁸⁶

Turing to the facts of the case, the Court concluded that Blankenship’s campaign activities “had a significant and disproportionate influence in placing Justice Benjamin on the case.”⁸⁷ This is evident, the Court reasoned, from the large amount of money that Blankenship spent on this campaign.⁸⁸ Although the Court conceded that Blankenship’s campaign activities might not have directly caused Justice Benjamin’s electoral victory, this was of little significance to the Court. The size of Blankenship’s contributions relative to the total amount spent in the election, combined with the small margin of victory, allowed the Court to find that “the risk that Blankenship’s influence engendered actual bias is sufficiently substantial that it ““must be forbidden if the guarantee of due process is to be adequately implemented.””⁸⁹ The Court further noted the close temporal relationship between the campaign contributions and the justice’s

⁸³ *Id.* at 2263 (“The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.”).

⁸⁴ 2263 (*citing, inter alia*, *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)).

⁸⁵ *Id.* at 2263-64

⁸⁶ *Id.* at 2264 (*quoting* *Withrow v. Larkin*, 421 U.S. 35 (1976)).

⁸⁷ *Id.* at 2265.

⁸⁸ *Id.* at 2264

⁸⁹ *Id.* at 2264 (internal quotation ommitted).

election such that it was “reasonably foreseeable” when Blankenship made the contributions that the appeal would come before Justice Benjamin if he won the election.⁹⁰

The Court concluded by opining that it’s addressing “an extraordinary situation,” and that its holding will not cause adverse consequences.⁹¹ Just as with previous decisions addressing extreme facts giving rise to recusal, the Court believed that lower courts are “quite capable” of applying the standard that it announced in the case.⁹² This is particularly true because state statutes often require recusal above and beyond the constraints of due process that the Court was announcing.⁹³

Chief Justice Roberts wrote a vigorous dissent, in which he argued that *Caperton* will “inevitably lead to an increase in allegations that judges are biased,” thus eroding the public’s confidence in the impartiality of the judiciary.⁹⁴ After explaining how the Court has departed from its prior precedents, the Chief Justice poses 40 questions to highlight the uncertainties that he believes result from the majority’s holding.⁹⁵ In the end, the Chief Justice predicted that the Court will “regret” this decision because lower courts will expand its boundaries, “each claiming the title of ‘most extreme’ or ‘most disproportionate’ facts.”⁹⁶

Justice Scalia also dissented, arguing that “the principal consequence of today’s decision is to create vast uncertainty” in the 39 states that elect their judges.⁹⁷ He predicted the rise of the “*Caperton* claim” and the indeterminate law that will have to be applied when adjudicating such

⁹⁰ *Id.* at 2264-65

⁹¹ *Id.* at 2265.

⁹² *Id.* at 2266

⁹³ *Id.* at 2267 (“Because codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.”).

⁹⁴ *Id.* at 2274 (Roberts, C.J., dissenting).

⁹⁵ *Id.* at 2269-73 (Roberts, C.J., dissenting).

⁹⁶ *Id.* 2274 (Roberts, C.J., dissenting).

⁹⁷ *Id.* at 2274 (Scalia, J., dissenting).

claims.⁹⁸ Justice Scalia also lamented that the decision will reinforce the public perception that litigation is simply a game.⁹⁹ In this case, Justice Scalia believes that Court has done more harm than good in seeking to correct an imperfection in our system by “expansion of our constitutional mandate in a manner ungoverned by any discernable rule.”¹⁰⁰

ii. Scope of *Caperton* & Boundaries of Due Process

Caperton has fundamentally changed the interplay between judicial recusals and the Constitution. Given the significance of *Caperton*, and the questions it left open, the boundaries of the decision are unclear and lower courts may interpret the case as an invitation to require recusal in an even greater number of situations.¹⁰¹

As a preliminary matter, courts interpreting *Caperton* will undoubtedly struggle with framing the facts of the actual case. On the one hand the facts have the “feel of a best seller,”¹⁰² not only because they *did* make for a best seller—John Grisham’s “The Appeal”—but also because they ooze corruption and unfairness. In the Court’s own words they are “extreme,” “extraordinary,” “rare,” and “exceptional.”¹⁰³ On the other hand, both the majority and the public may have exaggerated the facts.¹⁰⁴

And even on the undisputed facts, as Chief Justice Roberts points out, it is unclear as to how extreme they are really are.¹⁰⁵ Blankenship had contributed to other candidates in the past,

⁹⁸ *Id.*

⁹⁹ *Id.* at 2274 (Scalia, J., dissenting).

¹⁰⁰ *Id.* at 2275 (Scalia, J., dissenting).

¹⁰¹ Stephen M. Hoersting & Bradley A. Smith, Speech and Elections: The *Caperton* Caper and Kennedy Conundrum, 2008-09 CATO SUP. CT. REV. 319, 319 (noting that the *Caperton* standard is a “largely unworkable standard for judicial recusal.”).

¹⁰² Joan Biskupic, *Supreme Court Case With the Feel of a Bestseller*, USA TODAY, Feb. 16, 2009.

¹⁰³ *See Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2263, 2265, 2267 (2009).

¹⁰⁴ *See Hoersting & Smith, supra* note 101, at 322-23 (“The press depiction of the *Caperton* facts is enough to horrify anyone who believes in impartial justice. It is also completely incorrect.”).

¹⁰⁵ *Caperton*, 129 S.Ct. at 2273.

which the dissenters found “undercut[] any notion that his involvement in this election was ‘intended to influence the outcome’ of particular pending litigation.”¹⁰⁶ His only direct contribution amounted to \$1,000 and his independent expenditures were not so outlandish when compared to what other lawyers, in aggregate, spent on Benjamin’s opponent.¹⁰⁷ The dissenters were also unconvinced that money made the difference in this election—Benjamin’s opponent may have been brought down by his lack of endorsements, refusal to participate in debates, and a disturbing speech.¹⁰⁸ And he lost by a healthy margin (7 points), suggesting that Blankenship’s money wasn’t the deciding factor.¹⁰⁹

The holding of the case is no less controversial. It raises questions like “how much money is too much money?” or “[w]hat level of contribution or expenditure gives rise to a ‘probability of bias?’”—two of the more than forty questions asked by the dissent.¹¹⁰ But the more the fundamental issue is whether *Caperton* is even limited to money. Reading the holding out of context, the answer seems to be “yes”:

[w]e conclude that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case *by raising funds* or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the *contribution’s relative size in comparison to the total amount of money*

¹⁰⁶ *Id.* at 2274.

¹⁰⁷

Blankenship's independent expenditures do not appear "grossly disproportionate" compared to other such expenditures in this very election. "And for the Sake of the Kids" -- an independent group that received approximately two-thirds of its funding from Blankenship -- spent \$ 3,623,500 in connection with the election. But large independent expenditures were also made in support of Justice Benjamin's opponent. "Consumers for Justice" -- an independent group that received large contributions from the plaintiffs' bar -- spent approximately \$ 2 million in this race. *Id.* at 682a-683a, n. 41. And Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was "intended to influence the outcome" of particular pending litigation.

Id. at 2273-74.

¹⁰⁸ *Id.* at 2274.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2269-72.

