Drawing the Due Process Line: Judicial Campaigns and Constitutional Recusal

*Brett Parker**

For nearly a century, the Supreme Court has recognized that the Due Process Clause can require a seemingly biased judge to recuse herself from a case. However, the standard it has expounded for ruling on constitutional recusal motions is frustratingly vague and tautological: it focuses on whether the circumstances of a case create "an unconstitutional potential for [judicial] bias." State courts have struggled to give meaning to this standard, particularly when the recusal motion is based on campaign events. Meanwhile, litigants have a difficult time gauging when a constitutional recusal claim will have any reasonable chance of success. I address that confusion in this article. I propose a reinterpretation of the Due Process recusal standard that (a) is faithful to the Court's existing case law and (b) provides meaningful guidance to the lower courts. I begin by reviewing the Court's Due Process recusal decisions and the state court cases that attempt to apply those rulings. Next, I explain why the content of the Due Process recusal standard remains significant even though state disqualification laws may appear more stringent. I then turn to the existing scholarship on Due Process recusal. I find that most scholars can be classified as "minimalists" (those who believe that Due Process recusal should be vanishingly rare) or "maximalists" (those who argue that Due Process recusal should be relatively common). This article rejects both extremes. Instead, I offer a reformulation that gives Due Process recusal its proper scope. I then consider how this new standard would apply in a wide variety of campaign-related recusal scenarios. Finally, I conclude the article by discussing the limited power of Due Process recusal to ensure unbiased judges in states with judicial elections.

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Introduction

In the spring of 2000, Ferrill McRae was in a bind. He was a long-tenured judge in Alabama, but he was also a Democrat.[1] Judge McRae took his seat in 1965, appointed by Governor George Wallace back when racist "Dixiecrats" dominated Southern politics.[2] By 2000, however, southerners had soured on Democrats.[3] Conservatives fled to the GOP, and Alabama voters had favored the Republican candidate in the last four presidential elections.[4] Perhaps reading the electoral tea leaves, Judge McRae decided to switch his party affiliation, running for his seat as a Republican.[5] However, he faced a significant challenge in the primary: a local lawyer endorsed by the bar association.[6]

While this election was in progress, Judge McRae was presiding over the capital trial of former Alabama state trooper George Martin.[7] Martin's wife had died in a car fire several years earlier, and Martin stood accused of killing her.[8] The evidence pointing to Martin as the perpetrator was less than airtight—nevertheless, an Alabama jury had convicted him of murder and recommended that he served life in prison.[9] In most states, that would have settled the question of his sentence.[10] However, in the early 2000s, Alabama,

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[1] Ken Silverstein, *The Judge as Lynch Mob*, The Am. Prospect (Dec. 19, 2001), https://prospect.org/features/judge-lynch-mob/ [https://perma.cc/QY29-XLLE].

[2] *See* Katherine Sayre, *Longtime Mobile County Circuit Judge Ferrill McRae dies at 77*, AL.com (Jan. 14, 2019), https://www.al.com/live/2011/10/longtime_mobile_county_circuit.html [https://perma.cc/VF5L-R289]; Gerald R. Webster, *Demise of the Solid South*, 82 Geographical Rev. 43, 45–46 (1992).

[3] *See, e.g.*, Seth J. Hill & Chris Tausanovitch, *Southern Realignment, Party Sorting, and the Polarization of American Primary Electorates, 1958–2012*, 176 Pub. Choice 107, 108–12 (2018); Elizabeth Becker, Abby Goodnough, Laura Mansnerus, Todd S. Purdum, Diana Jean Schemo, Jacques Steinberg & Matthew L. Wald, *The 2000 Elections: State by State; South*, N.Y. Times (Nov. 9, 2000), at B 15 (reporting Republican George W. Bush's defeat of Democrat Al Gore in the 2000 presidential election and discussing the state's Republican majority congressional delegation).

[4] *See generally* Samuel J. Abrams & Morris Fiorina, *Party Sorting: The Foundations of Polarized Politics*, *in* American Gridlock: The Sources, Character, and Impact of Political Polarization (2015, eds. James A. Thurber & Antoine Yoshinaka); *see also* Mark Cason, *Alabama Results For the Last 10 Presidential Elections*, AL.com (Nov. 8, 2016), https://www.al.com/news/birmingham/2016/11/alabama_results_for_the_last_1.html [ ].

[5] Silverstein, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See id.*; *New Trial Ordered for Death Row Inmate George Martin Due to Prosecutor's Misconduct*, Equal Just. Initiative (Oct. 1, 2013), https://eji.org/news/alabama-death-row-inmate-george-martin-wins-new-trial/ [https://perma.cc/CH5X-EMPP] (describing the evidence supporting Martin's conviction).

[10] *See id*; *see also* Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017, 1018 (observing in 1999 that only four states allowed a judge to override a jury's sentencing decision).

judges could override a jury's vote for a life sentence and instead impose the death penalty.[11] While the matter was still pending before Judge McRae, he ran a television advertisement touting all the individuals he had sentenced to death.[12] Included in the list was George Martin.[13] Judge McRae won reelection; Martin would spend fifteen years on death row before having his sentence overturned.[14]

Judge McRae's conduct represents the most egregious form of judicial campaigning: he appears to have shaped the outcome in a pending case in order to impress voters. Rule 4.1(A)(12) of the ABA Model Code of Judicial Conduct provides: "a judge or a judicial candidate shall not . . . make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court."[15] Announcing a death sentence in a campaign advertisement appears to be a serious violation of this rule. Perhaps more importantly for a defendant like George Martin, it would seem to conflict with the constitutional guarantee of Due Process. A judge who has already celebrated your capital sentence in a television advertisement has a strong incentive to be partial during your sentencing hearing. Allowing Judge McRae to hand down a sentence anyway would presumably involve a risk of bias "too high to be constitutionally tolerable."[16]

Judge McRae's case was notable because of its extremity. Few judicial candidates would risk the appearance of placing electoral expediency over fundamental fairness. However, his conduct only represents the tip of the iceberg in terms of judicial campaign speech. Ads promising harsh treatment of criminal defendants fill the airwaves during campaigns.[17] Challengers commonly castigate incumbents for leniency when it comes to heinous crimes and assure voters that they will throw the book at accused criminals.[18] Commentators have lamented this state of affairs, arguing that it deprives defendants of a fair trial.[19] Yet there remains little consensus about when judicial campaign statements cross a constitutional line.[20]

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[11] *Burnside*, *supra* note 10, at 1018.

[12] *Id.*

[13] *Id.*

[14] *Id.*; *Ex parte* State, 287 So.3d 384, 386–87 (Ala. 2018).

[15] Model Code of Jud. Conduct r. 4.1(A)(12) (Am. Bar Ass'n 2007).

[16] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009) (internal quotation marks omitted).

[17] *See, e.g.*, Katie Berry, Brennan Ctr. for Justice, How Judicial Elections Impact Criminal Cases 6 (2015).

[18] *See id.*; *see also* State v. Allen, 778 N.W.2d 863, 886–87 (Wis. 2010); *In Re* Judicial Disciplinary Proceedings against the Honorable Michael J. Gableman, No.2008AP2458-J, 2010 WL 182385, at *17–19, 20–36 (Deininger, J., concurring; Fine, J., concurring).

[19] *See, e.g.*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 308, 329–330 (1997).

[20] *Compare* Keith Swisher, *Pro-Prosecution Judges: "Tough On Crime," Soft on Strategy, Ripe for Disqualification*, 52 Ariz. L. Rev. 317, 347–48 (2010) (asserting that "tough on crime" campaigns and "debts of gratitude" could trigger judicial recusal), *with* James Bopp Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of Caperton v. Massey,* 60 Syracuse L. Rev. 305, 306 (2010) (arguing that judges will almost never need to recuse themselves over campaign incidents). I review these articles and others in Part IV, *infra*.

Much of this confusion stems from the Supreme Court's vague articulation of a standard for judicial recusal under the Fourteenth Amendment's Due Process Clause.[21] On at least six occasions, the Court has determined that the Constitution does not permit a particular judge to sit.[22] Yet despite these periodic encounters with the subject, the Justices have offered the lower courts only limited guidance. The case law establishes that a judge cannot sit if she has money at stake in the case or had a "direct, personal role" in the defendant's prosecution.[23] However, there is a third line of cases in which other factors are sufficient to disqualify the judge. The Supreme Court has directed lower courts hearing such cases to consider whether "the average judge . . . is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[24] This test provides little help, though. Its elements are imprecise (when is a judge "likely" to be neutral?) or question-begging ("an unconstitutional 'potential for bias'").

Unsurprisingly, scholars have taken this ambiguous test and reached opposite conclusions. Some assert that campaign behavior will almost never trigger Due Process recusal.[25] They read the Court's precedents narrowly, asserting that generally only financial interest or involvement in the accusatory process can trigger recusal.[26] Meanwhile, other authors argue that judicial elections commonly create recusal obligations for the winners.[27]

While both sides offer reasonable arguments for their cause, going to either extreme would be a mistake. Given the Supreme Court's recusal case law, the politics of contemporary judicial elections, and the First Amendment, the Due Process Clause of the Fourteenth Amendment is best read to apply to a limited set of campaign-related cases. Specifically, a judge must be recused if campaign events make it such that the average person *could not* be impartial in her position. Put otherwise, given the psychological tendencies of the average person, is it realistic to imagine that she can overcome the temptation to favor one of the parties?

This test has several virtues, each of which I discuss in detail in Section V.A. First, it remains faithful to the Supreme Court's explicit holdings and the outcomes of its relevant cases; second, it incorporates the Court's assumption that the average judge will remain impartial in the face of ordinary threats to her neutrality; third, it limits the set of successful Due Process claims to the clearest cases of bias; and finally—and perhaps most impor-

[21] Unless otherwise noted, references to the "Due Process Clause" in this article concerns the clause in the Fourteenth Amendment, not the Fifth Amendment. While both provisions can mandate judicial recusal, only state court judges run for election, and so the Fifth Amendment Due Process Clause will generally not be relevant in this article.

[22] *See* Williams v. Pennsylvania, 579 U.S. 1, 4 (2016); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890 (2009); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828–29 (1986); Ward v. Village of Monroeville, 409 U.S. 57 61–62 (1972); *In re* Murchison, 349 U.S. 133, 139 (1955); Tumey v. Ohio, 273 U.S. 510, 535 (1927).

[23] *Williams*, 579 U.S. at 10.

[24] *Id.* at 9.

[25] *See, e.g.*, Bopp & Woudenberg, *supra* note 20, at 327–28.

[26] *Id.* at 309 n.31.

[27] *See, e.g.*, Swisher, *supra* note 20, at 347–48.

tantly—it offers lower courts clear guidance in approaching the recusal inquiry.

As I explain in Section V.B, this test can be straightforwardly applied to several categories of campaign speech. When it comes to general pronouncements about law or policy—e.g., "I think criminal sentences should be longer" or "I believe abortion should be legal"—the judge has no Due Process obligation to recuse herself. On the other end of the spectrum, promises of a specific outcome—e.g., a death sentence—for an identified party will typically require recusal; it would be extremely difficult for an average person to ignore such promises and rule fairly. In the middle are statements that appear to commit the judge in a class of cases. Campaign rhetoric such as "all murderers of children should receive the death penalty" or "I will always believe the testimony of a police officer" will require extended analysis, and the correct decision may turn on the surrounding circumstances. Relevant factors might include (a) the centrality of the statement to the judge's platform, (b) the time elapsed between the statement and the case, and (c) whether the case clearly implicates the campaign rhetoric.

Though this standard is faithful to controlling precedent and understandable for the lower courts, I do not pretend that it vindicates the broader values that underlie the Due Process Clause. Upholding these values is not work courts can do by themselves. Rather, we would need a cultural commitment to judicial impartiality, much in the same way that the U.S. commitment to free speech goes beyond the legal protections of the First Amendment.[28] I suggest that modern judicial elections hamper such a commitment.

The remainder of this article is organized as follows. In Part II, I review the Supreme Court's Due Process recusal case law, as well as lower court developments in the years since the landmark *Caperton v. A.T. Massey Coal Co.* decision. In Part III, I discuss why Due Process recusal claims remain important despite the existence of seemingly broader state grounds for disqualification. Part IV considers the previous scholarly work on Due Process recusal, which mostly takes "minimalist" or "maximalist" stances on the subject. I offer my proposal in Part V. In the same section, I also explain how the standard I support would apply in various campaign scenarios. Finally, Part VI considers the inability of constitutional recusal to fully address the Due Process issues judicial elections create.

I. Judicial Recusal and the Due Process Clause

This Part discusses the case law on constitutional judicial recusal. Its three sections consider the Supreme Court decisions leading up to *Caperton*, the *Caperton* case itself, and subsequent developments in the thirteen years since. This exercise reveals several patterns in the application of the Due

[28] *See, e.g.*, Jonathon W. Penney, *Privacy and the New Virtualism*, 10 Yale J.L. & Tech. 194, 244–45 (2008).

Process Clause to recusal questions, patterns which will in turn inform my analysis of when judicial recusal is constitutionally required. I identify three basic types of recusal scenarios: (1) situations in which the judge has money at stake;[29] (2) cases in which the judge had a "direct, personal" role in a criminal defendant's prosecution;[30] and (3) circumstances in which the judge has some other unusually strong incentive (professional, electoral, or personal) to favor one of the parties.[31] Scenarios (1) and (2) have produced straightforward results: the judge must recuse herself. However, category (3) cases have produced considerable confusion. Cases related to judicial campaign rhetoric often fall into that gray area.

*A. The Due Process Clause Pre-*Caperton

Though *Caperton* is perhaps the Supreme Court's most significant decision in the area, the Court had eighty-two years of prior experience with judicial recusal. The first case in this line was *Tumey v. Ohio*,[32] which concerned an Ohio statute that authorized town mayors to try certain petty criminal offenses without a jury. If the defendant was convicted and assessed a fine, the mayor would receive a portion as compensation.[33] Unsurprisingly (at least to modern ears) the Court held that it "deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."[34] The mayor's fee ($12) depended on the defendant's conviction, and that was sufficient to disqualify him.[35]

Though *Tumey* appears to be a straightforward application of the Due Process Clause, it contained two important pieces of doctrine. First, the Court determined that the defendant did not need to show prejudice to overturn his conviction—the judge's conflict was a structural error.[36] Second (and perhaps more significantly), the Court expounded what would come to be known as the "average judge" test for judicial recusal.[37] The test provides

[29] *See, e.g.,* Tumey v. Ohio, 273 U.S. 510, 523 (1927).

[30] *See, e.g.*, Williams v. Pennsylvania, 579 U.S. 1, 3 (2016) (holding that a judge could not hear a collateral appeal when he had previously authorized the capital prosecution of the defendant as a DA).

[31] *See, e.g.,* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 871, 890 (2009).

[32] The case grew out of a pedestrian offense: possessing alcohol during prohibition. *See* Joshua E. Kastenberg, *Chief Justice William Howard Taft's Conception of Judicial Integrity: The Legal History of* Tumey v. Ohio, 65 Clev. St. L. Rev. 317, 358 (2017) (describing Tumey's background as a local carpenter and his mild sentence).

[33] *Id.* at 516–17, 519.

[34] *Id.* at 523.

[35] *Id.*

[36] *Id.* at 535; *see also* Arizona v. Fulminante, 499 U.S. 279, 294 (1991); Rose v. Clark, 478 U.S. 570, 577 (1986).

[37] Technically, the standard refers to "the average man as judge" rather than the "average judge," as the Fifth Circuit correctly points out in *Cain v. White*, 937 F.3d 446, 453 (5th Cir. 2019), but the contemporary Supreme Court typically makes reference to the "average judge,"

that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."[38] Though formulated in the context of a criminal case, the "average judge" test would soon become the general standard for constitutionally mandated judicial recusal.[39]

The next major landmark on the road to *Caperton* was *In re Murchison*. The case addressed whether a judge could preside over a perjury trial after he acted as a "one-man judge-grand jury" and indicted the defendants himself.[40] Justice Black, writing for a six-member majority, applied the standard articulated in *Tumey*.[41] He concluded that a judge involved in the accusatory process could never be entirely disinterested in the defendants' fate, and could not constitutionally preside.[42] Interestingly, the judge from *Murchison* was not disqualified by a direct *material* interest in the outcome of the case—he stood to lose neither money nor property by acquitting the defendants. It was the real risk that the judge would treat the prosecution's success as a vindication that led to his disqualification.[43]

The Court relied on similar reasoning for its ruling in *Ward v. Village of Monroeville*, a case that again featured a mayor-judge.[44] Unlike the mayor in *Tumey*, the Monroeville mayor received no direct compensation from hearing cases. Instead, the fines, forfeitures, costs, and fees the mayor imposed went into the town's treasury, and generally constituted about 40-50% of the town's revenue.[45] The Court, speaking through Justice Brennan, nevertheless held that the risk of bias was too high to ignore: the "mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court."[46] The tangential professional benefits the mayor stood to reap from a conviction violated Due Process.

