# CAPERTON'S AMICI

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When Hugh Caperton and his co-plaintiffs petitioned the Supreme Court for a writ of certiorari to the West Virginia Supreme Court of Appeals, several briefs amici curiae asked the Court to hear the case. Prominent among these was the brief of the American Bar Association (ABA). For a century, the Association has been developing codes of judicial ethics. These codes have been adopted widely throughout the country, mainly as statements of ideals, but occasionally enforced by state courts. *Caperton v. A.T. Massey Coal Co.*<sup>1</sup> attracted the ABA's attention, and a paragraph from its brief introduces the case to my readers:

This case presents an important and unresolved question regarding an issue of increasing concern in courts across the country - namely, whether the constitutional right to due process places limits upon a judge's consideration of a legal matter in which one party was a substantial contributor to that judge's election to the bench. Here, the Chairman and CEO of Respondent Massey, one of the nation's largest coal companies, which had lost a \$50 million fraud verdict to Petitioners, contributed (both directly and indirectly) \$3 million supporting the 2004 campaign of Justice Brent D. Benjamin for a seat on the Supreme Court of Appeals of West Virginia. These campaign contributions, representing more than 60% of the total money spent on Justice Benjamin's campaign, were made at the very time Massey was preparing to appeal that verdict. After an initial decision was vacated for another judge's failure to recuse; the fraud verdict was ultimately overturned in a 3-2 decision, with Justice Benjamin casting the deciding vote after refusing to recuse himself. In light of the frequency with which such situations arise, and in light of language in past decisions of this Court, the ABA respectfully submits that state courts at all levels need guidance

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<sup>1. 129</sup> S. Ct. 2252 (2009).

from this Court on the boundaries imposed by the Due Process Clause.<sup>2</sup>

After considering the briefs of the parties and amici, the Court granted the writ. Now the amici grew in number. The amici supporting Caperton warned that spending on judicial election campaigns was increasing rapidly, and they asked the Court to set a minimum standard under the Fourteenth Amendment's Due Process Clause for required recusal of a judge on the basis of contributions in support of his or her campaign. Caperton's amici went on to suggest that due process demanded a recusal in the case at hand, and thus reversal of the state supreme court's decision. The amici supporting Massey argued mainly that matters concerning recusal should be left to state law, because the states were actively considering reforms in response to any problems presented by campaign spending in judicial elections, and because it was impossible for the Court to devise a clear standard to govern applications of the Due Process Clause to such cases. They argued for affirmance of the West Virginia court's decision.<sup>3</sup>

The Supreme Court reversed, 5–4. Justice Kennedy, for the Court, concluded that, under the Court's precedents, the Due Process Clause does require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." He continued, "Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal." His opinion cited the ABA's Model Code of Judicial Conduct, and quoted from the brief amicus curiae of the Conference of Chief Justices. Writing the principal dissent, Chief Justice Roberts argued that the "probability of bias" standard was so open-ended that, far from providing guidance in future cases, it would serve "to erode public confidence in judicial impartiality...."

In this discussion of the *Caperton* case, I bring some of the amici curiae to center stage—in recognition of their supporting roles. Ordinarily, at this level, highly competent counsel represent both sides, and they tell the Justices what they need to know in deciding the case. In such circumstances, amici—if they appear at all—are likely to add little of

<sup>2.</sup> Brief of the American Bar Association as Amicus Curiae in Support of Petitioners [for grant of certiorari] [hereinafter ABA Brief] at 5–6 (footnote omitted), Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 3199726.

<sup>3.</sup> Massey's lawyers eventually argued (unsuccessfully) for dismissal of the writ of certiorari as improvidently granted—a move that would have allowed the Court to get rid of the case without expressing any opinion.

<sup>4.</sup> Caperton, 129 S. Ct. at 2257 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

<sup>5.</sup> *Id*.

<sup>6.</sup> Id. at 2267 (Roberts, J., dissenting).

substance.<sup>7</sup> In some cases, the parties' advocates may fail to explore the available arguments, and briefs amici may be the only well-argued guides to decision.

Caperton lies outside both of these patterns. First-rate counsel on both sides, in their briefs and at oral argument, made the best points available, given the facts and the existing law. In my view, however, some of the amici in support of Caperton, et al.<sup>8</sup> provided significant support in persuading the Court to hear the case and to decide for the petitioners. Pondering the weight of the amici in Caperton, one might think, "This couldn't happen—but it did." Here I seek to tell how and why it did.<sup>9</sup>

## A WEST VIRGINIA STORY

In *The Appeal*, a 2008 novel by John Grisham, the owner of a chemical company seeks to buy a seat on Mississippi's Supreme Court, after a local jury has given a \$41 million verdict against his company, based on its dumping of toxic waste into a little town's water supply. The owner provides several million dollars to elect a judge of his own choice to the court, just before that court is to hear his company's appeal. When Matt Lauer interviewed Grisham on *The Today Show*, he asked whether any specific story had inspired *The Appeal*. Grisham said there were several such stories, commenting, "huge sums of money get involved on both sides to purchase a seat on the [state] supreme court." When Lauer suggested that this particular story might seem a bit farfetched, Grisham replied, "It's already happened. It happened a few years ago in West Virginia." 10

<sup>7.</sup> The Supreme Court has taken a generous position, liberally allowing the filing of briefs amici. For the view of Judge Richard Posner that briefs amici should be restricted, and the contrary view of then-judge Samuel Alito, see Ed R. Haden & Kathy Fitzgerald Pate, *The Role of Amicus Briefs*, 70 ALA. L. REV. 114 (2009). Andrew Frey, a prominent Washington lawyer, has written, persuasively, that Judge Alito had it right. *See* Andrew Frey, *Amici Curiae: Friends of the Court or Nuisances?*, 33 No. 1 LITIG. 5 (2006). In *Caperton*, Frey was on the brief for the respondents (Massey et al.), and he served ably as counsel in the oral argument.

<sup>8.</sup> Amici in support of Massey appeared only after the Court had granted certiorari. I refer fleetingly to some of these briefs.

<sup>9.</sup> I leave it for others to speculate on the future of *Caperton*'s due process "floor" for recusal in cases involving contributions to judges' election campaigns. In addition to this symposium, see the three thoughtful comments on *Caperton* in the *Harvard Law Review*'s annual survey, *The Supreme Court, 2008 Term Comments*: Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 88–103 (2009); Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 114–19 (2009); Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 137–51 (2009).

 $<sup>10.\ \</sup>textit{W. Va. Politics Basis for New Grisham Novel}, Charleston Daily Mail, Jan. 30, 2008, at 6C.$ 

The central figure in the West Virginia drama is Don Blankenship. He is not (formally) a party to this case, but he is the Chief Executive Officer of Massey. A personification of Big Coal, Blankenship has made a career converting Appalachian mountaintops into strip mines, 11 directing a work force in which about 3% are unionized. 12 Blankenship is accustomed to throwing his weight around. If this means supplying money for a campaign to remove a justice who seems likely to vote against Massey when the company's \$50 million liability for damages comes before the state supreme court—well, that is all in a day's work. The target justice is Warren McGraw, a former tough prosecutor and classic pro-labor politician, who had been elected to the state senate and eventually became president of that body. 14 In the ordinary course, Justice McGraw could expect to pass through a ho-hum electoral season to the customary re-election. But Blankenship decides to provide funds for McGraw's opponent in the Democratic primary. 15 McGraw wins, but his adversary gets enough votes to give encouragement to Brent Benjamin, the Republican nominee. Blankenship now turns the money spigot to full force.

Blankenship's political consultants included specialists in political "opposition research," who can almost always find something that can be used to rouse voters' wrath. The campaign against McGraw follows this pattern. Anti-McGraw radio messages, television spot announcements, and direct mailings are supplemented by recorded phone messages telling voters to be "scared" of McGraw. Of course, these campaign ads do not refer to the case that Massey is taking to the state supreme court. Rather, they focus on McGraw's vote in a February 2004 decision in which Tony Arbaugh petitioned for release from prison. As a teenager Arbaugh pleaded guilty to sexual assault, and was given a suspended sentence of imprisonment for fifteen to thirty-five years.

<sup>11.</sup> See, e.g., Michael Shnayerson, The Rape of Appalachia, VANITY FAIR, May 2006, at 140.

<sup>12.</sup> Deborah Solomon, *A Coal CEO's Unusual Pastime: Firing Up W. Va. Politics*, WALL ST. J., Feb 13, 2006, at A1.

<sup>13.</sup> With accrued interest, the amount at stake has passed above \$80 million and is still growing.

<sup>14.</sup> In the latter position, he led the campaign for a coal-severance tax, imposed on all coal mined in the state, with proceeds mostly going to counties where the coal was mined. Chris Wetterich, Massey CEO Seeks Donations for McGraw Opponent, CHARLESTON GAZETTE, Aug 18, 2004, at 3A, available at 2004 WLNR 1204246.

<sup>15.</sup> West Virginia law explicitly treats judicial elections as partisan. On the blurring of the distinction between "partisan" and "nonpartisan" in this context, see Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397 (2003).

<sup>16.</sup> Toby Coleman, Benjamin May Face Bias Questions Court Winner Says He Is 'Not Bought by Anybody', CHARLESTON GAZETTE, Nov. 4, 2004, at 1C, available at 2004 WLNR 6248443.

<sup>17.</sup> The story is told in MICHAEL SHNAYERSON, COAL RIVER 78-82 (2008).

<sup>18.</sup> Arbaugh himself had been a victim of sexual abuse when he was a child.

teen he was placed on probation, with conditions: no alcohol or drugs, compulsory counseling, and a monthly probationary fee. Arbaugh missed some counseling sessions, and he smoked marijuana; for this misbehavior, the state revoked probation. The trial judge thought a long prison term was pretty severe for this kind of violation, but said he had no choice but to send Arbaugh to prison to serve his sentence. Arbaugh appealed to the state supreme court, which decided, 3–2 (McGraw in the majority), to give him another chance. A social worker from the Marist Brothers had volunteered to enroll Arbaugh in a program, Youth System Services, proposing that he live in a church community and serve as a janitor at a local Catholic high school. A draft opinion agreed with these conditions, but the final opinion, accepted by McGraw, made no reference at all to school employment. Arbaugh did not work in a school. But when Benjamin's supporters find the draft opinion, they accuse McGraw of voting to place a child molester in a school.

Blankenship indirectly funds most of the media attack that swamps the West Virginia airwaves. A "527 group" political action committee<sup>19</sup> is formed under the name of "And for the Sake of the Kids" (ASK). This is the vehicle for the lion's share of Blankenship's contributions in support of Benjamin's campaign. Week after week, ASK pays for advertising hammering away at McGraw for being soft on child molesters.<sup>20</sup> Then the Benjamin group strikes pay dirt.

In a Labor Day speech, the overwrought McGraw fumes and fumbles—in short, he has lost it. Walking about on the stage, grimacing, bending over, McGraw says "They follow, *looking for ugly*... trying to take ugly pictures to do ugly things with. (voice rising) Ugly! To repeat lies. Things that are untrue. Who do they think elected me?" A tape of McGraw's embarrassing performance is passed on to Benjamin's campaign, which edits it by interjecting its own satirical comments, and broadcasts the video statewide. With plenty of Blankenship's money in hand, Benjamin's supporters lay an electronic media blanket over West Virginia in the final months before the election. <sup>21</sup> McGraw loses—West

<sup>19.</sup> Named for section 527 of the Internal Revenue Code, this term refers to an organization that is not subject to the Code's limits on contributions to a political action committee.

