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Caperton v. A.T. Massey Coal Co.: Something is Rotten in the State of West Virginia—A Common-Law Approach to Constitutional Judicial Disqualification

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Note

CAPERTON v. A.T. MASSEY COAL CO.: SOMETHING IS ROTTEN IN THE STATE OF WEST VIRGINIA—A COMMON-LAW APPROACH TO CONSTITUTIONAL JUDICIAL DISQUALIFICATION

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In *Caperton v. A.T. Massey Coal Co.*,[1] the Supreme Court of the United States considered when the Due Process Clause of the Fourteenth Amendment requires a judge to disqualify himself from hearing a case because one of the parties contributed to his judicial campaign.[2] Holding that there was an unconstitutionally high probability of bias,[3] the Court remanded the case for rehearing without the now-disqualified judge.[4] In so holding, the Court articulated a disqualification jurisprudence that failed to account for the general development of its due process jurisprudence.[5] Although a correct application of precedent would have allowed the Court to reach the same result,[6] the Due Process Clause did not require such a disposition.[7] Instead, the Court should have affirmed the judgment of the Supreme Court of Appeals of West Virginia, not because the judge properly remained on the case, but because constitutional principles should not have been extended to the judge's decision.[8]

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1. 129 S. Ct. 2252 (2009).
2. *Id.* at 2256–57.
3. *Id.* at 2265.
4. *Id.* at 2267.
5. *See infra* Part IV.A–B.
6. *See infra* Part IV.C.1.
7. *See infra* Part IV.C.2.
8. *See infra* Part IV.C.3.

I. THE CASE

In August 2002, a West Virginia jury found A.T. Massey Coal Company, Inc. and its subsidiaries ("Massey") liable for tortious interference with existing contractual relations, fraudulent misrepresentation, and fraudulent concealment based on Massey's actions while negotiating to purchase a coal mine.[9] The jury awarded $50,038,406 in compensatory and punitive damages to the plaintiffs, Hugh M. Caperton, Harman Development Corporation ("Harman Development"), and Harman Development's subsidiaries (collectively "Caperton").[10] Following the Circuit Court of Boone County's denial of Massey's motions for judgment as a matter of law, a new trial, or remittitur, the defendants appealed to the Supreme Court of Appeals of West Virginia.[11]

Before the appeal was considered, however, the State of West Virginia held its 2004 judicial elections.[12] Don Blankenship, the chairman, chief executive officer, and president of Massey, supported attorney Brent Benjamin's challenge to supreme court of appeals incumbent Justice McGraw.[13] Blankenship contributed the $1000 statutory maximum directly to Benjamin's campaign, as well as approximately $2.5 million to And For The Sake Of The Kids ("ASK"), a political organization formed under Section 527 of the Internal Revenue Code that supported Benjamin and opposed Justice McGraw.[14] This comprised more than two-thirds of the total funds raised by ASK.[15] Blankenship also spent approximately $500,000 in independent expenditures to support Benjamin through such devices as direct mailings and advertisements.[16] In total, Blankenship spent more than

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9. Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 233 (W. Va. 2008). Harman Mining Corporation ("Harman Mining") and Sovereign Coal Sales, Inc. ("Sovereign") were two of the three subsidiaries through which their previous parent corporation owned the Harman Mine, an underground coal mine in Buchanan County, Virginia, that produced high quality metallurgical coal. *Id.* at 230. In 1993, Caperton formed Harman Development Corporation and purchased Harman Mining, Sovereign, and the third subsidiary in order to acquire the mine. *Id.* The trial judge found that Massey, another coal supplier that had entered into negotiations to purchase the mine from Harman Development, *id.* at 231–32, "intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because . . . the Defendants concluded it was in its financial interest to do so," Joint Appendix at 32a, *Caperton*, 129 S. Ct. 2252 (No. 08-22).

10. *Caperton*, 679 S.E.2d at 229, 233.

11. *Id.* at 229.

12. The order appealed from was not issued by the circuit court until March 15, 2005. *Id.*

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

14. *Id.*

15. *Id.*

16. *Id.*

all of Benjamin's other supporters and three times more than Benjamin's own committee.[17] Benjamin won the election with over fifty percent of the votes.[18]

Following Justice Benjamin's election, Caperton moved to disqualify him from hearing Massey's forthcoming petition for appeal[19] and participating in any related proceedings, alleging a conflict caused by Blankenship's campaign involvement while he was party to a pending case.[20] Justice Benjamin denied the motion, and the court ultimately granted review of the case.[21]

Despite finding that "Massey's conduct warranted the type of judgment rendered in this case,"[22] the supreme court of appeals reversed the judgment, remanding the case and ordering the circuit court to dismiss the case with prejudice.[23] Caperton sought a rehearing, and both parties moved to disqualify three of the five justices who had decided the appeal.[24] Two of the justices, Justices Starcher and

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17. *Id.*

18. *See* 2004 OFFICIAL ELECTION RETURNS OF WEST VIRGINIA (2005), http://www.sos.wv.gov/elections/historyresource/Documents/allgeneral04.pdf (listing Benjamin's total vote count at 382,036 and McGraw's at 334,301).

19. Caperton filed his motion after Massey indicated its intention to appeal but before Massey actually filed the petition. Joint Appendix, *supra* note 9, at 324a.

The appellate jurisdiction of the Supreme Court of Appeals of West Virginia is entirely discretionary. *See* W. VA. CONST. art. VIII, § 4 ("[An] appeal shall be allowed by the supreme court of appeals . . . only after the court . . . is satisfied that there probably is error in the record, or that [the record] presents a point proper for the consideration of the court."). As there are no intermediate appellate courts in West Virginia, *see* W. VA. CODE § 58-5-1 (2005) ("A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment . . . ."), Massey's appeal would necessarily be heard in the supreme court of appeals—but only if the court granted review, *see* West Virginia Supreme Court of Appeals, http://www.state.wv.us/wvsca/Supreme.htm (last visited Mar. 1, 2010) ("West Virginia is one of only 11 states with a single appellate court . . . . The Court's appellate jurisdiction is entirely discretionary.").

20. *Caperton*, 129 S. Ct. at 2257. Caperton moved to disqualify Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct. *Id.*

21. *Id.* at 2257–58.

22. Caperton v. A.T. Massey Coal Co., No. 33350, slip op. at 13 (W. Va. Nov. 21, 2007).

23. *Id.* at 63. The supreme court of appeals explained that its decision was mandated by a forum selection clause that required all actions to be brought in Buchanan County, Virginia, and by principles of res judicata raised by Harman Mining and Sovereign's earlier contract suit against Massey's subsidiary. *Id.* at 44–45, 63. For the specifics of the earlier suit, see *Wellmore Coal Corp. v. Harman Mining Corp.*, 568 S.E.2d 671 (Va. 2002).

24. *Caperton*, 129 S. Ct. at 2258. Caperton sought disqualification of Justice Benjamin again, as well as Justice Maynard, who had vacationed with Blankenship while the case was pending. *Id.* Massey sought disqualification of Justice Starcher, who had been a vocal critic of Blankenship's role in the 2004 elections. *Id.*

Maynard, disqualified themselves, but Justice Benjamin did not.[25] With Justice Benjamin acting as chief justice, the court granted Caperton's motion to rehear the case.[26] Caperton moved to disqualify Justice Benjamin for the third time, but Justice Benjamin refused to withdraw.[27] Ultimately, the supreme court of appeals vacated the original opinion and again reversed the circuit court's judgment.[28] Approximately four months later, Justice Benjamin filed a concurring opinion in which he defended the court's decision and his refusal to disqualify himself.[29] The United States Supreme Court granted certiorari to determine when the Due Process Clause of the United States Constitution requires judicial disqualification in the context of judicial elections.[30]

II. LEGAL BACKGROUND

Although the Court's due process jurisprudence began as a historical inquiry, the Court has long understood the Due Process Clause to embody basic rights, rather than fixed, technical practices.[31] Accordingly, the Court's disqualification jurisprudence, while derived from strict common-law rules, has evolved out of the basic right to a fair trial.[32]

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25. *Id.* Although accepting that he should not have made the "intemperate remarks," Justice Starcher disqualified himself specifically to encourage Justice Benjamin's disqualification. E-mail from Larry V. Starcher, Former Justice, Supreme Court of Appeals of W. Va., to author (Nov. 16, 2009) (on file with the Maryland Law Review). In his Voluntary Disqualification Order, he strongly urged Justice Benjamin to disqualify himself. *See* Voluntary Disqualification Order at 9, A.T. Massey Coal Co. v. Caperton, No. 33350 (W. Va. Feb. 15, 2008), *available at* http://www.state.wv.us/wvsca/press/caperton.pdf ("And I reiterate that unless another justice also steps aside in this case, my replacement on the Court will be selected by the justice whose campaign was supported by something close to $4,000,000 from monies that came from one side of the case.").

26. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 229 (W. Va. 2008) ("This case is presently before this Court on rehearing.").

27. *Caperton*, 129 S. Ct. at 2258.

28. *Caperton*, 679 S.E.2d at 229 & n.1.

29. *Id.* at 286–87, 291–93 (Benjamin, C.J., concurring). Justice Albright referenced Justice Benjamin's refusal to disqualify himself in his dissent on rehearing and suggested that the disqualification motion raised due process issues that needed to be addressed. *Id.* at 284 n.16 (Albright, J., dissenting).

30. *Caperton*, 129 S. Ct. at 2256, 2262.

31. *See infra* Part II.A.

32. *See infra* Part II.B.

A. *The Court's Due Process Jurisprudence Has Shifted from a Historical Inquiry to a Flexible Test Based upon Fundamental Principles of Liberty and Justice*

The Court has long recognized that the Due Process Clause of the Fourteenth Amendment[33] evades easy definition,[34] but its understanding of and approach to the doctrine have changed from a historical inquiry to one that is flexible and principle-based.[35] Over time, the Court developed a balancing test, thus providing guidelines for due process analysis,[36] but it never rejected its earlier approaches.[37] In short, the history of due process interpretation illustrates that the Court has always eschewed "comprehensive definition[s],"[38] preferring instead to define due process as a function of "ordered liberty" and "a fair and enlightened system of justice."[39]

1. *The Court Shifted from a Historical Inquiry to a Principle-Based Approach*

The first known usage of the phrase "due process" was in an English statute enacted in 1354, which stated that "no Man . . . shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."[40] According to the influential English jurist Sir Edward Coke, however, the concept of due process had been incorporated into the English document Magna Carta in 1215, which de-

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33. The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

34. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961))); Holden v. Hardy, 169 U.S. 366, 389 (1898) ("This court has never attempted to define with precision the words 'due process of law' . . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard . . . .").

35. *See infra* Part II.A.1.

36. *See infra* Part II.A.2.

37. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994) ("As this Court has stated from its first due process cases, traditional practice provides a touchstone for [due process] analysis.").

38. Twining v. New Jersey, 211 U.S. 78, 100 (1908), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

39. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969).

40. 1354, 28 Edw. 3, c. 3 (Eng.); *see also* Thomas H. Burrell, *Justice Stephen Field's Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony*, 43 GONZ. L. REV. 77, 141 n.325 (2007–2008) (noting the origin of the phrase "Due Process").

clared that "[n]o freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land."[41] Coke explained that the phrase "by the law of the land" was synonymous with the phrase "due proces[s] of law," which in turn signified "due proces[s] of the common law."[42]

It was Coke's view of history—his equation of the words "due process of law" with "by the law of the land"—that the Supreme Court adopted in *Murray's Lessee v. Hoboken Land & Improvement Co.*[43] when it first considered the meaning of the Due Process Clause of the Fifth Amendment.[44] Recognizing that the Constitution "contains no description of those processes which it was intended to allow or forbid,"[45] the Court derived a two-part test for determining when the due process requirement is met.[46] First, the Court must examine the entire Constitution to ascertain whether there is a controlling provision.[47] Absent such a provision, the Court "must look to those settled usages and modes of proceeding existing in the common and statue [sic] law of England."[48]

This strict historical approach did not last, however. Twenty-nine years later, the Court expanded its understanding of the Due Process Clause in *Hurtado v. California*[49] when it allowed California to dilute

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41. Magna Carta, c. 39 (1215), *reprinted in* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914) (second and third alterations in original).

42. 2 EDWARDO COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, 1797). This is an accepted, if controversial, interpretation of Coke. *Compare* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *13 (12th ed. 1873) ("The words, *by the law of the land*, . . . are understood to mean due process of law, that is, by indictment or presentment of good and lawful men . . . ."), *with* Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 277 (1975) ("When we peruse the commentary as a whole, however, it becomes doubtful that Coke was simply equating 'per legem terrae' with 'due process of law.'"). Ultimately, however, it makes no difference because the Supreme Court asserted a particular historical interpretation, which is all that matters in a legal system that privileges precedent over historians' accounts. *See infra* text accompanying note 44.