*contributed to the campaign, the total amount spent in the election, and the apparent affect such contribution had on the outcome of the election.*¹¹¹

The majority seems particularly troubled by the possibility of one of the litigants buying her own judge.¹¹² The underpinning of the holding, however, is broader than financial contributions; the problem that the court attempts to redresses in *Caperton*, is the objective “probability of bias.”¹¹³ Indeed, to reach its conclusion, the Court builds on the “principles” set out in a handful of cases for the sole purpose of highlighting the fundamental problem of judicial bias (rather than just influence through financial incentives).¹¹⁴ Revealingly, none of those cases involved direct contributions and one—*In re Muchison*—had nothing to do with money.¹¹⁵ Of course, Supreme Court precedent always develops to encompass different circumstances and factual scenarios. But given *Caperton*’s focus on the probability of bias, litigants in the courtroom of a judge who had been elected in “significant” part and as a result of a “disproportionate” support from crusaders against the litigants, would have a plausible claim stemming directly from the holding of the case.¹¹⁶

This would not require a particularly robust interpretation of *Caperton*; as the dissenters point out, it logically flows from the holding: “there are a number of factors that could give to a ‘probability’ or ‘appearance’ of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, *prior speeches and writings*, religious

¹¹¹ *Id.* at 2264-65 (emphasis provided).

¹¹² *Id.* at 2265 (“Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when -- without the consent of the other parties -- a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin’s recusal”).

¹¹³ *Id.* at 2263.

¹¹⁴ *Id.* at 2262.

¹¹⁵ *Id.* at 2261.

¹¹⁶ *Id.* at 2264 (finding that the campaign efforts “had a significant and disproportionate influence in placing Justice Benjamin on the case”). It is worth noting that the speech would not have to be the necessary or sufficient factor in the judges victory. *See id.*

affiliation, and countless other considerations.”¹¹⁷ Chief Justice Roberts is alarmed by how broad the majority’s holding seems to be: as the Chief Justice wrote:

. . . the standard the majority articulates—‘probability of bias’ fails to provide clear, workable guidance for future cases. At the most basic level it is unclear whether the new probability of bias standard is *somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally*.¹¹⁸

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

What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received "disproportionate" support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are "tough on crime," must the judge recuse in all criminal cases? 20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?¹¹⁹

These uncertainties arise partly because the majority emphasizes the “extremeness” of the case,¹²⁰ with the hope that courts will not be flooded with non-meritorious *Caperton* claims,¹²¹ but says nothing about limiting it to financial contributions. It is not difficult to imagine a “speech” *Caperton* claim that is more “extreme” than one involving a miniscule financial contribution.

¹¹⁷ *Id.* at 2268 (emphasis provided).

¹¹⁸ *Id.* at 2269 (emphasis provided).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2272 (“To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority’s only answer is that the present case is an “extreme” one, so there is no need to worry about other cases. The Court repeats this point over and over. (“this is an exceptional case”); (“On these extreme facts”); (“Our decision today addresses an extraordinary situation”); (“The facts now before us are extreme by any measure”); (Court’s rule will “be confined to rare instances”)) (internal citations omitted).

¹²¹ *Id.* at 2266 (“As such, it is worth noting the effects, or lack thereof, of the Court’s prior decisions. Even though the standards announced in those cases raised questions similar to those that might be asked after our decision today, the Court was not flooded with *Monroeville* or *Murchison* motions. That is perhaps due in part to the extreme facts those standards sought to address. Courts proved quite capable of applying the standards to less extreme situations.”).

Even if the Court did try to limit to the holding to instances involving financial contributions, expecting lower courts to be selective in applying the rule in only “extreme” cases is not realistic —and may indeed be “just so much whistling past the graveyard.”¹²² The history of federal jurisprudence abounds with examples of the Court setting out rules born out of some “extreme” cases only to see it grow in the district courts.¹²³ The dissent provides one such “cautionary tale,”¹²⁴ but there are others. For instance, in 2007 the Supreme Court came down with its *Twombly v. Bell Atlantic* decision that raised the pleading standard in certain antitrust actions.¹²⁵ Although the decision appeared to be limited to the antitrust context, many lower courts quickly seized upon its holding as grounds to raise the pleading in other types of cases.¹²⁶ Only two years later, after much uncertainty in the lower courts,¹²⁷ the Supreme Court decided *Ashcroft v. Iqbal*, which held that *Twombly*’s heightened pleading is generally applicable in federal court.¹²⁸

¹²² *Id.* at 2272.

¹²³ *See id.* (“There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: ‘Hard cases make bad law.’”).

¹²⁴ The Court summed it up as follows:

Consider the cautionary tale of our decisions in *United States v. Halper* and *Hudson v. United States*. Historically, we have held that the Double Jeopardy Clause only applies to criminal penalties, not civil ones. But in *Halper*, the Court held that a civil penalty could violate the Clause if it were “overwhelmingly disproportionate to the damages [the defendant] has caused” and resulted in a “clear injustice.” 490 U.S., at 446, 449. We acknowledged that this inquiry would not be an “exact pursuit,” but the Court assured litigants that it was only announcing “a rule for the rare case, the case such as the one before us.”

Just eight years later, we granted certiorari in *Hudson* “because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*.” The novel claim that we had recognized in *Halper* turned out not to be so “rare” after all, and the test we adopted in that case -- “overwhelmingly disproportionate” -- had “proved unworkable.” We thus abandoned the *Halper* rule, ruling our “ill considered” “deviation from longstanding double jeopardy principles.”

Id. at 2272-73 (internal citations omitted).

¹²⁵ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹²⁶ *See, e.g., Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007); *Leading Cases, Pleading Standards*, 121 HARV. L. REV. 305 (2007).

¹²⁷ Hon. Colleen McMahon, 41 SUFFOLK U. L. REV. 851, 852 (2008) (“Because *Twombly* is so widely cited, it is particularly unfortunate that no one quote understands what the case holds.”).

¹²⁸ *See Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).

Whether “*Caperton* motions” for recusals based on the judicial candidates’ platforms will be readily granted as a matter of straight application of *Caperton*, or because the holding is not explicitly limited to financial contributions, or because there is seldom uniformity in the application of new standards to the “rare” circumstances . . . whatever the reason may be, the distinct possibility that courts will have to deal with a “variety of *Caperton* motions,” looms large.¹²⁹ Only with the application of a careful balancing test articulated in *Mathews*, can the court be sure that *Caperton* affords adequate due process protection to the litigant in a potentially biased courtroom without sacrificing the confidence in our judicial system or the candidates’ First Amendment rights.¹³⁰

II. FIRST AMENDMENT LIMITATIONS ON RECUSAL

a. First Amendment Rights of Judicial Candidates

Just as the Due Process Clause protects the right of litigants to a fair tribunal, the First Amendment protects the judicial candidates’ freedom of speech.¹³¹ It is worth noting at the outset that (as the controversial recent Supreme Court decision reminded us) the first amendment includes the right to give money.¹³² More relevant for this discussion, however, is the idea that the amendment also protects the right to *receive* money.¹³³ If the Supreme Court or the circuit courts agree, then the argument in this section that there are pressing first amendment concerns in recusal cases is even more forceful. But because this paper focuses on recent Supreme Court

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

¹³⁰ *Id.* at 2274 (“It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias,” will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.”).