<sup>20.</sup> In one ad, a voice begins, "According to the prosecutors, he sexually molested multiple West Virginia children." Later in the text, it is made clear that "he" does not refer to McGraw, but to a person whose case came before the state supreme court. The Associated Press, *State Bar Urges Cleaner Supreme Court Race*, CHARLESTON DAILY MAIL, Oct. 19, 2004, at 5A, *available at* 2004 WLNR 3628487.

<sup>21.</sup> This tape won a prize in the category "statewide radio spot" from the American Association of Political Consultants. These folks are the ones who are gaining more and more influence—and more money—every election season. As my grandfather would say, How do you like *them* apples?

Virginia's first supreme court election loss by a Democrat since 1928.<sup>22</sup> After demonstrating that this sort of negative campaigning works, Benjamin speaks to the National Press Club in Washington. During his speech he plays clips of his video advertisement featuring McGraw's speech<sup>23</sup>—much as a hunter might decorate his library with the head of a tiger that one of his bearers shot.

When Caperton's case reaches the state supreme court, the newly elected Justice Benjamin supplies the deciding vote in a 3–2 decision reversing the trial court's judgment.<sup>24</sup> In her majority opinion, Justice Davis says,

At the outset, we wish to make perfectly clear that the facts of this case demonstrate that Massey's conduct warranted the type of judgment rendered in this case.<sup>25</sup>

After the case comes down in the state supreme court, Chief Justice Starcher (a dissenter) publishes some strikingly uncomplimentary remarks about Blankenship, and the press publishes a photograph of Justice Maynard (who voted with the majority) having dinner with Blankenship in a restaurant on the French Riviera. Once the photo reaches the media, the court orders a rehearing, and Justice Starcher recuses himself. Eventually, because of his remarks about Blankenship, Maynard also self-recuses.

Justice Benjamin, requested by the plaintiffs to recuse himself, does no such thing—and in West Virginia there can be no appeal to the whole court. As Acting Chief Justice, Benjamin appoints two circuit judges as replacements to serve in the rehearing of *Caperton*. After the new hearing, the tally remains 3–2 in favor of Massey; Justice Benjamin again casts a vote making a majority. Once more Justice Davis writes the majority opinion, but this time she omits the passage saying that Massey's conduct deserves the level of damages the jury had awarded. Four months after the decision comes down—and several weeks after the U.S. Supreme Court grants certiorari—Benjamin files a concurring opinion.

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<sup>22.</sup> On the speech, see SHNAYERSON, supra note 17, at 82–83

<sup>23.</sup> Justin D. Anderson, Benjamin Tells Forum How He Used McGraw's "Looking for Ugly" Speech, CHARLESTON DAILY MAIL, June 7, 2007, at 1A, available at 2007 WLNR 10731601.

<sup>24.</sup> The majority's grounds are highly contestable, sounding in res judicata and in the effect of a forum-selection clause.

<sup>25.</sup> Caperton v. A.T. Massey Coal Co., Inc., No. 33350, 2007 WL 4150960 (W. Va. Nov. 21, 2007, vacated on rehearing Apr. 3, 2008). Nonetheless, she says, it would be improper to compromise the law to reach "a result that clearly appears to be justified." *Id*.

<sup>26.</sup> Caperton v. A.T. Massey Coal Co., Inc., 679 S.E.2d 223 (W. Va. 2008). Justice Albright, who dissented the first time around, dissents again, in language expressing scorn for the majority's forum-selection and res judicata grounds. *Id.* at 256 (Albright, J., dissenting). The judges appointed by Justice Benjamin divide their votes, each joining in one of the two main opinions. *Id.* at 223.

He rejects "the self-serving due process standard of disqualification" proposed by Caperton and the dissenters. Further, saying he is unbiased in the *Caperton* case, Justice Benjamin denounces the argument for his recusal as an exercise in "political justice," based on "half-truths, innuendo, surmise, prejudice and bias."<sup>27</sup>

## PERSUADING THE COURT TO TAKE THE CASE

Review by the Supreme Court<sup>28</sup> in this case is by no means a sure thing. In the larger field of campaign spending, ever since *Buckley v. Valeo*,<sup>29</sup> the Court has shown a strong inclination toward leaving the political market free for buyers and sellers. When the Petition is filed in *Caperton*, the Court has given no sign that it will exempt judicial elections from this free-market principle. Indeed, the Court has denied certiorari in several previous cases in which petitioners have claimed that due process was violated when a state judge declined recusal under circumstances bearing some similarity to the facts in this case.<sup>30</sup>

<sup>27.</sup> Id. at 285 n.1 (Benjamin, J., concurring).

<sup>28.</sup> From here on, this locution refers to the U.S. Supreme Court.

<sup>29. 424</sup> U.S. 1 (1976) (holding that the First Amendment invalidated parts of the Federal Elections Campaign Act (1971) that limited spending in political campaigns). The Court's recent decision in *Citizens United v. Fed. Election Comm'n*, No. 08-205, 2010 WL 183856 (U.S. 2010), has read the First Amendment even more broadly, striking down a provision of a 2002 Act of Congress that forbade broadcast of campaign messages paid for by corporations or unions in the sixty days before a general election or the thirty days before a presidential primary. *Id.* Citizens United was a 5–4 decision; Justice Kennedy wrote the opinion of the Court. *Id.* 

<sup>30.</sup> Some similarity, but only some. Unlike Caperton, any of these cases would have led the Court into a factual swamp. I found the citations of these cases in Roy A. Schotland, New Challenges to States' Judicial Selection, 95 GEO. L.J. 1077, 1102 n.98 (2007). This is a good place to recognize Professor Schotland's many contributions to our understanding of these problems, and to express my appreciation.

In Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005), cert. denied, 547 U.S. 1003 (2006), the Court refused to hear a case in which a \$1.5 billion judgment against State Farm had been given by a trial court and affirmed by an intermediate appellate court. While the case was pending for decision in the Supreme Court of Illinois, State Farm's lawyers and others alleged to be associated with the company contributed some \$1.3 million to a trial judge's campaign for election to that court. He won the election, declined to recuse himself, and cast the deciding vote in a 4–3 decision that relieved State Farm from the huge judgment. The connections between State Farm and many of the contributors were disputed.

In Consolidated Rail Corp. v. Wightman, 715 N.E.2d 546 (Ohio 1999), cert. denied, 529 U.S. 1012 (2000), a jury had awarded \$25 million in punitive damages against the railroad in a wrongful death case, and the trial court had remitted the amount to \$15 million. This was the second trial of the case; in the earlier trial the jury had found contributory negligence (40%) by the young woman who died, and had given no punitive damages at all. There was a serious argument in the state supreme court over the question whether the second trial was prejudiced by the rulings of a judge hostile to Conrail. While the Supreme Court of Ohio was considering petitions for discretionary review in this case, two Justices each had received \$25,000 in re-election campaign contributions from Wightman's counsel (who was handling this case on a 33 1/3% contingency fee), counsel's wife, his siblings, and their spouses. Before any decision, Conrail learned of these contributions and

The Court's most recent judicial-election decision offers little encouragement for the Caperton petitioners. In 2002, in Republican Party of Minnesota v. White, 31 a bare majority held that a Minnesota law violated the First Amendment by prohibiting a candidate in a judicial election from announcing his or her position on a disputed legal or political issue. In White, both the ABA and the Conference of Chief Justices filed amici briefs asking the Court to uphold the law; their briefs sounded themes resembling those in their *Caperton* briefs. The four dissenters, in opinions by Justice Ginsburg and Justice Stevens, sharply distinguished judicial elections from elections of legislators or executive officials. Their arguments centered on the state's strong interest in maintaining judicial impartiality. Justice Ginsburg, in a passage linking the law at issue with a parallel prohibition on campaign promises, remarked that such promises carried "the probability of actual bias on the part of the judge . . . . "32 This language would later play a prominent role in the Court's Caperton opinion.

Concurring with the *White* decision on First Amendment grounds, two Justices went on to express misgivings about the increasing role of money in judicial elections. Justice O'Connor reported her alarm at the strains imposed by judicial elections on the duty of a judge to be impartial, and she singled out for special concern the need for large sums of money to run a campaign.<sup>33</sup> She has since expressed her regret at having cast the fifth vote to strike down Minnesota's regulations,<sup>34</sup> and in her address to this Symposium, she rightly deplores the ways in which massive spending in judicial elections threatens to infect our courtrooms.<sup>35</sup> In *White*, Justice Kennedy expressed his own worry that "judicial campaigns in an age of frenetic fundraising and mass media may foster dis-

moved for recusal of the two justices. The court never ruled on these motions, but, with the two challenged justices voting and one of them writing the court's opinion, (i) affirmed the judgment against Conrail, and (ii) reinstated interest payments that the intermediate appellate court had removed, adding some \$5 million to Conrail's liability. The facts (concerning prejudice in the trial court) were muddy here, too.

A third example is the famous case of *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. dismissed*, 485 U.S. 994 (1988). Surely, the Supreme Court would not choose to grapple with such a monster absent a clear showing of an urgent need.

<sup>31. 536</sup> U.S 765 (2002).

<sup>32.</sup> Id. at 817 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

<sup>33.</sup> Id. at 788-92 (O'Connor, J., concurring).

<sup>34.</sup> Matthew Hirsch, Swing Voter's Lament: At Least One Case Still Bugs O'Connor, LEGAL INTELLIGENCER, Nov. 9, 2006, available at 2006 WLNR 25575705.

<sup>35.</sup> See Justice Sandra Day O'Connor, Keynote Address: Symposium on Judicial Independence, 33 SEATTLE U. L. REV. 559 (2010).

respect for the legal system."<sup>36</sup> He suggested that a state might "adopt recusal standards more rigorous than due process requires."<sup>37</sup>

Six years later, in *New York State Board of Elections v. Lopez Torres*<sup>38</sup>—just six months before the petition for certiorari in *Caperton* was filed—Justice Kennedy recorded his dismay about the harms being done by judicial elections. New York "elects" trial court judges in a process effectively controlled by local political party bosses. The Court unanimously held that this system did not violate the First Amendment rights of other prospective candidates. Justice Kennedy concurred, but added this comment on an election process in which a judicial candidate must conduct a campaign and raise money in a system that gives free play to interest groups:

[T]he persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. . . . [I]t is unfair to [judges] and to the concept of judicial independence if the State is indifferent to a selection process open to manipulation, criticism, and serious abuse.<sup>39</sup>

The problems identified by Justices O'Connor and Kennedy are built into a system that selects judges (and sometimes removes them) by popular vote. The sensible solution would be for the states to convert to the federal model: life tenure during good behavior. But such a change seems beyond political possibility. By the time when Caperton et al. sought review in the Supreme Court, *White*'s application of the First Amendment had imposed severe restrictions on other generalized state efforts to protect the fairness of the judicial process from blatant politicking. Indeed, on the remand of *White*, the Eighth Circuit invalidated Minnesota's companion laws prohibiting a judicial candidate from speaking to a political organization or directly accepting money or soliciting contributions.<sup>40</sup>

Caperton's Petition for Certiorari is well crafted, a model of its genre. Of course it does what every brief for a petitioner must do: it gives reasons for folding the present case into the existing body of due process doctrine. That doctrine, the petition says, requires recusal of a judge not only on a showing of actual bias, but also on evidence that "objectively" indicates to a reasonable observer an appearance, or probability, of bias. It argues that the Court should decide the case in order to clarify the law

<sup>36.</sup> White, 526 U.S. at 794 (Kennedy, J., concurring).