43. 59 U.S. (18 How.) 272 (1855).

44. *Id.* at 276–77.

45. *Id.* at 276.

46. *Id.* at 276–77.

47. *Id.* at 277.

48. *Id.*

49. 110 U.S. 516 (1884). In *Hurtado*, the Court held that the Fourteenth Amendment language is "used in the same sense and with no greater extent" than the Fifth Amendment language. *Id.* at 534–35; *see also* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 610 (1936) ("[T]he restraint imposed by the due process clause of the Fourteenth Amendment upon legislative power of the State is the same as that imposed by the corresponding provision of the Fifth Amendment upon the legislative power of the United States.").

the procedure required for criminal proceedings.[50] Responding to the appellant's contention that the Due Process Clause has a "fixed, definite, and technical meaning,"[51] the Court explained that its holding in *Murray's Lessee* stood only for the proposition that something "must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country,"[52] not that due process is limited to those processes with a historical pedigree.[53] The Court explained that freezing the definition of due process "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement."[54] Instead, the Court explained, "the spirit of personal liberty and individual right" has been "developed by a progressive growth and wise adaptation to new circumstances."[55] Accordingly, the Court held that the Due Process Clause allows a degree of flexibility because it embodies "broad and general maxims of liberty and justice," which "must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[56]

In *Twining v. New Jersey*,[57] the Court followed its reasoning in *Hurtado* and concluded that a legal process is essential to due process if it derives from "a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government."[58] The Court cautioned, though, that it must "not import into the discussion [its] own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limi-

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50. *Hurtado*, 110 U.S. at 538. Specifically, the California legislature dispensed with the traditional requirement of indictment by grand jury for felony prosecutions. *Id.* at 520. The Court applied a due process analysis despite its explanation that "appeals of murder, which were prosecutions by private persons, were never regarded as contrary to Magna Charta." *Id.* at 526, 528.

51. *Id.* at 521.

52. *Id.* at 528.

53. *Id.* at 529.

54. *Id.* In reaching this conclusion, the Court quoted approvingly from Thomas Cooley's *A Treatise on the Constitutional Limitations*: "The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form." *Id.* at 527 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 356 (1868)). The Court also stated that "we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Id.* at 531.

55. *Id.* at 530.

56. *Id.* at 532.

57. 211 U.S. 78 (1908), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

58. *Id.* at 106.

tations."[59] Accordingly, it found no support in precedent that due process requires anything more than the court have jurisdiction and the parties are accorded notice and an opportunity to be heard.[60]

The Court further emphasized the importance of these fundamental principles to its due process analysis in *Moore v. Dempsey*,[61] where it held that kangaroo courts[62] violate the Due Process Clause.[63] Rather than engage in the historical inquiry suggested by *Murray's Lessee* and modified by *Hurtado*, the Court cited only one prior case—doing so for the specific proposition that a mob's actual interference with the course of justice entails a denial of due process.[64] Instead, the Court reasoned as if from first principles and held that due process is denied if "the whole proceeding is a mask" and state courts subsequently failed to correct this error.[65]

In contrast, the Court in *Tumey v. Ohio*[66] explained that an analysis of due process *requires* a historical inquiry into the "settled usages and modes of proceeding" that existed in English common and statutory law and that were later incorporated into American legal practice.[67] Although it analyzed the Due Process Clause differently from the *Dempsey* Court, the *Tumey* Court nonetheless based its holding in the defendant's basic right to an impartial judge.[68] Justice Cardozo expressed the underlying principle eloquently in *Palko v. Connecticut*,[69] in which he referred to due process as that which is "implicit in the concept of ordered liberty."[70] The test, therefore, according to Justice

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59. *Id.* at 106–07. The Court went on to explain that its due process analysis only permits consideration of "those fundamental rights which are expressed in that provision," since the rights fundamental in citizenship are otherwise secured. *Id.* at 107. Thus, the question is simply "whether the right is so fundamental in due process that a refusal of the right is a denial of due process." *Id.*

60. *Id.* at 110–11.

61. 261 U.S. 86 (1923).

62. The term "kangaroo court" refers to "a sham legal proceeding in which a person's rights are totally disregarded and in which the result is a foregone conclusion." BLACK'S LAW DICTIONARY 868 (6th ed. 1990).

63. *Dempsey*, 261 U.S. at 90–91; *see also* Dr. Bonham's Case, (1610) 77 Eng. Rep. 646, 657 (K.B.) ("[F]orasmuch as the defendants have confessed in the Bar, that they have imprisoned the plaintiff without cause, the plaintiff shall have judgment . . . .").

64. *Dempsey*, 261 U.S. at 90–91.

65. *Id.* at 91.

66. 273 U.S. 510 (1927).

67. *Id.* at 523.

68. *Id.* at 535.

69. 302 U.S. 319 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969).

70. *Id.* at 324–25. The precise context of this quote is with regard to substantive due process, *see id.* (discussing "immunities" against the federal government that the Four-

Cardozo, was whether a "fair and enlightened system of justice" could not exist without the right or procedure in question.[71]

2. *More Recently, the Court Has Developed a Balancing Test to Guide Its Due Process Analysis*

The Court never moved away from this principle-based approach to the Due Process Clause, but as it dealt with a wider variety of cases, the Court developed more specific guidelines for determining what process is due. For example, in *Cafeteria & Restaurant Workers Union v. McElroy*,[72] a cook alleged a violation of due process after she was summarily fired for failure to meet new security requirements.[73] In resolving her claim, the Court articulated a balancing test for determining the requirements of due process, which weighed the nature of the government function at issue against the private interest affected by the governmental action.[74]

The Court clarified this approach in *Morrissey v. Brewer*,[75] a case in which the Court considered the process due before a revocation of parole.[76] The first question, the Court explained, is whether procedural protections are due, a determination that "depends on the extent to which an individual will be condemned to suffer grievous loss."[77] Once the requirement for process has been established, the Court must then determine its scope, and it is that inquiry that entails the situation-specific flexibility that the Court described in *McElroy*.[78]

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teenth Amendment establishes as valid against the states), but Justice Cardozo's elaboration transcends this distinction, *see infra* note 71 and accompanying text.

71. *Palko*, 302 U.S. at 325 (discussing the rights to trial by jury and immunity from prosecution except as a result of indictment). As the Court later clarified, the question is really whether the procedure is necessary to our historically contingent "Anglo-American regime of ordered liberty." Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 504 n.12 (1977) ("[A]n approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko v. Connecticut* . . . .").

72. 367 U.S. 886 (1961).

73. *Id.* at 887–89.

74. *Id.* at 895. The Court followed this approach in *Bloom v. Illinois*, in which it found that, in serious contempt proceedings, "considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power." 391 U.S. 194, 209 (1968). The Court thus balanced the need to further respect for judges and courts against the individual's interest in avoiding serious criminal punishment without having been afforded fundamental procedural protections. *Id.* at 208.

75. 408 U.S. 471 (1972).

76. *Id.* at 472.

77. *Id.* at 481 (internal quotation marks omitted).

78. *Id.* The Court explained it as follows:

> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it

The Court explained how to determine what specific process is due in *Mathews v. Eldridge*.[79] In *Mathews*, the Social Security Administration terminated the petitioner's disability benefits without a pretermination hearing.[80] Relying on the *Morrissey* Court's assertion that "due process is flexible and calls for such procedural protections as the particular situation demands,"[81] the Court articulated three levels of analysis: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest through current procedures and the comparative value of additional or different procedures; and (3) the government's interest, which includes the function of the contested process as well as any burdens entailed by heightened procedural protections.[82] The Court has thus translated the flexible and imprecisely defined Due Process Clause into a usable legal principle, but due process analysis nonetheless remains flexible and rooted in fundamental principles.[83]

B. The Court's Judicial Disqualification Jurisprudence Has Developed from a Strict Common-Law Approach to One Founded upon Broader Principles of Fairness

The Court's approach to judicial disqualification departs from its procedural due process jurisprudence[84] in that "[t]he due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding."[85] At its core, the Due Process Clause has always required disqualification because of interest,[86] but the finer points of the rules governing disqualification have

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has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure. *Id.*

79. 424 U.S. 319 (1976).

80. *Id.* at 323–25.

81. *Id.* at 334 (alteration and internal quotation marks omitted) (quoting *Morrissey*, 408 U.S. at 481).

82. *Id.* at 335.

83. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) (noting that "the Due Process Clause, like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting Hurtado v. California, 110 U.S. 516, 527 (1884))); *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))); Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.").

84. *See supra* Part II.A.2.

85. Peters v. Kiff, 407 U.S. 493, 501 (1972).

86. *See* Tumey v. Ohio, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required

never been as clearly demarcated.[87] Tracking the development of the Court's due process jurisprudence, the Court's disqualification jurisprudence shifted from a historical inquiry to an analysis based on fundamental principles.[88]

1. *The Court Originally Engaged in Historical Inquiry to Decide Disqualification Cases*

Historically, the rules governing judicial disqualification derive from the maxim that "no man shall be a judge in his own case."[89] As such, the English court in *Day v. Savadge*[90] denied the City of London's participation in cases affecting it, asserting that "even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in it self."[91] Similarly, in *City of London v. Wood*,[92] the court explained that "it is against all laws that the same person should be party and Judge in the same cause."[93] *Between the Parishes of Great Charte & Kennington*[94] illustrated the strictness of this rule when the court disqualified a judge from hearing a case about a pauper merely because the judge paid taxes in the parish from which the pauper in question had been removed.[95]

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to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.").

87. *Compare* Offutt v. United States, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."), *with* Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971) (distinguishing the case at hand from *Offutt* and noting that "not every attack on a judge . . . disqualifies him from sitting").

88. *See infra* Part II.B.1–2.

89. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 610 (1947). This is merely one phrasing of a maxim that has deep historical roots. *See* Dr. Bonham's Case, (1610) 77 Eng. Rep. 646, 652 (K.B.) ("*aliquis non debet esse Judex in propria causa*" [no man should be a judge in his own cause] (author's translation)); THE FEDERALIST NO. 10, at 42 (James Madison) (Terence Ball ed., 2003) ("No 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."). In *Dr. Bonham's Case*, Coke went on to state that "one cannot be Judge and attorney for any of the parties." (1610) 77 Eng. Rep. at 652. He found problematic that parties on one side of the case had acted as "judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture." *Id.*

90. (1615) 80 Eng. Rep. 235 (K.B.).

91. *Id.* at 237.

92. (1701) 88 Eng. Rep. 1592 (K.B.).

93. *Id.* at 1602. The court explained that a single person serving as both party and judge is a "manifest contradiction." *Id.*

94. (1743) 93 Eng. Rep. 1107 (K.B.).

95. *Id.* at 1107–08. The court also noted that if there had been no other judges to hear the case, the interested judge could have heard it so as "to prevent a failure of justice." *Id.* at 1108. This foreshadowed the modern doctrine of necessity, which holds that "a judge is not disqualified to sit in a case if there is no other judge available to hear and decide the

Yet it was only when the judge had an interest in the case that he would be disqualified at common law.[96] Thus, in *Brookes v. Earl of Rivers*,[97] the court refused to disqualify a judge whom it determined had no interest, even though the judge was brother-in-law to one of the parties.[98]

The Supreme Court of the United States generally adopted these common-law principles guiding judicial disqualification. One of the first cases in which the Court dealt with the issue of judicial disqualification was *Tumey v. Ohio*.[99] The statute at issue in *Tumey* allowed violators of the state's Prohibition Act to be tried by the village mayor without a jury.[100] Pursuant to authority granted by the statute, the Village Council of North College Hill passed an ordinance that disbursed to the mayor a portion of the fines collected under the statute, but because the mayor was to be paid from the fines collected, he would only be paid if he convicted the defendant.[101] Explaining that "questions of judicial qualification [need] not involve constitutional validity,"[102] the Court accepted as given the general rule that judges are disqualified because of interest in a controversy, although it noted that some cases raise subtle questions as to the requisite degree or nature of the interest.[103] Applying the historical inquiry described by *Murray's Lessee v. Hoboken Land & Improvement Co.*,[104] the Court explained that American courts adopted the English common-law rule that judges who had even the slightest pecuniary interest in a controversy would be disqualified,[105] although some courts and legislatures

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case." 46 AM. JUR. 2D *Judges* § 84 (2006); *see also* United States v. Will, 449 U.S. 200, 213–16 (1980) (adopting the doctrine explicitly).