¹³¹ See U.S. CONST. amend I; *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

¹³² *Citizens United v. FEC*, 175 L.Ed. 2d 753 (2010).

¹³³ See *Dean v. Blumenthal*, 577 F.3d 60, 70 (2d. Cir. 2009).

case law, where specific first amendment considerations have been recognized, the discussion that follows centers on judicial candidates' speech. In a landmark decision, *Republican Party v. White*, the Supreme Court held that a state may not prohibit judicial candidates from explaining their views on disputed legal issues.¹³⁴ To be sure, judicial recusals are different from state canons that directly regulate speech. Nevertheless, as a result of *White* even mandatory recusals, with their potential to chill speech, give rise to First Amendment concerns.

Like most states, Minnesota had judicial conduct canons, which were based on the ABA Model Code of Judicial Conduct.¹³⁵ At issue in *White* was Minnesota's "announce clause" that stated that "a candidate for a judicial office, including an incumbent judge, [shall not] announce his or her views on disputed legal or political issues."¹³⁶ The controversy arose when Gregory Wersal, running for associate justice of the Minnesota Supreme Court, distributed literature in which he criticized several decisions of the Minnesota Supreme Court.¹³⁷ After a complaint was filed with the agency responsible for prosecuting ethical violations of judicial candidates, Wersal withdrew from the race.¹³⁸

Not to be deterred, Wersal ran again, two years later, this time seeking an advisory opinion from the agency on whether it planned to enforce the announce clause.¹³⁹ The agency's response was equivocal: although it had doubts about the constitutionality of the provision, it was unable to answer Wersal's inquiry because he did not submit a list of announcements that he

¹³⁴ 536 U.S. 765 (2002).

¹³⁵ *Id.* at 768.

¹³⁶ See MINN. CODE OF JUDICIAL CONDUCT, CANON 5(A)(3)(d)(i) (2000).

¹³⁷ *White*, 536 U.S. at 765.

¹³⁸ *Id.* at 769.

¹³⁹ *Id.*

would be making.¹⁴⁰ Wersal subsequently filed a lawsuit in federal court that culminated in the *White* decision.¹⁴¹

The Supreme Court was careful in limiting its holding to the announce clause, which was separate from the clause that prohibited candidates from making promises other than “faithful and impartial performance of the duties of the office” (the pledge or promise clause).¹⁴² The Court’s interpretation of the announce clause, however, was more expansive than what the Minnesota Supreme Court, the District Court, and the Eighth Circuit offered.¹⁴³ The Court concluded that the clause prohibited a candidate “from stating his views on any specific nonfanciful legal question . . . except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.”¹⁴⁴

Because the announce clause was a content-based regulation of speech and also burdened a category of speech that is at the core of what the First Amendment protects, the Court applied strict scrutiny.¹⁴⁵ Without deciding whether impartiality is a compelling interest,¹⁴⁶ or indeed even what interest was advanced by the state, the Court held that the announce clause was not narrowly tailored to any goal that could rise to the level of compelling.¹⁴⁷ Quite simply, the state

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 770 (“All the parties agree this is the case, because the Minnesota Code contains a so-called “pledges or promises” clause, which *separately* prohibits judicial candidates from making ‘pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office’ . . . a prohibition that is not challenged here and on which we express no view.”); *see also* Family Trust Found. Of Ky., Inc. v. Ky. Judicial Conduct Comm’n 388 F.3d 224, 227 (6th Cir. 2004) (“Although the Supreme Court’s decision in *White* applied only to an announce clause and did not involve promises and commit clause, the district court found that the difference in this case is simply one of label: the State has enforced the promises and commit clause as a de facto announce clause, and therefore the State is unlikely to succeed in light of the binding precedent in *White*.”).

¹⁴³ *White*, 536 U.S. at 771-72.

¹⁴⁴ *Id.* at 773.

¹⁴⁵ *Id.* at 775.

¹⁴⁶ Courts interpreting *White* have since found that judicial impartiality can be a compelling goal. *See e.g.*, Jenevein v. Willing, 493 F.3d 551, 559 (5th Cir. 2007) (“An impartial judiciary, while a protean term, translates here as the state’s interest in achieving a courtroom that at least on entry of its robed judge becomes a neutral and disinterested temple, in appearance and fact—an institution of integrity, the essential and cementing force of the rule of law. That this interest is compelling cannot be gainsaid.”).

¹⁴⁷ *White*, 536 U.S. at 776-77.

was regulating speech based on its content, which in the eyes of the majority has little to do with impartiality.¹⁴⁸ As the Court explained, “when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.”¹⁴⁹

While the majority opinion clearly left the door open for lower courts to find that judicial impartiality is a compelling interest, it has provided little guidance on how a state canon’s restriction on speech can ever be narrowly tailored. A federal appellate court has suggested one answer. In *Jenevein v. Willing*, a state judge facing public pressure over his refusal to withdraw from a case, chose to don his robe and hold a press conference in his courtroom.¹⁵⁰ The commission in charge of investigating ethical charges, issued a censure order against the judge.¹⁵¹ The Fifth Circuit held that the order could only survive strict scrutiny if it censured the judge for using state equipment, his robe, and the courtroom instead of a public forum: “[t]oday we say only that the state can put the courtroom aside.”¹⁵² The commission, however, went over the line by directing the order at the content of the judge’s speech.¹⁵³

Perhaps the most forceful and memorable lines of *White* came from Justice O’Connor’s concurrence. A critic of judicial elections, Justice O’Connor, observed that Minnesota “has voluntarily taken on the risks to judicial bias” by instituting the practice of popularly electing judges.¹⁵⁴ As one court summarized O’Connor’s argument, “the state cannot . . . attempt to have

¹⁴⁸ *Id.* at 776.

¹⁴⁹ *Id.* at 776-77.

¹⁵⁰ 493 F.3d 551, 561 (5th Cir. 2007).

¹⁵¹ *Id.* at 560.

¹⁵² *Id.* at 561.

¹⁵³ *Id.* at 562.

¹⁵⁴ *See* *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002).

it both ways by electing its judiciary yet simultaneously gagging its judicial candidates and thus preventing the voting public from receiving the information necessary to cast an informed vote.”¹⁵⁵

One of the questions purposefully left open by *White* is whether the “commit” or “pledge” clauses also run afoul of the First Amendment.¹⁵⁶ No consensus exists either among state or federal courts on whether these regulations are like the announce clause struck down in *White* and therefore unconstitutional.¹⁵⁷

Even if appellate courts or the Supreme Court ultimately limit *White* to announce clauses, uncertainty remains over “how, and whether, this new freedom can coexist with the goal of maintaining a fair, independent, and impartial judiciary.”¹⁵⁸ Armed with *White*, candidates are free to criticize decisions of judges against whom they are running—criticism that may be steeped as much in populism as in the law or legal process. One commentator provides a particularly pointed view of a world in the wake of *White*:

Instead of reciting platitudes about how they will be fair and efficient, judicial candidates will now have to engage each other and stake out distinct positions. They will have to develop campaign platforms, essentially, against which voters can compare their judicial records once elected. Fueled by rising levels of funds, high-profile advertisements will transmit the candidates’ messages and the

¹⁵⁵ 345 F.Supp.2d 672, 704 (E.D.Ky. 2004).