Ward is perhaps the most interesting of the Court's early recusal cases because it significantly extended the non-controversial *Tumey* holding. *Tumey's* outcome is difficult to contest—if a judge will be paid only if she rules one way, she can hardly be considered disinterested. It is no shock that the ruling was unanimous.[47] By contrast, *Ward* assumes that an *indirect professional benefit* associated with ruling for one party can be enough to create

likely to avoid the implication that only men can be judges. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009).

[38] *See, e.g.,* Tumey v. Ohio, 273 U.S. 510, 532 (1927).

[39] *See, e.g.*, Aetna Life Ins. Company v. Lavoie, 475 U.S. 813, 824 (1986).

[40] *In re* Murchison, 349 U.S. 133, 133–35 (1955).

[41] *Id.* at 136–37.

[42] *See id.* at 137. In particular, he emphasized that the judge would struggle to discount the personal knowledge that led her to indict the defendant, threatening her ability to offer impartial rulings at trial. *See id.* at 138.

[43] *See id.*

[44] Ward v. Village of Monroeville, 409 U.S. 57, 57–58 (1972).

[45] *Id.* at 58.

[46] *Id.* at 60.

[47] Tumey v. Ohio, 273 U.S. 510 (1927).

an intolerable risk of bias.[48] Indeed, the identification between the mayor-judge and the prosecution in *Ward* appears even more attenuated than the connection between the judge and the prosecution in *Murchison*. To some extent, the judge from *Murchison was* the prosecution; he lodged the formal accusation that produced the trial.[49] The mayor-judge in *Ward* had an indirect interest in the prosecution's success; he did not create the case himself.

The Court's extension of *Tumey* in *Ward* took the Due Process question outside the realm of bright-line rules and into the fuzzier world of standards.[50] The Court determined that receiving an indirect professional benefit from a particular decision can be enough to trigger constitutional recusal. But surely not every such benefit warrants disqualification. For example, elected judges sometimes handle cases in which the public strongly favors a particular outcome. Issuing that ruling would yield an indirect professional benefit (enhanced reelection prospects). Logically, though, this potential benefit cannot by itself force a judge's recusal—otherwise, states with elected judges would have no one to hear politically-charged cases. *Ward* thus produced a line-drawing problem. Future courts would have to determine at what point an indirect benefit transforms a neutral jurist into a partisan.

The final relevant pre-*Caperton* case, *Aetna Life Insurance Company v. Lavoie* came closer to *Tumey* than to *Ward*. It concerned an Alabama Supreme Court Justice's participation in an insurance case.[51] Ruling for the plaintiff in that case would have provided a favorable precedent for the Justice in suits he had pending against the same insurance company.[52] Nevertheless, the Justice heard the case and provided the decisive vote for the plaintiff's position.[53] In a unanimous judgment, the Court concluded that the Justice's interest was "'direct, personal, substantial, and pecuniary'" and required his recusal under the Due Process Clause.[54] However, because the case straightforwardly applied *Tumey*, it took the Court no closer to answering the line-drawing question it created in *Ward*.[55]

This review reveals that the Court's decisions prior to *Caperton* produced three recusal categories: cases where the judge has money at stake; cases in which the judge has already played a non-judicial role; and cases in which a judge has a strong incentive to favor one party, but not money or personal property. The first two situations seem black-and-white—a judge cannot hear a case if she has a direct financial interest, nor can she do so if

[48] *See Ward*, 409 U.S. at 60.
[49] *In re* Murchison, 349 U.S. 133, 137 (1955).
[50] Interestingly, it appears from Justice Powell's notes that *Ward* was initially slated to be a summary reversal under *Tumey*. Lewis F. Powell Jr., *Ward v. Village of Monroeville* Case File 4-6 (1972) (on file with Washington and Lee University School of Law). However, Justice Rehnquist appears to have convinced his colleagues to allow argument (he eventually dissented). *Id.*
[51] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 815 (1986).
[52] *Id.* at 817–819.
[53] *Id.* at 816–818.
[54] *Id.* at 824 (quoting Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972)).
[55] *Id.* at 824.

she was involved with either the prosecution or the defense.[56] The third category is more amorphous. Ultimately, it is that category that raises questions about the relationship between judicial elections and judicial recusal. In *Caperton*, the Court confronted those questions, but provided only Delphic guidance.

B. Caperton v. A.T. Massey Coal

Caperton stands out as the first—and so far, only—occasion in which the Supreme Court has required a judge's recusal because of election-related events.[57] In doing so, the Court reinforced *Ward*'s message that direct financial interest is not the only constitutionally-cognizable risk of bias; electoral incentives can also pose a significant threat to judicial impartiality.

The sensational facts of *Caperton* are well-known, requiring only a brief summary here. In 2002, a West Virginia jury awarded Hugh Caperton and other plaintiffs $50 million in a suit against Massey Coal.[58] After the verdict but prior to the appeal, Massey Coal President Don Blankenship spent approximately $3 million supporting West Virginia Supreme Court candidate Brent Benjamin against incumbent Justice Warren McGraw.[59] Benjamin won in a close contest, then cast the deciding vote in a 3-2 decision reversing the jury verdict against Massey Coal.[60] The court then granted rehearing, with two Justices disqualifying themselves from the case.[61] Nevertheless, Justice Benjamin denied a motion to recuse himself and once again joined a 3-2 ruling favoring Massey Coal.[62]

The Supreme Court granted certiorari and reversed the state supreme court in a 5-4 decision.[63] Justice Anthony Kennedy, writing for the Court, took pains to emphasize that the Due Process inquiry is an objective one: "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"[64] At some point "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," and the affected judge has no choice but to recuse.[65] Whether or not the judge actually holds the perceived bias becomes immaterial.[66]

The challenging aspect of *Caperton* was determining how, exactly, to draw the boundary between Justice Benjamin's conduct and the common-

[56] The Court has not explicitly addressed whether a judge must recuse herself if she was previously on the defense team, but the case law virtually guarantees that result.
[57] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881–82, 886–87 (2009).
[58] *Id.* at 872.
[59] *Id.* at 873.
[60] *Id.* at 873–876.
[61] *Id.* at 875.
[62] *Id.*
[63] *Id.* at 871, 890.
[64] *Id.* at 881.
[65] *Id.* at 872 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
[66] *Id.* at 886.

place behavior of other state supreme court justices. In states with elected jurists, campaign donors frequently have business before the judges they supported, yet most of these cases do not implicate the Due Process Clause.[67] Indeed, Chief Justice John Roberts criticized the majority on precisely these grounds—he argues that the lower courts had no guidance in applying the vague "probability of bias" standard to future recusal motions.[68] To an extent, the Chief Justice was correct. Justice Kennedy's answer to the line-drawing question was to emphasize the extreme facts of the case.[69] His reasoning resembles Justice Elena Kagan's dissent in *Rucho v. Common Cause*.[70] Faced with the question "how much [partisan gerrymandering] is too much" for the Court to tolerate," she provided an answer rooted in the case before her: "This much is too much."[71] Persuasive though that rejoinder might be in egregious cases, it remains a challenging standard for lower courts to implement.

Nevertheless, Chief Justice Roberts was engaged in a selective reading of the Court's precedents when he argued that Justice Kennedy's *Caperton* opinion created a new problem. The Chief Justice wrote:

> "Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents."[72]

This interpretation of the Due Process Clause seems tidy and appealing, but it ignores *Ward*. The mayor-judge in *Ward* had no direct financial interest in the cases he adjudicated.[73] True, the fines and fees he imposed benefited the town's treasury, but none of that money went directly to him.[74] Chief Justice Roberts does not attempt to reconcile *Ward* with his vision of the Due Process Clause; indeed, his dissent fails to cite the case.[75]

Ward had already opened the door to claims of bias based on indirect professional benefits. The real question in *Caperton* was whether the professional benefits Justice Benjamin would receive by ruling for Massey Coal were significant enough to produce an intolerable probability of bias. *Ward* strongly implied that the answer was "yes." In each case before the mayor-

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[67] *See, e.g.*, Elizabeth K. Lamphier, Note, *Justice Run Amok: Big Money, Partisanship, and State Judiciaries*, 2011 MICH. ST. L. REV. 1327, 1345 (observing that approximately 86% of cases heard by the Michigan Supreme Court in the 1990s involved at least one campaign donor).

[68] *Caperton*, 556 U.S. at 890–91 (Roberts, C.J., dissenting).

[69] *Id.* at 886–887.

[70] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2521 (2019) (Kagan, J., dissenting).

[71] *Id.*

[72] *Caperton*, 556 U.S. at 890.

[73] *See* Ward v. Village of Monroeville, 409 U.S. 57, 59 (1972).

[74] *Id.* at 58.

[75] *See Caperton*, 556 U.S. 868, at 890–902 (Roberts, C.J., dissenting).

judge in *Ward*, a conviction could produce at most a small increase in the budget the mayor-judge oversaw. An additional $50 in the town coffers pales in comparison to the consequences Justice Benjamin faced in *Caperton*: the potential loss of his largest political benefactor. It is hard to imagine Don Blankenship bankrolling Justice Benjamin's future campaigns if he upheld a $50 million verdict against his company.[76] Any judge in Justice Benjamin's position would be concerned that their electoral future was at stake. Considered from this angle, *Caperton* seems to be an easier case than *Ward*.

Since the professional gains for Justice Benjamin so clearly exceeded what was at stake for the mayor-judge in *Ward*, the case offers only limited information about the line between a manageable conflict of interest and a constitutionally intolerable risk of bias. Nevertheless, circumstantial evidence suggests that *Ward* is probably close to it. In *Caperton*, the Court split along ideological lines, with Justice Kennedy joining the four more liberal Justices in reversing the lower court.[77] His majority opinion also stressed that "[t]he facts now before us are extreme by any measure."[78] Put otherwise, Justice Kennedy may not have offered a fifth vote under even slightly more ordinary circumstances. If *Caperton*—a case in which it appeared to some members of the public that one of the parties *bought* a judge[79]—was a marginal decision, then *Ward* itself is probably flush with the Due Process line.

C. More Recent Developments

Over the last thirteen years, the Court has only decided a single case applying *Caperton*: *Williams v. Pennsylvania*, a 2016 capital appeal. After the case arrived at the state supreme court, respondent Terrance Williams sought the recusal of Justice Ronald Castille. Justice Castille had led the office that prosecuted Williams and had explicitly granted his subordinate permission to seek the death penalty.[80] Williams argued that this earlier decision now created an impermissible risk of actual bias.[81]

A five-member Court majority agreed.[82] Justice Kennedy's opinion for the Court determine that *Murchison* governed if the judge had a "direct, personal role in the defendant's prosecution."[83] The Court determined that Justice Castille's actions met this standard. After concluding that Justice Castille's participation was improper, the majority considered whether Williams was entitled to relief. In the underlying appeal, Justice Castille's vote had not been decisive; nevertheless, the Court concluded that because failure to recuse is a structural error, Justice Castille's participation infected the en-

[76] *Id.* at 874.
[77] *Id.* at 871, 890.
[78] *Id.* at 887.
[79] *See, e.g.*, John Gibeaut, *Caperton's Coal*, 95 A.B.A. J. 52, 53 (2009).
[80] *See generally* Williams v. Pennsylvania, 579 U.S. 1, 5 (2016)
[81] *Id.*
[82] *Id.* at 3.
[83] *Id.* at 10.

tire proceeding.[84] On that basis, it vacated the Pennsylvania Supreme Court's ruling.[85]

Though undoubtedly meaningful to Terrance Williams, the Court's decision provided little new information about Due Process recusal. The Court had already established in *Murchison* that a judge who is part of the accusatory process might be disqualified under the Due Process Clause.[86] *Williams* merely clarified *how* involved a judge must be before the risk of bias becomes constitutionally intolerable.[87] It did little to shine light on the murky constitutional terrane explored in *Ward* and *Caperton*.

Although *Williams* represents the only Supreme Court pronouncement on judicial recusal and the Due Process Clause since *Caperton*, several lower court decisions have interpreted and applied the case. For example, in *Ivey*, one party to an alimony dispute sought the trial court judge's recusal because of campaign contributions made by her ex-husband, his attorney, his attorney's wife, and that attorney's law partner.[88] The ex-husband personally donated $5,000, which amounted to seven percent of the judge's reelection fund.[89] The Nevada Supreme Court unanimously concluded that these contributions were insufficient to create a constitutional problem.[90] The donations were simply too small, and it was not clear that the judge would hear a case involving the donor at the time the contributions were made.[91]

One court has even suggested that a six-figure donation does not produce an impermissible risk of bias. In *Bocian v. Owners Insurance Company*, an attorney at the firm representing Bocian had contributed $224,000 to oppose the trial court judge's retention.[92] Nevertheless, the trial court judge denied a recusal motion, and the Colorado Court of Appeals affirmed.[93] The court distinguished *Caperton* by observing that it was an attorney, not a party, that made the donation in question.[94] In addition, the court suggested that litigants must clear a higher bar if it is *their* actions—rather than the opposition or the judge's—that creates the basis for the disqualification motion.[95]

One additional lower court case warrants discussion here: the Wisconsin Supreme Court's *State v. Allen*. Allen, a criminal defendant, sought the recusal of Justice Michael Gableman after the court agreed to hear his post-conviction appeal.[96] During his campaign to unseat an incumbent Justice, candidate-Gableman had repeatedly made comments disparaging his oppo-

[84] *Id.* at 14–16.
[85] *Id.* at 17.
[86] *In re* Murchison, 349 U.S. 133, 137 (1955).
[87] Williams v. Pennsylvania, 579 U.S. 1, 8 (2016).
[88] Ivey v. District Court, 299 P.3d 354, 356 (Nev. 2013).
[89] *Id.*
[90] *Id.* at 358.
[91] *Id.*
[92] 482 P.3d 502, 511 (2020).
[93] *Id.* at 507–08.
[94] *Id.* at 512.
[95] *Id.* at 512–13.
[96] State v. Allen, 778 N.W.2d 863, 864 (Wis. 2010).

nent for favoring criminal defendants, focusing particular energy on the incumbent's representation of a defendant in a child-rape case.[97] Allen, perhaps unsurprisingly, believed that Justice Gableman would be biased against him. Ultimately, the Wisconsin Supreme Court split 3-3 on whether it should rule on the recusal motion collectively—three Justices argued that only Justice Gableman could hear the motion, while three others wanted a full briefing on the subject.[98] The split meant that the motion for full-court consideration could not be granted.[99]

Nevertheless, Chief Justice Shirley Abrahamson filed a separate opinion with two colleagues that gave strong consideration to Allen's claim.[100] Chief Justice Abrahamson's opinion took seriously the possibility that campaign statements could lead to disqualification under *Caperton*.[101] She suggested that it was there was a "question" as to whether "'tough on crime' judicial electioneering risks depriving a criminal defendant of the constitutional right to an unbiased judge."[102] Though it ultimately held no legal force, Chief Justice Abrahamson's opinion—and the willingness of two colleagues to join her—suggests that in front of the right court, certain extreme campaign statements could require recusal.[103]

This review demonstrates that the current state of Due Process recusal law contains both areas of clarity and ambiguity. When a judge is directly and personally involved in the accusatory process, or has a personal financial interest in the outcome of a case, the Due Process Clause prohibits her involvement.[104] However, when a judge has an indirect professional interest in her ruling—e.g., when it concerns a major political benefactor—confusion reigns. The two Supreme Court cases most on-point, *Ward* and *Caperton*, offer only general guidance. They instruct that (1) the recusal standard is objective, (2) requires an unconstitutional potential for bias, and (3) will only apply in a handful of situations. Subsequent lower court cases have suggested that campaign activities might sometimes meet this standard but have yet to identify criteria for making that decision. It is this uncertainty that I address in Part V of this article. Before I turn to that task, however, it makes sense to first consider the coverage of state recusal laws. After all, if state law required recusal whenever campaign activities might implicate the constitutional standard, that standard would have limited relevance. As we will see, though, the application of state disqualification laws leaves gaps that the Due Process Clause might fill.