96. William Blackstone explained the following:

> By the laws of England also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges or justices cannot be challenged. For the law will not suppose a possibility of [bias] or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (Oxford, Clarendon Press 1768) (footnote call numbers omitted).

97. (1668) 145 Eng. Rep. 569 (Ex.).

98. *Id.* The court explained that "favour shall not be presumed in a judge." *Id.*

99. 273 U.S. 510 (1927).

100. *Id.* at 516–17.

101. *Id.* at 517–20.

102. *Id.* at 523.

103. *Id.* at 522. One such case is when the judge's sole interest derives from his status as a taxpayer. *Id.* In this regard, the Court suggested that "the circumstance that there is no judge not equally disqualified to act in such a case has been held to affect the question." *Id.*

104. 59 U.S. (18 How.) 272, 276–77 (1855); *see supra* text accompanying notes 43–48.

105. *Tumey*, 273 U.S. at 524–26, 528.

eschewed a strict application of this rule because they found it to be "inconvenient, impracticable and unnecessary."[106] The Court concluded that relaxation of the strict common-law rule "has not become so embedded by custom" as to provide due process of law, except when the judge's interest "may be properly ignored as within the maxim *de minimis non curat lex*."[107] Accordingly, it held that the Due Process Clause requires judicial disqualification when the judge has a "direct, personal, substantial, pecuniary interest."[108] The Court stressed that, although "matters of kinship, personal bias, state policy, [and] remoteness of interest" are generally questions for legislative discretion,[109] due process would always be implicated (and denied) by any procedure that "offer[s] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."[110]

The *Tumey* Court also offered an alternative ground for finding a denial of due process. Due process is denied, it explained, when "an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial";[111] here, the mayor had the partisan interest in raising public moneys because his responsibility for the financial condition of his village created a strong motive "to help his village by conviction and a heavy fine."[112]

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106. *Id.* at 529. Such cases arose when the judge's interest was "too slight to excite prejudice against a defendant." *Id.* at 530.

107. *Id.* at 531. In other words, "[t]he law does not concern itself about trifles." BLACK'S LAW DICTIONARY 431 (6th ed. 1990).

108. *Tumey*, 273 U.S. at 523. The Court did not, however, decide whether due process requires disqualification for lesser interests because it engaged in historical analysis specifically to determine whether a traditionally unacceptable procedure—paying a judge from conviction fines—had become acceptable as a "settled usage[ ]" or "mode[ ] of proceeding." *Id.* at 523–24.

109. *Id.* at 523.

110. *Id.* at 532. The Court noted that "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.*

111. *Id.* at 534. The Court's articulation of this as a distinct rationale notwithstanding, this "alternative" ground certainly might be interpreted as nothing more than an example of what might lead the average man as judge "not to hold the balance nice, clear and true between the State and the accused." *Id.* at 532.

112. *Id.* at 532–33; *see also* Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (finding a due process violation on the ground that an official perforce occupied two inconsistent positions).

2. *The Court's Approach to Disqualification Shifted to an Emphasis on Fundamental Principles*

The Court abandoned its historical approach and relied on broad principles of fairness and justice in *In re Murchison*.[113] In that case, the Court found a denial of due process when a Michigan judge served as a one-man grand jury and subsequently tried, convicted, and sentenced two men for criminal contempt based on their conduct during the grand jury proceeding.[114] The Court explained judicial disqualification under the Due Process Clause in terms of general principles, rather than the historical inquiry undertaken in *Tumey*.[115] Due process, the Court explained, requires "[a] fair trial in a fair tribunal," a requirement that entails an absence of actual bias.[116] Yet, the Court continued, "our system of law has always endeavored to prevent even the probability of unfairness."[117] Thus, the *Tumey* holding, according to the Court, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,"[118] an appropriate outcome because "justice must satisfy the appearance of justice."[119] The Court ultimately held that, having participated in the accusatory process, "a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused."[120]

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113. 349 U.S. 133 (1955).

114. *Id.* at 134–35, 139.

115. *Compare id.* at 136–38 (discussing fairness and practicality concerns), *with supra* notes 99–110 and accompanying text (describing the historical inquiry undertaken by the *Tumey* Court).

116. *In re Murchison*, 349 U.S. at 136. The Court followed this approach in *Ungar v. Sarafite*, where it determined that the judge in question need not be disqualified because the Court could not "say there was bias, or such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." 376 U.S. 575, 588 (1964); *see also* Peters v. Kiff, 407 U.S. 493, 502 (1972) ("[D]ue process is denied by circumstances that create the likelihood or the appearance of bias.").

117. *In re Murchison*, 349 U.S. at 136.

118. *Id.*

119. *Id.* (internal quotation marks omitted) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). Citing the maxim that no man should be a judge in his own case or where he has an interest in the outcome, the Court explained that the nature of the interest "cannot be defined with precision." *Id.* Instead, the Court explained, "[c]ircumstances and relationships must be considered." *Id.*

Offutt involved the issue of federal judges' power to punish contempt. 348 U.S. at 13. The Court decided the case pursuant to its authority to supervise the federal courts, *id.*, and held that the trial judge in question should have disqualified himself because he "permitted himself to become personally embroiled with the petitioner" and therefore did not represent the "impersonal authority of law," *id.* at 17.

120. *In re Murchison*, 349 U.S. at 137. The Court also noted a potential denial of the defendants' fundamental right to examine and cross-examine witnesses. *Id.* at 139.

Sixteen years later, the Court in *Mayberry v. Pennsylvania*[121] similarly focused its analysis on principles of fairness when it disqualified a judge from sentencing a defendant who had verbally abused the judge throughout the trial.[122] The Court held that "a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor."[123]

The Court expanded its disqualification jurisprudence in *Gibson v. Berryhill*,[124] in which it explained that a judge's pecuniary interest in the litigation did not need to be as "direct or positive" as the interest in *Tumey*.[125] It thus affirmed the district court's conclusion that the Alabama Board of Optometry was disqualified from deciding the question of an optometrist's unprofessional conduct, since "success in the Board's efforts would possibly redound to the personal benefit of members of the Board."[126]

Two years later, in *Withrow v. Larkin*[127] the Court explored the question of judicial bias and reiterated the presumption against it. In *Withrow*, the Court addressed whether a state medical examining board could suspend a doctor's medical license on charges stemming from its own investigation.[128] Although the case involved an administrative agency, the Court discussed the general principles inherent in the due process right to a fair trial.[129] The Court explained its jurisprudence as a history of identifying various situations "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[130] But the Court also explained that state administrators are assumed to be impartial and objective, and thus "'capable of judging a particular controversy fairly on the basis of its own circumstances.'"[131] In addition to this presumption of honesty and integrity, the Court explained, due process analysis incorporates "a realistic appraisal of

121. 400 U.S. 455 (1971).

122. *See id.* at 464–66 ("Whether the trial be federal or state, the concern of due process is with the fair administration of justice.").

123. *Id.* at 465–66 ("No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.").

124. 411 U.S. 564 (1973).

125. *Id.* at 579. This expansion was also a reversion to the stricter common-law approach seemingly ignored by the *Tumey* holding. *See supra* text accompanying notes 105–08.

126. *Gibson*, 411 U.S at 578.

127. 421 U.S. 35 (1975).

128. *Id.* at 46.

129. *See id.* at 46–47 (discussing the dangers of having a biased decisionmaker).

130. *Id.* at 47.

131. *Id.* at 55 (quoting United States v. Morgan, 313 U.S. 409, 421 (1941)); *see also supra* notes 96, 98.

psychological tendencies and human weakness."[132] Although the Court ultimately found no per se due process violation, it allowed that its holding did not preclude courts in other cases from determining that, given the specific facts and circumstances at issue, the risk of unfairness was intolerably high.[133]

In *Aetna Life Insurance Co. v. Lavoie*,[134] the Court clarified the *Gibson* Court's expansion of *Tumey*.[135] In *Lavoie*, an Alabama Supreme Court justice refused to disqualify himself from hearing an appeal in a case involving an insurance company's allegedly tortious behavior when he had two pending actions against insurance companies.[136] The Court held that the justice's "general hostility towards insurance companies that were dilatory in paying claims" did not engender a due process violation, although it did find a denial of due process in the justice's direct stake in the case's outcome.[137] It explained that, traditionally, judges were not disqualified for bias or prejudice, although there had been a recent trend toward statutory provisions that permit such disqualification—a trend that was not sufficient for imposing a constitutional requirement under the Due Process Clause, since state decisions about legal procedures are discretionary and may only be proscribed by the Due Process Clause when they "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[138] In so holding, the Court explicitly declined to decide whether allegations of bias or prejudice could be sufficient under the Due Process Clause, although it offered dictum that such disqualification would only ever be constitutionally required "in the most extreme of cases."[139] Addressing the appellant's contention that the other justices should have disqualified themselves as well, the Court explained the "direct, personal, substantial, [and] pecuniary" test as a spectrum: "At some point, [t]he biasing

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

133. *Id.* at 58. The Court also noted that findings "made by judges with special insights into local realities are entitled to respect." *Id.*

134. 475 U.S. 813 (1986).

135. *See supra* text accompanying notes 124–25.

136. *Lavoie*, 475 U.S. at 817–18.

137. *Id.* at 820–21, 824. The Court found a denial of due process because the Alabama Supreme Court decision was binding on all lower courts, including the one in which the justice's cases were pending. *Id.* at 822. The justice thus "acted as a judge in his own case." *Id.* at 824 (citation and internal quotation marks omitted). The Court stressed that its holding did not address whether the justice was biased or influenced in fact, but simply that sitting on the case would possibly tempt the average judge "'not to hold the balance nice, clear and true.'" *Id.* at 825 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

138. *Id.* at 821 (internal quotation marks omitted) (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).

139. *Id.*

influence . . . [will be] too remote and insubstantial to violate the constitutional constraints."[140] Finally, the Court noted that the Due Process Clause merely establishes the baseline for judicial disqualifications and that "Congress and the states . . . remain free to impose more rigorous standards for judicial disqualification."[141]

Congress, in fact, did so by requiring the disqualification of a federal judge "in any proceeding in which his impartiality might reasonably be questioned,"[142] as well as in five specifically enumerated situations.[143] In *Cheney v. U.S. District Court for the District of Columbia*,[144] a party moved to disqualify Justice Scalia under this statute, questioning the appearance of his impartiality.[145] In denying the motion,[146] Justice Scalia explained that "[t]he people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find footfaults."[147]

III. THE COURT'S REASONING

In *Caperton v. A.T. Massey Coal Co.*,[148] the United States Supreme Court reversed the decision of the Supreme Court of Appeals of West Virginia and remanded the case for further proceedings, holding that the "serious, objective risk of actual bias" required Justice Benjamin's disqualification because Blankenship, the chairman, chief executive officer, and president of Massey, "had a significant and disproportionate influence in placing Justice Benjamin on the case."[149] Writing for the majority, Justice Kennedy opened by explaining that most matters

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140. *Id.* at 826 (alteration in original) (internal quotation marks omitted) (citing Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980)).

141. *Id.* at 828; *see also* Bracy v. Gramley, 520 U.S. 899, 904 (1997) (noting that due process questions are, "in most cases, answered by common law, statute, or the professional standards of the bench and bar").

142. 28 U.S.C. § 455(a) (2006). This standard does not depend upon "the reality of bias or prejudice but its appearance." Liteky v. United States, 510 U.S. 540, 548 (1994).

143. *See* 28 U.S.C. § 455(b) (listing circumstances under which a judge shall disqualify himself). This standard requires disqualification because of relationships that are even more distant than in-law status, *id.* § 455(b)(5), which directly contrasts with the strict common-law rule, *see* Brookes v. Earl of Rivers, (1668) 145 Eng. Rep. 569 (Ex.) (refusing to disqualify a judge who was brother-in-law to one of the parties).

144. 541 U.S. 913 (2004).

145. *See id.* at 913–16 (addressing whether Justice Scalia should recuse himself because he went duck hunting in a group that included then-Vice President Cheney).

146. *Id.* at 929.

147. *Id.* at 928.

148. 129 S. Ct. 2252 (2009).