¹⁵⁶ *White*, 536 U.S. at 770.

¹⁵⁷ See *Kan. Judicial Review v. Stout*, 287 Kan. 450, 459 (2008) (citing *Family Trust Found. of Ky., Inc. v. Kentucky Judicial Conduct Comm'n*, 388 F.3d 224, 227-28 (6th Cir. 2004) (holding that pledges and commits clauses are similar in scope to announce clause, unconstitutional); *Pa. Family Institute, Inc. v. Celluci*, 521 F. Supp. 2d 351, 387 (E.D. Pa. 2007) (pledges and commits clauses narrowly construed, constitutional); *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021, 1044 (D.N.D. 2005) (pledges and commits clauses are similar in scope to announce clause, unconstitutional); *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003) (pledges and commits clauses are different from announce clause, constitutional); *In re Watson*, 100 N.Y.2d 290, 301, 763 N.Y.S. 2d 219, 794 N.E.2d 1 (2003) (pledges clause different from announce clause, constitutional)).

¹⁵⁸ *Pa. Family Inst., Inc v. Black*, 489 F.3d 156, 164 (3d Cir. 2007) (citing Robert H. Alsdorf, *The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and Judiciary in a Democracy*, 30 HASTINGS CONST. L.Q. 197 (2003); Rachel Paine Caufield, *In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing*, 38 AKRON L. REV. 625 (2005); Nancy Gertner, *To Speak or Not to Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147 (2004); David Shultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985 (2006)).

assessments of interested groups to more people. Voter turnout should rise. Retention rates should fall.¹⁵⁹

Judicial candidates are not the only ones armed with a new found freedom; interest groups around the country have filed “right to listen” suits stemming from the questionnaires they have sent to candidates running for state court judgeships.¹⁶⁰ When candidates have refused to fill out forms that ask them to announce their views on politically-charged legal questions, like right to abortion, these groups have pointed to state canons as the reason for their refusal.¹⁶¹ Whether these canons are indeed the perpetrators—or saviors—is less than clear, to say the least.¹⁶² For some time, third party groups have run into what may have stricken them as a judicially imposed formality, called standing: “to maintain a “right to listen claim, a plaintiff must clearly establish the existence of a “willing speaker . . . [because i]n the absence of a willing speaker, an ‘Article III court must dismiss the action for lack of standing.’”¹⁶³ But this wall may too be crumbling. In a 2008 decision of *Kansas Judicial Review v. Stout*, where a past

¹⁵⁹ David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 297 (2008).

¹⁶⁰ See *Pa. Family Inst., Inc v. Black*, 489 F.3d 156, 164 (3d Cir. 2007) (citing *Ind. Right to Life, Inc. v. Shepard*, 463, F. Supp. 2d 879 (N.D. Ind. 2006); *N.D. Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005); *Family Trust Found. of Ky. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004)). Interest groups’ interest in these questionnaire was not unpredictable, even if the number of the “right to listen” lawsuits is a bit jarring. See David E. Pozen, *supra* note 159, at 300 (“The rapid rise in campaign spending, the aggressive outreach done by interest groups and political parties, and the politicization of campaign speech have transformed many judicial races from sleepy, low-key affairs into high-stakes, high-salience affairs. They have broken down the traditional, regulatory, stylistic, and rhetorical barriers distinguishing judicial elections from other elections. Judicial candidates increasingly invoke their beliefs on abortion, same-sex marriage, tort reform, and other controversial issues; *if they do not proactively do so, interest groups may try to ferret them out through questionnaires.*”) (emphasis added); Barbara E. Reed, *Tripping the Rift: Navigating Judicial Speech Fault Lines in the Post-White Landscape*, 56 MERCER L. REV. 971, 981 (2005).

¹⁶¹ *Pa. Family Inst., Inc v. Black*, 489 F.3d 156, 164 (3d Cir. 2007).

¹⁶² See Terry Carter, *Loaded Questionnaires?: Judicial Candidates Advised to Be Wary of Answers Inviting Suits Challenging Canons*, 5 No. 36 ABA J. E-REPORT 3 (2006) (arguing that the reason why candidates choose to be silent may well be professional views that judges ought to guard their political views); *Ind. Right to Life, Inc. v. Shepard*, 507 F.3d 545, 548 (7th Cir. 2007) (noting that the candidates who explained why they did not respond to a questionnaire asking for the views on *Roe v. Wade*, most explained that they did not rely on the canons, but either felt it professionally or personally inappropriate to respond).

¹⁶³ *Pa. Family Inst., Inc v. Black*, 489 F.3d 156, 166-67 (3d Cir. 2007) (quoting *Competitive Enter. Inst. v. U.S. Dep’t of Transp.*, 856 F.2d 1563, 1566 (D.C. Cir. 1988)); see also *Ind. Right to Life, Inc. v. Shepard*, 507 F.3d 545, 550 (7th Cir. 2007); see also *Alaska Right to Life v. Feldman*, 504 F.3d 840, 843 (9th Cir. 2007) (interest group’s claim that its decision to not circulate a questionnaire because of the canons was an inappropriate restriction of speech, dismissed for lack of ripeness).

judicial candidate claimed to have been this willing speaker who was discouraged to fill out a questionnaire because of the canons restricting his speech, the Tenth Circuit found that the interest group that circulated the questionnaire had standing.¹⁶⁴

From a legal standpoint, however, *White*'s reach should not be overstated; in 2008 the Court, in a unanimous decision, has refused to use—indeed even consider—*White* as a sword to cut through the nominating process of judicial candidates in New York.¹⁶⁵ A candidate may have the right to speak, but, as it turns out, no guarantee that anyone would listen. The Second Circuit in *Lopez Torres v. N.Y. State Bd. of Elections*,¹⁶⁶ drew on and distinguished *White* to strike down the process by which political parties, given their clout, were effectively choosing state judges.¹⁶⁷ The Supreme Court, without citing *White*, overturned the Second Circuit, limiting the candidate's associational right not to join, while observing that the first amendment does not call on the courts to manage the marketplace of ideas “by preventing too many buyers from settling upon a single product.”¹⁶⁸ The fact that being chosen by a political party in New York was, for all practical purposes, the only way to guarantee an audience for your speech had nothing to do with the first amendment. As the court observed, it “says nothing more than that the party leadership has more widespread support than a candidate not supported by the leadership.”¹⁶⁹ Nonetheless, *White*'s impact on judicial elections is significant: so long as a state chooses to hold popular elections for judges, *White* continues to protect candidates' speech.

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

¹⁶⁵ *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

¹⁶⁶ *Id.*

¹⁶⁷ *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 183, 201 (2d Cir. 2006).

¹⁶⁸ *See Lopez Torres*, 552 U.S. at 203-04, 209.