<sup>37.</sup> *Id*.

<sup>38. 552</sup> U.S. 196 (2008).

<sup>39.</sup> *Id.* at 212–13 (Kennedy, J., concurring). Justice Breyer joined in this part of Justice Kennedy's concurrence.

<sup>40.</sup> Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005) (en banc).

for the benefit of state courts and other decision makers. Anticipating an argument from the other side, the petition seeks to reassure the Court that a decision for the petitioners will not cause a flood of litigation. Above all, the petition offers an emphasis that persists in the petitioners' submissions at all stages of the case: an elaborate statement of the facts in this particular case. If you want to get the feel of the case, read the first fifteen pages of the Petition for Certiorari. I have read these passages repeatedly, and each time I emerge with a negative assessment of Blankenship. (I shall not stain the pages of this *Review* with a detailed description.) At the oral argument, Justice Ginsburg referred to him in police officer language, calling him "a prime culprit" and "the perpetrator." She got it right; the *Caperton* case, seen close-up, is all about denying Blankenship a part of the loot.

Soon after the Petition for Certiorari in *Caperton* is filed, five briefs amici join the petitioners in urging the Court to hear the case. Surely, the petitioners need no help from amici in designing substantive arguments. Yet the amici's participation does help the petitioners—and, in my view, it helps the Court. The central issue has turned away from a focus on the First Amendment; there is no restriction of speech. Rather the case is located at the heart of concern about judicial elections: how to maintain unbiased judging under conditions so toxic.

Now that the issue is one of judicial ethics, the ABA is on its home ground. With increasing anxiety, its leaders have kept track of the appalling harms wrought by the uses of money in judicial elections—a subject on which state courts have largely remained silent. The passage I quoted from the ABA's first amicus brief<sup>43</sup> is amplified in accounts of huge contributions of money in several state judicial elections. The brief cites national and state polls confirming the widely shared opinion of Americans that monetary contributions influence judicial decisions. Even more alarming, "[a] 2002 national survey of elected state judges showed that 26% of them believe campaign contributions have at least *some* influence on judges' decisions, and another 9% believe such contributions have a *great deal* of influence." The ABA goes on to say

<sup>41.</sup> Predictions of such floods often come true. An excellent analysis of the ways in which this can happen is given by my colleague Eugene Volokh, in *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003). (Don't miss the wonderful Volokh-designed cartoon at p. 1031.) In *Caperton*, he was one of the counsel on Massey's brief.

<sup>42.</sup> Transcript of Oral Argument at 17, Caperton v. A.T. Massey, 129 S. Ct. 2252 (2009) (No. 08-22) 2009 WL 527723.

<sup>43.</sup> ABA brief, *supra* note 2. The ABA filed a second amicus brief after the Court granted certiorari.

<sup>44.</sup> Id. at 8-9.

<sup>45.</sup> Id. at 9-10 (emphasis in original).

that the magnitude and timing of Blankenship's contributions, direct and indirect (through ASK), "gave Justice Benjamin, in appearance if not in fact, a personal interest in the outcome of this case similar to those this Court deemed to require recusal in *Tumey* and *Murchison*."<sup>46</sup>

The facts of both of the cited cases involved what some now call "actual bias": in *Tumey*, a small pecuniary interest for the judge, and in *Murchison*, a judge's previous accusation of the defendant in a case to be tried in his own court. The language about bias in these two opinions can be read more broadly, but in later cases of alleged bias the Supreme Court has not extended the due process clause beyond factual settings closely resembling those two precedents. The ABA brief continues: "If the facts of this case do not implicate due process concerns, then few judicial contribution cases ever will." There it is in capsule form: After *White*, if due process is to offer any protection against infection of the judiciary by massive political spending, it will be now or never. Ultimately, at the moment of decision, four Justices will opt for never, but five will not.

Next in importance at this stage would seem to be the amicus brief of the Committee for Economic Development (CED). This group, as described in its brief, is an organization of business leaders; its trustees "include leaders of America's largest corporations and business organizations . . ."<sup>50</sup> The brief makes an important substantive point, arguing that the influence of money on judicial elections threatens to undermine the confidence of businesses to make their economic decisions with trustworthy information about the state of the law:

Without exaggerating the predictability of judicial decisions, it certainly is true that where outsized judicial contributions by parties create the perception that legal outcomes can be purchased, eco-

<sup>46.</sup> *Id.* at 12–13. *Tumey v. Ohio*, 273 U.S. 510 (1927), and *In re Murchison*, 349 U.S. 133 (1955), are precedents repeatedly invoked on both sides in *Caperton*.

<sup>47.</sup> The judge had served as a "single-judge grand jury."

<sup>48. &</sup>quot;Every procedure which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear, and true ... [denies] due process of law." *Tumey*, 273 U.S. at 532. "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. The Court then quoted *Tumey*, above, before concluding, "justice must satisfy the appearance of justice." *Id.* (quoting Offutt v. United States, 342 U.S. 11, 14 (1954)).

<sup>49.</sup> ABA brief, supra note 2, at 12.

<sup>50.</sup> Brief of Amicus Curiae The Committee on Economic Development [on petition for certiorari] [hereinafter CED brief], at 1–2, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 3165832. Of course, this was not the first time—nor will it be the last—for business interests and social conservatives to take opposing positions about the reach of the due process clause. The same attitudinal division may appear from time to time in today's Supreme Court.

nomic actors will lose confidence in the judicial system, markets will operate less efficiently, and American enterprise will suffer accordingly.<sup>51</sup>

In this perspective, the rule of law is not just the cliché of choice for after-dinner speeches. It is a base on which prosperity rests.<sup>52</sup>

The importance of the CED brief is not that it conveys a new substantive message. The rule of law has been invoked by the petitioners, and its rhetoric is available to nearly anyone in any lawsuit. What matters is the connection between this message and the identity of the people who are conveying it. These titans of industry and commerce are saying that the growing influence of money on judicial elections is a matter of grave concern, not just to the parties to a lawsuit, but to the health of the economy. Who would know better than they?

One other point in the CED brief is worth mention. It may seem to be an echo of the ABA brief, but a better metaphor is that the two briefs are in harmony. After reinforcing the Petition's call for the Court to provide guidance for the state courts, 53 the CED adds:

On the other hand, if Justice Benjamin's interpretation of federal due process is permitted to stand, state court judges may draw the conclusion that due process imposes no meaningful limits on their recusal decisions, and public confidence in judicial decisionmaking will continue to suffer.<sup>54</sup>

The CED is thus making its own form of a "guidance" argument. A failure of the Supreme Court to act might, indeed, guide the state courts—to the disastrous conclusion that the due process clause is not a "floor" for state recusal laws, but a bottomless abyss.

If any Justice should be surprised to find that the CED is alarmed at the increasing role of money in judicial elections, surely the Brennan Center's position is no surprise at all. 55 The Center, deservedly respected as a think tank for liberals, reminds the Court that the Caperton case, despite its extreme facts, is not alone in its high level of spending in judicial campaigns. The Center's brief recounts similar levels of spending in

<sup>51.</sup> Id. at 6.

<sup>52.</sup> The CED's dig about the purchase of legal outcomes is carefully introduced by "the perception." No one on Caperton's side wants to suggest that Justice Benjamin's vote was bought.

<sup>53.</sup> CED brief, supra note 50, at 8 ("Lower court judges, who in West Virginia and many other states are the sole arbiters of motions seeking their recusal, look to this Court to set the 'outer boundaries of judicial disqualifications' required by federal due process." (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986))).

<sup>55.</sup> Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law, the Campaign Legal Center, and the Reform Institute [on petition for certiorari], Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 3165831.

Wisconsin, Illinois, and Alabama, along with survey evidence of perceptions that such spending does buy influence—perceptions not only by litigants (both contributing and not contributing), but also by ordinary folk, and even by judges. In sum, there is a widely held belief that the people who make these big contributions are not fools. The Center concludes: "The national profile of this bellwether case makes it all the more important that this Court grant certiorari." And the Court does. 57

#### AFTER THE WRIT: BRIEFS ON THE MERITS

A bellwether case, by definition, is one that leads the way for cases that will follow. Is it consistent to argue, first, that the facts of *Caperton* are sufficiently extreme to minimize the danger of a flood of litigation, and then to argue that experience in other states has demonstrated the horrors of politicized judicial elections? Counsel for Massey have not remarked on this tension, either in briefs or in oral argument. Perhaps, remembering Justice Kennedy's recent observations,<sup>58</sup> they do not want to add emphasis to the petitioners' warning that money is playing a rapidly increasing role in judicial elections and needs to be controlled somehow.

Linda Greenhouse, commenting on *Caperton* after the decision came down, wrote, "The real fight in this case was evidently in conference, in a closed-door debate that went on for weeks over whether to grant [the petition for certiorari]." If any outsider should know, she is the one. And yet...

Even now, after the grant of certiorari, it remains uncertain whether the Court will agree that the due process clause extends to political contributions. The four Justices who dissented in *White* look like votes for the *Caperton* petitioners. It is conceivable that a fifth vote might come from Chief Justice Roberts or Justice Alito—but just barely conceivable. Justice Kennedy looks to be the one who must be convinced; the parties' lawyers know it, and the amici know it.

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<sup>56.</sup> *Id.* at 23. Amici briefs in support of the Petition were also filed by Public Citizen, a consumer advocacy group, and by the [state of] Washington Appellate Lawyers Association. The latter brief suggested that, if the Court were to decide in favor of the petitioners, it might consider existing state laws governing levels of spending in judicial elections as indicators that legislatures do not consider contributions below those levels to be of public concern.

<sup>57.</sup> My guess is that five Justices voted for granting certiorari—the five that eventually joined in Justice Kennedy's opinion of the Court.

<sup>58.</sup> See supra notes 36 and 38 and accompanying text.

<sup>59.</sup> Linda Greenhouse, *The Supreme Court Breakfast Table: Do Female Judges Have to Quit their All-Women Book Groups?*, SLATE, June 24, 2009, http://www.slate.com/id/222092 7/entry/2221229.

#### THE PETITIONERS' BRIEF ON THE MERITS

Now a new season of briefing is on. The petitioners say, "Mr. Blankenship was the central figure in the trial." He is also the central figure in their brief; his name appears eighteen times in their description of the case in the West Virginia courts. The petitioners continue to avoid saying that Justice Benjamin was actually biased, but rest their case on appearances, arguing that a reasonable observer would conclude that bias was probable. Such a conclusion is supported, they say, by (1) the huge amount of Blankenship's contributions to ASK in support of the campaign; (2) the proportion of those contributions (more than half) to the total spent in the campaign; (3) Blankenship's additional fundraising for Benjamin among doctors and others; (4) the timing of the financial support—Massey was preparing its appeal to the very court where Benjamin would serve; and (5) the fact that Benjamin's decision on recusal was not reviewable by any other judge.

Toward the end of their argument on the probability-of-bias standard, the petitioners suggest that "it would only be natural for Justice Benjamin to feel a debt of gratitude to Mr. Blankenship for his extraordinary efforts on the campaign's behalf." This locution seems designed to attach the petitioners to the coattails of Justice O'Connor. They quote her remark in the *White* concurrence: "relying on campaign donations may leave judges feeling indebted to certain parties or certain groups." The petitioners do repeat the "debt of gratitude" phrase once, 64 but it is not central in their argument. Even so, as we shall see, counsel for the respondents find that it makes a good target.