149. *Id.* at 2264–65.

relating to judicial disqualification do not implicate constitutional protections.[150] Rather, the Due Process Clause incorporates the common-law rule that required disqualification when the judge had "a direct, personal, substantial, pecuniary interest" in the case.[151] The Court explained that this common-law rule reflects the principle that "[n]o man is allowed to be a judge in his own cause."[152]

According to the majority, however, new problems have emerged that were not dealt with at common law.[153] The majority, therefore, went on to discuss two such situations where the Court has found the probability of bias to be constitutionally impermissible.[154] The Court first considered judges who have a financial interest in the outcome of a case, but whose interest, it explained, is not great enough to have been considered personal or direct at common law.[155] The Court then considered judges who, rather than a pecuniary interest, have a conflict arising from their role in a previous proceeding.[156] From its discussion of precedent, the majority emphasized that due process requires disqualification when there is a "general concept of interests that tempt adjudicators to disregard neutrality."[157] The constitutional yardstick, the majority elaborated, is not whether the judge was, in fact, influenced.[158] Instead, the question is whether sitting on the case "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."[159] Thus, according to the majority, the test is an objective one and does not inquire into subjective bias, although the requisite interest for judicial disqualification "cannot be defined with precision."[160]

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150. *Id.* at 2259.

151. *Id.* (internal quotation marks omitted) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

152. *Id.* (alteration in original) (citation and internal quotation marks omitted).

153. *Id.*

154. *Id.*

155. *Id.* at 2259–60.

156. *Id.* at 2261.

157. *Id.* at 2260.

158. *Id.* at 2261.

159. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)). The Court later offered two alternative, if circular, articulations. First, "whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id.* at 2262 (internal quotation marks omitted). Second, "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 2263 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

160. *Id.* at 2261 (internal quotation marks omitted) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

The majority then turned to the present case, which, it explained, presented novel facts because the Court had never previously dealt with the question of disqualification in the context of judicial elections.[161] Disclaiming that it did not decide whether there was bias in fact,[162] the Court concluded 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."[163] In making this assessment, the Court considered "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election"[164] and found that Blankenship's contributions indeed had a disproportionate influence on the election's outcome.[165] Similarly, the Court explained that a critical factor is the temporal relationship between the campaign contributions, the pendency of the case, and the judge's election because, just as no man should judge his own cause, no man should be permitted to pick his own judge—at least without the other parties' consent.[166]

Finally, the Court emphasized that the present case involved an "extraordinary situation."[167] Because states adopt judicial regulations that are stricter than what is constitutionally necessary, the majority predicted that most disqualification disputes would not even touch upon constitutional considerations.[168] Thus, the majority explained, there need not be any fear of adverse consequences arising out of the Court's holding that Justice Benjamin's failure to disqualify himself raised constitutional issues.[169]

Chief Justice Roberts wrote a dissenting opinion, which was joined by Justices Scalia, Thomas, and Alito.[170] The dissent criticized two facets of the majority opinion. First, emphasizing that the Court has only ever identified two situations in which a judge's failure to

161. *Id.* at 2262.
162. *Id.* at 2263.
163. *Id.* at 2263–64.
164. *Id.* at 2264. The Court later explained that whether the contributions were necessary and sufficient to the judge's victory is irrelevant, since a causal determination is as difficult an inquiry as whether a judge was actually biased. *Id.* Nevertheless, the Court did find such a causal connection. *See infra* text accompanying note 165.
165. *Caperton*, 129 S. Ct. at 2264.
166. *Id.* at 2264–65.
167. *Id.* at 2265.
168. *Id.* at 2267.
169. *Id.* at 2265–66.
170. *Id.* at 2267 (Roberts, C.J., dissenting).

disqualify himself implicates constitutional principles,[171] Chief Justice Roberts asserted that, as a general rule, judicial disqualification is to be regulated by the common law, statutes, and judicial and bar regulations.[172] Thus, he objected, the majority was unnecessarily invoking the Constitution.[173]

Second, Chief Justice Roberts criticized the standard adopted by the majority as vague, explaining that it provides no guidance to courts and litigants.[174] According to Chief Justice Roberts, the test articulated by the majority will—despite the majority's disclaimer—lead to adverse consequences, such as an increased number of disqualification motions and a corresponding increase in due process challenges.[175] In short, Chief Justice Roberts argued 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 [will] diminish the confidence of the American people in the fairness and integrity of their courts."[176]

Justice Scalia wrote separately to emphasize the adverse consequences he believed would follow and to reproach the majority for attempting to "right all wrongs and repair all imperfections through the Constitution."[177] According to Justice Scalia, the Court was doing more harm than good by ambiguously expanding a constitutional protection to address imperfections in the judicial system, such as the one on display in the present case.[178]

IV. ANALYSIS

In *Caperton v. A.T. Massey Coal Co.*, the Supreme Court held that the Due Process Clause required Justice Benjamin's disqualification because Blankenship had "a significant and disproportionate influence" in placing Justice Benjamin on a case in which Blankenship had a personal stake.[179] To reach this result, the Court mischaracterized

171. *Id.* at 2268 (describing the two situations discussed by the majority).

172. *Id.*

173. *See id.* at 2267 (criticizing the majority for using the Due Process Clause to overturn Justice Benjamin's failure to recuse himself).

174. *Id.*

175. *Id.* at 2272–74.

176. *Id.* at 2274. Chief Justice Roberts further suggested that the present case was not as unique as the majority believed. *Id.* at 2273. He also criticized the majority's characterization of Blankenship's independent expenditures as campaign contributions, given that Justice Benjamin could not control the funds' use, and they might as easily have hurt Justice Benjamin's campaign as helped it. *Id.*

177. *Id.* at 2274–75 (Scalia, J., dissenting).

178. *Id.* at 2275.

179. *Id.* at 2263–64 (majority opinion).

its precedent and articulated a disqualification jurisprudence that failed to account for the general development of its due process jurisprudence.[180] By doing this, the Court empowered itself to invoke the Constitution and thereby disqualify Justice Benjamin.[181] Of course, the Court could have disqualified Justice Benjamin through a correct application of its precedent,[182] but a correct application of precedent would have also made clear that the Due Process Clause did not mandate a particular disposition.[183] Had the Court recognized this, it could have given greater weight to other issues implicated by the case—issues that should have prompted the Court to affirm the judgment of the Supreme Court of Appeals of West Virginia.[184]

A. The Court Failed to Account for a Fundamental Methodological Shift in Its Approach to Due Process

The right to due process today is very different from its original conception.[185] In contrast to today's broad, principle-based doctrine, many commentators accept that the English tradition from which the concept of due process arose was narrow and technical—and this is true regardless of whether one traces the Due Process Clause to Magna Carta like the Court did in *Murray's Lessee v. Hoboken Land & Improvement Co.*[186] or whether one traces it specifically to the English statute enacted in 1354 that first used the phrase "due Process of the Law."[187] But even as it adopted Magna Carta as ancestor to the Due Process Clause, the Court began broadening the doctrine; where

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180. *See infra* Part IV.A–B.

181. *See infra* notes 332–39 and accompanying text.

182. *See infra* Part IV.C.1.

183. *See infra* Part IV.C.2. Thus, under existing precedent, Justice Benjamin's failure to disqualify himself was not a priori a denial of due process.

184. *See infra* Part IV.C.3.

185. *See supra* Part II.A.

186. 59 U.S. (18 How.) 272 (1855); *see supra* text accompanying notes 43–48.

187. 1354, 28 Edw. 3, c. 3 (Eng.); *see* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911) (tracing the phrase "due process of law" to Chapter 3 of 28 Edw. III and explaining that it refers to "the indictment or presentment of good and lawful men . . . or by writ original of the common law" (internal quotation marks omitted)); Jurow, *supra* note 42, at 266–70, 277–79 (explaining that the terms "due process of law" and "process" were consistently used to refer precisely to a particular method of summoning a person to appear and answer accusations). Corwin, among others, traced this statute to Magna Carta. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring) ("[Sir Edward] Coke equated the phrase 'due process of the law' in the 1354 statute with the phrase 'Law of the Land' in Chapter 29 of Magna Charta . . . ."); Corwin, *supra*.

Magna Carta only bound the king,[188] the Court in *Murray's Lessee* explicitly disclaimed any such limitation on the Due Process Clause.[189] The Court has since applied the Due Process Clause to all three governmental branches.[190]

In keeping with the original, technical understanding of Magna Carta, some early commentators explicated the American concept of due process as only applying in criminal trials,[191] and indeed, most of the Court's early due process cases involved individuals opposing the state qua state.[192] By the time of *Aetna Life Insurance Co. v. Lavoie*,[193]

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188. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 96 ("The Magna Carta bound the King and the 1354 statute the judges. Parliament was unfettered.").

189. *Murray's Lessee*, 59 U.S. (18 How.) at 276 ("The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.").

190. *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980) (legislature); Brown v. Mississippi, 297 U.S. 278 (1936) (police); Tumey v. Ohio, 273 U.S. 510 (1927) (judges).

191. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 353–54 (Boston, Little, Brown, & Company 1868) (approving the following definition of due process: "By the law of the land is most clearly intended the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 567 (5th ed. 1994) ("So that this clause in effect affirms the right of trial according to the process and proceedings of the common law."). *But see* Hurtado v. California, 110 U.S. 516, 553 (1884) (Harlan, J., dissenting) (approving an early understanding of due process that embraced both civil and criminal cases).

192. *E.g.*, Mugler v. Kansas, 123 U.S. 623, 624–25 (1887) (indictment for violating a statute prohibiting manufacture and sale of liquor); *Hurtado*, 110 U.S. at 518 (statement of facts) (trial for murder); Munn v. Illinois, 94 U.S. 113, 114–18 (1876) (criminal prosecution for serving as public warehousemen without a license); *Murray's Lessee*, 59 U.S. (18 How.) at 274–76 (validity of distress warrant issued by a solicitor of the treasury). The Court's disqualification jurisprudence certainly developed in this category, and the Court suggested this limitation in *Tumey* when it explained that procedures violate due process if they might lead the judge "not to hold the balance nice, clear and true *between the State and the accused*." 273 U.S. at 532 (emphasis added).

Not all of the Court's early cases were predicated on criminal trials. *See, e.g.*, Kennard v. Louisiana *ex rel.* Morgan, 92 U.S. 480, 481–82 (1875) (dealing with the claim that a state court denied due process in adjudicating between two holders of the same governmental office). Yet *Kennard* is a far cry from more recent civil cases implicating the Due Process Clause because the issue in *Kennard* arose from positive state action, rather than asserted court impropriety. The Court was thus able to characterize the case as an instance of individual versus state:

> The sole question presented . . . is, whether the State of Louisiana, *acting under the statute of Jan. 15, 1873*, through her judiciary, has deprived Kennard of his office without due process of law . . . . The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution.

Id. at 481 (emphasis added).

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

however, the Court was applying due process considerations to suits between two private parties.[194]

Whatever the specifics of its original contours, however, the expansion of the Due Process Clause's scope from merely those "settled usages and modes of proceeding existing in the common and statue [sic] law of England"[195] to broad considerations of fairness[196] represents a fundamental shift in the Court's approach to due process, not a mere case-by-case extension of existing rules.[197] The Court did, of course, discuss these principles in *Caperton*, but it attempted to situate them within the historical inquiry of "new problems . . . that were not discussed at common law"—problems that the Court has identified as "instances which, as an objective matter, require recusal."[198] By couching its due process jurisprudence as an application of existing rules to new situations, the Court failed to ground itself adequately in the fundamental principle upon which its understanding of the Due Process Clause now rests—the right to a fair trial in a fair tribunal.[199]

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194. *See id.* at 815 (suit between insurer and insured); *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

195. *Murray's Lessee*, 59 U.S. (18 How.) at 277.

196. *See, e.g.*, *In re* Murchison, 349 U.S. 133, 136 (1955) (explaining that due process requires "[a] fair trial in a fair tribunal"); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (suggesting that due process is that which is required by a "fair and enlightened system of justice"), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969).

197. Justice Scalia articulated this in *Pacific Mutual Life Insurance Co. v. Haslip*:

> By [1934], [the Court's] understanding of due process had shifted in a subtle but significant way. . . . [D]ue process required "fundamental justice" or "fairness" in *all* cases, and not merely when evaluating nontraditional procedures. . . .
>
> In the ensuing decades, however, the concept of "fundamental fairness" under the Fourteenth Amendment became increasingly decoupled from the traditional historical approach. . . .
>
> . . . .
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> . . . [O]ur due process opinions in recent decades have indiscriminately applied balancing analysis to determine "fundamental fairness," without regard to whether the procedure under challenge was (1) a traditional one and, if so, (2) prohibited by the Bill of Rights.