¹⁶⁹ *Id.* at 205.

b. Recusal as Burdening Speech

Limiting a judicial candidate's or a sitting judge's speech through a judicial canon similar to the one at issue in *White* is, of course, not the same as discouraging comments made by judges through the implicit threat of mandatory recusals. To be sure, speech would still be burdened, if not forbidden, on the basis of its content. And, if it's made in the course of a campaign, discussing qualifications, that speech is at the core of the First Amendment protection.¹⁷⁰ But both the process and consequences are different: the regulation is indirect because the speech itself is not prohibited—only presiding over a case at a later date is—and the result is a potential disqualification from a case, not the judgeship altogether.¹⁷¹ These reasons may be why Justice Kennedy in his concurrence in *White* suggested that recusals are the preferred method of dealing with troubling comments made by the judges and candidates.¹⁷² And it may be why in interpreting *White*, some courts have assumed that recusals are the constitutionally permissible alternatives to the canons.¹⁷³

It could also be that recusals are narrowly tailored to the potentially compelling interest of judicial impartiality, in a way that the announce clause in *White* was not.¹⁷⁴ Indeed, in the highest courts of two states, New York, *In re Watson*¹⁷⁵ and Florida, *In re Kinsey*,¹⁷⁶ even

¹⁷⁰ Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002).

¹⁷¹ There are two strands to this argument. First, because recusals are not direct regulations of speech, they may be deemed incidental. See Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 HARV. L. REV. 1175, 1178. Second, they may be content-neutral, so they would not get the same scrutiny that the state canon did in *White*. See David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 B.Y.U. L. REV. 481, 512 (2009).

¹⁷² 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“[The state] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial office.”).

¹⁷³ See e.g., *In re Enforcement of Rule 2.03, Canon 5.B.(1)(c)* (Mo. 2002) (en banc) (“Recusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct.”).

¹⁷⁴ See Michelle T. Friedland, *Disqualifications or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUMB. L. REV. 563, 570 (2004).

¹⁷⁵ 100 N.Y.2d 290 (2003).

traditional pledge clause canons, not dissimilar from one mentioned in *White*, have passed muster under strict scrutiny. The Florida Supreme Court held that it is “beyond dispute that [the Canon] serves a compelling interest[:]” it preserves the “integrity” of the judiciary as “it would be inconsistent with our system of government if a judicial candidate could campaign on a platform that he or she would automatically give more credence to the testimony of certain witnesses or rule in a predetermined manner”¹⁷⁷ The canon was also narrowly tailored, the court found, because it allowed the candidate to state his personal views on disputed issues.¹⁷⁸ Similarly, the New York Court of Appeals in *In re Watson* upheld its state’s canon under strict scrutiny, observing that “[j]udges must apply the law faithfully and impartially—they are not elected to aid particular groups, be it the police, the prosecution or the defense bar. Campaign promises that suggest otherwise gravely risk distorting public perception of the judicial role.”¹⁷⁹

Reminded by these decisions, it’s not difficult to imagine how an expansive recusal standard would pass strict scrutiny; after all, it would target the same concerns and serve the same interests highlighted by the New York and Florida courts. Indeed, at least one federal court has held that a recusal statute satisfied strict scrutiny.¹⁸⁰ But triggering the strict scrutiny review is in of itself a signal that there are major First Amendment considerations.¹⁸¹

¹⁷⁶ 842 So. 2d 77 (2003). The canon, that the court described as more “narrow” provided in part:

A candidate for judicial office . . . shall not:

- (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or]
- (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court

FLA. CODE JUD. CONDUCT, CANON 7A(3)(d)(i)-(ii).

¹⁷⁷ *In re Kinsey*, 842 So.2d at 87.

¹⁷⁸ *Id.*

¹⁷⁹ *In re Watson*, 100 N.Y.2d at 302.

¹⁸⁰ *Family Trust Found., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 706 (E.D.Ky.2004).

¹⁸¹ *See e.g.*, *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (observing that it is a “rare case” where a law survives strict scrutiny).

Finally, a plausible argument can be made that recusals, given that they burden speech incidentally, are not subject to strict scrutiny.¹⁸² In *United States v. O'Brien*, the Court announced a four-prong, intermediate-like test for laws that have the effect of restricting speech even if they do not aim at expression directly.¹⁸³ As mentioned previously, recusal standards do not *forbid* speech, but whether they target speech directly, is a matter of debate.¹⁸⁴ Assuming they do not—likely a dubious assumption given that it is precisely speech that would triggers a restriction (recusal) rather than a noncommunicative act like in *O'Brien*—and the *O'Brien* test applies rather than strict scrutiny, it is still an indication that there are major first amendment concerns.¹⁸⁵ Indeed, the purpose of intermediate scrutiny is to give the government “latitude in designing a regulatory” scheme rather than a conclusion that there are no constitutional concerns.¹⁸⁶

Thus, whatever Justice Kennedy’s reasons may be for embracing recusals, this form of regulation means that political speech is burdened, chilled, and possibly directly targeted, giving rise to weighty constitutional concerns that may even merit the highest level of judicial scrutiny when examining legislation. Since this standard emanates from *Caperton* rather than a statute or canon, the court is without its most effective tool to ensure that “political speech . . . [prevails] against laws that would suppress it, whether by design or inadvertence”—strict scrutiny.¹⁸⁷ In

¹⁸² See David K. Skott, *supra* note 171, at 504 (2009) (*citing* *United State v. O'Brien*, 391 U.S. 367, 376-78 (1968)); *see also* Dorf, *supra* note 171, at 1178.

¹⁸³ *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (opining that the law must be within the constitutional power of the government, furthering a substantial interest, which is unrelated to the suppression of free speech, and the incidental restriction on the first amendment freedoms must be no greater than necessary).

¹⁸⁴ Since such a standard would presumably list the type of speech that would disqualify a judge from presiding over a case, it seems that it is speech rather than some other, non-expressive conduct that is targeted.

¹⁸⁵ See *e.g.*, *Rumsfeld v. Forum for Academic & Instit. Rights, Inc.*, 547 U.S. 47, 53 (2006) (characterizing the *O'Brien* decision as an instance where even “symbolic speech” was deemed deserving of First Amendment protection).

¹⁸⁶ See *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 213-14 (1997).

¹⁸⁷ *Citizens United v. FEC*, 175 L.Ed. 2d 753, 781-82 (2010).

order to ensure that First Amendment rights are fairly weighed against litigants' due process protections, a careful balancing test should be applied.

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

As explained in more detail above, *Caperton's* analysis and holding may be read to apply in cases that do not involve financial contributions. Indeed, "probability of bias" is as likely born out of a judicial candidate's speech against a litigant as it is out of a campaign contribution, as the *Caperton* dissent points out. As a result, courts must also be prepared to weigh First Amendment considerations. Aside from the right to receive money—a right that has not yet been recognized by the Court¹⁸⁸—there are weighty concerns identified by *White*. The moment a state institutes judicial elections, first amendment attaches, and judicial candidates have the right to announce their views.¹⁸⁹ And if *Caperton* motions begin to mandate recusals, then speech may be burdened in a constitutionally intolerable way. This burden does not come from legislation, so the court would be left without its most powerful tool—strict scrutiny. Precisely for all these reasons, the due process test developed in *Mathews v. Eldridge* is the perfect antidote: while weighing the litigant's right to due process, it would also consider the first amendment as well as the integrity of the judicial system, producing a constitutionally hygienic outcome.

¹⁸⁸ See *Dean v. Blumenthal*, slip op., No. 07 CV 1986 (2d Cir. Aug. 11, 2009).