[97] *Id.* at 886–87 n.83.
[98] *Id.* at 863.
[99] *Id.*
[100] *Id.* at 863–64.
[101] *Id.* at 886.
[102] *Id.*
[103] *Id.*
[104] Williams v. Pennsylvania, 579 U.S. 1, 10 (2016); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

II. State Recusal Law

The dominant statutory recusal scheme for state court judges is the ABA's Model Code of Judicial Conduct. Forty-nine states have adopted some version of the ABA standard,[105] which requires recusal if "the judge's impartiality might reasonably be questioned."[106] On its face, this test appears to be considerably more stringent than the constitutional standard. A risk of bias that is "too high to be constitutionally tolerable" would seem to always raise reasonable questions about a judge's impartiality. Moreover, it seems that some cases might meet the latter standard without rising to the level of the former.

The Supreme Court is aware that the ABA standard requires disqualification more frequently than the Due Process Clause. It has declared that the Due Process Clause sets a "constitutional floor" that state recusal statutes will generally exceed.[107] As I discuss below, however, two factors keep the Due Process standard relevant: (1) state supreme court rules as to *who* makes the recusal decision; and (2) the common conflation of the state recusal standard with the constitutional minimum.

A. Making the Recusal Decision

The idea of a judge ruling on her own disqualification seems odd. A recusal motion alleges that the judge cannot rule fairly; if that allegation is true, there is no reason to expect the judge to handle the motion itself competently. Nevertheless, judges in the United States commonly decide recusal motions directed at themselves. The Wisconsin Supreme Court demonstrated as much in *State v. Henley*.[108] In a 4-3 decision, the Court held that the full bench could not disqualify a judicial peer.[109] Instead, that power rested solely with the Justice whose recusal was sought.[110] In addition to an extended analysis of Wisconsin law, the Court majority observed that it was following the tradition of the U.S. Supreme Court.[111]

The Wisconsin Supreme Court's procedure is common among state high courts—as Lynne Rambo has observed, numerous others follow the same practice.[112] While not a universal custom,[113] this procedure does leave

[105] Swisher, *supra* note 20, at 353.
[106] Model Code of Judicial Conduct r. 2.11(A) (Am. Bar Ass'n 2007).
[107] *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009)
[108] State v. Henley, 802 N.W.2d 175 (Wis. 2011).
[109] *Id.* at 176.
[110] *See id.* at 182–83.
[111] *Id.* at 181–82; *see also* Steven Lubet, *It Takes a Court*, 60 Syracuse L. Rev. 221, 221 (2010) (arguing that *Caperton* was a case about "poor judicial role modeling" by the Supreme Court).
[112] *See* Lynne H. Rambo, *High Court Pretense, Lower Court Candor: Judicial Impartiality After* Caperton v. Massey Coal Co., 13 Cardozo Pub. L. Pol'y & Ethics J. 441, 458 n.79–80 (2015); Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 Neb. L. Rev. 862, 866 (2016) ("[J]udges typically decide their own recusal motions").

some litigants without the means to get an independent review of their state law-based recusal motions. The Supreme Court does not have appellate jurisdiction over such motions,[114] leaving the affected judge's decision as the last word on the subject.

This state of affairs represents a serious obstacle to a litigant trying to disqualify a judge because of campaign statements. To understand why, consider again Justice Gableman, the Wisconsin Supreme Court member who lambasted his opponent for representing a criminal defendant accused of raping a child.[115] An individual who appeared before the Wisconsin Supreme Court convicted of the same crime would understandably be worried that Justice Gableman would rule against him regardless of the strength of his claims. Yet that would be *precisely* the type of case in which Justice Gableman would want to participate. He told voters that they should elect him *because* he would be a reliable vote against this type of defendant.[116] Recusing himself would betray voters who believed him.

Unsurprisingly, state high court judges frequently deny motions for their recusal.[117] *Caperton* and *Williams* illustrate this point[118]—indeed, in the latter case, Justice Castille also rejected a motion to refer the recusal question to the whole court.[119] Likewise, in recent litigation in North Carolina, members of the state legislature unsuccessfully sought the recusal of Justice Anita Earls on two occasions; she denied both motions.[120] This refusal makes review under the Due Process Clause of the Fourteenth Amendment the only remedy for litigants. As judicial elections become more aggressively contested and vitriolic,[121] we might expect recusal motions based on campaign activities to become more frequent, making recourse to the Due Process Clause a more common occurrence.

Finally, it is worth noting that the content of the Due Process standard can indirectly affect the state law recusal decisions on state courts of last resort. The stricter the federal constitutional rule, the greater the incentive

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[113] *See* Rambo, *supra* note 112, at 458 n.82 (listing some states that allow other high court members to disqualify a peer).

[114] *See, e.g.*, Murdock v. City of Memphis, 87 U.S. 590, 608, 638 (1875).

[115] James Sample, Adam Skaggs, Jonathan Blitzer. & Linda Casey, Brennan Ctr. for Just., The New Pol. of Judicial Elections 2000-2009 32–33 (2010).

[116] *See id.* at 33.

[117] *See, e.g.*, Robinson Nursing and Rehabilitation Center v. Phillips, 502 S.W.3d 519, 521, 523 (Ark. 2016) (denying a motion to recuse when the Justice in question allegedly received $40,000 from the owner of the company involved in the case); Pellegrino v. Ampco Systems Parking, 807 N.W.2d 40, 40–41 (Mich. 2009) (denying a motion for recusal based on campaign conduct allegedly evincing bias); Peterson v. Borst, 784 N.E.2d 934, 935 (Ind. 2003) (denying a motion to recuse based on a Justice's participation in a city-level commission).

[118] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 873–74 (2009); Williams v. Pennsylvania, 579 U.S. 1, 7 (2016); *see also* Rambo, *supra* note 112, at 474–76 (observing that *Caperton* arose precisely because individual judges are allowed to self-regulate).

[119] Williams, 579 U.S. at 7.

[120] *See* Harper v. Hall, 867 S.E.2d 326, 328–29, 332 (N.C. 2022) (denying the motion in the instant case and discussing the denial of a similar motion in the 2019 redistricting case).

[121] *See, e.g.*, Melinda Hall, *Partisanship, Interest Groups, and Attack Advertising in the Post-White Era, or Why Nonpartisan Judicial Elections Really Do Stink*, 31 J.L. & Pol. 429, 438–442 (2016).

for state high court judges to grant recusal more liberally. After all, even an unanimous decision can be vacated if a constitutionally disqualified judge is allowed to sit.[122] To avoid wasting time and resources, it is in the interest of state Supreme Court Justices to recuse if the disqualification question is close and the case is minor. Moreover, doing so on state law grounds—rather than the Due Process Clause—ensures that the Supreme Court will not further review the decision.[123] Of course, what the court considers to be a "close" disqualification question depends on the Due Process standard. Accordingly, the content of that standard may impact state law decisions.

B. Caperton and State Law Standards

The Due Process standard also remains important for reasons beyond policing state Supreme Court Justices. In the aftermath of *Caperton*, it appears that some state court judges (and lawyers) have conflated its holding with state recusal law. That is, they seem to be applying *Caperton* to decide disqualification issues, rather than a less demanding state standard. This development raises the stakes for the Due Process test: it elevates the test above its status as a constitutional backstop and expands its influence into more run-of-the-mill recusal scenarios.

Consider again *Bocian*, discussed in Part II.C. Bocian had challenged the trial court judge's failure to recuse under both the Due Process Clause and Colorado Rule of Civil Procedure 97.[124] The latter requires recusal whenever "a judge determines that, for any reason, he or she cannot, or *it appears* he or she cannot, act in an impartial manner."[125] The reviewing court indicated that an "appearance" of bias exists if the situation creates a reasonable question about the judge's impartiality (i.e., the standard from the Model Code of Judicial Conduct).[126] However, rather than analyzing Bocian's argument according to that standard, the court looked to *Caperton* to determine if the donation at issue demanded recusal.[127] At no point in the discussion did the court consider whether the appellant might prevail under Colorado's standard—by all indications, the court treated *Caperton* as the controlling law in the case.[128]

The Alabama Court of Criminal Appeals also viewed *Caperton* as decisive in *McMillian v. State*.[129] Appellant McMillan sought recusal based on campaign contributions his trial attorneys made to the presiding judge. McMillan asserted that those attorneys were ineffective and believed their dona-

[122] *See* Williams, 579 U.S. at 7.
[123] *See generally* Murdock v. City of Memphis, 87 U.S. 590 (1875) (holding that the Supreme Court does not have jurisdiction to hear appeals of state-law issues from state courts).
[124] Bocian v. Owners Ins. Co., 482 P.3d 502, 509, 511–513 (Colo. App. 2020).
[125] Colo. R. Civ. P. 757.19(2)(g) (emphasis added).
[126] *Bocian*, 482 P.3d at 511.
[127] *Id.* at 511–12.
[128] *Id.* at 511–13.
[129] McMillian v. State, 258 So.3d 1154 (Ala. Crim. App. 2017).

tion would sway the judge against that conclusion.[130] McMillan raised his claim in the language of the Model Code of Judicial Conduct.[131] Nevertheless, the court consider the campaign contribution under the *Caperton* rubric, concluding that it was too small to create an intolerable risk of bias.[132]

One court has explicitly acknowledged its tendency to blur the lines between constitutional and non-constitutional grounds for recusal. In *State v. Sawyer*—a rare example of a successful *Caperton* claim—the Kansas Supreme Court recognized three possible foundations for a recusal motion: Kansas statute, the Kansas Code of Judicial Conduct, and the Due Process Clause of the Fourteenth Amendment.[133] The court candidly admitted that "[its] previous cases have tended to obscure any analytical distinctions and overlap between claims depending on one or more of these three bases."[134] It suggested that this "shortcoming" was responsible for some confusion in Sawyer's brief.[135] Interestingly, the court found no statutory basis for the appellant's recusal motion, but nevertheless concluded that he was entitled to relief under the Due Process Clause.[136] The basis for disqualification was the judge's *previous* decision to recuse himself in a case involving Sawyer.[137] That prosecution had proceeded via bench trial; the one at issue in this case was a jury trial, which the judge believed he could fairly preside over.[138] The Kansas Supreme Court saw no meaningful difference between the situations and determined that the judge needed to recuse himself in the second case as well.[139]

Judges are not alone in their confusion when it comes to recusal standards. Attorneys seeking disqualification will sometimes bring only *Caperton* claims, ignoring possible state law remedies. For instance, in the Wisconsin case *In re Paternity of B.J.M*—one of the few successful *Caperton* cases—the appellant's lawyer failed to seek recusal under the applicable state statute in addition to the Fourteenth Amendment.[140] Likewise, in *Sawyer*, the attorney for the appellant neglected to raise Kansas' version of Model Code of Judicial Conduct R. 2.11(A) as grounds for recusal.[141] Instead, the lawyer only sought disqualification under a much more restrictive state statute and the Due Process Clause.[142]

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[130] *Id.* at 1183.
[131] *See id.* ("McMillan next argues that his due-process rights were violated because, he says, his postconviction petition was considered by a judge whose 'impartiality might reasonably be questioned.'").
[132] *Id.* at 1184–85.
[133] 305 P.3d 608, 611–12 (Kan. 2013).
[134] *Id.* at 612.
[135] *Id.*
[136] *Id.* at 908.
[137] *Id.* at 612–13.
[138] *Id.*
[139] *Id.* at 614.
[140] *In re* Paternity of B.J.M, 944 N.W.2d 542, 546 n.17 (Wis. 2020).
[141] *Sawyer*, 305 P.3d at 612.
[142] *See id.*

These examples suggest that both judges and lawyers may look to *Caperton* even when doing so is inappropriate. Though lamentable, this tendency makes the content of the Due Process standard all the more important.

III. Proposed Applications of the Due Process Standard

For some of the above reasons and others,[143] legal academics have recognized the importance of the Due Process standard for judicial recusal and have considered the proper application of *Caperton* and its predecessors in future cases. Interestingly, though, these scholars largely tend to take what I call "minimalist" or "maximalist" positions. The minimalists treat the Court's recusal jurisprudence as a series of exceptional cases with limited practical application, while the maximalists see *Caperton* as a significant constraint on judicial participation. For reasons I will discuss in Part V, *infra*, I think the most plausible—and practical—understanding of the recusal cases falls somewhere in between. The minimalist position, while defensible, ignores the Court's pre-*Caperton* history and throws up its hands in the face of increasingly contentious judicial campaigns. Meanwhile, the maximalist position is best described as aspirational. It is simply not feasible to require constitutional recusal as frequently as some of those scholars desire. I will ultimately advocate for a more modest reading—*Caperton* as a circumscribed but not inevitably doomed set of claims. But to see the merit of this position, it is important to understand the reasoning that drives the minimalist and maximalist positions.

A. The Minimalist Theory of Due Process Recusal

Perhaps the most dogmatic assertion of the minimalist position came only a year after *Caperton*. Writing in the *Syracuse Law Review*, attorneys James Bopp and Anita Woudenberg argued that the scope of *Caperton* is "limited to the facts of the . . . case itself."[144] The authors criticize the majority opinion at length, calling its analysis "incomplete" and declaring "campaign spending as a basis for recusal turns traditional recusal standards on their head."[145] Ultimately, they conclude that "[l]ike *Shelley v. Kraemer* and *Bush v. Gore*, the *Caperton* decision is applicable only to its own facts."[146] Bopp and Woudenberg highlight the decision's emphasis on "extreme facts" and argue that the Court created a test specific to those facts.[147] In their

[143] *See, e.g.*, Rambo, *supra* note 112, at 476–77 (arguing that Due Process recusal helps prevent the courts from becoming a political branch of government).

[144] Bopp & Woudenberg, *supra* note 20, at 306.

[145] *Id.* at 312, 320.

[146] *Id.* at 327.

[147] *Id.* at 328–29. The authors assert that the *Caperton* test "considers whether . . . 'a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election cam-

view, *Caperton* was "ill-advised" in light of what they believed to be the correct Due Process Clause standard: judges can be disqualified for pecuniary interests only.[148]

While Bopp and Woudenberg take perhaps the most limited view of Due Process recusal, numerous other scholars adhere to the minimalist position. Richard Esenberg is among them. In his 2010 article,[149] Esenberg draws attention to the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*.[150] The closely divided *White* Court held that laws prohibiting judicial candidates from announcing positions on specific issues violated the First Amendment.[151] Esenberg reasonably infers that "the extent and nature of the right to speak ought to tell us something about the extent and nature of the duty to recuse."[152] Since "[a] broad reading of *Caperton* would permit a candidate or his supporters to exercise their right to speak on political and legal issues only at the expense of the candidate being unable to address those issues if elected," such a reading would inevitably suppress speech.[153] While one could take a formalist approach to this inconsistency—arguing that judges have a right to take positions, but not hear cases concerning those positions—Esenberg dismisses that approach as "didactic" and likely to frustrate the voters' wishes.[154] He then runs through a series of campaign scenarios that might implicate *Caperton*, generally concluding that First Amendment concerns would restrict the case's application.[155] For instance, he determines that "tough-on-crime" judicial campaigns typically do not require disqualification: "a duty to recuse would seem to require an extraordinarily direct and broad statement of bias against defendants as a class."[156]

Meanwhile, law professor Pamela Karlan stakes out territory that might be appropriately labeled "descriptive minimalism." Though Karlan argues that the courts have no principled reason to limit their application of *Caperton*,[157] she evinces pessimism about the prospects that judges would frequently invoke the case.[158] She declares that she had "little doubt that the

paign when the case was pending or imminent.'" *Id.* at 328 (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009)). Asserting that this quote represents a "test" seems like a stretch—other scholars treat the "unconstitutional potential for bias" language as the relevant standard. *See, e.g.*, Swisher, *supra* note 20, at 345, 345 n.114; Charles R. Raley, Note, *Judicial Independence in the Age of Runaway Campaign Spending: How More Vigilant Court Action and Stronger Recusal Statutes Can Reclaim the Perception of an Independent Judiciary*, 62 CASE W. RES. L. REV. 175, 189 (2011).

[148] Bopp & Woudenberg, *supra* note 20, at 308–09.

[149] Richard M. Esenberg, *If You Speak Up, Must You Stand Down: Caperton and its Limits*, 45 WAKE FOREST L. REV. 1287 (2010).

[150] 536 U.S. 765 (2002).