The petitioners' main argument for disqualifying Justice Benjamin is that the denial of recusal, given Blankenship's contributions to ASK, will suggest the probability of bias to an average observer. To put this point in a nutshell: it looks really bad. The phrase "debt of gratitude" is one way of expressing what an ordinary person would think of a judge who remains on the court that is deciding the case of a massive contributor. The wording may also serve as a euphemism, allowing the petitioners to avoid suggesting directly that Justice Benjamin's participation in this case was the *quo* that responded to Blankenship's *quid*.

<sup>60.</sup> Brief for Petitioners at 5, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22).

<sup>61.</sup> Id. 1-8.

<sup>62.</sup> Id. at 31.

<sup>63.</sup> Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring).

<sup>64.</sup> Brief for Petitioners, *supra* note 60, at 34 ("[T]here is no reason to believe that Justice Benjamin is any less likely to feel a debt of gratitude to Mr. Blankenship because a majority of his financial support was provided through [ASK].").

<sup>65.</sup> See infra notes 88-100 and accompanying text.

Let me be clear: Although I am convinced that Justice Benjamin should have recused himself, <sup>66</sup> I do not suggest that his vote in this case was bought. But surely Blankenship bought Benjamin's seat on the West Virginia Supreme Court of Appeals, and surely he did so with the *Caperton* case in mind. By the time this brief is filed, Blankenship has the first of his objectives in hand: the elimination of McGraw from his company's case. "Probable bias" surely is an improvement over a due process recusal standard tightly wrapped around the small-change *Tumey* decision. <sup>67</sup> But the expression does not capture the main interests at stake in the *Caperton* decision. In a wide perspective, the Court is asked to save recusal as a due process remedy of last resort—the only remedy in sight to moderate the poisoning of judicial elections. In the narrowest view, focused on the facts of this case, the Court is asked to respond to the injustice of letting Blankenship walk away with the rest of his swag.

## BRIEFS OF PETITIONERS' AMICI

Within a week following the filing of the petitioners' brief, eleven briefs amici are filed in support, four of them by amici who have previously urged the Court to grant review.<sup>68</sup> Several of these briefs prove to be helpful to the petitioners' case; I reserve the most helpful among them to the end of this discussion.<sup>69</sup>

The ABA's brief renews its argument that due process requires judges to be free from actual bias and also to avoid the appearance of bias—appearance, that is, "in reasonable minds." The most important addition to the earlier brief is the suggestion of how to determine whether reasonable minds would expect bias. The ABA says that "hard and fast rules" are no answer; rather, it proposes consideration of a set of factors, roughly matching those proposed in the petitioners' brief, but with further attention to the relationship between the contributor and the case before the state court. The brief concludes by calling for the Court to provide guidance about the demands of due process, "especially needed today, when increased judicial campaign contributions pose a greater threat than ever to public confidence in the integrity of the judiciary."

<sup>66.</sup> This view is shared even by Lawrence Lessig, who (with some reluctance) concludes that *Caperton* was wrongly decided. Lessig, *supra* note 9, at 109–13.

<sup>67.</sup> See supra notes 45-46 and accompanying text.

<sup>68.</sup> The ABA, the CED, the Brennan Center, and Public Citizen. Washington Appellate Lawyers Association, the other amicus from that time, has joined the large group led by Justice at Stake. *See infra* notes 72–73 and accompanying text.

<sup>69.</sup> See infra notes 76-110 and accompanying text.

<sup>70.</sup> Brief Amicus Curiae [on writ of certiorari] of the American Bar Association in Support of Petitioners at 12–13, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22).

<sup>71.</sup> Id. at 20–21.

The brief of the Brennan Center and its co-amici also follows the pattern of their earlier brief in the case, but it adds an arresting scenario for the Court to contemplate. Imagine that 99 out of 100 judges adhere to the ABA's general standard for recusal—already written into law in most states, even in West Virginia—but

an isolated colleague ignores it without consequence—even in cases that, under the standard, cannot credibly be described as "close". . . . Such a state of affairs harms not only litigants and the public, but the ninety-nine other judges as well. ¶This case is that scenario in microcosm. <sup>72</sup>

The Center goes on to argue that a failure to reverse the West Virginia decision would properly be interpreted as holding "that, in effect, there are no real due process constraints on recusal."<sup>73</sup>

The brief amici curiae of the Committee for Economic Development (CED) makes the same points that it made in its brief supporting the grant of certiorari—in large part, using the same words. Yet this, too, is an important brief—and, again, the importance lies in the identities of the signatories. Now the CED is not alone; joining this brief are four giant corporations (Intel, Lockheed Martin, PepsiCo, and Wal-Mart), and two groups of lawyers who defend corporations in business litigation (Defense Trial Counsel of Indiana) and in tort litigation (Illinois Association of Defense Counsel). This combination is a powerful reminder to the Supreme Court that the problem illustrated in this case is seen by some solid citizens as a threat to the security of legal expectations—and thus to a central pillar of a free market.

A seventh amicus joining the CED brief is Transparency International-USA, a nonprofit organization that works around the world to combat corruption in the interest of economic stability. Here, too, the most important datum is the identity of the amicus. Of course all the amici, like the petitioners, continue to tiptoe around any suggestion that the *Caperton* case might involve the actual corruption of a judge. But the presence of Transparency International as an amicus is a soft reminder of a larger problem. As Justice Ginsburg later intimated, one way to

<sup>72.</sup> Brief of Amici Curiae the Brennan Center for Justice at NYU School of Law et al. at 27, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22). Here the Center takes note of the Brief Amici Curiae of 27 Former Chief Justices and Justices in Support of Petitioner, in which all those state supreme court justices agree that the facts of *Caperton* create an unconstitutional appearance of impropriety. *Id.* at 27 n.7. They draw on their own experience as candidates in judicial elections to say that, under such circumstances, all of them would have self-recused. *Id.* This short but punchy brief is well worth reading.

<sup>73.</sup> Id. at 30.

protect against efforts to buy judges is to deny "perpetrators" at least some of the potential fruits of their labors.

Still another brief amici curiae, led by Justice At Stake, represents the views of twenty-seven organizations that might be called "good government" groups. These amici include the American Judicature Society. Common Cause, and the League of Women Voters.74 The central message in this brief is aimed at a Justice who might prefer to leave the political-spending problem to the state courts. Such a Justice might worry that a ruling for the petitioners on a due process ground could divert the states away from devising their own responses to spending in judicial elections. These amici argue, to the contrary, that a decision for the petitioners in this case will help state legislatures and state courts to refine their efforts to do just that. They suggest various paths that the states might follow, from the far-reaching but unlikely (such as public financing, or a return to merit selection) to the more modest and more likely (such as recusal standards based on specific dollar limits, or specific time frames).<sup>75</sup> If the Court should brush aside the present egregious case, they say, "state reform efforts may be weakened or even overcome by the Court's implicit acceptance of the perceived and real threats to judicial impartiality . . . like the ones in this case."<sup>76</sup>

#### THE STATE CHIEF JUSTICES WEIGH IN

I have left until last the amicus brief that seems to have carried the most weight in *Caperton*: the brief of the Conference of Chief Justices.<sup>77</sup> The members of the Conference are the chief justices of all the states, the District of Columbia, and all the commonwealths and territories from the Northern Marianas to the Virgin Islands. The Conference previously submitted a brief in the *White* case,<sup>78</sup> in support of what proved to be the

<sup>74.</sup> One of the amici here is the Washington Appellate Lawyers Association, thus rounding out the list of organizations that filed amici briefs twice in *Caperton*.

<sup>75.</sup> Brief of Justice At Stake et. al. as Amici Curiae in Support of Petitioners at 11–16, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22). For reviews of possible state remedies—also ranging widely in their chances for adoption—see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 L. & CONTEMP. PROBS. 79 (1998); David Barnhizer, "On the Make": Campaign Funding and the Corrupting of the American Judiciary, 50 CATH. U. L. REV. 361 (2001).

<sup>76.</sup> Brief of Justice at Stake et al., supra note 75, at 16.

<sup>77.</sup> One of the principal authors of this brief also wrote the Conference's brief for the losing side in *White*. See Brief of the Conference of Chief Justices as Amicus Curiae in Support of Respondents, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521). We are left to speculate why the effort failed there but succeeded in *Caperton*. My speculation is twofold: first, a forced recusal leaves intact the contributor's First Amendment' protection; second, *Caperton*'s dramatic facts convinced Justice Kennedy that some constitutional remedy was needed.

<sup>78.</sup> See supra note 31 and accompanying text.

losing side. In *Caperton*, as I see it, the Conference's brief is influential in the decision of the case. It would claim too much to say that the brief tips the scales for the petitioners, but at the very least it is an important encouragement.

The brief's title ends with the words "In Support of Neither Party," but that recital is a formality. The Conference first notes that its board of directors, in a special vote, unanimously authorized the brief. When a case involves review of a decision by a state supreme court, a Conference brief is authorized "only if critical interests of the state courts are at stake . . . . "80 Such a brief, says Conference policy, must "not take a position on the specifics of the decision." Thus, they say, the Conference does not take a position on the commands of the Due Process Clause in relation to the recusal of this particular West Virginia justice in this particular case. The brief concludes with a modest request:

that this Court clarify the applicability of the Due Process Clause to motions to disqualify based on campaign support and articulate the considerations that should be weighed in deciding whether the Constitution requires recusal.<sup>82</sup>

So, the beginning and the end of the Conference's brief are neutral. Between those two points, however, the substance of the brief is unswervingly favorable to the petitioners' case.

One item surely is noted by the addressee-Justices: the brief's principal authors are Roy Schotland and Thomas Phillips. Schotland is one of the nation's most notable scholars on the funding of judicial election campaigns and has been among the first to discuss appropriate responses to the growing effects of money in those elections. In one of those early analyses, he noted that judicial elections in our country "have become, and in many more places will become, noisier, nastier, and costlier."

82. Id. at 29.

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<sup>79.</sup> As you have surmised, the Chief Justice of West Virginia was not one of these directors. This brief was also reviewed and approved by a committee including the chief justices of North Dakota (chair), Indiana, Massachusetts, Ohio, South Carolina, Texas, and Utah. Chief Justice Wallace P. Jefferson (Texas) is now the President-elect of the Conference's board of directors. I am proud to join with him in the *Review*'s symposium.

<sup>80.</sup> Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party [hereinafter CCJ brief] at 2 (emphasis in original), Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22).

<sup>81.</sup> Id.

<sup>83.</sup> See Roy A. Schotland, Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?, 2 J. L. & POL. 57 (1985). My colleague Stuart Banner was there, too. See Stuart Banner, Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 STAN. L. REV. 449 (1988).

<sup>84.</sup> Roy A. Schotland, *After California, What's Next for Judicial Elections?*, 70 JUDICATURE 356, 359 (1987) (colloquy, American Judicature Society).

How right he was. Thomas Phillips, the co-author of the Conference's brief, is a former Chief Justice of Texas. He, too, knows whereof he speaks, both on the dangers posed by election spending to the work of state judges and on the capacity of state supreme courts to deal with claims of bias such as the claim in *Caperton* itself.

The Conference's amicus brief offers careful expositions of the problem of campaign spending in judicial elections, the limited but significant role of the due process clause in recusal cases of the type involved here, and the factors that might be considered in determining the application of the clause to a particular case. The brief avoids the language of exhortation, but—without declaring an explicit conclusion—it carries the reader inexorably to the decision that the Court eventually will reach. Anyone who reads Justice Kennedy's opinion and the Conference's brief—in that order—will see their parallel lines.