499 U.S. 1, 33–36 (1991) (Scalia, J., concurring) (citations omitted). This shift first manifested in *Hurtado* when the Court explicitly rejected the strict historical approach apparently mandated by *Murray's Lessee* in order to limit the scope of the Due Process Clause. *See Hurtado*, 110 U.S. at 528–29 (majority opinion) ("[A] process of law . . . must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; *but it by no means follows that nothing else can be due process of law.*" (emphasis added)).

198. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009).

199. *See supra* notes 113–19 and accompanying text. Of course, the Court in *Withrow v. Larkin* explained its disqualification jurisprudence as a history of identifying situations "in which experience teaches that the probability of actual bias" is unconstitutionally high. 421 U.S. 35, 47 (1975). One way to read the Court's statement is as an assertion that the

B. The Court's Discussion of Disqualification Principles Failed to Account for the Development of Its General Due Process Jurisprudence

In order to "place the present case in proper context," the Court discussed two situations "not discussed at common law" where the Court has required disqualification.[200] The implication, of course, is that these situations were those where the Court has expanded its disqualification jurisprudence.[201] But by taking this approach, the Court misconstrued its precedent and skewed its discussion of disqualification.[202]

1. Tumey v. Ohio *and Its Progeny: The Court's Misconstruction of the First Situation "Not Discussed at Common Law"*

The first situation that the Court addressed was that in which the judge's financial interest in the outcome of the case "was less than what would have been considered personal or direct at common law."[203] In this regard, the Court invoked *Tumey v. Ohio*[204] and its progeny.[205] The Court's discussion, however, inverted *Tumey*'s relationship to the common-law tradition.[206]

The Court asserted that "[t]he [*Tumey*] Court was . . . concerned with more than the traditional common-law prohibition on direct pecuniary interest."[207] Instead, it reasoned, the *Tumey* Court was "concerned with a more general concept of interests that tempt adjudicators to disregard neutrality."[208] But that was not, in fact, the case—or at least in the way the Court intended. The Court asserted that the *Tumey* holding, which required disqualification for "direct, personal, substantial, pecuniary" interests, was an adoption of the common-law rule;[209] accordingly, the Court's discussion of "new

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Court's disqualification jurisprudence was, in fact, merely a common-law extension of existing rules, rather than a fundamental methodological shift.

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

201. *See id.* at 2260 ("The Court was thus concerned with more than the traditional common-law prohibition on direct pecuniary interest.").

202. *See infra* Part IV.B.1–2.

203. *Caperton*, 129 S. Ct. at 2260.

204. 273 U.S. 510 (1927).

205. *Caperton*, 129 S. Ct. at 2259–61. The Court also invoked, in the following order, the cases of *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). For a discussion of these cases, see *infra* notes 218–29 and accompanying text.

206. *See infra* notes 209–12 and accompanying text.

207. *Caperton*, 129 S. Ct. at 2260.

208. *Id.*

209. *Id.* at 2259.

problems . . . not discussed at common law" included one in which "a judge had a financial interest in the outcome of the case" that was "less than what would have been considered personal or direct at common law."[210] But as *Tumey* itself makes clear, the common-law rule was that "the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable."[211] It was only in the *Tumey* Court's discussion of then-current American practices that it found some divergence from the traditional approach, and it was this *exception* to the common-law rule that the Court adopted as its test for when a judge should be disqualified because of interest.[212] This was the *Tumey* Court's only departure from traditional common law, however; its second holding—that the mayor occupied two inconsistent positions[213]—hearkened all the way back to *Dr. Bonham's Case*[214] and *City of London v. Wood*.[215] Moreover, the Court limited constitutional disqualification to these two instances, expressly disclaiming disqualification in "matters of kinship, personal bias, state policy, [and] remoteness of interest."[216] The Court's use of *Tumey* to extend traditional disqualification principles thus rests on infirm ground because that case only involved one instance of divergence from the common-law approach, namely where the Court adopted an exception to the common-law rule in order to limit disqualification, not extend it.[217]

This inversion holds true for the Court's use of *Ward v. Village of Monroeville*,[218] *Gibson v. Berryhill*,[219] and *Aetna Life Insurance Co. v. Lavoie*.[220] In *Ward*, the Court explored the *Tumey* Court's requirement of a direct, personal, and substantial pecuniary interest,[221] but it ulti-

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210. *Id.* at 2259–60. If, as the Court explained, *Tumey* adopted the common-law rule, then the inclusion of the *Tumey* line of cases in the set of situations "not discussed at common law," *id.* at 2259, is problematic. Of course, the *Caperton* Court did not explicitly endorse *Tumey*'s analysis of common law as correct, but that is the implication of its introduction of *Tumey* as "[t]he early and leading case on the subject." *Id.*

211. Tumey v. Ohio, 273 U.S. 510, 524 (1927) (citing Dr. Bonham's Case, (1610) 77 Eng. Rep. 646 (K.B.)). The Court continued, "And this strict principle, unless there is relief by the statute, is seen in modern cases." *Id.* at 526.

212. *See supra* notes 99–110 and accompanying text.

213. *See Tumey*, 273 U.S. at 534.

214. (1610) 77 Eng. Rep. 646 (K.B.); *see supra* note 89.

215. (1701) 88 Eng. Rep. 1592 (K.B.); *see supra* notes 92–93 and accompanying text.

216. *See Tumey*, 273 U.S. at 523 (explaining that such matters are those for legislative discretion).

217. *See supra* notes 209–12 and accompanying text.

218. 409 U.S. 57 (1972).

219. 411 U.S. 564 (1973).

220. 475 U.S. 813 (1986).

221. *Ward*, 409 U.S. at 59–60.

mately grounded its holding in the second of *Tumey*'s holdings—the one that found problematic a situation where "an official perforce occupies two practically and seriously inconsistent positions."[222] The Court's statement in *Gibson* that "the financial stake need not be as direct or positive as it appeared to be in *Tumey*,"[223] a statement that the *Caperton* majority cited to support its reading of the case law,[224] did not expand the Court's disqualification jurisprudence. Instead, it simply provides a reading of *Tumey* that better accords with the strict common-law rule.[225] The *Lavoie* Court followed this approach, but by requiring only the disqualification of the justice with pending litigation and not the rest of the justices who were class members in a class action suit, the Court reaffirmed the line drawn by *Tumey*'s departure from the strict common-law approach.[226] In short, none of these cases—from *Tumey* to *Lavoie*—*expanded* disqualification requirements from the common-law rule.

Instead, these cases reflect the methodological shift that the Court's due process analysis has undergone.[227] The *Caperton* Court's reading of *Tumey* as "concerned with a more general concept of interests that tempt adjudicators to disregard neutrality"[228] was correct, but not because of *Tumey*'s relationship to disqualification jurisprudence, as the Court implied. This is a subtle but important point: Understanding *Tumey* and its progeny in light of the Court's general due process jurisprudence reorients *Caperton* away from the syllogistic implications of the Court's reading of precedent and toward a flexible baseline of fundamental fairness that permits more than one disposition.[229]

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222. *Id.* at 60 (internal quotation marks omitted) (quoting Tumey v. Ohio, 273 U.S. 510, 534 (1927)).

223. *Gibson*, 411 U.S. at 579.

224. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2260 (2009) (discussing *Gibson* and that Court's interpretation of *Ward*).

225. See *supra* notes 104–08 and accompanying text for a discussion of the common-law rule.

226. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824–27 (1986). The Court made this explicit when it held that the disqualified justice "acted as 'a judge in his own case,'" *id.* at 824 (quoting *In re* Murchison, 349 U.S. 133, 136 (1995)), and had a "'direct, personal, substantial, [and] pecuniary'" interest, *id.* (alteration in original) (quoting *Ward*, 409 U.S. at 60).

227. *See supra* Part IV.A.

228. *Caperton*, 129 S. Ct. at 2260.

229. *See infra* Part IV.C.2.

2. In re Murchison *and* Mayberry v. Pennsylvania*: The Court's Misconstruction of the Second Situation "Not Discussed at Common Law"*

The Court again failed to track the development of its general due process jurisprudence when it examined "[t]he second instance requiring recusal that was not discussed at common law"—namely when a judge "was challenged because of a conflict arising from his participation in an earlier proceeding."[230]

In this context, the Court invoked *In re Murchison*[231] and *Mayberry v. Pennsylvania*.[232] *In re Murchison*, however, only diverged from traditional principles in its reasoning—not its result. After all, the *In re Murchison* holding has close common-law antecedents.[233] It thus represents not a new situation, but a new approach to a familiar one.[234] The reason that "prosecuting judges [should not] be trial judges of the charges they prefer" is that "[f]air trials are too important a part of our free society."[235] It was this *approach* that the Court followed in *Mayberry* when grounding its holding in "the concern of due process . . . with the fair administration of justice."[236] The Court's empha-

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230. *Caperton*, 129 S. Ct. at 2261.

231. 349 U.S. 133 (1955).

232. 400 U.S. 455 (1971).

233. This can be brought out by a comparison of *In re Murchison* and two of the early English cases. The *In re Murchison* Court set forth the following line of reasoning:

> It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. . . . A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be . . . wholly disinterested in the conviction or acquittal of those accused. . . . [I]t can certainly not be said that he would have none of [a prosecutor's] zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

349 U.S. at 137.

Similarly, in *Dr. Bonham's Case*, the court stated that "[t]he censors cannot be . . . judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture . . . ; and one cannot be Judge and attorney for any of the parties." (1610) 77 Eng. Rep. 646, 652 (K.B.) (citations omitted). The *In re Murchison* Court's reasoning is aligned even closer to the reasoning in *City of London v. Wood*, however:

> [I]t is against all laws that the same person should be party and Judge in the same cause, for it is manifest contradiction; . . . the party endeavours to have his will, the Judge determines against the will of the party, and has authority to enforce him to obey his sentence: and can any man act against his own will, or enforce himself to obey?

(1701) 88 Eng. Rep. 1592, 1602 (K.B.).

234. *See supra* notes 113–19 and accompanying text.

235. *In re Murchison*, 349 U.S. at 137.

236. *Mayberry*, 400 U.S. at 465.

sis on broad due process concerns ensured the relevance of its assertion that "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication."[237] In this regard, *Mayberry* does depart from the common-law disqualification doctrine, for it is difficult to find the issue of fair adjudication in *Brookes v. Earl of Rivers*,[238] where the court refused to disqualify a judge whose brother-in-law was one of the parties.[239] But recognizing that the Court's disqualification jurisprudence has developed over time requires an understanding of how and why it did so, and it is this aspect of the analysis that the Court ignored by treating *In re Murchison* and *Mayberry* (as well as *Tumey* and its progeny) as mere common-law extensions of existing rules.[240]

C. *The Court Should Have Considered Other Salient Factors Because Its Jurisprudence Did Not Mandate a Particular Disposition*

Although the *Caperton* Court's failure to account for its general due process jurisprudence skewed its discussion of disqualification case law, it could have nonetheless reached the same result through a correct application of precedent.[241] Of course, a correct application of the precedent would also have made manifest that principles of due process did not mandate a particular result.[242] Instead, a correct application of its precedent would have allowed the Court to weigh other salient considerations, which ultimately should have tipped the balance in favor of affirming the judgment of the Supreme Court of Appeals of West Virginia.[243]

1. *The Court Could Have Reached the Same Result by Properly Applying Its Precedent*

Over time, the Court's due process jurisprudence increasingly emphasized broad notions of fairness.[244] The basic question in a due process inquiry into judicial disqualification is therefore the basic question of fairness and impartiality.[245] This is to be expected be-

237. *Id.*
238. (1668) 145 Eng. Rep. 569 (Ex.).
239. *Id.*
240. *See supra* text accompanying note 229.
241. *See infra* Part IV.C.1.
242. *See infra* Part IV.C.2.
243. *See infra* Part IV.C.3.
244. *See supra* Part II.A.
245. *See supra* Part II.B; *cf.* David C. Gray, *Why Justice Scalia Should Be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249, 1251, 1265 (2007) (explaining that even a constitutional originalist can find contemporary meaning in the Eighth Amendment's

cause the fairness and impartiality of a tribunal implicates its ability to function,[246] as well as its role in democracy.[247] Accordingly, maintaining public confidence in the impartiality of the judiciary remains a fundamental concern.[248]

The implication of this basic due process criterion for disqualification is that the Court could have disqualified Justice Benjamin even if it had applied its precedent correctly. As the Court explained in *Withrow v. Larkin*,[249] due process analysis requires "a realistic appraisal of psychological tendencies and human weakness."[250] Even accepting Chief Justice Roberts's argument that "Justice Benjamin and his campaign had no control over how [Blankenship's contributions to ASK] w[ere] spent,"[251] $2.5 million is a significant amount of money to donate to a political organization dedicated to a single candidate.[252] Considering psychological tendencies does, in fact, raise the specter of a constitutionally problematic probability of bias because the question becomes, not what proximately caused Justice Benjamin's election, but what Justice Benjamin *thought* contributed to his election. It

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prohibition against cruel and unusual punishment by reading it as a prohibition against that which "actually *is* cruel and unusual").

246. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 89, at 378 ("The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.").

247. *See* Hurtado v. California, 110 U.S. 516, 536 (1884) (referring to judicial review of governmental action as "the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority").

248. *See* Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Indeed, this concern has spawned a great deal of recent debate over the wisdom of judicial elections and their various forms. *See, e.g.*, Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1260 (2008) ("Like judicial independence, judicial accountability is not an end in itself. It too serves other ends: To promote the rule of law, institutional responsibility, and public confidence in the courts."). Geyh further explains that the "perennial policy struggle is to strike an optimal balance between judicial independence and accountability," a balance that would ensure enough judicial independence that judges decide cases "without fear or favor," but also ensures enough accountability that the judges do not "disregard the facts or law to the detriment of the rule of law and public confidence in the courts." *Id.*

249. 421 U.S. 35 (1975).

250. *Id.* at 47.

251. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2273 (2009) (Roberts, C.J., dissenting) (emphasis omitted).

252. *See id.* at 2257 (majority opinion) (noting that Blankenship's donations to ASK accounted for approximately two-thirds of the total funds it received); Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 479 (1962) ("While 'feelings' hardly decide constitutional cases, they may well reflect historical and social institutions and attitudes not irrelevant to concepts which permeate the fourteenth amendment.").

is therefore suggestive that the complexity of the chain of causation precludes any ability to rule out the effect of Blankenship's contributions as proximate cause.[253]

Moreover, despite Chief Justice Roberts's assertion that the complexity of the causal chain that led to Justice Benjamin's election undermines any assertion that Blankenship chose the judge in his own cause,[254] the reason that Caperton moved to disqualify Justice Benjamin before Massey filed its petition of appeal[255] was the long delay between Massey's notice of intent to appeal and its actual appeal.[256] This delay was due in large part to technical difficulties in obtaining the trial transcript, but it was also due to Massey's repeated requests for continuances.[257] Whatever the causal relationship between Blankenship's contributions and Justice Benjamin's election, Massey's large number of requests belies Chief Justice Roberts's assertion, at least with respect to what it appears Massey was *trying* to do. This concomitance of appearances and a causal chain too complex to isolate Massey's actual influence may very well be of higher constitutional significance than either factor alone.[258] Hitherto, the Court may not have extended the requirements of the Due Process Clause to encompass the mere appearance of bias, but the importance of public confidence in the judiciary entails that such an extension would have a historical pedigree.[259] Accordingly, a proper application of due process precedent could have supported the Court's holding.

Alternatively, the Court could have grounded its reasoning in the traditional prohibition against judges hearing their own cases.[260] After all, if the Court in *Gibson* could find sufficient interest to disqualify the Alabama Board of Optometry in the *possibility* that the Board's decision would "redound to the personal benefit of members of the

253. *Compare Caperton*, 129 S. Ct. at 2264 ("Blankenship's campaign contributions . . . had a significant and disproportionate influence on the electoral outcome."), *with id.* at 2274 (Roberts, C.J., dissenting) ("It is also far from clear that Blankenship's expenditures affected the outcome of this election.").

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

255. *See supra* note 19.

256. E-mail from Larry V. Starcher, *supra* note 25.

257. *Id.*

258. In other words, appearances have greater weight when they are grounded in fact.

259. *See supra* notes 246–48 and accompanying text. *But see* James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?* 22 (Stanford Pub. Law, Working Paper No. 1491289, 2009), *available at* http://ssrn.com/abstract=1491289 (reporting the results of an empirical study and concluding that "whether the [campaign] contribution is likely to influence the outcome of the election has nothing to do with perceptions of impartiality and legitimacy"); *infra* note 282.

260. *See supra* text accompanying notes 89, 99–110.

Board,"[261] perhaps Justice Benjamin's interest in maintaining his judicial position through the next election is equally sufficient.[262] How persuasive this is, of course, remains an open question, since Justice Benjamin's twelve year term[263] might mean that the biasing influence is too remote. But the mere availability of such an argument illustrates the flexibility of a correct application of precedent.

2. The Due Process Clause Did Not Require a Particular Disposition

The fact that the Due Process Clause embodies the abstract principle of fairness, requiring only an impartial tribunal—even if that requirement encompasses more concrete indicia, such as the absence of actual or any probability of bias—gives the Court room to have decided the case either way.[264] The Court itself has recognized that there is a point beyond which there is no fixed meaning.[265] This does not mean that the Court was unfettered by parameters,[266] just that the

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261. Gibson v. Berryhill, 411 U.S. 564, 578 (1973).

262. In other words, Justice Benjamin might very well be interested in maintaining the goodwill of Blankenship so as to ensure continued financial contributions—or at least ensure that Blankenship does not expend considerable resources to elect somebody else. *Cf.* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1088 (1996) ("[A] litigant ought to make a passable case against a sitting judge by asserting that the judge has a direct, personal interest in ruling in accordance with his [campaign] promise because it is central to his reelection, his personal employment.").

263. *See* W. VA. CODE § 3-1-16 (2006) (establishing the term length for justices on the supreme court of appeals).

264. *See* Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 527 (1982) (defining legal practice generally as an "exercise in interpretation"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) ("[W]e should prefer to see the other clauses of the Bill of Rights read as an affirmation of the special values they embody rather than as statements of a finite rule of law . . . ."); James Boyd White, *Thinking About Our Language*, 96 YALE L.J. 1960, 1973 (1987) (discussing the instability of language, even those terms that people assume refer transparently to an underlying concept, and explaining that "all of our language, not just certain terms within it, is in constant flux"); *cf.* Gray, *supra* note 245, at 1265 (explaining that the Eighth Amendment's prohibition against cruel and unusual punishment does not depend on what any given society *thinks* is cruel and unusual, but what actually *is* cruel and unusual).

265. *See* Rochin v. California, 342 U.S. 165, 169–70 (1952) (explaining that even the most specific constitutional provisions, a category to which the Due Process Clause does not belong, evoke sharp differences among judges and among a particular judge's various decisions).

266. *See id.* at 170 (explaining that, despite the vagueness of the contours of the Due Process Clause, judges cannot ground their decisions in personal notions because they are limited by "considerations . . . fused in the whole nature of our judicial process"); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 28 (1921) (explicating the judge's function as "extract[ing] from the precedents the underlying principle" before "determin[ing] the path or direction along which the principle is to move and develop"); Easterbrook, *supra* note 188, at 92 ("The whole idea of having a written constitution is inconsistent with

boundaries of the inquiry had not yet been defined precisely enough to demand a particular disposition.

Caperton did not allege that Justice Benjamin had a "direct, personal, substantial, pecuniary interest" in the case.[267] Nor did he contend that Justice Benjamin occupied two mutually inconsistent roles as in *In re Murchison*.[268] Instead, Caperton's motion—and the Court's ultimate opinion—relied upon the idea asserted in *In re Murchison*: Avoid the probability of unfairness and satisfy the appearance of justice, even if this requires disqualification of a judge who is unbiased in fact.[269] But in *Lavoie*, the Court specifically rejected a claim that the judge in question had a "general hostility" to one of the parties and suggested that disqualification for bias would only be constitutionally required in "the most extreme of cases."[270] Although the *In re Murchison* Court asserted that "justice must satisfy the appearance of justice," that statement was mere dictum: The Court's holding was rooted in the fact that the judge occupied inconsistent roles and was therefore *not* impartial in fact.[271] Accordingly, in *Cheney v. U.S. District Court for the District of Columbia*,[272] Justice Scalia rejected the argument that "the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, [and] any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned."[273]

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constant revisions in interpretation . . . . Words are designed to control. We have a text and must make sense of it even at some cost to today's notions of moral philosophy.").

267. *See* Joint Appendix, *supra* note 9, at 331a–335a (arguing that there was an appearance of bias).

268. *See supra* text accompanying note 120.

269. In its first motion, Caperton argued that "a reasonable person, knowing all of the relevant facts, would harbor doubts about Justice's [sic] Benjamin's ability to be impartial and that disqualification is necessary in order to develop and maintain the public's confidence in West Virginia's judiciary." Joint Appendix, *supra* note 9, at 335a. Likewise, the Court held that "objective standards may also require recusal whether or not actual bias exists or can be proved." Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009).

270. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820–21 (1986). This suggests a reason why Justice Kennedy scrupulously characterized the facts of *Caperton* as "extreme." *See Caperton*, 129 S. Ct. at 2265 ("The facts now before us are extreme by any measure.").

271. *See In re* Murchison, 349 U.S. 133, 136–39 (1955) (explaining that the judge was also acting as prosecutor and that the judge's dual role implicated the defendants' right to cross-examine witnesses).

272. 541 U.S. 913 (2004).

273. *Id.* at 923 (internal quotation marks omitted). Part of Justice Scalia's rationale was that the editorials contained incorrect facts and legal principles. *Id.* at 922–24.

Another part of Justice Scalia's rationale was that United States Supreme Court Justices should hesitate to disqualify themselves because of the potential adverse consequences, such as would occur if the now-eight member Court split evenly on a decision. *Id.* at 915. The ability of the West Virginia Supreme Court of Appeals justices to find replacements, in contrast, was evident when Justices Starcher and Maynard disqualified themselves

Although Caperton asserted that a reasonable person would entertain doubts about Justice Benjamin's impartiality, it is also possible that a reasonable person, knowing all of the relevant facts, would not. After all, even Justice Starcher, who called for Justice Benjamin's disqualification and asserted that "big money should never be permitted to buy, or be seen to buy, justice,"[274] accepted that Blankenship's contributions were less to elect Justice Benjamin than they were to oust incumbent Justice McGraw.[275] An objective observer might reasonably assume Justice Benjamin understood that Blankenship merely wanted to oust the incumbent, which minimizes the likelihood of any biasing gratitude harbored by Justice Benjamin toward Blankenship.[276]

While the Court's case law makes clear that actual bias is unacceptable,[277] its concern about the probability of bias has always been an evidentiary matter,[278] and the mere appearance of bias has never itself been a constitutional criterion for disqualification.[279] The

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on rehearing. *See* Caperton v. A.T. Massey Coal Co., 679 S.E.2d 223, 264–65 (W. Va. 2008) (listing the judges "sitting by temporary assignment" to replace the disqualified justices).

274. Voluntary Disqualification Order, *supra* note 25, at 8.

275. Justice Starcher explained the following:

> I think it's safe to say that Justice Benjamin was basically an unknown. I don't think Blankenship knew him. I think he just happened to be running on the Republican ticket at a time when Blankenship was ready to spend a lot of money. Despite what Benjamin may think, it wasn't his popularity that elected him. It was the beating that the big bucks on his behalf gave Justice McGraw. A lot of folks say Benjamin didn't get elected; McGraw got defeated.

E-mail from Larry V. Starcher, *supra* note 25; *see also Caperton*, 129 S. Ct. at 2274 (Roberts, C.J., dissenting) ("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.").

276. *See supra* text accompanying notes 248–53.

277. *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 47 (1975) ("[A] biased decisionmaker [is] constitutionally unacceptable . . . ."); Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971) (holding that the defendant in criminal contempt proceedings was entitled to an unbiased judge—one who was "not bearing the sting of [the defendant's] slanderous remarks"); *In re* Murchison, 349 U.S. 133, 136 (1955) ("Fairness of course requires an absence of actual bias in the trial of cases.").

278. *See Withrow*, 421 U.S. at 58 (explaining that while the present facts did not amount to a per se due process violation, this did not "preclude a court from determining from the special facts and circumstances present in the case before it that *the risk of unfairness is intolerably high*" (emphasis added)); Estes v. Texas, 381 U.S. 532, 542–43 (1965) (explaining that most due process claims require a showing of actual prejudice, but the Court has sometimes found due process violations without such a showing when the procedure "involves such a probability that prejudice will result"); *In re Murchison*, 349 U.S. at 136 (noting that the *Tumey* holding is so stringent as to possibly "bar trial by judges who have no actual bias").

