

CHIEF JUSTICE ROBERTS AND THE “FORTY THIEVES”^{*/}

Keith R. Fisher^{**/} & Konstantina Vagenas^{***/}

“What’s in a name? That which we call a rose/ By any other name would smell as sweet.”¹ Whether or not one agrees with the young Shakespeare about names—and many decidedly do not²—numbers (as

^{*/}Copyright © 2009, 2010 by Keith R. Fisher and Konstantina Vagenas. All Rights Reserved. This article was specially solicited by the University of Akron’s new e-law journal, *Strict Scrutiny*. **N.B.** The views expressed in this article are only those of the authors and do not necessarily reflect the views or policies of the American Bar Association.

^{**/}Official Reporter, ABA Ethics 20/20 Commission, and Liaison from the ABA Business Law Section to the Standing Committee on Judicial Independence. Professor Fisher was the principal author of the briefs *amicus curiae* submitted by the ABA in the *Caperton* case at both the certiorari stage and the merits stage. Recently, he was also appointed the Reporter for the Standing Committee’s Judicial Disqualification Project.

^{***/}Chief Counsel & Manager of Judicial Independence Initiatives, Justice Center, American Bar Association. Both authors wish to acknowledge, with warmth and gratitude, the extraordinarily helpful and insightful comments of Roy Schotland.

¹. WILLIAM SHAKESPEARE, *ROMEO & JULIET THE SECOND ACT*, sc.2, 43-44.

². For example, those steeped in traditional magical and alchemical lore would insist that words have power and that naming things or entities can have enormous significance. See generally DONALD TYSON, *THE POWER OF THE WORD: THE SECRET CODE OF CREATION* (2004); DONALD C. LAYCOCK, *THE COMPLETE ENOCHIAN DICTIONARY: A DICTIONARY OF THE ANGELIC LANGUAGE AS REVEALED TO DR. JOHN DEE AND EDWARD KELLEY* (2001); ISRAEL REGARDIE, *THE GOLDEN DAWN: THE ORIGINAL ACCOUNT OF THE TEACHINGS, RITES & CEREMONIES OF THE HERMETIC ORDER* (6th ed. 1989). Through the centuries, there has been much discussion in Judaeo-Christian theology, starting with the Tetragrammaton, about what the true name of God might be. For some scholarship on the subject, see generally LESTER SUMRALL, *THE NAMES OF GOD* (1993); NATHAN STONE, *NAMES OF GOD* (1944). Likewise there is the ancient belief, derived possibly from preoccupation with what might be the true name of God and the true name of the Devil (cf. Michael Hornyansky, *The Truth of Fables*, in *ONLY CONNECT: READINGS ON CHILDREN’S LITERATURE* 130 (Sheila Egoff et al. eds., 2d ed. 1980) (“There are only two beings in the universe who have secret names, unknown to all but the adept: one of them is God, whose holy Name must not be spoken; the other, over whom mortal man may gain power by pronouncing his mysterious proper name, is the Devil.”), that knowing someone’s name gave power over that person. This is exemplified in fairytale literature (e.g., the Grimms’ Rumpelstiltskin, or the English variant Tom Tit Tot). See

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

numerologists undoubtedly will assure you) are decidedly a different story and have always been thought to have extrinsic significance.

The number forty, for example, has extensive numerical significance, principally (though not exclusively) in biblical texts. A time period in the Bible—whether in days, months, or years and whether in the books of the Old or New Testament—that features the number forty is most often a time of trial, testing, punishment, or probation;³ however, the number forty in scripture also symbolized periods of peace and reward.⁴

Thus one cannot help but remark at the rather prominent instantiation of the number forty in a Supreme Court opinion, even a dissent. This occurred in the Supreme Court's June 8, 2009 decision in *Caperton v. A. T. Massey Coal Co.*,⁵ a case that has attracted

generally JACK ZIPES, *BREAKING THE MAGIC SPELL: RADICAL THEORIES OF FOLK AND FAIRY TALES* (1979); STEVEN OLDERR, *SYMBOLISM: A COMPREHENSIVE DICTIONARY* (1986).