¹⁸⁹ See U.S. CONST. amend I; *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

a. *Mathews v. Eldridge* and the Reach of its Balancing Test

Mathews requires courts to balance three factors in determining whether the procedures employed in a particular situation comport with the due process clause.¹⁹⁰ The first factor is the private interest at stake; that is, the precise nature of the life, liberty, or property interest that risks deprivation.¹⁹¹ The second factor is the “risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards.”¹⁹² Courts will balance these two factors against the third factor, which is the government or public interest, “including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”¹⁹³ The Court has used somewhat ambiguous language to describe this last factor,¹⁹⁴ which might vary considerably depending on the nature of the case.¹⁹⁵

Although developed in the administrative law context, courts have imported the *Mathews* test into many other areas of the law.¹⁹⁶ It is simply not true that the *Mathews* test is applied only to weigh adequacy of administrative procedures when property interests are at stake, although

¹⁹⁰ Commentators has analogized the three-factor *Mathews* test to the three-factor negligence formula famously described by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

¹⁹¹ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (describing the first factor as “the private interest that will be affected by official action . . .”). These interests vary widely, and might consist of one’s freedom from government confinement, see, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), or one’s interest in fair procedures prior to issuing a pre-judgment attachment order, see, e.g., *Connecticut v. Doehr*, 501 U.S. 1 (1991).

¹⁹² *Mathews*, 424 U.S. at 335.

¹⁹³ *Id.*

¹⁹⁴ See *Doehr*, 501 U.S. at 13 (noting: “any ancillary interest the government may have in providing the procedure or forgoing the added burden.”).

¹⁹⁵ See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp.2d 443, 446 (D.D.C. 2005) (noting the government’s interest as “national security” under the third prong of *Mathews*). Although *Mathews* speaks in terms of the “government interest,” the Court has made clear that in a private action, this may include the other private adversary’s interest. In *Connecticut v. Doehr*, the Court held that the state statute ran afoul of due process because it allowed prejudgment attachment of real estate without notice and hearing. This case was significant in that it applied *Mathews* in a case that “pitted private interests against other private interests”; it did not involve a direct challenge to government action as in *Mathews* itself. The Court in *Doehr* adapted the test to “private civil litigants’ use of the court system.” Andrew Ralph Blair-Stanek, *Twombly is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1, 12-14 (2010).

¹⁹⁶ See, e.g., *Hamdi*, 542 U.S. 507 (relying on *Mathews* to hold that a citizen labeled as an “enemy-combatant” was entitled to received notice of the factual basis for his classification and challenge it before a neutral decision-maker).

making.”²⁰⁵ Taken together, these cases suggest that the court does not apply *Mathews* when one interest at stake is so weighty that the court should give deference to that interest and not balance it with others. These areas, however, are narrow, and have been interpreted as such. For instance, in *Krimstock v. Kelly*,²⁰⁶ the Second Circuit rejected the argument that *Mathews* is inapplicable in criminal cases; *Medina*, the court explained, dealt only with constitutional guarantees in criminal proceedings regarding burdens of proof.²⁰⁷

b. *Mathews Meets Caperton*

Caperton fundamentally changed the interplay between judicial recusal (and judicial elections) and the Constitution. Given the uncertainty over the reach of *Caperton*'s, and the constitutional freedoms it potentially implicates, courts should use the *Mathews v. Eldridge* test to determine whether the due process clause requires recusal. Although one might struggle in vein to reconcile the Supreme Court's varied use of the *Mathews* test, a review of the policies underlying many of the cases using *Mathews* supports the notion of applying *Mathews* in the context of judicial recusal. In some ways, applying *Mathews* in this context is more compelling than anywhere else: the test not only allows the court to carefully arrive at a fair result, but it holds *Caperton* together, with its principles intact. That is, it would allow the courts to confront the tension between due process and first amendment rights without judging whether the case is sufficiently “extreme”—an exercise that was derided by the Chief Judge in *Caperton*'s dissent.²⁰⁸

²⁰⁵ *Id.* at 177 (internal quotation and citation omitted).

²⁰⁶ 464 F.3d 246 (2d Cir. 2006).

²⁰⁷ *Id.* at 254.

²⁰⁸ *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2274 (2009) (Roberts, C.J., dissenting).

i. Applying *Mathews* is Appropriate

First, it's worth noting that simply because *Mathews* has not, to date, been applied by the Supreme Court to recusal challenges does not mean that it cannot be applied. Those that argue *Mathews* cannot be applied in this context contend that the Supreme Court's recusal jurisprudence evinces a deliberate absence of any citation to *Mathews*.²⁰⁹ Although this argument cannot be discounted, it is by no means controlling.²¹⁰ The Supreme Court has never suggested that *Mathews* cannot be applied to recusal challenges under the due process clause; and in fact, one federal district court recently cited *Mathews* in this regard.²¹¹ Moreover, importing *Mathews* into this context is consistent with the Supreme Court's "deep – and growing – attachment to the *Mathews* test."²¹² Recently, the Court in *Hamdi v. Rumsfeld* relied on the *Mathews* test to hold that a citizen labeled by the government as an "enemy-combatant" was entitled to received notice of the factual basis for his classification and challenge it before a neutral decision-maker.²¹³ The argument in favor of applying *Mathews* in this context is more persuasive in light *Caperton* raises additional factors that must be balanced with a litigant's due process rights.

Additionally, applying *Mathews* would not be that ground-breaking because its balancing test has been applied in circumstances analogous to judicial recusals. Many of the cases challenging administrative procedures occur in the context of adjudications, and demonstrate courts' willingness to scrutinize the components of adjudications that contribute to a fair

²⁰⁹ See Friedland, *supra* note 174, at 575 n. 48; John A. Meiser, Note *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1820 (2009).

²¹⁰ Cf. *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 496 (7th Cir. 2006); *Ai Yue Chen v. Gonzales*, 177 Fed. Appx. 159, 160 (2d Cir. 2006); *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (2d Cir. 2002); *Shinn v. Champion Mortg. Co., Inc.*, 09 CV 0013, 2010 WL 500410, at *7 n.4 (D.N.J. Feb. 5, 2010).

²¹¹ *Fieger v. Ferry*, No. 04-60089, 2007 U.S. Dist. LEXIS 71274 (E.D. Mi. Sept. 26, 2007) (citing *Mathews* in considering whether state recusal standards comport with due process).

²¹² See *Blair-Stanek*, *supra* note 195, at 12; see also *City of Los Angeles v. David*, 538 U.S. 715 (2003) (applying *Mathews* to city procedures following the towing of a resident's car); *Boumediene v. Bush*, 553 U.S. ____ (2008).

²¹³ 542 U.S. 507 (2004).

outcome, including the identity of the decision-maker. For instance, in *Marshall v. Jerrico, Inc.*,²¹⁴ the Supreme Court considered a challenge a federal statutory scheme that remitted all penalties for violations of federal labor laws to the federal agency that imposed penalties.²¹⁵ The statute was challenged under the due process clause on the basis that it created an impermissible risk of bias by encouraging the agency to impose “unduly numerous and large assessments of civil penalties.”²¹⁶ The Court upheld the statute, refusing to apply the “strict requirements of judicial neutrality” to the determinations of an administrative prosecutor.²¹⁷ The Court then cited *Mathews* for the proposition that “the neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.”²¹⁸

Similarly, as *Connecticut v. Doehr* suggests, *Mathews* is often used to evaluate the fairness of state and federal judicial proceedings. For instance, where the Supreme Court had to weigh the adequacy of judicial process for a criminal defendant, it has chosen to use the *Mathews* test. In *United v Raddatz*,²¹⁹ the Court considered whether due process permits a district judge to rule on a motion to suppress based only on the record made by a magistrate judge.²²⁰ The Court applied the *Mathews* test without analysis, as if *Mathews* was the default test.²²¹ Other examples in this regard include *Parham v. J.R.*,²²² where the Court used *Mathew* to evaluate the constitutionality of a procedure that allowed parents to commit their children a

²¹⁴ 446 U.S. 238 (1980).