[151] *Id.* at 788.

[152] Esenberg, *supra* note 149, at 1324.

[153] *Id.* at 1324–25.

[154] *Id.* at 1325.

[155] *Id.* at 1326–36.

[156] *Id.* at 1333.

[157] *See* Pamela S. Karlan, Comment, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 93 (2009).

[158] *Id.*

Court will reject [Due Process] claims by criminal defendants that the decisions in their cases were influenced by electoral concerns,"[159] noting that *Caperton* contains an element of "good-for-this-day-and-this-train-only."[160] In addition, Karlan raises one of the practical problems that Part III of this article considers: judges typically decide the question of their own recusal, leaving a largely uninterested Supreme Court as the only real enforcer of the Due Process standard.[161]

Bopp, Woudenberg, Esenberg, and Karlan are far from the only commentators to advance the minimalist view of the Court's Due Process recusal law,[162] but they provide a representative set of arguments for that position. They draw attention to three significant reasons to be skeptical of a capacious reading of the recusal case law: first, the emphasis in *Caperton* on the extreme facts of the case and the limited scope of prior recusal cases;[163] second, the Court's expansive interpretation of the First Amendment in cases like *White* and *Citizens United*, which would seem to limit campaign-related recusals;[164] and third, the limited ability of the federal courts to police the Due Process line, leaving the task to state court judges who are largely uninterested in disqualifying themselves.[165] Each of these points has some persuasive power. However, neither individually nor collectively do they mandate a minimalist view of Due Process recusal.

The notion that *Caperton* was a once-off ignores *Ward* and cannot account for subsequent cases of Due Process recusal. Bopp and Woudenberg eschew any meaningful discussion of *Ward* in their article. Their sole reference to the case comes in a "see, e.g." citation and they assume it stands for the uncontroversial rule that judges cannot hear cases in which they have pecuniary interests.[166] This treatment denies *Ward* the attention it deserves. As discussed in Part II.A., *supra*, the recusal basis in that case was not the mayor *himself* receiving money for a particular outcome. Instead, it was the mayor's interest in keeping the *town's* coffers full.[167] Put otherwise, *Caperton* was merely the second time the Court disqualified a judge because of incen-

[159] *Id.*
[160] *Id.* at 94.
[161] *Id.* at 100–01.
[162] *See, e.g.*, Lawrence Lessig, Comment, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 117–119 (2010) (labeling the Court's *Caperton* test "badly defined," arguing that it was unnecessary, and asserting that the states are better equipped to experiment with recusal law than the Supreme Court); *cf.* Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 SYRACUSE L. REV. 247, 248 (2010) (criticizing the Court's factual analysis in *Caperton*).
[163] Bopp & Woudenberg, *supra* note 20, at 309 n. 31, 312.
[164] Esenberg, *supra* note 149, at 1303–06, 1322–23.
[165] *See* Karlan, *supra* note 157, at 100.
[166] *See* Bopp & Woudenberg, *supra* note 20, at 309 n.32.
[167] Ward v. City of Monroeville, 409 U.S. 57, 58, 60 (1972). In other words, the benefits the mayor could expect were professional—e.g., enhanced reelection prospects, greater occupational fulfillment, easier funding decisions—not personal. While some might argue that the mayor could perhaps expect a higher salary if he imposed greater fines and fees, such speculation was not a part of the Court's decision. *See generally id.*

tives other than personal finances. Comparisons to *Bush v. Gore* and *Shelley v. Kramer* lack plausibility for this reason.

Moreover, while successful Due Process recusal claims have been rare, they are not nonexistent. In at least a handful of cases,[168] litigants have successfully invoked the constitution to disqualify a judge. Most obvious is the *Williams* case discussed in Part II.C, *supra*, but both the Kansas and Wisconsin Supreme Courts have accepted *Caperton* claims in *Sawyer* and *In re Paternity of B.J.M*, respectively. Several federal courts have also granted relief premised on *Caperton*. The Seventh Circuit directed the lower court to grant a writ of habeas corpus on that basis in *Gacho v. Wills*,[169] and the Ninth Circuit granted an evidentiary hearing on a judicial bias claim in *Hurles v. Ryan*.[170] The Third Circuit did the same in an unpublished disposition.[171] In *Cain v. White*, the Fifth Circuit affirmed summary judgment for the plaintiffs on a 42 U.S.C. Section 1983 claim asserting that Louisiana judges violated Due Process by using defendant fines and fees as part of a general-purpose fund.[172] These and other cases illustrate that *Caperton* was not a one-off.[173]

Most relevant to this article, however, was the Louisiana Court of Appeal decision in Daurbigney v. Liberty Personal Insurance Company.[174] In that case, the attorneys representing the plaintiff had been attacked by the trial court judge in a campaign advertisement during her unsuccessful campaign for state supreme court.[175] The judge implied that the attorneys' firm (along with others) was making unethical contributions to her opponent's cause.[176] Understandably, these lawyers sought the judge's recusal in the case at issue.[177] Though their motion cited Louisiana state law, the court nevertheless applied the Due Process standard.[178] Citing the "objective test articu-

[168] *See generally In re* Paternity of B.J.M, 944 N.W.2d 542 (Wis. 2020); State v. Sawyer, 305 P.3d 608 (Kan. 2013); see also infra notes 165-170 and accompanying text.

[169] 986 F.3d 1067, 1072 (7th Cir. 2021).

[170] 752 F.3d 768, 788 (9th Cir. 2014).

[171] *See* Rivera v. Superintendent Houtzdale SCI, No. 16-2243, 738 F. App'x 59, 65–66 (3d Cir., June 19, 2018).

[172] 937 F.3d 446, 451, 453–54 (5th Cir. 2019).

[173] *See also* Echavarria v. Filson, 896 F.3d 1118, 1120, 1131–32 (9th Cir. 2018) (holding there was an unconstitutional potential for bias when a Nevada judge presided over a murder trial after previously having been investigated by the FBI and may have been worried the investigation would be reopened if he ruled in favor of the defense); Norris v. United States, 820 F.3d 1261 (11th Cir. 2016) (remanding for an evidentiary hearing to determine if there was an intolerable probability of judicial bias), Florida Parishes v. Hannis T. Bourgeois, L. L. P., 102 So. 3d 860, 862 (La. Ct. App. 2012) (holding that all judges in a specific district had to be recused in a case involving officials the judges appointed).

[174] 272 So.3d 69 (La. Ct. Ap. 2019).

[175] *Id.* at 71–72.

[176] *Id.*

[177] *Id.* at 72.

[178] *Id.* at 72–73. Though applying a constitutional standard, the court observed that "[r]eference to the Louisiana Code of Judicial Conduct is helpful in determining whether objectively speaking the 'risk of bias' is too high to be constitutionally tolerable." *Id.* at 74 (quoting Rippo v. Baker, 137 S. Ct. 905, 907 (2017)). The case thus provides yet another example of courts blurring the lines between state and constitutional recusal law. *See* Section III.B, *supra*.

lated by the U.S. Supreme Court," it asked whether the probability of bias was too high to be constitutionally tolerable.[179] Ultimately, it determined that

> "[l]ooking at this case objectively, given the optics, the tone, timing and wording of the ad, it is implausible that this client, or any reasonable client under the circumstances, could have trust and confidence in the impartiality of the trial judge when the sitting trial judge hearing her case has published such an ad directly naming and attacking her attorneys."[180]

Given these observations, the court reversed the trial court's denial of the recusal motion and ordered the challenged judge disqualified.[181]

Between *Ward* and the aforementioned cases, Bopp and Woudenberg's complete dismissal of Due Process recusal seems ill-advised. More plausible is Richard Esenberg's argument that the First Amendment significantly restricts the applicability of *Caperton* and its predecessors, at least in the campaign context. In *Republican Party of Minnesota v. White*, the Court struck down Minnesota's "announce" law, which prevented judicial candidates from publicly taking positions on disputed legal or political issues.[182] Justice Scalia's majority opinion in *White* explicitly contemplates the possibility that elected judges will rule on the issues on which they announce positions.[183] Given this dicta, it is difficult to imagine that run-of-the-mill campaign activities demand constitutional recusal.[184]

While the general form of Esenberg's argument is persuasive, the Court's subsequent decision in *Williams-Yulee v. Florida Bar* constrains its reach.[185] Esenberg argues that statements expressing bias against a class of individuals generally do not trigger Due Process recusal;[186] that judicial campaigns can engage in vigorous anti-defendant posturing without risking disqualification;[187] and that the actions of supporters outside of campaign contributions will almost never produce recusal.[188] However, *Williams-Yulee* suggests that the scope of First Amendment speech protection by judicial candidates is narrower than it is for speech by ordinary politicians or private citizens. The *Williams-Yulee* Court recognized that states have a compelling interest in safeguarding public confidence in the impartiality of the judiciary.[189] The interest was sufficient to justify a narrowly tailored ban on personal solicitation of contributions by judicial candidates, confirming that the

[179] *Id.* at 73.
[180] *Id.* at 77.
[181] *Id.*
[182] 536 U.S. 765, 788 (2002).
[183] *See id.* at 780–81.
[184] *Cf. id.* at 792 (O'Connor, J., concurring) (arguing that Minnesota had voluntarily assumed the risk of judicial bias by choosing to elect its judges).
[185] 575 U.S. 733 (2015).
[186] *See* Esenberg, *supra* note 149, at 1330–31.
[187] *See id.* at 1332–1333, n.270.
[188] *See id.* at 1335–36.
[189] *Williams-Yulee*, 575 U.S. at 445–448.

judicial role comes with limitations on speech that would be unconstitutional if applied to others.[190] In the wake of *Williams-Yulee*, the lower courts have upheld laws preventing judicial candidates from making reckless false statements,[191] hosting political fundraisers,[192] endorsing other candidates,[193] seeking or using endorsements from political parties,[194] and listing their party affiliations on the ballot.[195]

Williams-Yulee makes clear that some categories of judicial speech sufficiently threaten public confidence in the judiciary so as to occasion a complete ban. It thus stands to reason that some statements could spawn the lesser sanction of recusal. Recusal is a much more narrowly tailored remedy to public concerns about the impartiality of the judiciary. It imposes no personal punishment on the judicial speaker and only applies in specific cases where the public might suspect substantial judicial bias.

Over and above *Williams-Yulee*, it seems clear that some speech is protected by the First Amendment but would *still* require recusal. Consider, for example, a prominent lawyer who is considering running for judge but has not yet begun a campaign. If this lawyer were to publicly attack a politician on Twitter—say, calling that politician unethical or dishonest—such speech would surely be protected by the First Amendment. However, if that lawyer were to subsequently run for and win a judgeship, it seems equally clear that she would have to recuse herself if a case involving that politician came before her.[196] The judge was entitled to say what she did, but that does not mean she can constitutionally hear a case in which her bias is obvious.

Finally, Justice Kennedy's concurring opinion in *White* contemplated the possibility of state recusal laws that are more restrictive than the Due Process Clause.[197] It is difficult to reconcile these comments with the claim that the First Amendment sharply limits Due Process recusal. Justice Kennedy's opinion indicates that statutory law can impose a price on judicial speech—surely if ordinary law can do so, the Due Process Clause can as well.[198] As such, while Esenberg seems right to assert that the Supreme Court will not extend recusal law liberally, the First Amendment is less of an obstacle to doing so than he may have thought.

The practical problem that Karlan raises—namely, that it falls to the Supreme Court to enforce Due Process recusal, and that the Court has lim-

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[190] *See id.* at 446.
[191] *See* Winter v. Wolnitzek, 834 F.3d 681, 693 (6th Cir. 2016).
[192] *See id.* at 692–93.
[193] *See id.* at 691–92.
[194] *See* French v. Jones, 876 F.3d 1228, 1230–31, 1241 (9th Cir. 2017).
[195] *See* Ohio Council 8 American Federation of State v. Husted, 814 F.3d 329, 333 (6th Cir. 2016).
[196] *Cf.* Daurbigney v. Liberty Pers. Ins. Co., 272 So.3d 69 (La. Ct. Ap. 2019) (disqualifying a lower court judge who had called one of the litigant's attorneys unethical during her campaign).
[197] *See* Republican Party of Minnesota v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) (states "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards").
[198] *See id.*

ited interest in doing so—was a concern at the time she was writing. However, recent experience suggests that state appellate courts are willing to police lower court judges,[199] including in at least one case where a judge's campaign speech was at issue.[200] Moreover, even if the Supreme Court rarely reviews Due Process recusal claims, the threat that it will do so remains present—after all, the Court recently summarily reversed a lower court that misapplied *Caperton* and its predecessors.[201] The shadow of the Court looms over state court judges that do not at least engage with the proper standard, making some *Caperton* claims plausible. This pressure will be particularly acute when the case at bar is relatively simple—no court wants to have a unanimous decision reversed and their efforts duplicated because it allowed an ineligible judge to participate. In light of these considerations, Due Process recusal standard appears to have more bite than Karlan had anticipated.

B. The Maximalist Theory of Due Process Recusal

While minimalist commentators see Due Process Recusal as a vanishingly rare remedy, maximalist scholars go in the other direction. Among the most expansive interpretations of *Caperton* belongs to Keith Swisher. Writing in the *Arizona Law Review*, Swisher addressed the general question of when "tough on crime" judges must recuse themselves.[202] Much of his article focuses on state disqualification standards,[203] but his *Caperton* commentary offers a broad scope for Due Process recusal. Swisher suggests that whenever a judge faces a serious risk of losing her job if she appears soft on crime—that is, if her electoral or monetary support in previous races was derived from tough on crime rhetoric—the Due Process Clause requires that judge's recusal.[204] Such an approach would effectively bar certain elected judges from ever sitting in criminal cases, transforming Due Process Recusal from a limited claim into a ubiquitous phenomenon. Swisher, of course, is not the only author to adopt this type of stance. Charles R. Raley argues that "Caperton's result stands for the proposition that campaign contributions should not be allowed to threaten the appearance of elected judges' impartiality."[205] Beginning from this premise, he concludes that "[i]n the absence of contrary evidence, a substantial campaign contribution . . . requires that the judge recuse himself or herself from hearing the case."[206] Meanwhile, Penny J. White expressed concerns that the Supreme Court would not apply *Caperton* widely,

[199] *See, e.g.*, State v. Sawyer, 305 P.3d 608, 610 (Kan. 2013); *In re* Paternity of B.J.M, 944 N.W.2d 542, 544 (Wis. 2020).
[200] *Daurbigney,* 272 So.3d at 71–72.
[201] *See* Rippo v. Baker, 137 S. Ct. 905, 907 (2017).
[202] Swisher, *supra* note 20, at 319–20.
[203] *See id.* at 351–57.
[204] *See id.* at 347–48.
[205] Raley, *supra* note 147, at 213.
[206] *Id.* at 214.

but nevertheless urged state courts to "fulfill the responsibility thrust upon them" by interpreting Due Process recusal broadly.[207]

In addition to authors like Swisher, Raley, and White, there were also those who opposed the decision but nevertheless feared that it would take root. Andrew L. Frey and Jeffrey A. Berger fall into this camp.[208] The authors criticized the Court for paying "little attention to the actual dynamics" at play in *Caperton*, but nevertheless worried that "it is difficult to see why the decision would not have widespread application."[209] They believed the lack of clarity in the test would require lower courts to sort through a morass of recusal motions, and that "there is little reason to be confident that due process-based disqualification will be inapplicable to other bias claims."[210] Put otherwise, Frey and Berger occupy the same territory as Chief Justice Roberts: they predict that *Caperton* will wreak havoc on the lower court.[211]

Nevertheless, Frey and Berger were the exceptions to the rule—most maximalists supported a broad application of *Caperton*.[212] Normatively, it is hard to argue with them. Judges are currently allowed to sit in situations where many in the public would suspect them of bias. Most obviously, they can hear cases in which one of the parties gave their campaign thousands of dollars or endorsed their election.[213] This reality certainly seems to deny some litigants a fair trial in an everyday sense (if not in a strict legal sense).

Yet to the extent that the maximalists intend to offer an accurate—rather than aspirational—interpretation *Caperton*, it seems impossible to agree with them.[214] *Caperton's* emphasis on "extreme facts" may not make the case sui generous, but it does imply that most ordinary campaign activities will not rise to the level of Due Process recusal.[215] Small contributions, generic position-taking, even commentary on past cases—in general, none of

[207] *See* Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 150–52 (2009). White had painful personal experience with judicial elections. Appointed to the Tennessee Supreme Court in 1994, she voted with the court majority in several cases to overturn capital sentences. When she came up for retention in 1996, Tennessee conservatives mounted a vigorous campaign against her, arguing that a vote against Justice White was a vote for the death penalty. Justice White lost the election. *See generally* Colman McCarty, *Injustice Claims a Tennessee Judge*, WASH. POST (Nov. 26, 1996), https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/ [https://perma.cc/H8EQ-MGYC] (describing the circumstances of Justice White's defeat).