First, the Conference sets the stage by describing the ways in which state judges are selected (including judicial elections), and the increase in hotly contested elections of judges. These contests become "high-dollar free-for-alls marked by dueling campaign salvos by organized interest groups, often located outside the state of the election." As a result, the Conference says,

it becomes harder for both the candidates and the public to perceive the fundamental distinction between the neutral and reactive role of the judiciary and the policy-initiating branches of government.<sup>86</sup>

The main safeguard has been the states' codes of judicial conduct, usually patterned after the ABA's model code. But *White* struck down Minnesota's "announce" clause, and lower courts have extended the *White* principle to the ABA code's "pledges and promises" clause<sup>87</sup> and its "commits" clause, holding them to be violations of the First Amendment. In the Conference's view, these rulings are undue extensions of *White*. The chief justices express the hope that the Court will "affirm the state courts' legitimate constitutional role in protecting the due

<sup>85.</sup> CCJ brief, supra note 80, at 8.

<sup>86.</sup> *Id.* at 9. Here the Conference quotes its own amicus brief in the *White* case, on the dangers thus posed for judicial independence.

<sup>87.</sup> *Id.* at 12 (citing eight such cases, and three other decisions upholding the clause). The clause would restrict a judicial candidate from making a pledge or promise of conduct in office other than impartial performance of the duty of a judge.

<sup>88.</sup> *Id.* at 13 (citing seven cases). This clause would restrict a judicial candidate from committing or appearing to commit the candidate to cases or issues likely to come before the court in question.

<sup>89.</sup> The Conference also mentions decisions striking down state prohibitions against judges' personal solicitation of campaign funds from people likely to be litigants or lawyers in their courts. *Id.* at 13–14.

process rights of all litigants to fair and impartial trials in elective judicial systems."<sup>90</sup>

Next, the Conference turns to the brief's central point: given (1) "the sharp rise in judicial campaign spending," (2) the increasing politicization of the campaigns, and (3) the questions raised by *White* and its progeny for the constitutionality of efforts to enforce codes of speech-related judicial conduct,

recusal and disqualification of judges have become ever more important in States with vigorously contested judicial elections. <sup>91</sup>

In other words, recusal is all that's left as a constitutional protection. If the Court fails to reverse the West Virginia decision in this case, the game is over, and the harsh politicization of judicial elections has won. This is a potent argument. And coming from a solid phalanx of state chief justices, it is authoritative.

But assuming that due process should require recusal in some cases, the Court still needs a way to determine whether the facts of a given case justify such a remedy. The Conference argues effectively, from a long line of due process precedents, that the Court really has not insisted on a showing of actual bias. Even in the earliest case, *Tumey v. Ohio*, 92 the chief justices say that the Court "evaluated the circumstances and decided that the probability of bias for this judge was too great for the Constitution to countenance.",93 As the reader progresses through this part of the brief, it becomes clear that the Supreme Court has never directly accused this or that judge of actual bias. Rather it has said, in the Conference's words, that "the Constitution forbids procedures that create a probability that prejudice will result."94 Not only is the "probable bias" approach desirable as a way to avoid calling names; it is also useful because "the appearance of likely bias . . . may be the only evidence of actual bias."95 According to the Conference, the question must be, not whether a fastidious judge is able to resist temptation, but "whether an average judge would be tempted under the circumstances."96

<sup>90.</sup> Id. at 14.

<sup>91.</sup> Id. at 15 (citing and commenting on Justice Kennedy's White concurrence).

<sup>92, 273</sup> U.S. 510 (1927).

<sup>93.</sup> CCJ brief, *supra* note 80, at 19. A cynical view (that I do not share) would treat the Conference as an interest group representing officeholders. True, incumbency is a strong asset in a judicial election that is not polluted by the harsh campaigning that big money buys. But if the Conference's brief were motivated by self-interest, Roy Schotland would be an unlikely choice for its author. My recommendation to anyone who is inclined toward the cynical view of the chief justices' brief is: Read it.

<sup>94.</sup> Id. at 20.

<sup>95.</sup> Id. at 22.

<sup>96.</sup> *Id*.

Having asked this question, the Conference of Chief Justices suggests a way of proceeding to resolve it. Invoking the traditional flexibility of due process analysis, 97 they reject any "bright-line rule" in favor of a determination of probable bias case by case, seeking "fairness with reference to particular conditions or particular results." Recognizing the argument that such case-by-case determinations "might open the floodgates for thousands of constitutional disqualification challenges against elective judges who preside over cases involving supporters and contributors," the chief justices suggest that this fear is unfounded. This is a vital reassurance, especially convincing because it comes from the heads of the state judiciaries that will have to deal with any such disqualification challenges.

In support of their suggestion that a ruling for the petitioners will not open the floodgates, they say,

we know of only two other instances as extreme as this one [Caperton] in terms of size of the expenditure and percentage of the total support for a candidate.  $^{100}$ 

One of those cases is the *Avery* case, described above, <sup>101</sup> which culminated in a denial of certiorari. The other is a highly publicized case in which a rich contributor accounted for more than 90% of the contributions to one judicial candidate's unsuccessful campaign for the Texas Supreme Court, as well as one-third of the funds raised by another successful candidate for the same court. <sup>102</sup> I cannot imagine that anyone who reads this section of the brief will conclude that the Conference really is "In Support of Neither Party." Surely the chief justices who approved this text were riled up.

Now that they have drawn attention to the "extraordinary support" for justice in this "extreme" case, <sup>103</sup> the Conference offers further reassurance. The imposition of a due process limit here, they say, will not

<sup>97.</sup> The paradigm statement, as most readers will know, is *Mathews v. Eldridge*, 424 U.S. 319 (1976). The CCJ does not cite this decision, perhaps because it held that no hearing was required in the case at hand

<sup>98.</sup> CCJ brief, *supra* note 80, at 23 (quoting Snyder v. Mass., 291 U.S. 97, 116 (1927) (Cardozo, J.)). The classic treatment of the general question—long ago called the issue of "absolutes" v. "balancing"—is Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

<sup>99.</sup> CCJ brief, supra note 80, at 23.

<sup>100.</sup> Id.

<sup>101.</sup> See supra note 29. No doubt this reference was contributed by Professor Schotland.

<sup>102.</sup> CCJ Brief, *supra* note 80, at 23–24 (citing Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 84 (1986)). This reference surely had its origins in Chief Justice Phillips's own memory.

<sup>103.</sup> Id. at 23.

routinely subject judges to disqualification just because they have received substantial campaign support. To avoid that result without adopting a bright-line rule, the Supreme Court will need a standard for determining whether due process demands a recusal. Favoring a "probable bias" standard, the Conference suggests seven considerations, "neither exclusive nor exhaustive," that are relevant to this inquiry. 104 These criteria—the relationship (if any) of the donor to the judge, the size and relative importance of the contribution, its timing in relation to the case in which the donor is interested, etc.—are similar to the criteria suggested in the petitioners' brief and other briefs amici in their support.

Sometimes, the "fact that the organization saw fit to file the [amicus] brief is the important datum, not the legal arguments or the background information set forth between the covers of the brief." 105 Although this might be said of the brief of the Conference of Chief Justices, it would not be the whole story. The Conference, after all, is something on the order of a collective expert witness as to some of the legislative facts 106 at issue in *Caperton*. In their brief the chief justices were testifying as to: (1) the seriousness of the threat to judicial impartiality posed by campaign spending; (2) the utility of a due process "floor" as an encouragement of state action to turn the ABA codes of judicial conduct into real law, not just tepid exhortation; and (3) the weakness of the "floodgates" argument. I think the majority was paying attention. Even if it be true that "it [is] largely the non-legal information presented in [amici] briefs that [make] them useful,"107 the Conference's considered pronouncements on these subjects must be counted as information.

#### THE RESPONDENTS' BRIEF ON THE MERITS

The respondents' brief, like the brief for the petitioners, is a piece of advocacy well done. Surely counsel for the respondents see immediately that the petitioners' mention of a "debt of gratitude" is a gift not to be refused. The respondents pounce on it in their opening sentence:

<sup>104.</sup> Id. at 25.

<sup>105.</sup> Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. PA. L. REV. 743, 786 (2000).

<sup>106.</sup> That is, the factual background that informs the balancing of interests for constitutional decisions—as distinguished from the particulars of a given case (adjudicative facts). For an ancient account by a young author, see Kenneth L. Karst, Legislative Facts in Constitutional Litigation, 1960 SUP. CT. REV. 75 (1960).

<sup>107.</sup> Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & Pol. 33, 42 (2004). See also Paul M. Collins Jr., Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation, 38 LAW & SOC'Y REV. 807, 815-16 (2004).

The question presented is whether the Due Process Clause of the Fourteenth Amendment required Justice Benjamin's disqualification on the theory that he must have felt a "debt of gratitude" to Blankenship that created a "probability of bias" in favor of respondents. <sup>108</sup>

Later the respondents speak of the "debt of gratitude theory" as the petitioners' central theory, and lambaste it for sixteen pages. They repeatedly deploy the phrase, quotation marks and all, treating it as the embodiment of the petitioners' case. Such a theory of recusal, they say, has no limiting principle, for it could extend to newspaper endorsements, group endorsements (by a labor organization, a trade association, a civic group), or even a governor's appointment of the judge. <sup>109</sup> Indeed, "under petitioners' theory," recusal might be equally required in a case involving someone who has contributed to the campaign against the judge's appointment or election. <sup>110</sup>

An eight-page section, <sup>111</sup> entitled "A 'debt of gratitude' theory would be unworkable," <sup>112</sup> begins by pointing out that the petitioners' supporting amici have offered various different multi-factor considerations that would be relevant (but not exclusive) in deciding whether due process requires recusal under a "probability of bias" inquiry. The criticisms of the various multi-factor tests include their overlaps, their differences, their vagueness, and their invitation to courts to decide recusal cases in any way they might please. The section continues with one-byone examinations of various possible factors (size of contribution, timing, importance to the election, etc.), arguing that each factor has contours that vary from one amicus to another, with no clear guidance for determining whether recusal is required. The expression "debt of gratitude" is repeated often enough to make clear that the respondents have identified it as a phrase worth trumpeting. <sup>113</sup>

Another section of the respondents' brief argues that a "debt of gratitude" theory of due process is unnecessary because the states are busy considering various means of confronting whatever problems may be raised by spending in judicial elections. Examples of state action noted by the respondents are contribution limits (on timing or on amounts); peremptory recusal provisions that allow a litigant to recuse a judge (at

<sup>108.</sup> Brief for Respondents at 1, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22).

<sup>109.</sup> Id. at 30-31.

<sup>110.</sup> Id. at 32-33.

<sup>111.</sup> Id. at 36-44.

<sup>112.</sup> Id. at 36 (italies in original).

<sup>113.</sup> Eventually the phrase does show up in Justice Kennedy's opinion for the Court, but not as a capsule version of the Petitioners' case. *See infra* notes 181–88 and accompanying text.

least a trial judge) without cause; and even a proposal—in West Virginia, mind you—to create a judicial commission to decide on recusal requests. This is a common style of argument, deployed by advocates in all manner of cases: "There is no problem here, and anyway, someone else is handling it."