279. *E.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824–25, 828 (1986) (couching its decision in terms of "the appearance of justice" but nonetheless holding that the disqualified justice "acted as a judge in his own case" and had a "direct, personal, substantial, [and]

Caperton majority thus reached its decision by characterizing the case as disqualification for probability of bias (as evidence of actual bias), and Chief Justice Roberts's dissent characterized the majority's holding as imposing a constitutional requirement of disqualification for the appearance of bias.[280]

Whatever other problems its absence engenders, the *appearance* of impartiality is not "implicit in the concept of ordered liberty"[281] if there is impartiality in fact.[282] Imposing a constitutional standard in such a case would be equivalent to "import[ing] into the discussion [the Court's] own personal views of what would be wise, just and fit-

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pecuniary" interest (alteration in original) (citations and internal quotation marks omitted)). *But see* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 n.12 (1988) (noting the "constitutional dimensions" of the Court's concern with the appearance of justice in *Lavoie*); Proctor v. Warden, 435 U.S. 559, 560 (1978) (per curiam) (reversing the denial of a habeas corpus petition because the lower court's per curiam order "ha[d] nothing whatsoever to do with the petitioner's case," and explaining that even if the result was ultimately just, it needed to appear to be just).

Although the Court in *Peters v. Kiff* explained that it "has held that due process is denied by circumstances that create the likelihood or the appearance of bias," 407 U.S. 493, 502 (1972), in explaining its decision, the Court noted both the appearance of bias *and* the increased risk of bias, and none of the cases that the Court cited went any further, *see id.* at 503–04 ("Illegal and unconstitutional jury selection procedures . . . create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.").

280. *Compare Caperton*, 129 S. Ct. at 2263 (majority opinion) ("The difficulties of inquiring into actual bias . . . simply underscore the need for objective rules."), *with id.* at 2267 (Roberts, C.J., dissenting) ("Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents."). In other words, the question is whether a probability or appearance of bias is merely the means of testing for actual bias, or whether they are constitutionally impermissible in their own right, regardless of actual bias.

281. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969); *see supra* text accompanying notes 70–71.

282. *See* Cheney v. U.S. Dist. Court for the Dist. of Columbia, 541 U.S. 913, 914, 924 (2004) (explaining that determining whether a judge's impartiality can be reasonably questioned depends on "the facts as they existed, and not as they were surmised or reported"). *But see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 594 (1980) (Brennan, J., concurring) ("For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably."); Levine v. United States, 362 U.S. 610, 616 (1960) (noting that the importance of the appearance of justice is "deeply rooted in the common law"); *cf.* Rose v. Mitchell, 443 U.S. 545, 555–56 (1979) (explaining that discrimination in the grand jury selection process "impairs the confidence of the public in the administration of justice," which in turn injures "law as an institution" and "the democratic ideal reflected in the processes of our courts" (citations and internal quotation marks omitted)).

But even if the appearance of justice, with the attendant issue of institutional legitimacy, *is* of constitutional magnitude, that does not necessarily mean that those concerns are embodied in the Due Process Clause. *See supra* note 59.

ting rules . . . and confound[ing] them with constitutional limitations."[283]

Bearing in mind the presumption established in *Withrow* that judges will be honest and impartial,[284] the upshot of this is that even had the Court properly applied its due process precedent, it need not have required disqualification.

3. The Court Should Have Considered Other Relevant Issues Implicated by the Case

Given that the Due Process Clause does not require a particular disposition, the Court should have given greater weight to the other issues implicated by the case.[285] Some of these issues are particularly salient to the ongoing judicial elections debate, such as the tension between judicial accountability and judicial independence.[286] But the case also raises issues beyond those of judicial election policy—namely, if the contribution is merely to elect someone from a particular political party, rather than a specific individual.[287] If picking the political party of one's judge is the same thing as picking one's judge,[288] what does this say about the constitutionality of partisan judicial elections?[289]

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283. Twining v. New Jersey, 211 U.S. 78, 106–07 (1908), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

284. *See supra* notes 127–31 and accompanying text.

285. This, of course, begs the question as to why the Court should have considered other factors if it could have reached the same result through a proper application of precedent. But absent the Court's ability to craft a clear standard within limits already articulated by case law, it behooves the Court to carefully consider the implications of its decision. *See supra* notes 264–66 and accompanying text; *infra* note 305 and accompanying text. The most important issue implicated by the case is the ambiguity of its holding. *See infra* notes 295–318 and accompanying text.

286. *See supra* note 248. An expansion of the Court's due process jurisprudence therefore comes at the expense of judicial accountability because if the two interests are mutually opposed, then the expansion of one must come at the expense of the other. *Cf.* Geyh, *supra* note 248, at 1260 (describing the importance of judicial accountability as its ability to prevent undesired "independence from decisional constraint, such as the freedom to decide cases for the benefit of friends or in exchange for bribes," which is the very problem raised in *Caperton*).

287. *See supra* note 275 and accompanying text.

288. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009) (characterizing the situation as a matter of Blankenship choosing his judge).

289. *See* Joe Cutler, *Oops! I Said It Again: Judicial Codes of Conduct, the First Amendment, and the Definition of Impartiality*, 17 GEO. J. LEGAL ETHICS 733, 748–49 (2004) (arguing that the "ethical dangers" arising from campaign funding derive from the transaction regardless of the donor's identity because "[f]inancial transactions create relationships"); Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 166 (Matthew J. Streb ed., 2007) (explaining accountability as "a product of electoral competition,"

Judicial disqualification also raises issues of cost, efficiency, and fairness.[290] Chief Justice Roberts's fear that there will be a flood of "*Caperton* motions" expresses this concern;[291] indeed, there have already been a handful of such disqualification motions—and in at least one such case, it has even been called a "*Caperton* claim."[292] Of course, as Chief Justice Roberts noted, "[c]laims that have little chance of success are nonetheless frequently filed,"[293] so the clearer standard he desires would not necessarily help, and rules of procedure usually include a mechanism for policing frivolous claims.[294]

As Chief Justice Roberts and Justice Scalia argued, however, the biggest problem with the Court's decision is that its articulated standard provides too little guidance.[295] The majority implicitly accepted

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which ultimately "bring[s] the judiciary better in line with citizen preferences"); *see also* Weaver v. Bonner, 309 F.3d 1312, 1321 (11th Cir. 2002) (interpreting the Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), as suggesting that "the standard for judicial elections should be the same as the standard for legislative and executive elections"); Roy A. Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 666 (2002) (explaining that the original purpose of judicial elections was "to secure independence for the judiciary, to insulate the judiciary from partisan politics and control, to improve the judges' performance and administration, and thus, to elevate the bench, the profession, and public confidence in the judicial system"). The Court recently weighed in on this debate with its decision in *Citizens United v. Federal Election Commission*, in which it struck down a federal law limiting corporate independent expenditures. 130 S. Ct. 876, 886 (2010).

290. *See* Frank, *supra* note 89, at 608 ("[I]f disqualification of judges is too easy, both the cost and the delay of justice go out of bounds. If disqualification is too hard, cases may be decided quickly, but unfairly.").

291. *See 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 . . . .").

292. *See, e.g.*, Henry v. Jefferson County Comm'n, No. 3:06-CV-33, 2009 WL 2857819, at *4 (N.D. Va. Sept. 2, 2009) ("Plaintiffs take the Supreme Court's holding in *Caperton* and stretches [sic] it to its extreme."); Rhiel v. Hook (*In re* Johnson), 408 B.R. 123, 124, 127 (Bankr. S.D. Ohio 2009) (rejecting as inapposite a motion for disqualification based on *Caperton* in a bankruptcy proceeding in which the judge in question had ruled adversely to the defendant's interest regarding a recovery of property); Marek v. State, 14 So. 3d 985, 989, 1000 (Fla. 2009) (affirming the post-conviction court's denial of the defendant's "*Caperton* claim" when the ground for the motion was the post-conviction judge's relationship with defense trial counsel), *cert. denied*, 130 S. Ct. 40 (2009).

293. *Caperton*, 129 S. Ct. at 2272.

294. *See, e.g.*, FED. R. CIV. P. 11 (granting courts authority to impose sanctions if an attorney improperly certifies that a pleading, written motion, or other paper is "not being presented for any improper purpose," "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and the asserted "factual contentions have evidentiary support"); W. VA. R. CIV. P. 11 (same).

295. *See Caperton*, 129 S. Ct. at 2269–72 (raising forty potential issues that the majority's standard fails to address, with varying levels of persuasiveness); *id.* at 2274 (Scalia, J., dissenting) (arguing that the majority's decision will "create vast uncertainty"); *supra* note 164 (noting the Court's contradictory stance on the relevance of a causal inquiry).

this ambiguity when it articulated a test without fixed criteria,[296] which makes sense given that there are compelling reasons as to why such ambiguity might not be fatal. First, the *Lavoie* Court suggested the conceptualization of disqualification as a spectrum,[297] and the *Caperton* facts are on the higher end of the spectrum.[298] Even the supreme court of appeals, explaining its reversal of the jury award, asserted that "the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case."[299] Second, the Court's emphasis on ensuring an objective disqualification rule is both appropriate and proper because objective rules are easier to administer, and they ensure the disqualification of judges who are not conscious of their biases.[300] Finally, the Court has, in the past, articulated holdings whose boundaries were not entirely clear.[301] Indeed, the Court in *Twining v. New Jersey*,[302] recognizing the "difficulties of ascertaining [the] connotation [of the Due Process Clause]," noted that the Court "has always declined to give a comprehensive definition of [the Due Process Clause], and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclu-

296. *See Caperton*, 129 S. Ct. at 2264 (majority opinion) ("The inquiry centers on the contribution's *relative* size *in comparison to* the total amount of money contributed to the campaign, the total amount spent in the election, and the *apparent* effect such contribution had on the outcome of the election." (emphasis added)).

297. *See supra* notes 140–41 and accompanying text.

298. *See Caperton*, 129 S. Ct. at 2265 (explaining why this case presents an extreme factual situation); *see also* Arman McLeod, *If at First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 505–09 (2005) (describing studies that found a link between campaign contributions and judicial decisions). As Chief Justice Roberts's dissent noted, however, the majority's blanket characterization of this case as extreme does not provide any explanation of how to distinguish between "normal" and "extreme" cases. *Caperton*, 129 S. Ct. at 2269–74 (Roberts, C.J., dissenting).

299. Caperton v. A.T. Massey Coal Co., No. 33350, slip op. at 13 (W. Va. Nov. 21, 2007).

300. *See* Crawford v. United States, 212 U.S. 183, 196 (1909) ("Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias . . . ."), *superseded by statute*, Act of Aug. 22, 1935, ch. 605, 49 Stat. 682 (changing the requirements for jury service), *as recognized in* United States v. Wood, 299 U.S. 123, 132–33 (1936); CARDOZO, *supra* note 266, at 167 ("Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.").

301. *See, e.g.*, Rochin v. California, 342 U.S. 165, 174 (1952) ("We are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is intended to preserve practical and substantial rights, not to maintain theories." (citation and internal quotation marks omitted)).

302. 211 U.S. 78 (1908), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

sion in the course of the decisions of cases as they arise."[303] This is, in fact, precisely what the Court did in *Caperton*, exercising its prerogative under *Withrow*.[304]

Yet the Court exercises its appellate jurisdiction in order to clarify the law, not to ensure justice in a particular case.[305] As Justice Cardozo wrote, "We must not sacrifice the general to the particular. We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance."[306] The Court articulated its holding out of the need for objective standards,[307] but an ambiguous holding whose contours are undefined is as difficult to administer as a subjective test would be.[308]

Of course, Justice Cardozo also wrote that "[e]very new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered."[309] But arguing that the Court can just clarify the holding in the next case ignores the fact that only the Supreme Court can review state court judgments.[310] For the Court to adopt such a distinctly common-law ap-

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303. *Id.* at 100; *see also* Wolf v. Colorado, 338 U.S. 25, 27 (1949) (explaining that, in conducting a due process inquiry, the judiciary should not "ask where the line is once and for all to be drawn" but should "recognize that it is for the Court to draw it by the gradual and empiric process of inclusion and exclusion" (citation and internal quotation marks omitted)), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

304. *See supra* text accompanying note 299; Withrow v. Larkin, 421 U.S. 35, 58 (1975) ("That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.").

305. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

306. CARDOZO, *supra* note 266, at 103.

307. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009) ("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.").

308. *See* Vieth v. Jubelirer, 541 U.S. 267, 291 (2004) (plurality opinion) (criticizing a proposed gerrymandering standard that was "essentially a totality-of-the-circumstances analysis, where all conceivable factors, none of which is dispositive, are weighed with an eye to ascertaining whether the particular gerrymander has gone too far"); U.S. Fid. Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass'n, 773 N.W.2d 243, 247 (Mich. 2009) (Corrigan, J., dissenting) (calling the *Caperton* opinion "positively Delphic in explaining the standards for courts attempting to implement it" and discussing competing interpretations espoused by various high-profile legal practitioners).