[208] Andrew L. Frey & Jeffrey A. Berger, *A Solution in Search of a Problem: The Disconnect Between the Outcome in* Caperton *and the Circumstances of Justice Benjamin's Election*, 60 SYRACUSE L. REV. 279 (2010).

[209] *Id.* at 288–89.

[210] *Id.*

[211] *See id.* at 289.

[212] *See, e.g.*, Swisher, *supra* note 20, at 338; Raley, *supra* note 147, at 213, White, *supra* note 207, at 151.

[213] *See* Ivey v. District Court, 299 P.3d 354, 356–58 (Nev. 2013); *cf.* Bocian v. Owners Ins. Co., 482 P.3d 502, 511–13 (Col. Ct. App. 2020) (upholding a denial of recusal when one party's law firm donated hundreds of thousands of dollars to defeat the judge in an earlier election).

[214] At minimum, Frey and Berger appear to be making a descriptive argument about *Caperton's* scope. *See, e.g.*, Frey & Berger, *supra* note 208, at 288–89.

[215] Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 960 (2009).

these actions implicate the Due Process Clause. If they did, Due Process recusal would become ubiquitous, defying the Court's edict that Due Process recusal should be "rare."[216] While many of us might wish for a capacious understanding of constitutional disqualification,[217] nothing more than a limited claim is a realistic reading of the current law.

C. An Intermediate Proposal: The Mathews Test

While most of the scholarly action with regard to Due Process recusal occurs at the poles of the debate, some commentators have taken more intermediate positions. For example, law professor Rick Hasen described *Caperton* as a "backstop for the most egregious cases of large campaign spending."[218] James Sample similarly characterized the case as "set[ting] a floor without drawing unnecessary and sweeping bright lines."[219] While neither author proposed an interpretation of *Caperton*, both seemed to conceive of the decision as creating a limited remedy applicable in at least a handful of situations.[220]

Andrey Spektor and Michael Zuckerman offer a particularly creative approach to Due Process recusal that rejects both the minimalist and maximalist positions.[221] The authors assert that applying the test from *Mathews v. Eldridge*[222]—typically used to determine what procedural protections Due Process requires in the civil context[223]—is the best way to approach questions of constitutional recusal.[224] The test considers three factors: (1) the private interest at stake in the proceeding, (2) the government's interest (including the burdens of additional procedural safeguards), and (3) the degree to which additional safeguards would decrease the probability of erroneous deprivation of the private interest.[225]

Spektor and Zuckerman argue that considering these three factors will allow the judges to balance First Amendment concerns with threats to Due

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[216] *Id.* at 890.

[217] Indeed, some authors go so far as to argue that the Due Process Clause *forbids* certain types of judicial elections. *See* Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1, 12 (2014) (asserting that "tying judges' continued tenure on the bench to the voters' will violates the Constitution by providing a future financial incentive for judges to decide cases far differently from how they would otherwise").

[218] *See* James Sample, Caperton: *Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 298 (2010) (quoting Rick Hasen, *Initial Thoughts on* Caperton v. Massey: *First Meaningful Limits on Excesses of Judicial Elections*, ELECTION LAW BLOG (June 8, 2009, 7:58 EST), https://electionlawblog.org/?p=12803 [https://perma.cc/J76P-D85D]).

[219] *See id.* at 296.

[220] *See id.* at 297–98; Hasen, *supra* note 218.

[221] Andrey Spektor & Michael Zuckerman, *Judicial Recusal and Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. 977 (2011).

[222] 424 U.S. 319 (1976).

[223] *See* Turner v. Rogers, 564 U.S. 431, 444–45 (2011).

[224] Spektor & Zuckerman, *supra* note 221, at 980.

[225] *Matthew*, 424 U.S. at 335.

Process when faced with a recusal motion.[226] Since their recusal test is meant to apply to private disputes as well as to conflicts with the state, they replace the "government interest" in limiting safeguards with the "public interest" in judges not recusing themselves.[227] The First Amendment rights of judges are subsumed within this "public interest" prong. Deterring judge-shopping also falls under the "public interest" factor in the balancing test.[228]

Spektor and Zuckerman seem to provide courts with flexibility to consider all the possible circumstances that could give rise to bias.[229] However, importing *Mathews* into the judicial recusal context ultimately would not be faithful to Court's prior case law. As the authors themselves note, none of the Supreme Court's recusal cases so much as cite *Mathews*.[230] An early commentator, current Ninth Circuit Judge Michelle T. Friedland, reviewed the Supreme Court's application of the *Mathews* test in other contexts and concluded it was unlikely that it displaced other approaches to recusal questions.[231] Moreover, the way the Court has described the requirement of an impartial judge—"necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself"—makes it seem more like a bedrock constitutional protection than the type of additional procedural safeguards *Mathews* is typically concerned with.[232]

The second prong of *Mathews* (what Spektor and Zuckerman refer to as the "public interest" factor) is also an awkward fit for the judicial recusal context. In classic applications of the *Mathews* test, the government's interest in avoiding additional procedural safeguards is often substantial. The government may be required to provide those safeguards in every future proceeding, sometimes at a high cost. Judicial recusal has a considerably smaller impact on the public. After all, judicial campaign speech is already subject to some regulations, and the Supreme Court has signaled that recusal is an appropriate remedy even when it comes to protected speech.[233] It is difficult to see how the so-called "public interest" prong could ever outweigh the potential injury from a biased judge. As a consequence, an honest application of the *Mathews* test would seem to demand recusal frequently—a result the Supreme Court has repeatedly disavowed.[234]

This review of the scholarship helps illustrate the lack of a unified, workable approach to the Due Process recusal standard. The minimalist position overstates constraints like the First Amendment and fails to recognize that the proliferation of hotly contested judicial campaigns will make Due

[226] *See* Spektor & Zuckerman, *supra* note 221, at 1007.
[227] *Id.* at 1013.
[228] *Id.* at 1013–14.
[229] *Id.* at 1008–10.
[230] *Id.* at 1007.
[231] *See Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 575 n.48 (2004)
[232] Williams v. Pennsylvania, 579 U.S. 1, 16 (2016).
[233] *See supra* notes 190–91 and accompanying text.
[234] *See, e.g.*, *Williams*, 579 U.S. at 13; Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 960 (2009); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986).

Process recusal more common. Meanwhile, the maximalist position seems clearly aspirational—it is difficult to read Justice Kennedy's majority opinion as creating anything other than a limited claim. Maybe more vigorous constitutional policing of judicial bias would be desirable, but it strains credulity to argue that it is the law today. Finally, those in the center either refrain from offering an interpretation of *Caperton* or suggest a problematic reframing of its test. This situation leaves plenty of room for a new approach to the Due Process recusal standard.

IV. Drawing the Due Process Line

To this point, I have rejected the minimalist and maximalist formulations of the Due Process standard, as well as a creative attempt by two authors to carve out a middle ground. In this section, I offer an alternative formulation of the Due Process recusal standard, one that accounts for the Supreme Court's existing cases while simultaneously providing lower courts with a workable test. The test would ask the following: IF PUT IN THE SAME POSITION AS THE JUDGE, *could* an average person decide the case impartially? I explain this proposal in greater detail in Section V.A; in Section V.B, I consider how it might apply to various campaign situations.

A. The "Could" Standard

Both the case law and the literature emphasize two standards for Due Process recusal. The first asks "whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias."[235] The second considers whether the circumstances "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."[236] As previously discussed, the first standard is both vague and potentially circular—it defines a constitutional violation in terms of unconstitutional risk.[237] Meanwhile, the second formulation is difficult to take at face value. The *Caperton* Court asserted that constitutional recusal will be "rare,"[238] yet "possible temptation[s]" for bias seem ubiquitous for elected judges.[239] Some reinterpretation of the "average judge" standard seems inevitable.

Nevertheless, these tests—read alongside the Court's rulings in cases like *Caperton*, *Ward*, and *Williams*—do offer some minimum criteria for any restatement of the Court's recusal jurisprudence. First, it is clear that the test must be objective, not subjective.[240] While actual bias is sufficient for disqualification, it is not necessary—a sufficiently high probability of bias is

[235] *See, e.g.*, *Caperton*, 556 U.S. at 881 (internal quotations omitted).
[236] *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 532 (1927).
[237] *See* Part I, *supra*.
[238] *Caperton*, 556 U.S. at 890.
[239] *Id.* at 878.
[240] *Id.* at 881.

enough. Certain sets of circumstances would demand the recusal of even a judge who embodied the platonic ideal of impartiality.[241]

Second, taking the original version of the "average judge" test seriously requires affording judges a presumption of impartiality. If it is true that (1) an average judge must recuse herself given a mere "possible temptation" towards bias and (2) recusal cases will be fairly uncommon, then it must be the case that the "average judge" will not feel temptation in numerous situations when the average *person* would. Put otherwise, we must assume that the average judge possesses an above-average ability to set aside personal feelings and can remain neutral when a regular person off the street would exhibit bias. The Court made as much explicit in *Withrow v. Larkin*, declaring that adjudicators generally receive a "presumption of honesty and integrity."[242] Moreover, judges often have a "duty to sit" when not disqualified,[243] which implies that judges can rule impartially even when the risk of bias falls just short of requiring recusal. Taken together, these considerations suggest that the proper Due Process standard must contain a presumption of judicial neutrality.

Third, it seems unlikely that the Court would endorse any standard that makes Due Process recusal common. In both of the Court's most recent decisions—including one from 2016—the majority emphasized the exceptional nature of constitutional disqualification. In *Caperton*, Justice Kennedy's majority opinion described Due Process recusal as "rare" and "the outer boundar[y] of judicial disqualifications."[244] It also characterized the Court's previous recusal cases as involving "extreme" facts.[245] The subsequent *Williams* Court reiterated that most recusal questions will be governed by statute, not constitutional law.[246] The Roberts Court was not breaking new ground with these pronouncements—previous Courts also emphasized that constitutional recusal is a limited remedy.[247] In the world of the "New Style" judicial campaign, one could argue that the Court's approach to Due Process recusal is outmoded.[248] Perhaps more contentious campaigns *should* yield more frequent constitutional disqualifications. Nevertheless, both *Williams* and *Caperton* post-date *White*. The Court had the opportunity to revise its view in light of the changed circumstances and continued to treat the consti-

[241] The utility of an objective standard is that it allows a judge to step back from a case without acknowledging bias. The judge thus gets to preserve her image as a neutral umpire. Moreover, she may also help maintain confidence in the judiciary as a whole by avoiding an admission that she possesses specific biases.

[242] 421 U.S. 35, 47 (1975); *see also* Williams v. Pennsylvania, 579 U.S. 1, 17 (2016) (Roberts, C.J., dissenting) (quoting *Larkin* for the same proposition).

[243] *See, e.g.*, State v. Henley, 778 N.W.2d 853, 861–82 (Wis. 2009) (discussing the duty to sit).

[244] *See Caperton*, 556 U.S. at 889–890.

[245] *Caperton*, 556 U.S. at 887.

[246] *Williams,* 579 U.S. at 13.

[247] *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986).

[248] *See* James L. Gibson, *"New Style" Judicial Campaigns and the Legitimacy of State High Courts*, 71 J. POL. 1285, 1287–88 (2009) (discussing the more expensive, more policy-driven "New Style" judicial campaign).

tutional disqualification as unusual. Accordingly, any accurate reinterpretation of the constitutional recusal test must confine the remedy to a small set of cases.[249]

The standard I have proposed—*could* an average person decide the case impartially given the circumstances—incorporates all three requirements. It is objective—it asks not whether the specific judge in question is actually biased, but instead whether we can conceive of the average person ruling impartially in the case. The judge might in fact be capable of herculean feats of neutrality, but she would still need to recuse if the average bias could not resist bias.

Moreover, by using "could" instead of "would," the standard assumes that the average judge will generally be unbiased. There are countless situations in which we *would* expect the average person to be biased, but still *could* imagine that person remaining neutral. For example, suppose a judge's father was the victim of a mugging and that the judge soon afterwards had a different alleged mugger before her in court. We would expect the average person to exhibit bias in this situation. Indeed, a juror with a similar background might well be struck.[250] However, it is not inconceivable that the person could remain unbiased—it seems psychologically possible that she could put aside her feelings about her father's mugging and rule fairly. My standard would assume that the judge is such a person, and thus would allow her to sit in that case.[251]

Finally—as the mugger example suggests—the "could" standard will make recusal fairly uncommon. Only in a handful of situations can we fail to

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[249] In this regard, constitutional recusal resembles one understanding of political bribery. Politics inevitably involves monetary efforts to influence government decisions. *See* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 786 (1985). Interest groups channel donations to friendly legislators, PACs produce television ads to pressure moderates, and politicians make policy commitments during fundraising speeches to industry. Good government advocates may deplore these practices, just as they might abhor judges hearing cases that involve campaign contributors. However, few political expenditures violate the law, and only a small subset of judicial campaign activities demand recusal. *See id.* at 786–787 (explaining the conventional view that bribery laws are narrow but suggesting that position is incorrect).

[250] *See, e.g.*, Fields v. Woodford, 309 F.3d 1095, 1104–05 (9th Cir. 2002) (discussing cases in which jurors' emotional attachment to the subject of trial could have led to their excusal for cause).

[251] This distinction between "would" and "could" has a criminal procedure analogue. When courts hear criminal appeals, they often confront claims of ineffective assistance of counsel (IAC) or prosecutorial withholding of potentially exculpatory information (*Brady* claims). In addressing these contentions, courts must deny relief if the poor representation or withheld evidence *would not* in any reasonable likelihood have affected the judgment of the jury. *See, e.g.,* Strickland v. Washington, 466 U.S. 668, 694 (1984); Kyles v. Whitley, 514 U.S. 419, 434–35 (1995). However, if the prosecution presents false testimony (*Napue* claims), the standard is whether the testimony *could not* in any reasonable likelihood have affected the jury. *See* Napue v. Illinois, 360 U.S. 264, 271 (1959); *see also* United States v. Agurs, 427 U.S. 97, 103 (1976). Courts usually treat the latter standard as more forgiving than the former. *See, e.g.*, United States v. Steinberg, 99 F.3d 1486, 1490 (9th Cir. 1996); United States v. Gonzales, 90 F.3d 1363, 1369 n.2 (8th Cir. 1996). Similarly, asking whether a judge "could" have been unbiased as opposed to considering whether the judge "would" have been unbiased gives the judge a presumption of impartiality.

even *imagine* the average person setting aside their biases; most of the time, the judge will receive the benefit of the doubt, at least from a constitutional perspective.[252] This stinginess accords with the Court's demand that Due Process recusal be an exceptional outcome.[253]

In addition to meeting these criteria, my standard should also account for the outcomes of the Court's recusal cases. Across its three strands of recusal jurisprudence—when the judge has a financial interest, when she previously participated as a party, or when she faces an unusually strong inducement towards bias—the Court has appeared to apply the same general test.[254] Accordingly, the "could" standard must have the same universality if it is to serve as an accurate interpretation of the Court's jurisprudence.

When it comes to the "easy" recusal cases, the "could" standard straightforwardly produces the outcome the Court in fact favored. In *Tumey* and *Lavoie*, the judge whose recusal was sought had money at stake in the case[255]—given a realistic appraisal of human psychological tendencies, it seems impossible to imagine that an average person could decide that case without bias. Similarly, it seems inconceivable that an average person could fairly judge a criminal case when she makes—or helps make—the accusation that produces the litigation, as was true in *Murchison* and *Williams*.[256]

Caperton might seem like a closer call. In many states with judicial elections, the court system relies on the notion that judges can set aside positive feelings about their donors (or negative feelings about their opponent's donors) and rule impartially.[257] It thus seems that residents of those states can generally conceive of their judges dispensing impartial justice to supporters and detractors alike. However, the extraordinary facts of *Caperton* distinguish it from the run-of-the-mill donor scenario. In the age of SuperPACs, it is easy to become numb to extravagant campaign spending, but the $3 million Blankenship put towards Justice Benjamin's election is a remarkable sum. For context, in 2010, $3 million would have made Blankenship the fourth largest donor in the entire country.[258] Could the average person put that type of spending out of her mind when ruling on the supporter's high-profile case? Probably not.