³. There is a plethora of examples. During the Great Flood, in Noah's time, it rained for forty days and forty nights. *Genesis* 7:12. After the deluge ceased, Noah remained on the Ark for another forty days. *Id.* 7:17. Moses, whilst receiving the Ten Commandments, spent forty days and forty nights on Mount Sinai. *Exodus* 34:28. Moses was forty years old and steeped in the learning of Egypt when first he visited his brethren the Children of Israel. *Acts* 7:23. Afterwards, he lived in Midian for another forty years before an angel appeared to him in the wilderness in the flame of a burning bush. *Id.* 7:30. Later still, Moses spent forty days and forty nights with God and fasted during that time. *Exodus* 34:28. The Israelites were made to wander for forty years in the desert and eat manna during that period before reaching the promised land. *Numbers* 14:33; *Deuteronomy* 8:2. Israel scouted out the land of Canaan for forty days. *Numbers* 13:25. A punishment of forty lashes was prescribed for punishing criminals. *Deuteronomy* 25:3; *2 Corinthians* 11:24. Goliath presented himself to Israel and taunted them for forty days. *1 Samuel* 17:16. The prophet Elijah fasted for forty days. *1 Kings* 19:8. When he fled for his life from Queen Jezebel, Elijah travels forty days and forty nights to Horeb. *1 Kings* 19:8. Nineveh's inhabitants were given forty days to repent before the city was punished. *Jonah* 3:4. Egypt was left desolate for forty years because of God's judgments. *Ezekiel* 29:12. Jesus spent forty days in the wilderness. *Mark* 1:12-13. Jesus fasted forty days and forty nights and was then tempted. *Matthew* 4:2.

⁴. For example, King Solomon reigned for forty years. *2 Chronicles* 9:30. So too did Eli, *1 Samuel* 4:18, Saul, *Acts* 13:21, and David, *2 Samuel* 5:4. There were several forty-year periods of peace and prosperity for Israel under Othniel, *Judges* 3:11, Barak, *id.* 5:31, and Gideon, *id.* 8:28. Jesus was seen on Earth forty days after his resurrection. *Acts* 1:3.

⁵. 129 S. Ct. 2252 (2009).

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

considerable publicity and public interest.⁶ The dissenting opinion of Chief Justice Roberts prominently featured forty questions about the scope of, ramifications of, and limitations on the majority's decision.⁷

As discussed below,⁸ it appears that the Chief Justice had to stretch a bit to reach a total of forty questions. As this impressive sum reflects neither a forecast of trial, testing, punishment, or probation, nor anything remotely partaking of peace and reward, we had to look, tongues firmly in cheek, farther afield for numerological significance. What we found came not from scriptural accounts of the ancient Middle East but from a different text centered in the same region: the tales of that courageous, extraordinarily inventive personage, celebrated in both literature and music,⁹ Queen Scheherazade. These adventures are gathered in the collection known throughout the world as *The Thousand and One*

⁶. See, e.g., ABA Now, Post-Caperton Issues Still Unfolding, as States Seek Solutions to "Justice for Sale" (Aug. 1, 2009), <http://www.abanow.org/2009/08/post-caperton>; Amanda Bronstad, *Stage Set for Lawsuits over Judicial Recusal: Big Campaign Cash Can Compromise Litigants' Due Process Rights—But What About the First Amendment?*, NAT'L L.J., June 22, 2009; Joan C. Rogers, *Draft ABA Report Reviews Rules and Processes for Judicial Recusal, Recommends Improvements*, 77 U.S.L.W. 1782 (June 16, 2009); *A Black Mark for Judicial Election*, AUSTIN AMERICAN-STATESMAN, June 13, 2009; *Bias on the Bench*, TOLEDO BLADE, June 12, 2009; Nathan Koppel, *Ruling on "Probable Bias" Spotlights Political Reality*, WALL ST. J., June 10, 2009, at A5; John Schwartz, *Uncertainty in Law Circles Over New Rules for Judges*, N.Y. TIMES, June 10, 2009, at A20; Jess Bravin & Kris Maher, *Justices Set New Standard for Recusals*, WALL ST. J., June 9, 2009, at A3; Adam Liptak, *Justices Issue a Rule of Recusal in Cases of Judges' Big Donors*, N.Y. TIMES, June 9, 2009, at A1; Ben Hallman, *High Court Rules Judges Who Receive "Substantial" Campaign Donations Must Step Aside; Will Chaos Follow?*, AM. LAW. LITIG. DAILY, June 8, 2009; Robert Barnes, *Justices Consider When a Judge Should Bow Out: Case Involves Campaign Contributor with Business Before Recipient's Court*, WASH. POST, Mar. 4, 2009, at A06; Len Boselovic, *Supreme Court Hears W. Va. Recusal Case: Should Standard be Established for Judicial Campaign Contributions?*, PITTSBURGH POST-GAZETTE, Mar. 4, 2009, at A1; Marcia Coyle, *Hot Recusal Case Debated: Justices will Decide What Standard Due Process Requires*, NAT'L L.J., Mar. 2, 2009; Joan Biskupic, *At the Supreme Court, a Case with the Feel of a Best Seller*, U.S.A. TODAY, Feb. 17, 2009 at 1A; Sharon Male, *Can Judges Be Bought?*, PARADE, Mar. 8, 2008; Sandra Day O'Connor, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25.