The respondents conclude by arguing that, even assuming a "probability of bias" standard, such a probability has not been shown in this case. Here are the highlights of this part of the argument: 115

- A footnote says, "Nor is there warrant for any insinuation that the pendency of the litigation is in fact what motivated Blankenship's expenditures." <sup>116</sup>
- Blankenship himself did not contribute all that money to the Benjamin campaign; rather he gave money to ASK, an independent group that made contributions to defeat McGraw. Nor did Benjamin ask Blankenship for any contributions.
- The contributions to ASK were not made by a party before the West Virginia court. They were made, not by Massey, but by Blankenship, who is neither a party nor a lawyer for a party.
- It cannot be assumed that contributions to the Benjamin campaign were what elected him. All the major newspapers in West Virginia supported him; McGraw refused to debate him; and then there was McGraw's embarrassing speech—the one that Justice Benjamin later played for the National Press Club.

Apparently Benjamin did not tell the Press Club how his campaign could afford to saturate West Virginia with his award-winning video.

## BRIEFS OF RESPONDENTS' AMICI

Mostly, the briefs amici in support of the respondents do little more than repeat arguments that were already made—and made effectively—by the respondents themselves. One repetition is stylistic, characterizing the petitioners' argument as a "debt of gratitude" theory. Other repetitioners' argument as a "debt of gratitude" theory.

115. Id. at 50-50

<sup>114.</sup> Brief for Respondents, supra note 108, at 46-49.

<sup>115.</sup> Id. at 50-56.

<sup>116.</sup> *Id.* at 50 n.7 (referring back to *id.* at 5 n.1, where they point out that Blankenship owns less than 1% of Massey's stock, and note that he has made contributions in other elections unrelated to Massey's interests).

<sup>117.</sup> Brief of Amicus Curiae James Madison Center for Free Speech Supporting Respondents [hereinafter Madison Center Brief] at 1, 3, 11, Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (No. 08-22); Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah as Amici Curiae in Support of Respondents [hereinafter Seven States' Brief] at 3, 5, 6, 10, 11, 19, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22); Brief of Law Professors Ronald D. Rotunda and Michael R. Dimino as Amici Curiae in Support of Respondents [hereinafter Rotunda

tions are substantive: Amici argue that the Court's precedents clearly limit due process recusals to cases of pecuniary interest and cases of contempt of court; that petitioners have not offered a doctrinally workable principle; that a ruling for the petitioners will set in motion a flood of litigation; or that the states are the appropriate loci for any needed corrective action. Other arguments by amici also echo the respondents: for example, the contentions that some amici in support of the petitioners seek to nibble away at *Buckley v. Valeo*, or even seek to inhibit states from holding judicial elections. The briefs of amici in support of the respondents may have influenced some of the *Caperton* dissenters, but they failed to move the majority. Still, three of these briefs are worth mentioning, not for their influence on the decision, but because they add their own forensic touches—and because they are interesting.

The Seven States' Brief (Alabama, et al.<sup>124</sup>) turns its focus away from the particulars of the *Caperton* case and toward generalized questions. The brief centers on the capacity of states to deal with recusal issues, the recent experience of states' experimentation with regulating recusal practice, and the likely ill effects if the Court should rule for the petitioners. Such a ruling, these amici argue, would burden state courts, would cause judges to over-recuse, and would encourage the deployment of recusal as a mischievous stratagem. The brief goes on to discuss in detail<sup>125</sup> the efforts in a number of states to deal with issues relating to money in judicial elections. These efforts are ongoing and include recusal measures, contribution limits, and combinations of those two. Justice Souter specifically mentions this brief during the oral argument.<sup>126</sup>

The Seven States' brief also offers two rhetorical devices that will find their way into the dissenting opinions. First, the brief originates

Brief] at 9, 10, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22); Brief of Amicus Curiae Center for Competitive Politics in Support of Respondents [hereinafter Comp. Politics Brief] at 11, 12, 15, 16, 18, 20, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22); Brief of Ten Current and Former Justices and Justices as Amici Curiae In Support of Respondents [hereinafter Ten Justices' Brief] at 3, 4, 11, 12, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22).

<sup>118.</sup> Madison Center Brief, *supra* note 117, at 7–9; Comp. Politics Brief, *supra* note 117, at 9–11, 22–23; Ten Justices' Brief, *supra* note 117, at 9–11; Rotunda Brief, *supra* note 117, at 3–12.

<sup>119.</sup> Ten Justices' Brief, *supra* note 117, at 12–17; Rotunda Brief, *supra* note 117, at 12–15; Seven States' Brief, *supra* note 117, at 18–27; Madison Center Brief, *supra* note 117, at 24–26.

<sup>120.</sup> Rotunda Brief, supra note 117, at 15-17; Madison Center Brief, supra note 117, at 24-26.

<sup>121.</sup> Seven States' Brief, supra note 117, at 12-18; Rotunda Brief, supra note 117, at 18-19.

<sup>122.</sup> Compare Comp. Politics Brief, supra note 117, at 22–27, with Brief for Respondents, supra note 108, at 52–63.

<sup>123.</sup> Compare Madison Center Brief, supra note 117, at 23–24, and Ten Justices' Brief, supra note 117, at 11–17, with Brief for Respondents, supra note 108, at 45–46.

<sup>124.</sup> Seven States' Brief, supra note 117.

<sup>125.</sup> Greater detail than that in the parallel passage in the respondents' brief.

<sup>126.</sup> See infra note 148 and accompanying text.

"Caperton motion" or "Caperton claim" as the name for this sort of recusal motion, if the petitioners should prevail. These terms seem certain to be enshrined in future due process jurisprudence. 127 Second, the Seven States offer a list of some twenty-four uncertainties that will result from a ruling for the petitioners. 128 At least ten of these will turn up on the list of forty uncertainties identified by Chief Justice Roberts in his Caperton dissent. At that time, the Chief Justice says, "These [forty] are only a few uncertainties that come quickly to mind." For me, this implausible remark produced an image of four clerks pulling an all-nighter, each with a quota of ten uncertainties. My hasty estimate exaggerated their task. In addition to the uncertainties supplied by the Seven States, the clerks could draw on those mentioned by Justice Alito at the oral argument. Even so, "The Forty Uncertainties" has an aesthetic appeal, evoking the memory of slogans that were popular in China during the era of Mao. 130

The Ten Justices' brief amici<sup>131</sup> offers a useful real-world perspective, which deserves recognition by anyone who seeks to understand the subject of campaign spending in judicial elections. The brief suggests that the recent increase in attention paid to state courts may be attributed to an increase of those courts' activity in fields such as state constitutional law and tort reform—and a resultant increased interest in state judges' points of view. The Ten Justices are concerned that a success for the petitioners in this case may invite a greater number of recusal motions, thus stimulating media coverage, threatening popular confidence in the courts, and exacerbating tensions within courts over judicial philosophy.

Just as the Brennan Center's briefs present predictably "liberal" views, so the amicus brief of the Madison Center presents views that are predictably "conservative." The brief reinforces the Center's unswerving support for the freedom to spend in election campaigns. <sup>132</sup> Taking an expressive turn, the Center says that a decision for the petitioners will replace a long-standing presumption of judicial impartiality with "a pre-

132. See Madison Center Brief, supra note 117. As the brief reminds the reader on page 1, the Center has defended this position consistently in a series of cases since McConnell v. FEC, 540 U.S. 93 (2003).

<sup>127.</sup> The terms were given a running start, appearing five times in Chief Justice Roberts's dissent and once in Justice Scalia's dissent. "Caperton motion" soon came to the pages of the Harvard Law Review. Karlan, supra note 9, at 100.

<sup>128.</sup> Seven States' Brief, supra note 117, at 22-27.

<sup>129.</sup> Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting). Karlan, supra note 9, at 93, quips that forty questions are "double the number in the traditional party game and ten times the number at a seder.'

<sup>130.</sup> If you are inclined to take the Chief Justice's list as more than a rhetorical device, please be sure to read Penny White's powerful point-by-point rejoinder. White, supra note 9, at 134–48.

<sup>131.</sup> Supra note 117.

sumption of corruption."<sup>133</sup> It also offers a counterweight to the Brennan Center's polling data concerning public attitudes toward the judiciary and judicial elections. For example, the Madison Center's polls suggest that, although people are concerned about the possible effects of campaign fundraising on judicial impartiality, they generally think judges are impartial. <sup>134</sup>

In *Caperton*, it would have been hard for any of the respondents' amici to match the weight of the briefs amici offered by the Conference of Chief Justices, the ABA, and the CED. The Seven States' brief and the Ten Justices' brief did provide material for the dissent, but these amici had an uphill fight in persuading Justice Kennedy. And the Madison Center, like the Brennan Center, offered information that was useful but not compelling.

#### THE AMICI IN THE ORAL ARGUMENT

Of course oral argument normally is limited to the parties,<sup>135</sup> but in this case, the amici in support of the petitioners "appear" informally, in repeated references by the petitioners' counsel and by the Justices—especially those Justices who eventually will join the opinion of the Court

The argument follows the usual pattern, with the Justices posing challenging questions to counsel representing the "other side," that is, the side against which the questioning Justice was inclined before entering the courtroom. The argument also confirms another bit of conventional wisdom. At this stage, it is important to be represented by experienced Supreme Court advocates. The parties in Caperton understand. Theodore Olson represents the petitioners (Caperton et al.), and Andrew Frey represents Massey and its co-respondents. These two are not merely well-seasoned veterans of Supreme Court litigation, but first-rate analysts who are quick on their feet, both in recognizing what a Justice has in mind and in offering a response that will move the case in the advocate's direction. Prominently seated in the courtroom is (retired) Justice Sandra Day O'Connor, the amica who does not need to write a brief. 136 For some time she has been on a crusade against the influence of big money in judicial elections; a year and a half before, she published an op-ed article in the Wall Street Journal, titled Justice for Sale. 137

<sup>133.</sup> Madison Center Brief, supra note 117, at 9.

<sup>134.</sup> Id. at app. 1.

<sup>135.</sup> The Solicitor General made no appearance in Caperton.

<sup>136.</sup> I owe this locution to Rick Hasen.

<sup>137.</sup> Sandra Day O'Connor, Justice for Sale: How Special Interest Money Threatens the Integrity of Our Courts, WALL St. J., Nov. 15, 2007, at A25. In late 2009, Justice O'Connor became

#### THEODORE OLSON FOR THE PETITIONERS

Olson starts by saying that the constitutional right to a fair tribunal "means not only the absence of actual bias, but a guarantee against even the probability of an unfair tribunal. In short—"

Short, indeed. Justice Scalia breaks in, saying "Who says? Have we ever held that?" Olson offers an example that does not satisfy Justice Scalia, and when Olson reaches the term "probability of bias," Chief Justice Roberts says, "Probability is a loose term. What—what percentage is probable?" And so it goes. Anyone who has read the parties' briefs will recognize the questions from these two Justices and Olson's answers.

After about twelve minutes filled with these three voices, engaged in the same sort of jousting, <sup>139</sup> Justice Kennedy has his own chance to speak—and his statement does not follow the pattern that has thus far dominated the discussion. That is, he is not posing a "question" to make a substantive dent in counsel's case. Instead, he is actually seeking illumination. This is an important moment; everyone who has followed the case up to now knows that Justice Kennedy's vote will be crucial. <sup>140</sup> Addressing Olson, he says that a decision for the petitioners will make disqualification a part of the pre-trial process, and adds:

Your standard is an unacceptable risk of impropriety or perception of bias, but I—I need some more specific standards within which to fit this case . . . . [I]t doesn't seem to me that the standard you offer us is specific enough.<sup>141</sup>

Enter the amici. Olson is determined to introduce the brief of the Conference of Chief Justices into the conversation. Their brief said (in Olson's paraphrase) "that we need a standard with respect to recusals for extraordinary campaign contributions. They said that—" Wait a moment, while Justice Scalia scores a major point:

chair of the O'Connor Judicial Selection Initiative, a program of the Institute for the Advancement of the American Legal System at the University of Denver. The plan is to support state initiatives to do away with direct election of state judges. Good luck to them; they will need it.