309. CARDOZO, *supra* note 266, at 23.

310. *See* 28 U.S.C. § 1257 (2006); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005) ("[Section] 1257, as long interpreted, vests authority to review a state court's judgment solely in this Court"). The *Caperton* Court exercised its jurisdiction under § 1257(a). *See* Petition for Writ of Certiorari at 1, *Caperton*, 129 S. Ct. 2252 (No. 08-22).

proach to defining its disqualification jurisprudence,[311] it must grant certiorari a sufficient number of times to clarify the legal principle.[312] If it does not, it must either leave the standard undefined or, alternatively, articulate a clear standard, which is the very approach it has eschewed throughout its case law;[313] contrariwise, if the Court fills its docket with disqualification cases, an inefficient project,[314] it risks establishing itself as the micromanager of state court rulings.[315] And this has never been the Court's role.[316]

The problems inherent in promulgating an ambiguous standard militate in favor of affirming the judgment of the supreme court of appeals—not because Justice Benjamin should not have disqualified himself, but because the risk was not worth the reward.[317] As Justice Cardozo wrote, "There can be no wisdom in the choice of a path unless we know where it will lead."[318]

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311. *See supra* note 303 and accompanying text.

312. This is particularly important given the trend of increased campaign contributions in judicial elections, as well as the increasing influence wielded by special interest groups. *See* Geyh, *supra* note 248, at 1265–66 (describing the increase in the amount of money spent in support of judicial candidates from 1990 to 2006 and noting the recent advent of "big league interest group involvement"). It is worth noting that Justice McGraw's campaign also raised a significant amount of money—over $1 million, exclusive of independent expenditures. *See* State of West Virginia, Campaign Financial Statement for Warren R. McGraw in Relation to 2004 Election Year (on file with the Maryland Law Review).

313. *E.g.*, *Caperton*, 129 S. Ct. at 2265 (explaining its recusal cases as those where "extreme facts . . . created an unconstitutional probability of bias that 'cannot be defined with precision'" (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986))); *In re* Murchison, 349 U.S. 133, 136 (1955) (refusing to draw the line regarding when a judge's interest in the outcome of a case requires disqualification and noting that the "interest cannot be defined with precision"); *cf.* New York v. Quarles, 467 U.S. 649, 654 (1984) ("The prophylactic *Miranda* warnings therefore are not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." (alteration in original) (citation and internal quotation marks omitted)).

314. *Cf.* Frank, *supra* note 89, at 608 (suggesting that there should be limits to "the cost and the delay of justice").

315. *See* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985) (explaining that the Court has articulated prophylactic criminal procedural rules because of "the difficulty of detecting constitutional violations on a case-by-case basis").

316. *See* Mickens v. Taylor, 535 U.S. 162, 167 n.1 (2002) ("[The Court] must lay down rules that can be followed in the innumerable cases we are unable to review . . . .").

317. *See* SIR FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 30 (London, MacMillan & Co. 1896) ("Many things are left alone by the State, as it were under protest, and only because it is thought that interference would do more harm than good.").

318. CARDOZO, *supra* note 266, at 102; *cf.* Mayberry v. Pennsylvania, 400 U.S. 455, 468 (1971) (Burger, J., concurring) ("In every trial there is more at stake than just the interests of the accused . . . .").

Five additional factors highlight this point. First, although one cited benefit of the Court's holding is that it sends a clear signal to the states to shore up their judicial regulations,[319] the Court could have sent the same message—if not quite as strongly—by granting certiorari and being scrupulously clear in its opinion that its affirmation of the judgment was predicated entirely on its present unwillingness to extend constitutional principles, not on its condonation of Justice Benjamin's decision.

Second, not only do "Congress and the states . . . remain free to impose more rigorous standards for judicial disqualification,"[320] but they have, in fact, done so.[321] The Court's extension of due process principles to Justice Benjamin's refusal to disqualify himself was superfluous in that Justice Benjamin *should* have disqualified himself under the West Virginia Code of Judicial Conduct.[322]

Third, it is not clear that the background of the case was one that required emergency intervention; while some commentators have criticized the legal system in West Virginia as a "Judicial Hellhole,"[323] others defend the West Virginia legal system against such critiques.[324] In fact, even Justice Starcher, a vocal critic of perceived attempts to

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319. *See, e.g.*, E-mail from Larry V. Starcher, *supra* note 25.

320. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986).

321. *See, e.g.*, 28 U.S.C. § 455(a) (2006) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in *any proceeding in which his impartiality might reasonably be questioned*." (emphasis added)); W. VA. CODE OF JUDICIAL CONDUCT Canon 3(e)(1) (1993) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned* . . . ." (emphasis added)).

322. *See* State *ex rel.* Brown v. Dietrick, 444 S.E.2d 47, 52 n.9 (W. Va. 1994) (quoting the following with approval: "[D]isqualification focuses on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, . . . [which] appears to require disqualification not only when there is in fact impropriety, but also when there is an appearance of impropriety" (internal quotation marks omitted)); *see also Lavoie*, 475 U.S. at 821 (reiterating that the Court may only interfere with state procedural regulations when they offend some fundamental principle of justice). The Court noted this in its opinion, but failed to recognize its impact on the analysis. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2266–67 (2009) (explaining how states' adoptions of stricter standards than constitutionally required ensure that "most disputes over disqualification will be resolved without resort to the Constitution"). Of course, there remains the unsettling possibility that the accountability of judges on a state's highest court will thereby be lessened without such extra-tribunal supervision, but that is a problem relevant to the judicial selection debate. *See supra* notes 246–48 and accompanying text.

323. *See, e.g.*, Victor E. Schwartz et al., *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. VA. L. REV. 757, 787 (2009) (describing an "aura of impropriety throughout West Virginia's civil justice system"); AMERICAN TORT REFORM FOUNDATION, JUDICIAL HELLHOLES 2004 23–24 (2004), http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf (ranking West Virginia as the fourth worst jurisdiction and the only "statewide Judicial Hellhole").

324. *See, e.g.*, Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1134–37 (2008) (characterizing

buy justice,[325] asserted that Blankenship's apparent attempt to improperly influence the judiciary through campaign contributions was unique.[326]

Fourth, it is not clear that recusal is an adequate remedy for perceptions of judicial partiality. In an empirical study in West Virginia based on the *Caperton* facts, James L. Gibson and Gregory A. Caldeira concluded that "[i]f a judge who accepts contributions is required to withdraw from the case owing to public perceptions, then these data suggest that judges who are simply offered such support should also withdraw."[327] This conclusion implicates the Court's focus on "the apparent effect such contribution had on the outcome of the election" and whether the contributor had a "significant and disproportionate influence in placing the judge on the case."[328] Gibson and Caldeira also found that "recusals can elevate judicial legitimacy, but . . . *the effect of recusals is not to restore the court/judge to the level of support that exists when no conflict of interest is present.*"[329] On the contrary, Gibson and Caldeira suggest that the adverse effect of these conflicts on perceptions of legitimacy and impartiality "is exacerbated when many judges recuse and when recusals are commonplace, because citizens draw larger and more general conclusions about the relationships between public office holders and donors."[330] This conclusion further complicates the relationship between campaign contributions, perceptions of impartiality, and institutional legitimacy beyond any simple reliance on institutional legitimacy to justify the Court's holding.[331]

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the critiques as "misleading and manipulative" and based on incomplete data and faulty inferences).

325. *See* Caperton v. A.T. Massey Coal Co., No. 33350, 2007 W. Va. LEXIS 119, at *107 (W. Va. Nov. 21, 2007) (Starcher, J., dissenting) ("It has been amusing for me to see Mr. Blankenship trying with all his might to create the circumstances where I would be forced to step aside and let him have *in toto* the kind of Court he wants . . . .").

326. Justice Starcher explained the following:

> I don't think most coal companies try to interfere . . . . Don Blankenship has been somewhat unique. I've never known any individual by name to step out and take a lead in spending that kind of money. We've never had the kind of direct interference, with [one] exception . . . . Blankenship is unique in this respect.

E-mail from Larry V. Starcher, *supra* note 25.

327. Gibson & Caldeira, *supra* note 259, at 24. This is because "[i]ndependent electoral support, irrespective of the judge's wishes, undermines institutional legitimacy to at least some degree." *Id.* at 19.

328. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009).

329. Gibson & Caldeira, *supra* note 259, at 32.

330. *Id.*

331. It is important to note, however, that this study cannot be generalized beyond the context of West Virginia, *id.* at 17, and the Court should properly be skeptical of basing any holding on such limited empirical evidence, *see, e.g.*, Edmond Cahn, *Jurisprudence*, 30

Finally, although affirming the judgment of the Supreme Court of Appeals of West Virginia may have appeared to be an unjust disposition,[332] such a normative characterization confuses the issues at stake. The West Virginia court's decision was fully grounded in applicable legal principles.[333] The only issue for the Court to decide was a procedural question—a question about *how* the West Virginia court arrived at its decision. Given that West Virginia's Code of Judicial Conduct regulates Justice Benjamin's decision—and many other jurisdictions have similar requirements[334]—at stake is the federalism concern of who, if anyone, should supervise states' highest courts.[335] Judges of courts in jurisdictions that have adopted the same strict standard as the one adopted by West Virginia will face the same decision, regardless of whether the Court can serve as a check on the decision.[336] And given the ambiguity of the *Caperton* holding, state court judges must interpret the standard before they can apply it—a process that promises to create a feedback loop if the Court begins to grant certiorari in order to constrain the state court interpretations.[337] In other words, state court judges must still exercise their discretion, a discretion that the Court in *Withrow* asserted carries a presumption of

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N.Y.U. L. REV. 150, 167 (1955) (referencing the Court's controversial use of sociological and psychological studies in *Brown v. Board of Education*, 347 U.S. 483 (1954), and noting that behavioral science findings "have an uncertain expectancy of life"). *But see* Kenneth B. Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 VILL. L. REV. 224, 235 (1959–1960) ("Of course there are dangers involved in the use of science in any area of human activity. . . . But this is not new. Science has nonetheless continued its advance and contributions to the ethical and material progress of mankind.").

332. *See, e.g.*, *supra* text accompanying note 22.

333. *See supra* note 23. This is not the same thing as claiming that the court reached the correct result on the merits. Yet it is noteworthy that, after the Supreme Court remanded the case for further proceedings, the West Virginia court—this time without Justice Benjamin—again reversed the jury verdict, grounding its decision in the forum selection clause. Caperton v. A.T. Massey Coal Co., No. 33350, slip op. at 1 (W. Va. Nov. 12, 2009).

334. As the Court acknowledged, "Almost every State—West Virginia included—has adopted the American Bar Association's objective standard: 'A judge shall avoid impropriety and the appearance of impropriety.'" Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2266 (2009) (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004)).

335. These are the same issues at stake in the judicial selection debate. *See supra* note 248.

336. *See, e.g.*, Law v. United States, Civil No. 1:08CV171, Criminal No. 1:06CR20, 2009 WL 1884444, at *1–5 (N.D. W. Va. June 30, 2009) (interpreting the governing statute, case law, motion to disqualify, and the facts before denying the motion), *appeal dismissed for lack of jurisdiction*, No. 09-7288, 2009 WL 4506387 (4th Cir. Dec. 3, 2009).

337. *See supra* notes 308, 310–16 and accompanying text.

integrity.[338] Making Justice Benjamin's decision a constitutional issue simply empowered the Court to supervise that discretion.[339]

In short, where the Court's due process jurisprudence did not demand a particular disposition, these additional factors weigh against applying the Due Process Clause to Justice Benjamin's failure to disqualify himself.

V. CONCLUSION

In *Caperton v. A.T. Massey Coal Co.*, the Supreme Court held that Justice Benjamin's refusal to disqualify himself amounted to a denial of due process.[340] In so holding, the Court conflated two separate jurisprudences in order to disqualify Justice Benjamin because extending constitutional principles was the only way the Court could have done so.[341] Although the ultimate result is not inconsistent with the Court's prior jurisprudence,[342] the Court should have weighed other salient factors in its decision and affirmed the verdict of the Supreme Court of Appeals of West Virginia.[343]

338. *See supra* text accompanying notes 127–31.

339. *See* U.S. CONST. art. III, § 2 (establishing the scope of the Supreme Court's jurisdiction).

340. 129 S. Ct. 2252, 2263–64 (2009).

341. *See supra* Part IV.A–B.

342. *See supra* Part IV.C.1–2.

343. *See supra* Part IV.C.3.