⁷. 129 S. Ct. at 2269-72 (2009) (Roberts, C.J., with Scalia, Thomas & Alito, JJ., dissenting).

⁸. See *infra* notes i-xxxix accompanying the tabular material at the end of this article.

⁹. E.g., NICOLAI RIMSKY-KORSAKOV, SCHEKEREZADA (1888); MAURICE RAVEL, SCHÉHÉRAZADE (1903).

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

Arabian Nights,¹⁰ the only mainstay in the Western canon that is not of the Western canon.¹¹ Therein we encounter the celebrated story of Ali Baba and the Forty Thieves.

As chronicled by Scheherazade, Ali Baba, an impecunious seller of wood, accidentally discovers the lair of a band of forty thieves, in which their ill-gotten gold and other riches are stored.¹² The thieves, for their part, soon learn that their hideout has been compromised, and after some misadventure (including the murder of Ali Baba's overly greedy brother, Cassim, and the undoing of some of the thieves at the hands of Morgiana, a clever slave girl), identify the newly prosperous Ali Baba as the threat to their wealth and security.¹³ They conceal themselves in large jars of oil and await the signal of their captain, disguised as a merchant and a guest in Ali Baba's house, to emerge and commit the usual murder and mayhem and also recover their loot.¹⁴ Their nefarious plan is ultimately thwarted—again by the clever slave girl, who is the only person of courage and wit in the entire story.¹⁵

Caperton is an enormously significant step in the right direction for judicial independence, judicial disqualification, judicial campaign finance reform, and judicial ethics. Arriving at this milestone required the selfless and nonpartisan labor of many people, including retired Justice Sandra Day O'Connor¹⁶ and countless others for whom the health, and indeed the survival, of an independent judiciary—the bulwark erected by the Founders against self-aggrandizement and abuse

¹⁰. For a complete, three-volume translation issued within the past year in the U.K., see MALCOLM LYONS & URSULA LYONS (TRANS.), *THE THOUSAND AND ONE NIGHTS* (2009).

¹¹. For a recent appreciation, see Jamie James, *Masterpiece: Old Tales that Still Seduce—Western Culture Owes a Debt to the “Arabian Nights”*, WALL ST. J., Aug. 29, 2009, at W12.

¹². ANDREW LANG, *THE BLUE FAIRY BOOK* 149 (2008 reprint ed.) available at <http://www.pitt.edu/~dash/alibaba.html>.

¹³. *Id.*

¹⁴. *Id.*

¹⁵. *Id.* To see how the plan was thwarted, and for the other details of the story, see Andrew Lang's classic version in *THE BLUE FAIRY BOOK*. *Id.*

¹⁶. See, e.g., Sandra Day O'Connor, *Fair and Independent Courts*, DAEDALUS, Fall 2008, at 8; Sandra Day O'Connor, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25.

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

of power by the political branches¹⁷—is of paramount importance to the welfare of our democracy. That health, and that survival, are being challenged by the diminution in public trust and confidence in the judiciary,¹⁸ particularly at the state level. That diminution, in turn, is occasioned in no small part by the excesses of judicial election campaigns in recent years.¹⁹

Our courts are not simply just another policymaking branch of government but perform the indispensable duty of assuring the rule of law. Protecting the decisional independence of the judiciary from undue

¹⁷. See, e.g., THE FEDERALIST NO. 78, at 433-34, 437-39 (Alexander Hamilton) (Clinton Rossiter ed., rev. Charles R. Kesler, 1999), No. 81 (Alexander Hamilton) (Clinton Rossiter ed., rev. Charles R. Kesler, 1999), at 451-52.