<sup>138.</sup> Transcript of Oral Argument at 4, Caperton v. A.T. Massey, 129 S. Ct. 2252 (2009) (No. 08-22) 2009 WL 527723. All page numbers in these notes refer to the official print of this argument. I have made some minor changes in spelling and punctuation, to correct the transcript's quotations from the briefs and to capture the rhythm of speech.

<sup>139.</sup> Except for one short question from Justice Ginsburg (whether "probable bias" means the same as "likelihood of bias"), the first twelve pages of Olson's argument are occupied entirely by questions from Justice Scalia and Chief Justice Roberts, along with Olson's responses.

<sup>140.</sup> If there has been any doubt about the Chief Justice's vote, his questioning up to this point has strongly indicated a general agreement with Justice Scalia.

<sup>141.</sup> Transcript of Oral Argument, supra note 138, at 15.

Was their standard the same as yours? I mean, that's frankly one of the problems in this case. The various amici and—and you come up with, you know, a wide divergence of standards. And all of them say: By the way, these seven factors or five factors or six factors, whatever they say, are not exhaustive; there may be others as well <sup>142</sup>

Olson replies that due process, like other constitutional standards such as probable cause, speedy trial, or equal protection, "can't be nailed down with levels of specificity." Then Justice Kennedy, still hoping for illumination of a problem that bothers him, says,

I want you to articulate some substandards that have—that are general in nature, that apply to this case, substandards that are more specific than the probability of bias. 144

This is the first of two critical moments in the oral argument, and Olson meets the challenge. He first explains that "probability of bias" is a phrase taken from the Court's own recusal precedents. Then, still speaking to Justice Kennedy, Olson says,

But let me answer your question this way: When the circumstances, including the timing of the contribution, the magnitude and proportion of the contribution, are such that it would lead a reasonable person in possession of all of the facts—these are all words from these Courts' decisions—to believe that the judge would have a difficult time being other than biased in favor of one of the parties, that would be the standard that would be applied. It's a general standard, but . . . the Conference of Chief Justices—<sup>145</sup>

Here, Olson is stopped by Justice Ginsburg, who reminds him that the money in this case came from Blankenship, who is not just the CEO of the defendant company, but "a prime culprit," one who "is targeted as the perpetrator." She wants to know whether this fact is central to the "view stated that there is really an appearance of impropriety here." Olson agrees that it is, but he makes clear that it is not the only factor—and that gives Justice Scalia another occasion to say that this whole "probability of bias" notion gives the Court "nothing to hang onto." 147

In response to Justice Scalia's challenge, Olson says what he tried to say to Justice Kennedy, some six questions before, about the views of

<sup>142.</sup> Id. at 16.

<sup>143.</sup> *Id*.

<sup>144.</sup> Id.

<sup>145.</sup> Id. at 17.

<sup>146.</sup> Id. at 18.

<sup>147.</sup> Id. at 18-19.

the Conference of Chief Justices. He refers to page four of the Conference's brief amicus, where it says (Olson paraphrasing the parts not in quotes),

we need it; "extraordinarily out-of-line campaign support from a source that has a substantial stake in the proceedings"; where those "extreme facts create a probability of actual bias." 148

And then they [the Chief Justices] go on to say, to answer the floodgate problem that my opponent raises—this is going to open the floodgates, and you will have nothing but recusal motions. They explicitly state that concern is not—is "unfounded." "No bright line rule can or should be attempted." These are the judges—<sup>151</sup>

Justice Scalia interrupts to suggest that an easier solution for any such problem would be to limit the amount of the contribution. <sup>152</sup>

Justice Souter asks his own question, inspired by the Seven States' Brief, suggesting that the states' own political process is dealing with the problem of money in judicial elections. He notes that West Virginia itself has taken some action. Should the Supreme Court stay its hand and let the states work out their own answers? Olson answers by saying that the process of money in judicial elections is spiraling out of control. There is a financial arms race in judicial elections in various states throughout the country. Justice Souter responds, "Oh, I think we all recognize that." Instead, Justice Souter wants to know what the states are doing as a remedy. Olson again invokes the Conference of Chief Justices: "They are the ones where the rubber meets the road, so to speak. They are saying, and the entire Conference is saying, we need some guidance here with respect to a constitutional limit—

Before Olson can quote the Chief Justices further, Justice Alito enters the fray. He, too, has the petitioners' amici in focus:

Well, they [the Chief Justices] propose a seven-factor test, and all of the other amici, who know a lot about this subject, propose multifactor tests. Public Citizen has ten factors, the ABA has four fac-

152. *Id.* Would that really be easier? Chief Justice Roberts soon interjects the question whether, given the Court's First Amendment decisions, the states really are free to limit contributions.

<sup>148.</sup> Id. at 19–20 (quoting CCJ brief, supra note 80, at 4–5).

<sup>149.</sup> Id. at 20 (quoting CCJ brief, supra note 80, at 23).

<sup>150.</sup> Id. (quoting CCJ brief, supra note 80, at 22).

<sup>151.</sup> Id.

<sup>153.</sup> West Virginia, in response to this very case, has limited to \$1,000 the amount of an individual's contributions to a 527 group.

<sup>154.</sup> Transcript of Oral Argument, supra note 138, at 22.

<sup>155.</sup> Id. at 23-24.

tors. In an effort to see if this can be put in more concrete terms, I wonder if you would be willing to say categorically that your—the holding you're proposing would not apply under any of these situations: Where the judges are appointed; where there are massive contributions and a hotly contested election, but the issue is not an economic issue, it's a social issue; where there isn't any specific issue headed for the court but there are massive contributions by, let's say, the plaintiffs' bar and the defense bar. Could you say categorically in any of those situations that your rule would not apply?<sup>156</sup>

Olson declines the invitation: "I would hesitate to do so, Justice Alito. I think you've put your finger on some of the circumstances that would take it out of the context of the appearance of justice for sale." These are factors to be considered, not categories to be excluded from the reach of due process. It is no part of the petitioners' case to put the argument in order categorical. Here Olson summarizes, for he has reserved time for rebuttal.

#### ANDREW FREY FOR THE RESPONDENTS

Now it is Frey's turn, and he quickly picks up on Justice Souter's suggestion about state law remedies for judicial election campaign abuses. He refers to West Virginia's recent legislation limiting the amounts of contributions to 527 groups. Frey says the Court has "repeatedly recognized that this is something that is meant to be dealt with through [legislation] or canons of judicial ethics or codes." Justice Ginsburg then refers to the *White* decision's implicit suggestion "that judges could say anything [in a judicial election], just as a legislator. Are you extending that notion—that an election is an election—to this area of the appearance of impropriety?" Frey replies that the present case is not about appearances. Justice Stevens pursues that point, asking Frey to say whether, "assuming appearances only" but no showing of actual bias, the appearances of bias would never raise a constitutional issue. Frey explains, "the Due Process Clause does not exist to protect the integrity or reputation of the state judicial systems."

Pressing the point, Justice Stevens reminds Frey that the brief amicus of the Conference of Chief Justices proposes a test that would ask

<sup>156.</sup> Id. at 24.

<sup>157.</sup> Id.

<sup>158.</sup> A respectful bow to W.S. Gilbert.

<sup>159.</sup> Transcript of Oral Argument, supra note 138, at 26.

<sup>160.</sup> This is a reference to a dispute over the wording of the petitioners' briefs. In the initial petition, they used the term "appearance of bias." Later, the petitioners equated that with a "probability of bias" standard.

<sup>161.</sup> Transcript of Oral Argument, supra note 138, at 27.

whether "an average judge would be tempted under the circumstances." But Frey sticks to his guns: "No, I don't think just appearance could ever raise a due process issue . . . . The question is whether there is actual bias of a kind that is recognized as disqualifying." Justice Stevens answers: "The whole point of this case is it has not been recognized. We have never confronted a case as extreme as this before." By now, it is clear that the Court is considering whether to extend Due Process Clause protections beyond the *facts* of the precedent cases, while invoking the more generalized *rhetoric* of opinions in the same cases.

Later, in a colloquy with Justice Souter, Frey agrees that "[a]ppearance is a standard for recusal, a nonconstitutional statutory standard for recusal, in virtually every State; so we already have—and in the Federal system, so—" Justice Souter interjects:

Yes. And we have—and we have an "appearance" standard under the ABA Canons, but I think it would be difficult to make a very convincing argument that the standard was effective in this case. 163

#### Ouch.

Justice Kennedy re-enters the discussion, saying to Frey,

I want you to be able to elaborate your full theory of the case, but, just so you know, it—it does seem to me that the appearance standard has—has much to recommend it. In part it means that you don't have to inquire into actual bias. It's—it's more objective. Now, of course it has to be controlled, it has to be precise. But I just thought that you [should] know that I—I do have that inclination. 164

This discussion of possible constitutional "tests" proceeds, and other Justices join in. After Justice Ginsburg says she has been "taking appearance, likelihood, probability as synonyms," and Justice Kennedy asks "why appearance is never [a] constitutional [test]," Frey explains that all of the proposed standards lack any foundation in precedent and are too open-ended to be adopted as a constitutional limit. Frey does say that a probability-of-bias standard—although "a very ill-advised rule without a historical foundation"—would be understandable, because it is "addressed to the right of the party to get a fair trial." But, according to Frey,

163. Id. at 32.

<sup>162.</sup> Id. at 29.

<sup>164.</sup> Id. at 33.

<sup>165.</sup> Id. at 34.

<sup>166.</sup> Id. at 36.

Appearance is addressed to a different thing. It's addressed to the reputation of the judicial system, which is not, I think, the function of the Due Process Clause to address. 167

This is the oral argument's second critical moment.

Here, a reading of the transcript produces a visual image, with Justices Stevens, Souter, and Kennedy all leaning forward to respond. Justice Kennedy gets there first, and says, "But our whole system is designed to ensure confidence in our judgments." Frey answers, "Well, I don't—I think this is a side point." Justice Kennedy goes on: "And it seems—it seems to me litigants have an entitlement to that under the Due Process Clause." If any moment marks a turning point in the *Caperton* case, this may be it. Adam Liptak, writing the next day in the *New York Times*, says, "By the end of the argument, Justice Kennedy's position appeared to have hardened," and Liptak illustrates his conclusion by quoting this very exchange. 170

Eventually, the discussion returns to the "debt of gratitude" figure of speech. Justice Souter reminds Frey that he had said that, even if there were a "probability of bias" standard that would trigger invocation of the Due Process Clause, the notion of a "debt of gratitude" would not qualify. Can Frey explain? Frey wants to make a preliminary point: common law did not recognize any "probability of bias" standard for recusal. Justice Souter says, "Common law did not have this [political] contribution system, which your colleague [Olson] referred to as spiraling out of control." Frey replies that the real issue at common law was—and the real issue still is—whether there should be disqualification for bias. Justice Ginsburg says, "We don't deal with an abstract setting. We have the set-

<sup>167.</sup> *Id*.

<sup>168.</sup> *Id.* at 37. Frey is not suggesting that public confidence is unimportant. Rather, it is a "side point" of the due process inquiry and should be left to state lawmakers.