²¹⁵ *Id.* at 239.

²¹⁶ *Id.* at 241-42.

²¹⁷ 446 U.S. 238, 250 (1980).

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

²¹⁹ 447 U.S. 667 (1980).

²²⁰ *Raddatz*, 447 U.S. 667 (1980).

²²¹ 447 U.S. 667, 677 (1980).

²²² 442 U.S. 584 (1979).

mental health facility.²²³ Similarly, in the famous case of *Lassiter v. Department of Social Services*,²²⁴ the Court employed *Mathews* to determine whether due process requires the state to provide an indigent parent with counsel in a proceeding to terminate her parent rights.²²⁵ And, as noted above, the Court recently applied *Mathews* to determine whether a citizen held as an “enemy-combatant” was entitled to received notice of the factual basis for his classification and challenge it before a neutral decision-maker.²²⁶ As these cases show, *Mathews* has been applied in various contexts, most noteworthy of which include cases where individual rights were weighed against the state, in criminal cases, and where the fairness of the decision-maker was at stake—all important components of cases where *Caperton* motions will be made. Just as importantly, *Mathews* has been called the default test and one that involves the most careful balancing of rights.

ii. Applying *Mathews* is Good Policy

The benefit of applying the *Mathews* test to recusal motions is that it preserves existing precedent, while providing the flexibility necessary to address new concerns raised by *Caperton*. Put another way, *Mathews* is a natural outgrowth of existing recusal precedent and will allow courts to respond to the myriad issues that might arise in the future.

In cases raising pre-*Caperton* concerns, such as direct pecuniary interest²²⁷ and personal animosity,²²⁸ *Mathews* will generally leave the existing legal landscape unchanged. These types of cases have focused on the specific rights of individuals to fair tribunals,²²⁹ rather on the more

²²³ *Id.*

²²⁴ 452 U.S. 18 (1981).

²²⁵ The Court weighed the complexity of the proceeding, the capacity of the parent to weigh the risk of an erroneous deprivation of a parent’s right. *Id.* at 31-32.

²²⁶ 542 U.S. 507 (2004).

²²⁷ *See, e.g.,* *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

²²⁸ *See, e.g.,* *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971).

²²⁹ *See supra* notes 44-64 and accompanying text.

macro-issues like the public or government interest. Courts have sometimes found that the individual right to a fair tribunal is so strong and no countervailing interest exists that the cases are not susceptible to balancing.²³⁰ While this may initially seem to mitigate against applying *Mathews*, a closer examination shows otherwise; even if *Mathews* were applied, the cases would likely come out the same way, since the first two factors – individual interest and risk of an erroneous deprivation – would likely outweigh the public interest, which in any case would be either is small, or completely in line with the public interest (i.e., to vindicate the litigant’s due process rights).²³¹

With regard to motions raising *Caperton* concerns—including campaign contributions, “prior speeches and writings” of the judge, or other factors that give rise to an objective appearance of bias,²³² a flexible approach is needed. *Caperton* motions implicate two competing interests: the First Amendment and the Due Process Clause.²³³ Since, as discussed above, *Caperton* may invite lower courts to expand its holding into new areas in which there exists an objective appearance of bias, including extra-judicial speech, the case risks chilling the speech of judges who seek to avoid disqualification. As one commentator noted, “Judicial elections present a dilemma for candidates because of their desire to say things that might win votes clashes with their duty to ensure due process.”²³⁴ Indeed, Justice O’Connor goes so far as to argue that judicial elections as an institution undermine the public interest in appearance of a fair tribunal.²³⁵

²³⁰ See *Medina v. California*, 505 U.S. 437 (1992).

²³¹ Cf. *Columbia Broadcast Sys., Inc. v. Democratic Nat’l Cmte*, 412 U.S. 97, 111-12 (1973) (noting the public interest in fairness).

²³² 129 S.Ct. at 2268 (emphasis provided)

²³³ See Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants’ De Process Rights*, 81 N.Y.U.L. REV. 1101, 1120-21 (2006).

²³⁴ See Shepard, *supra* note 4, at 24

²³⁵ See *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O’Connor, J., concurring).

The fact of judicial elections challenges the deeply-rooted idea in American law that a decision-maker must be neutral—that is, not committed to an outcome before the parties present their arguments. But many candidates for judicial office, for example, often campaign on ‘tough-on-crime’ platforms, and “jockey for the position of who will treat defendants more harshly.”²³⁶ Once elected, political pressure may persuade the judge to treat criminal defendants in a manner that pleases the electorate, rather than in a way that would dispense justice to the defendant.²³⁷ This contravenes the important counter-majoritarian benefit of judicial review, which exists to protect individual rights against the majority.²³⁸

Adding fuel to the fire, *White* opens the door for—indeed encourages—the type of speech that would undermine a litigant’s right to due process. First, *White* allows judicial candidates to announce their views and to criticize decisions.²³⁹ Even if a state has the (arguably) constitutional promise clause—prohibiting judicial candidates from making specific promises on how they would rule in future cases—the practical effect of *White* is permitting candidates to announce concrete views on issues that will likely come before them as judges. It doesn’t take much for the electorate to make the connection between one’s views and one’s actions after donning on the robe.²⁴⁰ Should the judge fail to live up to his words as a candidate, he will be

²³⁶ See Weiss, *supra* note 233, at 1105 (citing numerous examples of similar campaign platforms).

²³⁷ Scitt D. Weiner, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 199, 201 & n. 97.

²³⁸ See *id.* at 206 & n. 123.

²³⁹ See *White*, 536 U.S. at 765.

²⁴⁰ As the Court in *White* explained:

Uncoupled from the Announce Clause, the ban on pledges promises is easily circumvented. By prefacing a campaign commitment with the caveat, “although I cannot promise anything,” or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues. Semantic sanitizing of the candidate’s commitment would not, however, diminish its pernicious effects on actual and perceived judicial impartiality. To use the Court’s example, a candidate who campaigns by saying, “If elected, I will vote to uphold the legislature’s power to prohibit same-sex marriages,” will feel scarcely more pressure to honor that statement than the candidate who stands behind a podium and tells a throng of cheering supporters: “I think it is constitutional for the legislature to prohibit same-sex marriages.” Made during a campaign, both statements contemplate a *quid pro quo* between

punished at the polls next time around. The next candidate will make the same “announcements” (dare we say promises?) and make sure to live up to them. And so it goes.