Ward is likely the case nearest to the Due Process line. Nevertheless, I think the best evaluation of the circumstances of the case under that standard would favor disqualification. At the highest level of abstraction, *Ward*

[252] Of course, state recusal laws can provide less demanding disqualification standards.

[253] *See, e.g.*, Pennsylvania v. Williams, 579 U.S. 1, 13 (2016); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 960 (2009); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986).

[254] *See, e.g.*, *Williams*, 579 U.S. at 8; *Caperton*, 556 U.S. at 881; *Lavoie,* 475 U.S. at 825–26.

[255] *See* Tumey v. Ohio, 273 U.S. 510, 520 (1927); *Lavoie*, 475 U.S. at 817–19.

[256] *Williams*, 579 U.S. at 4–7; *In re* Murchison, 349 U.S. 133, 134–35 (1955).

[257] *Cf.* Republican Party v. White, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring) ("Minnesota has chosen to select its judges through contested popular elections . . . . In doing so the State has voluntarily taken on the risks to judicial bias described above.").

[258] *Who Are the Biggest Donors?*, OpenSecrets (last visited Mar. 8, 2022), https://www.opensecrets.org/elections-overview/biggest-donors?cycle=2010 [https://perma.cc/U22J-ZEZJ].

was about whether an elected executive officer can maintain impartiality in ordinance violation cases when she knows the outcomes will significantly affect her budget.[259] Framed this way, it seems hard to imagine that the average person could remain unbiased. After all, a mayor has a responsibility to her constituents, and her very political survival may depend on maintaining the town's budget for goods and services. By failing to maximize the revenues from fines and fees, the mayor is making a choice to limit the resources available to the people that elected her. It seems inconceivable that the average person could set aside this important competing responsibility and remain completely neutral when adjudicating violations of the traffic code.

The discussion thus far reveals that the "could" standard incorporates the Supreme Court's central holdings and accounts for the outcome of its Due Process cases. However, fidelity to the Court's prior holdings and case law is only the minimum required of a reformulated Due Process standard. The main advantage of my restatement of the constitutional recusal test is the clarity it would provide to state court judges. It offers a unified understanding of the Court's cases across several different subareas of recusal law and gives lower courts a single, straightforward inquiry to pursue when faced with a Due Process recusal claim. They simply have to determine whether, given the totality of the circumstances, an average person could rule impartially. In addition to offering concision, this standard gives judges the flexibility to move beyond the facts of *Caperton* and examine the range of circumstances that might lead to judicial bias. In the electoral context, they can consider the importance of specific statements to the judge's campaign, the size of the contributions or expenditures made by supporters, the degree to which the judge has attacked certain litigants or attorneys, or any other combination of factors. This elasticity is crucial—as of now, a common mode of analysis in campaign-related recusal cases is to consider how closely the circumstances align with those in *Caperton*.[260] This approach virtually guarantees a ruling against the recusal motion (after all, it will be rare for a future case to present nearly identical facts). By directing judges to make a more general inquiry about the psychological tendencies of the average person, it prods them to consider circumstances other than massive campaign spending that might produce bias.

Moreover, courts will likely have some familiarity with this type of "could" inquiry. For example, in assessing claims of pretextual traffic stops, courts applying federal constitutional law consider whether an officer "could" have legally stopped the motorist, not whether a reasonable officer "would" have done so.[261] The Florida courts follow a similar procedure in considering whether an inadvertent error on a sentencing scoresheet requires resentenc-

[259] *See* Ward v. Village of Monroeville, 409 U.S. 57, 57–58 (1972).

[260] *See, e.g.*, Ivey v. District Court, 299 P.3d 354, 357–58 (Nev. 2013); Bocian v. Owners Ins. Co., 482 P.3d 502, 511–513 (Col. Ct. App. 2020).

[261] *See* Whren v. United States, 517 U.S. 806, 809 (1996); Doyle v. State, 995 P.2d 465, 469–70 (Nev. 2000).

ing—they assess whether the sentence legally "could" have been imposed, rather than whether it "would" have been.[262] Likewise, when violations of *Napue* are at issue, the Supreme Court has directed lower courts to determine whether false testimony put on by the prosecution "could" have affected the judgment of the jury.[263] Determining whether the average person "could" be impartial as a judge seems no more difficult than determining whether a jury's judgment "could" have been affected by false testimony. Put otherwise, answering the former question should be a manageable task for jurists.

B. Applying the Due Process Standard to Campaign Scenarios

In what follows, I will consider how the "could" standard would apply to various potential recusal scenarios. In so doing, I draw on real-life examples from judicial campaigns. While the facts of these situations are often messier than those of a stylized hypothetical, they highlight the importance of the Due Process standard in practice. Moreover, these incidents may be more likely to resemble the recusal claims judges will actually confront.

In Section 1, I examine the types of candidate rhetoric that might require recusal. These include (a) general statements of position or bias; (b) statements that effectively promise a specific type of outcome for members of a particular group; (c) statements that effectively promise an outcome in a specific type of case; (d) statements of bias against specific parties; and (e) statements of bias against specific attorneys that appear before a judge. Section 2 shifts the focus away from judicial candidate behavior and towards the behavior of the candidate's supporters or opponents. It examines (a) large contributions by individual supporters/opponents of the candidate; (b) large contributions by firms supporting/opposing a candidate; and (c) large contributions by corporations (or the officers of a corporation) supporting/opposing a candidate.

The various scenarios discussed here do not exhaust the possible campaign activities that could warrant recusal. However, they do discuss a wide swath of potentially disqualifying behavior. As this analysis progresses, several general themes will emerge. First, judges move closer to the Due Process line when their campaign statements become more precise. When judges speak in broad terms—either about legal issues or types of litigants—they rarely run the risk of constitutional recusal. These statements might indicate a degree of bias, but rarely will they demonstrate that a judicial candidate could *never* be impartial in those kinds of cases.[264] Conversely, as campaign

[262] *See* Brooks v. State, 969 So.2d 238, 238–39 (Fla. 2007).

[263] *See* United States v. Bagley, 473 U.S. 667, 679 (1985) (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)).

[264] Jury selection in capital cases provides a helpful analogy. Venire members who *could never* impose the death penalty regardless of the law can be properly struck for cause. By contrast, those who only express a general opposition to the death penalty are eligible to serve. *See* Witherspoon v. Illinois, 391 U.S. 510, 519–20 (1968).

speech becomes more targeted, it raises the specter of disqualification. Statements about litigants, attorneys, or specific types of judicial actions exert greater psychological pressure on judges because wriggling out of these comments is more difficult. Precise comments will often create a strong constitutional case against the judge.

Second, the electoral context of a statement or donation can be critical to determining whether it requires recusal. The same size donation will have different biasing potential depending on the post in question. A $500 contribution will not trigger constitutional recusal for state supreme court judges, but it might for a traffic court commissioner. Similarly, statements made during the previous campaign will pose a greater threat to impartiality in the period immediately preceding the *next* campaign. Midway through a judge's term, she might not worry about seeming flaky. By contrast, a month before a tight election, she might be fixated on living up to her old comments. The standard takes seriously the Supreme Court's instruction to conduct a "realistic appraisal of psychological tendencies and human weakness."[265] For most humans, the salience of a past statement will be context-dependent.

Finally, the strength of a recusal claim can depend on the target of the judge's alleged bias. If the subject of a judge's ire is a defense-side civil litigation firm, she may have less incentive to act on her bias. After all, ruling against an individual represented by that firm will often have no direct impact on the firm's finances. By contrast, when the judge is potentially biased against a party—particularly an individual—her ability to negatively impact that party increases. With this larger power comes a greater temptation to use it.

As this review will reveal, the "could" standard for Due Process recusal allows judges to sit in a wide variety of cases in which a reasonable person would suspect bias. I will return to this concern in Part VI—for now, I simply consider the work the Constitution *can* do.

1. Candidate Behavior

This subpart examines common recusal questions that arise from a judge's campaign conduct. Specifically, I focus on the various types of comments judicial candidates might make, and whether such comments would mandate disqualification. I start with general statements about positions or types of litigants, before moving to particularized comments about cases, parties, and attorneys.

As these examples will illustrate, greater specificity moves a judge closer to crossing the Due Process line. General statements create less psychological compulsion than more precise comments. A judge who says she favors "tough sentencing laws" has room to hand out a light sentence without contradicting herself. She could say, for example, that she is merely adhering to precedent, or that her personal views cannot guide her rulings. By contrast,

[265] Withrow v. Larkin, 421 U.S. 35, 47 (1975).

consider a judge who declares "I will always impose the maximum penalty available under the law." If that judge later handles criminal sentencing, she will find it extremely challenging to levy anything other than the harshest available punishment. In light of the constitutional standard I articulated above, this additional cognitive pressure will often point towards recusal.

a. General Statements of Position or Bias

The most appropriate place to begin the Due Process analysis is with the garden-variety comments that provide the substance of judicial campaigns. An example of this type of statement comes from the 1997 Nevada Supreme Court case *Nevius*.[266] There, a death row inmate sought to disqualify Justice Cliff Young for his campaign comments about capital punishment.[267] Justice Young had touted his "record of fighting crime" during the campaign.[268] More specifically, he declared that he favored the death penalty in appropriate cases and noted that he had voted to uphold capital sentences 76 times.[269]

Justice Young's rhetoric may not have been ideal from a Due Process perspective. Indeed, one member of the Nevada Supreme Court argued that it warranted disqualification.[270] Under the "could" standard for Due Process recusal, however, it clearly did not mandate disqualification. Justice Young's comments allowed him space to reverse a capital sentence without contradicting himself. Favoring capital punishment in "appropriate cases" is hardly the same as supporting the punishment in every first-degree murder case. It seems that the average person in Justice Young's position would at least be capable of setting aside his campaign comments and hearing death penalty cases without bias.

It is fair to wonder whether the average person *would* do so—some people undoubtedly would not be able to put these types of prior statements outside their mind when determining a capital appeal. However, the Supreme Court has made clear that the bar for recusal is high, and judges should receive a presumption of impartiality.[271] What matters, then, is not the modal outcome, but rather the range of behaviors the average person would be capable of in a particular set of circumstances. In a case like *Nevius v. Warden*, it seems hard to deny that the range of conceivable behaviors includes judicial impartiality.

[266] Nevius v. Warden, 944 P.2d 858 (Nev. 1997).
[267] *Id.* at 859.
[268] *Id.* at 860 (Springer, J., dissenting).
[269] *Id.* at 859 (per curiam).
[270] *Id.* at 860–61 (Springer, J., dissenting).
[271] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889–90 (2009); Withrow v. Larkin, 421 U.S. 35, 47 (1975).

b. Statements Effectively Promising an Outcome for Particular Types of Defendants

As judges move from broad discussions of policy towards more particularistic statements, they step closer to the Due Process line. Whether they cross it is often a difficult question, as was the case with Justice Michael Gableman during his 2008 Wisconsin election. As mentioned previously, Justice Gableman was a circuit court judge at the time he challenged incumbent state supreme court Justice Louis Butler for a spot on the high court.[272] On March 18, 2008, candidate-Gableman released the following advertisement:

> "Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true! Judge, District Attorney, Michael Gableman has committed his life to locking up criminals to keep families safe— putting child molesters behind bars for over 100 years. Louis Butler worked to put criminals on the street. Like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?"[273]

While nothing in the advertisement specifically states that Justice Gableman would vote against releasing child molesters, no reasonable person could interpret it otherwise. Indeed, when defending the Justice during an official inquiry into the propriety of the advertisement, Justice Gableman's lawyer argued that the ad put "the focus . . . on Butler's willingness to find loopholes for even people that are despicable as this person is."[274] The implication is that certain defendants are so evil as to forfeit Due Process.

Candidate-Gableman's other campaign activities reinforced this message. One of his fundraising letters accused Justice Butler of being the "deciding vote" to release a "predator" into Milwaukee County.[275] His campaign website touted lengthy sentences he had handed out and highlighted his law enforcement endorsements.[276] And he pointedly declared that he would "not look for loopholes to put criminals back on our streets."[277] In the aftermath of the race, former Wisconsin Supreme Court Justice Janine Geske opined

[272] *In Re* Judicial Disciplinary Proceedings against the Honorable Michael J. Gableman, No.2008AP2458-J, 2010 WL 182385, at *3 (Wis. 2010).
[273] *Id.* at *5.
[274] State v. Allen, 778 N.W.2d 863, 886 n.83 (Wis. 2010) (opinion of Abrahamson, C.J.)
[275] Petitioner's Motion for Recusal of Justice Michael Gableman at 7, State v. Allen, 778 N.W.2d 863 (Wis. 2010) (No. 2007AP795).
[276] *Id.* at 4.
[277] *Id.* at 6.

that Justice Gableman had taken tough-on-crime campaigning to a whole new level.[278]

In light of these statements, *could* an average person in Justice Gableman's position treat criminal defendants impartially? His situation presents a borderline call. On one hand, his comments telegraph an intent to reject claims from defendants who commit particularly heinous crimes. His reference to procedural rights as "loopholes" reveals as much, since criminal appeals are often premised on violations of those rights. It is difficult to see how Justice Gableman could ever vote to reverse a conviction for child molestation or other sexual offenses without appearing to break his word. On the other hand, Justice Gableman's advertising and campaign statements highlighted particularly serious cases. When it comes to non-violent crimes (e.g., theft) he might feel unbound by his tacit promises.

Ultimately, the strongest argument for Justice Gableman's recusal would have come in a case involving a violent offense against a particularly vulnerable child. Such a case would bring the greatest psychological pressure to bear on the Justice, since he would likely feel a heightened sense of obligation to his voters. That pressure would be particularly acute at the beginning and end of the Justice's term (should he choose to run for reelection). At the outset of his tenure, his campaign promises are fresh in his mind and the minds of his constituents. Deviation from those comments would likely spawn press coverage. Similarly, during a reelection campaign, the Justice might fear that rulings favoring criminal defendants would cost him votes—constituents might not trust him in light of the previous broken promise. Social science research suggests that judges already feel pressure to behave punitively near the end of their term.[279] The Justice's previous comments might amplify that tendency.

When combined with either temporal proximity or an ongoing election, Justice Gableman's comments could plausibly trigger recusal in a child molestation case. The average person in his position would likely find it impossible to completely set these comments aside and rule without bias. However, at a sufficient point of removal from both the comments and the next election, the case for constitutional recusal becomes weaker. Four years into a ten-year term, the average person in the Justice's position might feel less tied to their previous comments and a safe distance from their coming campaign. It seems conceivable that they *could* remain completely unaffected by their earlier statements, which is all the standard I've offered would require. Finally, in a case involving a less culpable criminal defendant—say, a shoplifter—the argument for recusal would be at its nadir. Such a defendant

[278] Patrick Marley, *Defense Attorney Seeks Ouster of Gableman From Criminal Case*, MILWAUKEE J. SENTINEL (May 17, 2009), https://archive.jsonline.com/news/statepolitics/45268007.html/ [https://perma.cc/6J43-HEHL].

[279] *See, e.g.*, Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STATS. 741, 742 (2013); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office*, 48 AM. J. POL. SCI. 247, 248 (2004).

would be easily distinguishable from the category of offender Justice Gableman attacked, and the average person in the Justice's position would likely feel unbound by the campaign comments. While state ethics laws might counsel recusal, the Constitution would not.

c. Statements Effectively Promising an Outcome in a Particular Case Type

Though cannons of judicial conduct generally prohibit judicial candidates from promising specific outcomes,[280] such promises still get made. For example, in a 1996 County Court election in Indiana, William Haan pledged to voters that he would "stop suspending sentences" and "stop putting criminals on probation."[281] The Indiana Supreme Court eventually reprimanded Haan for these comments, but took no other action against him.[282] Haan lost his election; four years later, however, a sitting Indiana trial court judge named Fredrick Spencer prevailed on the back of similar comments in a television advertisement.[283] The Indiana Supreme Court summarized the content of the ad as follows:

> "The advertisement included narration stating, "When Judge Spencer ran for judge of the Circuit Court, he promised to send more child molesters to jail . . . burglars to jail . . . drug dealers to jail . . . ." The advertisement depicted a cell door slamming shut with each statement. The narrator stated in conclusion, "He's kept his promise. Let's keep Judge Spencer." The respondent appeared in his judicial robe at the beginning and at the end of the advertisement."[284]

Like Haan, Judge Spencer received only a reprimand for his violation of the state code of judicial conduct.[285] He ultimately remained on the bench until 2009.[286]

Both Haan and Judge Spencer promised negative outcomes for criminal defendants in certain types of cases. Haan's comments—that he would not suspend sentences or offer probation—are more sweeping than Judge Spencer's. Nevertheless, both candidates effectively committed themselves to particular outcomes. Pledging to send "more" child molesters, burglars, and drug dealers to jail implies that the judge will ignore case-specific nuances to achieve a policy goal.