<sup>169.</sup> *Id.* at 38. The imposition of a required recusal may not be enough to maintain public confidence in a judge's impartiality. In a study of attitudes in a West Virginia survey completed before the *Caperton* oral argument, James Gibson and Gregory Caldeira conclude that the *offer* of money to a (hypothetical) judge's election campaign, whether or not the money be accepted, tends to diminish confidence in the judge's impartiality. Recusal can increase confidence that the judge is impartial, but does not restore confidence to the level existing before the (hypothetical) contribution was made. (Respondents who had not heard of the *Caperton* case responded in much the same way as those who knew of it.) James L. Gibson & Gregory A. Caldiera, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?* (CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, July 2, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1428723.

<sup>170.</sup> Adam Liptak, Justices Hear Arguments on Money-Court Nexus, N.Y. TIMES, Mar. 4, 2009, at A18.

<sup>171.</sup> Transcript of Oral Argument, supra note 138, at 39.

ting of elections, of elections of judges and millions of dollars spent on them. That's the context in which this case arises." <sup>172</sup>

Returning to the subject of a "debt of gratitude," Frey says that such a standard is unworkable. Justice Breyer steps into the argument for the first time; plainly, he is thinking aloud. 173 He says that he sympathizes with Justice Benjamin's concurring opinion denying any bias, and that he is not assuming any actual bias. Justice Breyer offers an analogy: "[W]e don't manacle defendants, because many jurors, maybe not this one, would have been affected . . . ." Then he mentions the huge size of Blankenship's spending, and suggests that a judge supported on this scale might also think of possible money in support of a future reelection campaign. "And we have the fact of how it looks. . . . So we have all things that make it [the case] extreme." When Frey responds that "you have to have a logical principle," Justice Breyer adds that the case also involves money provided by a single individual, and "the fact that there's a case coming up that's likely for the judge to decide—all those things that are listed by the chief justices in their brief, all those things together make it a serious risk that there will be bias, even though an individual [judge] might not be [biased]."<sup>175</sup> Frey's response to Justice Breyer, in my judgment, is just what the respondents' case needs at this juncture: "You don't [want] a decision that's good for this case only. 

Finally, toward the end of Frey's argument, the discussion returns to the "debt of gratitude" lyric. Frey reiterates the argument in the briefs of the respondents and their supporting amici: A "debt of gratitude" theory is too broad and too indefinite. People who run for office roll up debts of gratitude in all sorts of directions: newspaper endorsements, plaintiffs' lawyers, doctors' groups, endorsements by political figures. Justice Stevens' rejoinder goes back to the amici:

[W]hy do we have to rest on just one factor? The Conference of Chief Justices suggested their seven factors should be taken into account. Why is that totally unworkable? Why does it have to be just one theory, debt of gratitude, and nothing else? They don't—the Chief Justices who are elected don't think that's the way to do it. 177

At this exasperating point, with the Conference of Chief Justices having the next-to-last word, Frey has time for just one sentence. He simply

173. This is clear from the transcript; take a look.

<sup>172.</sup> Id. at 40.

<sup>174.</sup> Transcript of Oral Argument, supra note 138, at 44-45.

<sup>175.</sup> Id. at 46.

<sup>176.</sup> Id. at 47.

<sup>177.</sup> Id. at 51.

reminds the Court of two cases in which Justices appointed by Presidents Nixon and Clinton—who presumably owed debts of gratitude to the appointing Presidents—voted against them.

#### OLSON'S REBUTTAL

Olson has reserved five minutes for rebuttal, and he quickly inserts a reference to the Conference of Chief Justices. First, in rejecting "actual bias" as a constitutional standard for recusal, Olson argues,

[T]his Court has repeatedly said actual bias was something that's virtually impossible to prove. . . . The Conference of Chief Justices said, don't go there. We can't ever determine that. 178

Second, addressing Justice Kennedy, he supports the petitioners' use of an "objective" test (the reaction of a reasonable observer), saying that such a test is supported by language that Justice Kennedy himself has used in the *Liteky* case. Olson quotes that opinion, which asks whether "the objective observer would entertain reasonable questions about the judge's impartiality." <sup>179</sup> As Olson notes, that case involved a challenge to a federal judge under 28 U.S.C. § 455, but he takes this occasion, once more, to invoke the Conference of Chief Justices. They have suggested that the Supreme Court and other courts would be fully capable of applying just such a standard to a question of bias by a state court judge. <sup>180</sup> Time for the argument is up, and now the case is submitted.

#### YES, WEST VIRGINIA, THERE IS A DUE PROCESS CLAUSE

Often, following an oral argument in the Supreme Court, reporters predict the outcome with some confidence. After the argument in *Caperton*, for many observers, caution was the word. An example is Jess Bravin, responding to a question from Ashby Jones in the *Wall Street Journal Law Blog*:

It seems pretty clear that Stevens will be assigning the opinion that will establish some sort of due process test. Roberts will likely assign the opinion articulating why a due process test in situations like this would be unworkable.

179. *Id.* (citing Liteky v. United States, 510 U.S. 540, 558 (1994)). This *Liteky* language was later quoted in Kennedy's majority opinion. Caperton v. A.T. Massey, 129 S. Ct. 2252, 2266 (2009).

<sup>178.</sup> Id. at 53.

<sup>180.</sup> Transcript of Oral Argument, supra note 138, at 53.

I think this is likely to be another case in which we look to Justice Kennedy. 181

Some, however, were more convinced that Caperton et al. would win—a group that included an Associated Press reporter, quoted in a prominent West Virginia newspaper:

The U.S. Supreme Court's four liberal members and Justice Anthony Kennedy all expressed support for a ruling that the Constitution's guarantee of a fair trial could require judges not to participate in a case in which there was a likelihood of bias. <sup>182</sup>

The reporter's implicit prediction, of course, comes true, and the vote is 5–4. Writing for the majority, Justice Kennedy adopts the "probability of bias" standard suggested by the petitioners and their supporting amici. That is, in the circumstances of this case, "there is a serious risk of actual bias—based on objective and reasonable perceptions. . . ." 184

Others, in this Symposium and elsewhere, provide critiques of the opinions in *Caperton* and make their own predictions of the decision's likely effects. Here I offer just a few words about the appearance of the amici in Justice Kennedy's opinion for the Court. He cites the ABA's brief, along with its Model Code of Judicial Conduct, as support for the proposition that a judge has a duty to avoid not only impropriety but also the appearance of impropriety. In addition, Justice Kennedy quotes the Code's elaboration of "appearance" in a way that supports the *Caperton* opinion's references to "probability of bias":

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<sup>181.</sup> Ashby Jones, *Post-Gaming the Massey Energy Arguments*, WALL ST. J. L. BLOG, Mar. 3, 2009, http://blogs.wsj.com/law/2009/03/03/post-gaming-the-massey-energy-arguments/tab/article.

<sup>182.</sup> Retired Justice Cites W. Va. Ethics Case, CHARLESTON GAZETTE, May 14, 2009, at 5A. For a similar view, see Tony Mauro, Supreme Court Justices Appear Ready to Set Recusal Rules, LEGAL INTELLIGENCER, Mar. 4, 2009, available at 2009 WLNR 22652555. The Charleston article quoted a speech of (retired) Justice Sandra Day O'Connor to an Indiana county bar association, after she had attended the oral argument in Caperton. "It does not look good, does it? . . . Why would a state want to subject itself to an influx of money into its courtroom?"

<sup>183.</sup> The *Caperton* case returned to the West Virginia Supreme Court of Appeals, to be heard by a court that includes only one Justice who participated in the court's earlier encounters with the case. That is Justice Robin Davis. Justice Albright, who dissented in both previous rounds, has died. He was replaced by Justice Thomas McHugh (who had retired from the court). Acting Chief Justice Davis appointed Judge (retired) James O. Holliday to replace Justice Benjamin. Meanwhile, two Justices have been elected: Margaret Workman and Menis Ketchum. The case was argued in this court for the third time on Sept. 8, 2009.

<sup>184.</sup> *Caperton*, 129 S. Ct. at 2263. In his introduction of the "probability of bias" standard, he mentions Justice Benjamin's "debt of gratitude" as one likely element in a reasonable observer's perception of such a probability. *Id.* at 2262.

<sup>185.</sup> Prominent in this literature are the comments cited in note 9, supra.

<sup>186.</sup> Chief Justice Roberts, in his dissenting opinion, also mentions the brief of the Conference of Chief Justices in support of his suggestion that independent expenditures by a group such as ASK may prove counterproductive. *Caperton*, 129 S. Ct. at 2273 (Roberts, C.J., dissenting).

[W]hether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. 187

As Justice Kennedy notes, West Virginia's own Code of Judicial Conduct includes a parallel provision that (in theory) calls for disqualification of a judge "in any proceeding in which his [or her] impartiality might reasonably be questioned." More generally, he says,

These Codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of Chief Justices has understood that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." <sup>189</sup>

The references to these two amici serve several purposes in Justice Kennedy's opinion. First, they remind the reader that the ABA and the state chief justices are sitting at Justice Kennedy's side of the table. Second, the discussion of the state codes makes clear that the majority Justices agree with the dissenters on an important point: the main work in disqualification cases will (and should) remain in the hands of state authorities. In nearly all cases—all the Justices hope, and some of them may even expect—the Supreme Court can rely on the state courts to deal with the impact of election contributions on judicial impartiality. To recite the familiar formula, the *Caperton* majority establishes a firmer due process "floor" in disqualification cases, but due process remains a minimum standard, located below the more demanding standards of state codes of judicial conduct. Third, Justice Kennedy draws support from

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<sup>187.</sup> Id. at 2266 (quoting ABA Annotated Model Code of Judicial Conduct Canon 2 (2004)).

<sup>188.</sup> *Id.* at 2266 (W. VA. CODE OF JUDICIAL CONDUCT, Canon 3E(1) (2009)). The Code is written into law, but in this case it was not enforceable against Justice Benjamin.

<sup>189.</sup> *Id.* at 2266 (quoting the Conference's amicus brief, *supra* note 80, at 11 and then at 4). 190. Former Texas Chief Justice Thomas Phillips, interviewed shortly after the *Caperton* decision, says:

The majority opinion recognized, even urges, states to pass recusal rules that are more rigorous than the due process floor in order to ensure the appearance and reality of impartial judges. The *Caperton* case may cause more of those rules-based motions to be filed, and state courts may have to grapple with the types of problems that the Chief Justice [Roberts] raised. And, on the whole, it will be good for these rather murky questions to be fleshed out. And, moreover, it will be good to have a heightened interest in what is required to have fair and impartial justices on the bench.

Tony Mauro, Coping With "Caperton": A Q&A With Former Texas Chief Justice, LAWJOBS.COM, June 11, 2009, available at <a href="http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp">http://www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp</a> ?id=1202431379110.

<sup>191.</sup> Perhaps the *Caperton* majority and the dissenters share the hope that those codes may come to be more than statements of ideals—that they may come to be law that is enforced by state courts. This result is devoutly to be wished. Its consummation, however, remains uncertain.

the Conference of Chief Justices for the statements he made at the second critical moment in the oral argument: Public confidence in judicial impartiality is, indeed, a major concern of due process; it is, indeed, an individual litigant's constitutional entitlement. Previously, these conclusions were points of argument. Now they are the opinion of the Court, to be deployed on another occasion, another day. 192

<sup>192.</sup> For an early application, see *Bauer v. Shepard*, 634 F. Supp. 2d 912 (N.D. Ind. 2009), drawing on *Caperton* in upholding the Indiana Supreme Court's recently revised versions of a "pledges of promises clause" and a "commits clause," both adapted from the ABA Code. The adaptations were made in response to the *White* decision, *supra* note 31 and accompanying text.