Second, as discussed in more detail earlier, *White* has encouraged organizations, mostly of conservative stripes, to issue detailed questionnaires about the judicial candidate’s or judge’s thoughts on hot-button issues, such as abortion. If the candidate was reluctant to announce his positions before, he may have little choice now, as more than enough rivals will eagerly put their views on papers. And if the candidate was oddly open minded before, he will be encouraged, or at least perceived to be, more committed now. The result is that in states judges are elected, few litigants will walk into a courtroom, expect due process, but face a judge who has not been on record announcing his stance on a legal issue. If that issue is being adjudicated in the litigant’s case, he can hardly expect anything like the due process our constitution guarantees.²⁴¹

In contrast to cases like *Medina v. California*²⁴² and *Weiss v. United States*,²⁴³ no one interest is so weighty in this context to preclude use of *Mathews*.²⁴⁴ Both the protections of procedural due process and the First Amendment are important individual rights that cannot defer to one another as a matter of law in the same way that certain interests may yield to the deference of the military. Instead of creating rigid rules, the tension between procedural due

candidate and voter. Both effectively "bind [the candidate] to maintain that position after election." And both convey the impression of a candidate prejudging an issue to win votes. Contrary to the Court's assertion, the "nonpromissory" statement averts none of the dangers posed by the "promissory" one.

536 U.S. 765, 821 (2002) (O'Connor, J., concurring).

²⁴¹ *Caperton*, 129 S.Ct at 2252.

²⁴² 505 U.S. 437 (1992).

²⁴³ 510 U.S. 163 (1994).

²⁴⁴ *Cf.* Justice Stevens made this point in *Lassiter*, where in his dissent he opined: “[t]he issue [of having counsel in a termination of parental rights proceeding] is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.” 452 U.S. 18, 59 (1981) (Stevens, J., dissenting).

process and the First Amendment is best settled through a flexible balancing approach under the circumstances.²⁴⁵

By using the *Mathews* test, court will adequately balance these often-competing interests. The first factor is “the private interest that will be affected by official action.”²⁴⁶ In this regard, courts may ask, among other things, what does the litigant stand to gain or lose in this action;²⁴⁷ whether it is a criminal or civil matter; whether, in a criminal case, the defendant is charged with a felony or misdemeanor.²⁴⁸ The second factor is the “risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards.” The weight of this factor depends on the precise circumstances of the case, but the inquiry will generally look to the degree of potential bias, i.e. the greater the objective appearance of impropriety, the more weight this factor holds.

Against these two factors courts will balance the public interest. In addition to the public interest in procedural fairness, the public also has an interest in the protecting the First Amendment.²⁴⁹ As the Supreme Court has held, “the First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference.”²⁵⁰ If recusal burdens speech, then affording too much weight to a litigant’s due process rights may infringe upon the presiding judge’s right to speak outside the courtroom, including on the campaign trail, thus harming the marketplace of ideas. And even if recusal does

²⁴⁵ See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005) (applying *Mathews* to determine what process is due to an inmate because due process in this situation calls for a flexible approach).

²⁴⁶ 424 U.S. 319, 335.

²⁴⁷ See, e.g., *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985) (noting that the individual interest in retaining employment is significant, given the severity of depriving one of a livelihood).

²⁴⁸ See Rachel Weiss, Note, *Defining the Contours of United States v. Hensley: Limiting the Use of Terry Stops for Competed Misdemeanors*, 94 CORNELL L. REV. 1321, 1339 (2009) (noting the common-law roots of the felony/misdemeanor distinction).

²⁴⁹ See, e.g., *ACLU v. Reno*, 31 F.Supp.2d 473, 473 (1999) (opining that “the importance of protecting freedom of speech is to foster the marketplace of ideas. If speech, even unconventional speech that some find lacking in substance or offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered.”).

²⁵⁰ *New York State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196, 208 (2008).

not burden speech, the public still has an important interest in permitting the presiding judge to speak his views outside the courtroom,²⁵¹ especially if the state has made a determination to permit judicial elections.

Additionally, separate and apart from these First Amendment concerns, courts may consider other factors that weigh into the public interest. As suggested by the *Caperton* dissent, the case raises the prospect of a flood of non-meritorious recusal motions,²⁵² which would operate to undermine public confidence in the impartiality of the judiciary. As a result, courts may consider the specific grounds for recusal in light of the public interest in maintaining the integrity of the judiciary by discouraging non-meritorious recusal motions.²⁵³ Additionally, the public has an interest in preventing litigants from gaming the system. Since the opposite of gratitude is revenge, a potential litigant might purposefully oppose a judge's election campaign for the purpose of later making a motion to disqualify the judge under *Caperton*.²⁵⁴ Allowing courts to take situations like this into account under the public interest, *Mathews* would operate to discourage such a practice, thus bolstering the integrity of the judicial system.

²⁵¹ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001) (noting the public interest in the free flow of information).

²⁵² See *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2266 (2009) (“As such, it is worth noting the effects, or lack thereof, of the Court’s prior decisions. Even though the standards announced in those cases raised questions similar to those that might be asked after our decision today, the Court was not flooded with *Monroeville* or *Murchison* motions. That is perhaps due in part to the extreme facts those standards sought to address. Courts proved quite capable of applying the standards to less extreme situations.”).

²⁵³ Cf. *Ysursa v. Pocatello Educ. Ass’n*, 129 S.Ct. 1093, 1099 (2009) (noting, in another context, the state’s interest in preserving the integrity of its electoral system).

²⁵⁴ See, e.g., Brief for Respondents, *Caperton v. A.T. Massey Coal Co., Inc.*, at *32-33.

CONCLUSION

The merits of judicial elections have been litigated in journals around the country.²⁵⁵ In light of the recent Supreme Court decisions in *White* and *Caperton*, this debate will only intensify. Rather than revisit the arguments for and against electing judges, this Article has argued that applying the *Mathews v. Eldridge* test in cases where a litigant’s due process is threatened by an elected judge—a possibility that the Court initially dismissed in *White* against Justice Ginsburg’s protests,²⁵⁶ and then took head on in *Caperton*—will balance First Amendment rights that judicial elections breed against the rights of the litigants that the Constitution protects. This test would also be mindful of the larger concern voiced by the *Caperton* dissent: that *Caperton* motions will undermine the integrity of the judiciary. In sum, the flexibility and elegance of the test in this context is also made timely in light of the uncertainty raised by the Court’s expansive rulings in the areas of judicial elections, due process protection, and First Amendment rights. Lower courts should be relieved that they would not need to break new ground to apply *Mathews* in this context. And Chief Justice’s prediction that the Court will have to revisit *Caperton* to measure the “extremeness” of the facts in future cases may not come true after all.²⁵⁷

²⁵⁵ Indeed, the topic of judicial election is the single most written about topic in the academia. See Pozen *supra* note 160 at 269; Philip L. Dubois, Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections, 40 Sw. L.J. 31 (1987).

²⁵⁶ See *White*, 536 U.S. at 804 (Ginsburg, J., dissenting) (“This judicial obligation to avoid prejudgment corresponds to the litigant’s right, protected by the Due Process Clause of the Fourteenth Amendment, to ‘an impartial and disinterested tribunal in both civil and criminal cases.’”)

²⁵⁷ *Caperton*, 129 S.Ct. at 2273 (Roberts, C.J., dissenting) (“I believe we will come to regret this decision as well, when courts are forced to deal with a wide variety of *Caperton* motions, each claiming the title of ‘most extreme’ or ‘most disproportionate.’”).