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[280] *See* Model Code of Judicial Conduct R. 4.1(A)(12) (Am. Bar Ass'n 2007).
[281] Swisher, *supra* note 20, at 329; *see also In re* Haan, 676 N.E.2d 740, 741 (Ind. 1997).
[282] *See id.*
[283] Matthew D. Besser, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After* Republican Party v. White, 64 Ohio St. L.J. 1197, 1211 (2003)
[284] *In re* Spencer, 759 N.E.2d 1064, 1065 (Ind. 2001).
[285] *Id.* at 1065–66.
[286] Dave Stafford, *Jack Brinkman to Fill in As Judge Spencer Quits*, The Herald Bulletin (Sept. 24, 2009), https://www.heraldbulletin.com/news/local_news/jack-brinkman-to-fill-in-as-judge-spencer-quits/article_9d8bc9ba-aac7-55d7-94ce-bd13944c3c0f.html [https://perma.cc/RX5Q-BLZG].

Unlike general claims about being "tough on crime," promises of a specific outcome raise significant Due Process questions. It is difficult to imagine that an average person in William Haan's position could have maintained neutrality the first time a convicted criminal defendant sought probation before him. Haan staked his campaign on a pledge to eliminate probation. Could any person realistically ignore the physiological pressure to maintain that position in their early tenure? Perhaps, but they would have to possess an extraordinarily cynical attitude towards campaign rhetoric and promise-keeping. The "could" standard likely would have required Haan's recusal from sentencing if probation or a suspended sentence was on the table.

Judge Spencer's comments present a closer question, because it seems possible that he could set them aside in the early part of his tenure. Indiana County Court judges serve six-year terms.[287] Accordingly, Judge Spencer could have ruled impartially for a few years while still leaving himself time to juice his statistics later in his term. Alternatively, Judge Spencer could have faced such a large volume of guilty defendants early in his term that he could afford to remain neutral in later years without risking his record.

Suppose, however, that Judge Spencer heard no cases involving child molesters in the first five years of his term. Were he assigned such a case in year six—knowing that it offered perhaps his only opportunity to send a child molester to prison—could he put this promise out of his mind and offer impartial justice? What if he faced an opponent who accused him of breaking his word? If Judge Spencer knew that ruling for the defendant in an alleged child molestation case would appear to violate his promise, it would bring to bear significant cognitive pressure. Faced with this pressure, it seems unlikely that the average person could put their campaign promise out of their mind. The defendant would have a strong claim to constitutional recusal.

d. Statements Concerning Specific Parties

Campaign comments about parties before the court range from indirect and irrelevant to direct and pertinent. The Judge McRae saga recounted at the outset of this article is a prime example of the latter.[288] In the course of his campaign, McRae announced specifically what the outcome would be in an extremely serious case before his court.[289] He effectively told the public that defendant George Martin was worthy of death, and that he would impose such a sentence in the case before him.[290] This statement may not strictly have been a "campaign promise"—it concerned what Judge McRae

[287] *How Judges are Selected in Indiana*, IND. COURT TIMES (last visited May 1, 2022), https://www.in.gov/courts/selection/#:~:text=the%20judges%20in%20your%20local,state%20legislator%20or%20a%20mayor [https://perma.cc/7ZKX-KQRB].

[288] *See* notes 1–14 and accompanying text.

[289] *See* Silverstein, *supra* note 1.

[290] *Id.*

planned to do before the election, not how he would act if he remained on the bench. However, Martin's case returned to Judge McRae's court in 2005, meaning that the judge had to reckon with his earlier pledge to the electorate.

In 2004, the Alabama Supreme Court upheld George Martin's conviction on direct appeal, but reversed his capital sentence.[291] The state high court held that Judge McRae's initial sentencing decision failed to treat the jury's recommendation of life without parole as a mitigating factor.[292] It thus remanded for a new sentencing hearing, forcing Judge McRae to confront the subject of his campaign advertisement.[293]

Of the scenarios thus far, this one seems to be among the most straightforward. Judge McRae made Martin's death sentence part of his pitch to his constituents—they should reelect him precisely because he was willing to ensure that people like Martin were executed. After staking his claim to his judgeship on Martin's death sentence, it is hard to imagine the average person in Judge McRae's position maintaining neutrality. Resentencing Martin to life without parole would be either (a) admitting that a key plank in his reelection platform was based on his own misreading of the law or (b) tacitly acknowledging that Martin's death sentence was politically motivated. To Judge McRae's constituents, it might also appear that he was offering leniency to someone he had determined was an evil, wicked criminal. By reissuing the death sentence, Judge McRae could avoid these embarrassing optics and save face. For the average person, the personal benefits associated with handing down a capital sentence would inevitably color the decision, requiring recusal under the "could" standard.

e. Statements Concerning Specific Attorneys

The potential for bias is more attenuated when judicial campaign statements concern *attorneys* instead of *parties*. After all, many attorneys—including criminal lawyers and the defense side in a civil case—get paid regardless of outcome. Ruling against these lawyers may limit their ability to attract new clients, but the immediate impact on their pocketbook is minimal. Consequently, a judge with a vendetta against a particular lawyer should receive less expected utility from ruling against that person. Since the payoff from such a ruling is lower, other factors—such as the relative merits of the parties' legal claims—can more easily prevail.

Notwithstanding this observation, judges will still sometimes make comments about attorneys on the campaign trail that raise serious recusal questions. Consider again the Louisiana judge discussed in Part IV.A of this article. That judge, Marilyn Castle, had sought a seat on the state supreme

[291] *See Ex parte* Martin, 931 So.2d 759, 771 (Ala. 2004).
[292] *Id.* at 771.
[293] *Id.*; *see also Former State Trooper Again Receives Death Sentence*, GADSDEN TIMES (June 18, 2005), https://www.gadsdentimes.com/story/news/2005/06/19/former-state-trooper-again-receives-death-sentence/32295234007/ [https://perma.cc/85P8-RCLT].

court in a race against eventual victor Jimmy Genovese.[294] During the campaign, Judge Castle ran the following advertisement in a Lafayette newspaper:

> "SHOULD PERSONAL INJURY LAWYERS PICK OUR NEXT SUPREME COURT JUSTICE Or should you? Personal Injury Lawyers have contributed over $1,000,000 to Jimmy Genovese's campaign. Then, when ethics laws prevented them from giving more, 18 of the wealthiest of them poured another $945,000 into a PAC (*Restore Our Coast*) created to promote Genovese's campaign."[295]

The advertisement specifically listed the plaintiffs' firm Broussard & David as one of the firms that unethically supported Judge Castle's opponent.[296] It also termed the PAC donations an "unethical attempt" to pick the next state high court justice.

When the campaign concluded, Judge Castle remained on the trial court and was eventually assigned a Broussard & David case.[297] The firm's attorneys sought Judge Castle's recusal; she initially denied the motion, but then referred it to another judge on the trial court.[298] That judge also denied the motion, and the firm took the case to the Court of Appeals.[299]

Standing alone, it seems unlikely that this advertisement would require Judge Castle's recusal in a case involving Broussard & David. The judge suggested that Broussard & David were among numerous attorneys who donated to a PAC supporting her opponent in order to obtain more favorable personal injury law.[300] While such a statement certainly evinces dislike for the firm, it is hardly comparable to Judge McRae calling for a litigant's execution.

However, additional facts make the case far closer. First, the underlying lawsuit was a personal injury matter that had yet to settle.[301] Judge Castle could easily have inferred that Broussard & David were operating on a contingent fee basis and that her rulings could determine whether the firm profited. Second, as the appellate court observed in its review of this case, donating to a PAC is neither illegal nor straightforwardly unethical by itself.[302] Some Americans undoubtedly oppose lavish campaign spending and wish PACs would be outlawed, but that does not necessarily imply that do-

[294] Daurbigney v. Liberty Pers. Ins. Co., 272 So.3d 69, 71 (La. Ct. App. 2019).
[295] *Id.*
[296] *Id.* at 71–72.
[297] *Id.* at 72.
[298] *Id.* at 74.
[299] *Id.*
[300] *Id.* at 71.
[301] Emma Cueto, *Political Ad Grounds For Judge's Recusal, Court Says*, LAW360 (May 10, 2019), https://www.law360.com/articles/1158666/political-ad-grounds-for-judge-s-recusal-court-says [https://perma.cc/U7D7-CJ8F].
[302] *Daurbigney*, 272 So.3d at 76.

nating to such organizations is immoral.[303] Third, Broussard & David presented evidence that they did not directly donate to the PAC in question—instead, a company they managed provided the cash.[304] Judge Castle had to go to "extra lengths to research and highlight" the firm's interest in that company.[305] Fourth, the facts underlying Judge Castle's advertisement create their own potential for bias. Broussard & David were indeed channeling money to Judge Castle's opponent, who defeated Judge Castle by less than a two-point margin in the race for state supreme court.[306] Judge Castle may well have held firms like Broussard & David responsible for denying her a remarkable career opportunity.

With these additional considerations in mind, the case for Judge Castle's recusal becomes much stronger. It is not clear, though, that the average person would be incapable of setting aside these potential sources of bias and ruling impartially. Ultimately, the outcome probably turns on the amount of money the firm funneled to Judge Castle's opponent. If Broussard & David gave a small donation, Judge Castle's advertisement could be dismissed as a campaign ploy by a candidate trying to take advantage of conservative aversion to personal injury attorneys.[307] However, if Judge Castle's advertisement came in response to a significant, potentially outcome-determinative expenditure, it would cast the statement in a different light. The combination of substantial financial support of Judge Castle's opponent, the clear negative statement about Broussard & David, the contingent fee basis of the firm's compensation, and the closeness of the election would probably be too much for the average person to conceivably ignore. The "could" standard would yield recusal.

2. Supporter or Opponent Behavior

To this point, I have focused primarily on how a judge's own campaign activities might warrant disqualification. Doing so only addresses half of the story, though. Just as a judge can make statements that might color her opinion of a litigant, parties can take actions that have the same effect. As the Supreme Court's *Caperton* decision highlighted, financial support for (or opposition to) a judge's campaign often brings the recusal question squarely to the fore. While a litigant's statements about a judge could theoretically produce disqualification as well, campaign contributions and expenditures ap-

[303] Indeed, even politicians who favor strict campaign finance laws often have PACs supporting their campaigns. *See, e.g.*, Nicholas Confessore, *Bernie Sanders Tops His Rivals in Use of Outside Money*, N.Y. TIMES (Jan. 28, 2016), https://www.nytimes.com/2016/01/29/us/politics/bernie-sanders-is-democrats-top-beneficiary-of-outside-spending-like-it-or-not.html [https://perma.cc/C4HY-B4HV].

[304] *Daurbigney*, 272 So.3d at 72 n.3.

[305] *Id.*

[306] *Newest Louisiana Supreme Court Member takes Oath of Office*, ACADIANA ADVOCATE (Jan. 3, 2017), https://www.theadvocate.com/acadiana/news/courts/article_02c5aaca-d1fe-11e6-acfc-0b55d1e81245.html [https://perma.cc/5DWG-Y4RS].

[307] *See generally* Robert A. Kagan, *How Much Do Conservative Tort Tales Matter?*, 31 L. & SOC. INQUIRY 711 (2006) (describing conservative efforts roll back American tort law).

pear to be significantly more common grounds for judicial recusal.[308] It is those contributions and expenditures that are my focus here.

a. Large Contributions by Individual Supporters/Opponents of the Candidate

An individual litigant's financial support for a judicial campaign can undoubtedly trigger that judge's recusal. *Caperton* demonstrated as much.[309] However, an individual's financial contribution to a judicial campaign can range from a $5 donation to a multiple-million-dollar advertising blitz. The Supreme Court has told us that the latter can warrant recusal;[310] meanwhile, the former undoubtedly does *not* demand recusal, lest the entire system of judicial elections in 39 states collapse. But what about large expenditures that do not quite rise to the level of Don Blankenship's? When should a judge avoid hearing that litigant's case?

The standard I've proposed—*could* an average person decide the case impartially given the circumstances—guides the analysis here. A judge making the recusal decision would have to consider both circumstances that would heighten bias and those that would diminish it. The size of the litigant's contribution is undoubtedly relevant, but so is the typical level of spending in an election for that judge's seat. A $10,000 expenditure pales in comparison to Blankenship's $3 million investment in Justice Benjamin's race. However, if the judgeship in question is a local probate position, $10,000 may well exceed all other expenditures combined. In this context, the figure would have undisputed biasing potential.

Other possible considerations include the donor's typical pattern of litigation and the stakes of the case. If the donor is in court every Thursday—say, a landlord with thousands of tenets—a judge could feel less pressure to favor the landlord. After all, she will probably have numerous future opportunities to rule in that individual's favor. Similarly, if the matter in question is minor, the judge may feel less responsibility to support her political patron. By contrast, if the litigant's entire business—or a large chunk of that business—is wrapped up in a single court case, the psychological pressure on the judge may well increase.[311] Other important personal matters (e.g., child custody disputes) could similarly strain the judge's neutrality.

This discussion highlights a weakness in the Nevada Supreme Court's analysis in the divorce case *Ivey*. One of the parties, Phillip Ivey, and his attorney had collectively donated just under $10,000 to the presiding judge's

[308] *See, e.g.*, Section II.C. & Section III.B., *supra*.
[309] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890 (2009).
[310] *Id.*
[311] *See* Thomas M. Susman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges' Decisions*, 26 J.L. & POL. 359, 366–67 (2011) (discussing evidence of the strong social impulse to return favors); *cf.* Caperton, 556 U.S. at 886 (highlighting that "Justice Benjamin . . . review[ed] a judgment that cost his biggest donor's company $50 million").

reelection campaign.[312] The Nevada Supreme Court dismissed these donations as "not reach[ing] the extraordinary level of the sum at issue in *Caperton*."[313] The court also observed that the timing of the donations was "less suspicious" because they came before the judge could reasonably have known he would hear this case.[314] However, the absolute size of the donations and the post-campaign status of the litigation in question should not end the inquiry.

Instead, the court should have considered how the totality of the circumstances would have affected the average person in the judge's position. $5,000 is considerably less than the $3,000,000 at issue in *Caperton*, and Ivey may well have made the donation without any intention of winning the judge's favor. That does not settle the issue, however. $5,000 likely means more to a state district court candidate than it would to a high court hopeful. Likewise, Ivey may not have intended to influence the judge, but that judge was still making decisions that affected a $180,000 monthly alimony payment.[315] The stakes of the litigation could have weighed on the judge, with a misstep potentially costing him a generous benefactor.

To its credit, the Nevada Supreme Court recognized that Ivey's contribution only represented about 7% of the judge's total fundraising.[316] This fact is significant. The average person in the judge's position could conceivably view Ivey's contribution as inessential to his reelection and set it aside when making his ruling. The Court's decision thus seems correct. However, by handcuffing itself to the facts of *Caperton*, the court made a risky move. *Caperton's* "extreme facts" were significant because it is impossible to conceive of the average person as remaining unbiased under those circumstances. Nevertheless, a different confluence of factors could potentially produce the same result. If the court looks only for resemblance to *Caperton*, it might miss equally unconstitutional behavior.

b. Large Contributions by Firms Supporting/Opposing a Candidate

Law firms arguably have a greater stake in who sits on the bench than any other donor to judicial candidates. Individuals and corporations may have a handful of matters before a court. A law firm might have dozens or hundreds. For plaintiff-side firms in particular, a friendly judge can determine whether the lawyers take home millions or nothing at all. Unsurprisingly, firms often spend more on judicial elections than all other contributors combined.[317]

A 2008 election for the Alabama Supreme Court illustrated how far firms will go. In that contest, the plaintiffs' firm Beasley Allen—which often had high-stakes cases before the Alabama Supreme Court—routed about

[312] Ivey v. District Court, 299 P.3d 354 (Nev. 2013).
[313] *Id.* at 358.
[314] *Id.*
[315] *Id.* at 356.
[316] *Id.* at 358.
[317] *See, e.g.*, SAMPLE ET. AL, *supra* note 113, at 15–16.

$606,000 to the campaign of Democratic candidate Deborah Bell Paseur.[318] Six of the firm's senior partners wrote a combined 52 checks to the campaign, averaging over $11,600 each.[319] The donations were funneled through thirty PACs, which transferred funds between themselves.[320] This procedure effectively disguised the contributions to Paseur's campaign. Paseur garnered 49.6% of Supreme Court votes, very nearly defeating Republican Greg Shaw despite Alabama's conservative orientation.[321]

Had Paseur won, she would have undoubtedly faced recusal questions. Matters involving Beasley Allen could certainly have triggered a disqualification inquiry, but so too might ordinary tort cases that could benefit a plaintiffs-side firm. Under the standard I have proposed, however, only in the former scenario would recusal be a realistic possibility.

Judicial candidates receive contributions from myriad donors spanning a variety of professions. When it comes to state supreme court justices, rare will be the case that does not indirectly affect at least *one* donor's interests. States with judicial elections have tacitly decided to ignore these potential conflicts, because the system could not otherwise operate.[322] These states assume that judges are capable of rising above indirect impacts on their donors and ruling fairly. This assumption, reasonable or not, must be credited from a constitutional perspective. Denying it would be tantamount to arguing that judicial elections are unconstitutional.

Matters in which the donor firm directly participates present a much closer question. Whether a donor firm wins or loses one of its own cases can have immediate financial consequences for that firm. As mentioned above, the monetary ramifications are particularly apparent for plaintiff-side firms. An office like Beasley Allen—which could afford to drop $606,000 on a single state supreme court race—will almost certainly handle multi-million-dollar litigation. A judge's ruling could determine whether that firm walks away with a hefty contingent fee or is left holding the bag for litigation expenses.

It goes without saying that the average person in Paseur's position would struggle to maintain neutrality in cases involving Beasley Allen, particularly in high-stakes matters. A judge might be comfortable ruling against an electoral patron in a small-dollar dispute—indeed, doing so might provide political cover for later decisions. But as the money at stake approaches and exceeds the total value of the firm's financial support, the pressure on the judge will increase. The average person will feel a psychological compulsion

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[318] *See id.* at 46–47.

[319] *Id.* at 46.

[320] *Id.*

[321] STATE OF ALA., CANVAS OF RESULTS 3, 6 (Nov. 25, 2008), https://www.sos.alabama.gov/sites/default/files/voter-pdfs/2008/statecert-2008-general-election-11-25-2008-without-write-in-appendix.pdf?_ga=2.192202922.1642492691.1655663863-1735148816.1655663863 [https://perma.cc/6E64-SEXE].

[322] *Cf.* Republican Party v. White, 536 U.S. 765 (2002) (O'Connor, J., concurring) ("If [Minnesota] has a problem with judicial impartiality, it is largely one that [Minnesota] brought upon itself by continuing the practice of popularly electing judges.").

to repay their debt of gratitude.[323] Some judges will confront an additional source of bias: a desire to secure the firm's largesse in future elections. When these two circumstances coincide—say, if Paseur heard a Beasley Allen appeal during her reelection bid—the average person could hardly remain unaffected.

Does the outcome differ if the law firm in question *opposed*, rather than *supported*, a judicial candidate? The previously mentioned *Bocian* case raised this question. There, one of the attorneys at the firm representing Bocian had spent $224,000 to defeat the trial court judge's retention.[324] Ruling against Bocian's recusal motion, the Colorado Court of Appeals distinguished efforts to elect a judge from attempts to unseat her.[325] The court worried that requiring the trial court judge's recusal would lead to efforts to forum shop.[326] It was concerned that firms would donate simply to create grounds to disqualify unfavorable judges.[327]

This reasoning has some appeal, but it is ultimately unpersuasive in light of the standard I have proposed. Only substantial contributions (generally tens of thousands of dollars) would raise serious recusal questions. It seems unlikely that firms will commonly make these kinds of expenditures simply to create recusal grounds.

Moreover, even if we assume some firms will engage in this type of strategic behavior, it does not follow that their clients should be punished. If the firm made the contribution in advance of taking on a client, the client can hardly be held responsible. Most clients will have little sense of what campaigns their attorneys have participated in. Indeed, they probably know nothing about their firm's campaign spending until the motion to recuse is filed. Ultimately, it is the *client* whose Due Process rights are threatened, and would be odd to set aside those rights because of behavior the client was neither aware of nor engaged in.

With these considerations in mind, it seems like spending in opposition to a judge should be treated similarly to contributions in support of that judge. The general inquiry thus remains unchanged: could the average person ignore a firm's $224,000 campaign to defeat her and dispense impartial justice? I generally think not. Though the dollar range for firm-based recusal

[323] Dmitry Bam, *Recusal Failure*, 18 N.Y.U. J. LEG. & PUB. POL'Y 631, 639 (2015) ("[I]t is no stretch to believe that a judge hearing a case involving a contributor would feel a debt of gratitude toward that individual—indeed, to feel otherwise would defy bedrock social norms."); *see also* Citizens United v. FEC, 558 U.S. 310, 458 (2010) (Stevens, J., concurring in part and dissenting in part); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 882, 884 (2009) (accepting Caperton's claim that "[t]hough not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected"); Republican Party of Minnesota v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) ("[R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups.").

[324] *See* Bocian v. Owners Ins. Co., 482 P.3d 502, 511 (2020).

[325] *Id.* at 512–13.

[326] *Id.*

[327] *Id.*

will typically be higher than the figure for client-based recusal, surely over $200,000 is too much.[328]

c. Large Contributions by Corporations Supporting/Opposing a Candidate

While firms and individuals commonly participate in judicial campaigns, they are not the only players in the field. Corporations (or their officers) often have strong preferences over who hears their cases and are willing to spend to put favorable judges on the bench. Lloyd Karmeier's campaign for Illinois Supreme Court provides one example of this behavior.

In May 2003, the Illinois Supreme Court heard arguments in *Avery v. State Farm Mutual Automobile Insurance Company*.[329] The case concerned a massive class action award against State Farm.[330] Plaintiffs from across the U.S. were alleging breach of contract and statutory consumer fraud—they claimed that State Farm improperly used "aftermarket" parts to repair cars damaged in accidents.[331] The jury returned an approximately $1.2 billion verdict for the plaintiffs, which the intermediate appellate court reduced slightly to $1.06 billion.[332]

Though the case had been submitted to the Illinois high court in 2003, it remained pending throughout the duration of the 2004 state supreme court election.[333] Lloyd Karmeier was a sitting circuit court judge and the Republican nominee for the open seat.[334] According to later court filings, Justice Karmeier had received $350,000 from State Farm and its employees over the course of the campaign (approximately 6% of his fundraising total).[335] He also accepted over $1,000,000 from groups that counted State Farm as a member (some evidence suggests that the company ultimately influenced $4 million of Justice Karmeier's fundraising).[336]

Justice Karmeier ultimately won the 2004 election.[337] He took his seat in December 2004 and the plaintiffs almost immediately sought his disquali-

[328] Few judges in the country make that kind of money—how can they realistically ignore firm spending their annual salary equivalent to beat them? NATIONAL CENTER FOR STATE COURTS, SALARY SURVEY SHOWS MOST JUDGES RECEIVED MODEST PAY HIKES (Aug. 4, 2021), https://www.ncsc.org/newsroom/at-the-center/2021/aug-4 [https://perma.cc/QJ5G-D8M8].

[329] Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (2005).

[330] *Id. at 810.*

[331] *Id.* at 810–11.

[332] Craig A. Cohen & Mark Rosenberg, Avery v. State Farm *Reversed By Illinois Supreme Court*, CORPORATE COUNSEL BUS. J. (Sept. 1, 2005), https://ccbjournal.com/articles/avery-v-state-farm-reversed-illinois-supreme-court [https://perma.cc/DX8T-SYS8].

[333] Billy Corriher & Brent DeBeaumont, *Dodging a Billion-Dollar Verdict*, CTR. FOR AM. PROGRESS (Aug. 14, 2013), https://www.americanprogress.org/article/dodging-a-billion-dollar-verdict/ [https://perma.cc/9C9H-MQ2J].

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] Ann Maher, *Spending Reaches $3 million in Battle For Illinois Supreme Court; 'Here We Go Again,' Critic Says*, MADISON – ST. CLAIR RECORD (Oct. 31, 2014), https://madis-

fication in *Avery*.[338] The Illinois Supreme Court ruled that it was up to Justice Karmeier to recuse himself, which he declined to do.[339] Instead, he voted with the court majority to overturn the class action verdict—his vote proved pivotal on the breach of contract claim.[340] The *Avery* plaintiffs sought certiorari at the Supreme Court on the recusal issue, but their petition was denied.[341]

Determining whether Justice Karmeier should have been constitutionally disqualified in this case requires understanding the position of corporate donors. Such donors occupy a middle ground between individuals and attorneys. Like individuals, they are a party to a proceeding before the court, and the court's ruling has a direct bearing on the corporation's fortunes. As is the case with attorneys, though, the relationship between the ruling and the *people* who made the decision to donate is more attenuated. Losing a large-dollar civil settlement is certainly a blow to corporate executives. However, it is unlikely to cost those executives their jobs, and generally will have only a limited impact on their compensation.

The case for Justice Karmeier's constitutional recusal is consequently weaker than if a single individual had made the donations in question. But it is stronger than it would have been had State Farm's attorneys made the contribution, and enough to require Justice Karmeier's disqualification under the constitutional standard I have proposed. Justice Karmeier's most significant donor spent lavishly to help him prevail in an extremely expensive state supreme court race.[342] He then had an immediate opportunity to overturn a record-setting verdict against his corporate benefactor. Perhaps some person in the world would feel no sense of obligation towards that donor and would have no trepidation about betraying that donor's expectations. However, that person would not be, in any sense, the "average" person. Not only *would* the average person feel trepidation to rule against State Farm, it seems inconceivable that they *could* feel otherwise. They might go to great lengths to deny and repress their bias, but it defies a realistic appraisal of human psychology to argue that they could completely eliminate it. No one enjoys disappointing their friends even under ordinary circumstances. When $1.06 billion is at stake, that basic impulse would become amplified to a painful level.

onrecord.com/stories/510556974-spending-reaches-3-million-in-battle-for-illinois-supreme-court-here-we-go-again-critic-says [https://perma.cc/39XR-QFUB].

[338] Brian Mackey, *Supreme Tort: The Campaign To Fire Justice Lloyd Karmeier*, NPR (Feb. 1, 2015), https://news.stlpublicradio.org/2015-02-01/supreme-tort-the-campaign-to-fire-justice-lloyd-karmeier [https://perma.cc/A3WA-REUP].

[339] *Id.*

[340] *Id.*

[341] Avery v. State Farm Mut. Auto. Ins. Co., 547 U.S. 1003, 1003 (2006) (denying certiorari).

[342] Corriher & DeBeaumont, *supra* note 333.

V. Judicial Elections and Robust Due Process

The constitutional recusal standard deserves the attention it has received, both here and elsewhere. Rightly or wrongly, state court judges often look to the standard when deciding their own recusal under state law.[343] Moreover, the mere possibility of Supreme Court regulation might curb flagrant abuses by certain state high court judges.[344] The Due Process recusal standard serves as a backstop against some of the most unsavory kinds of judicial behavior, and it is worthy of a better articulation than the tautological test the Supreme Court has offered.

It would be a mistake, though, to assume that constitutional recusal can create a Due Process culture in the state courts. As I have discussed, the Constitution does not impose any sort of general prohibition on judges hearing cases involving their donors. Donors appear before the courts far too frequently for such a prohibition to be viable—indeed, one study of the Michigan Supreme Court in the 1990s determined that 86% of cases before the court involved at least one campaign donor.[345] In the vast majority of disputes, the Constitution will have nothing to say about a state supreme court justice hearing a case involving a party who contributed $500 to her campaign.[346] Likewise, judges will frequently hear cases involving issues they commented on during their campaigns. Michael Gableman—the Wisconsin Supreme Court candidate who castigated his opponent for being soft on crime—would probably be able to determine a substantial array of criminal appeals without violating the Constitution.[347] Put otherwise, the Due Process Clause will often allow judges to sit in cases where a degree of bias is *likely*—only when partiality is nearly inevitable will it produce disqualification.

For many, it is disconcerting to allow judges to rule simply because they *could* possibly be impartial. And to their credit, states purport to impose stricter ethical standards on judges (even if, as discussed in Part III.B, *supra*, judges often ignore or misinterpret these statutes).[348] However, even states with relatively aggressive ethics rules still permit non-trivial risks of bias. California disqualifies judges from hearing cases in which a party or lawyer gave a donation of at least $1,500 in a recent or upcoming election.[349] That threshold permits a judge who received a $1,400 contribution from a party to

[343] *See* Section III.B, *supra*.
[344] *See* Section III.A, *supra*.
[345] Lamphier, *supra* note 67, at 1345.
[346] It is worth emphasizing that the Supreme Court could offer a substantially broader interpretation of the Due Process Clause. Many commentators would probably find that outcome normatively desirable. *See, e.g.*, White, *supra* note 201, at 150–52. However, the focus in this article is on reinterpreting the *existing* standard, not proposing the ideal test.
[347] *See* Section V.B.1.b, *supra*.
[348] *See* Section III.B, *supra*.
[349] Cal. Civ. Pro. Code § 170.1 (a)(9)(A) (West 2022).

sit. Most litigants would probably worry about their chances if their opponent made such a donation to the decisionmaker in their case.

States certainly *could* impose ethics rules that would more significantly limit the probability of bias. For example, states with contested elections could adopt the rule Utah uses for its retention elections: no judge can hear a case involving a litigant who gave her over $50.[350] Similarly, they could rely on Justice Kennedy's concurring opinion in *Republican Party v. White*, which declares that states "may adopt recusal standards more rigorous than due process requires."[351] This passage plausibly endorses the recusal of judges who make broad statements of opinion. A candidate who declares a firm belief in a mandatory death penalty could be required to sit out the sentencing phase of capital cases when she ascends to the bench.

Even these rules would not eliminate the risk of bias, however. The First Amendment limits how far states can go in restricting judicial speech,[352] and judicial candidates will likely become creative in conveying their position to the public without triggering disqualification. Moreover, states will have a difficult time combating abstract statements of principle without quickly creating a recusal crisis. Consider a judicial candidate who opines, "I do not believe in rehabilitation for convicted criminals, only retribution." That candidate would be telegraphing a "tough on crime" attitude to the public. Yet a recusal law broad enough to cover this situation would regularly disqualify every judge on the bench. The state would face judicial paralysis.

In addition, it seems unlikely that most states would choose to retain judicial elections were these reforms implemented. Lawyers, corporations, and individuals with business before the courts provide most of the funding for judicial elections. Much of this funding could evaporate if these parties could not appear before the judges they helped put in office. Similarly, it is not clear what benefit the electorate obtains from judicial elections if the candidates cannot act on issues on issues they've discussed. Much of the brief for judicial elections rests on the idea that voters *should* have the opportunity to learn how potential judges feel about issues and select the candidates who align with their views. As one commentator put it:

> "Judges are called upon to resolve unanswered questions about ambiguous spaces in the law. When judges fill those spaces by declaring what the law is, they make public policy. . . . And the only way to ensure that the public supports the policies judges make is to subject judges to periodic elections."[353]

[350] Utah Code of Jud. Admin. Ch. 12, Canon 2, r.2.11(A)(4) (2023).
[351] Republican Party v. White, 536 U.S. 765, 794 (2002) (Kennedy, J. concurring).
[352] *See generally id.*
[353] Charles G. Geyh, Who is to Judge? 84 (2019).

Left implicit in this argument for judicial elections is the assumption that voters know which judges support the policies they like. Requiring recusal when judges offer this information undermines the whole rationale for the practice.

Judicial elections with no funding and no substantial issue debate hardly seem worth the trouble. That is why some states "voluntarily take[ ] on the risks [of] judicial bias" that modern judicial elections entail.[354] The Court's interpretation of the Due Process Clause ultimately allows states to make that choice. But as long as states persist with this policy, some litigants will receive less than a full and fair hearing. Those proceedings can provide a constitutional minimum, but they will not provide truly robust Due Process. Appointive methods of judicial selection are by no means perfect, but they do eliminate electoral expediency as a source of bias.

[354] White, 536 U.S. at 792 (O'Connor, J. concurring).