¹⁸. Public trust in our court system is of preeminent concern. See generally HOWARD JAMES, CRISIS IN THE COURTS (1967); HERBERT JACOB, JUSTICE IN AMERICA (1972). “[T]he judiciary is, in at least in some measure, dependent on the public’s fundamental acceptance of its legitimacy.” Stephen Breyer, *Serving America’s Best Interests*, DAEDALUS, Fall 2008, at 139. As a recent ABA Report succinctly put it, “public confidence in our judicial system is an end in itself.” AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 10 (2003). See also BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921).

¹⁹. See, e.g., Harold See, *Judicial Elections and Decisional Independence*, 61 LAW & CONTEMP. PROBS. 141 (1998). See also Roy A. Schotland, *Elective Judges’ Campaign Financing*, 2 J.L. & POL. 57, 90 (1985). For polling data, see *infra* note 25.

As this article was being finalized, the Supreme Court handed down its long-anticipated decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). There the Court held that statutory limitations on independent campaign expenditures by corporations and labor unions violated the First Amendment. *Id.* at 913. (The case involved restrictions on the dissemination and showing of a documentary entitled “Hillary: The Movie.”) *Id.* at 887. Consequently, corporations and labor unions will be able to make unlimited expenditures in judicial elections as well. See *id.* at 968 (Stevens, J., dissenting). Although discussion of *Citizens United* is outside the scope of this article, the possibility that a vast influx of additional campaign money might enter the arena of judicial elections – which already in the past decade has been saturated with unprecedented campaign support, virulent attack ads, and concomitant diminution in public respect for state judiciaries – makes tighter controls over disqualification imperative in cases where parties have provided significant financial support. At a minimum, judges will need to have access to more information in order to be able to make appropriate disclosures in such cases, and donors who are parties or are associated or affiliated with parties before the court (including counsel) must be required to make their own disclosures on the record. The Judicial Disqualification Project being conducted by the ABA Standing Committee on Judicial Independence [hereinafter the “JDP”] will endeavor to address these issues.

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

influence of special interests and interest groups is thus of central importance to the concept of due process of law.²⁰ The signal achievement of the *Caperton* majority was the application of due process considerations to the fallout of judicial campaign finance.²¹ Judges and contributors alike are now aware that saying “Open Sesame” to the overflowing coffers of corporate campaign expenditures can have consequences with a constitutional dimension.²²

Like the forty thieves who lay in wait in the oil jars, however, the forty questions in the Chief Justice’s dissent lurk in the shadows, threaten the vitality of the decision by encouraging second-guessing of its rationale, and possibly lay the groundwork for eventual reconsideration or overruling.²³ In saying this, we ascribe no impure motives to the Chief Justice, who, along with the other dissenters, harbors genuine misgivings about the wisdom of this extension of the Court’s due process jurisprudence. The validity of his forty questions and their ability to withstand analysis are fair game, however. If we, like Morgiana of old, can subdue a significant number of these “forty thieves” and diminish the puissance created by their formidable cumulative number alone, then the threat to the continued vitality of the *Caperton* decision can be abated and, with a little luck, all can live happily ever after.

SYNOPSIS OF THE *CAPERTON* CASE

Both the majority and the dissenters in *Caperton* earnestly grappled with questions about the impact of applying the due process clause of the

²⁰. *Supra* n. 18.

²¹. *See* *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2256-57 (2009).

²². *Supra* n. 6.

²³. *See Caperton*, 129 S. Ct. at 2272-73. The overruling of *United States v. Halper*, 490 U.S. 435 (1989) eight years later by *Hudson v. United States*, 522 U.S. 93 (1997), which the Chief Justice discusses at some length, must be especially vivid for him, as early in his career he was appointed by former Chief Justice Rehnquist (for whom he had clerked) to file a brief *amicus curiae* in *Halper* in support of the judgment below and argue the case. Against all odds, he won it spectacularly (9-0 in favor of Halper).

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

Fourteenth Amendment to judicial disqualification motions predicated upon a litigant's large amount of monetary support for the election campaign of a judge hearing the case. Specifically, the case concerned a West Virginia high court judge who twice denied a motion to disqualify him from sitting on a case in which the Chairman and CEO of one of the parties had donated more than \$3 million to get the judge elected.²⁴ In the face of well-documented public mistrust of judges continuing to sit and hear cases in such circumstances,²⁵ as part of more widespread

²⁴. *Caperton*, 129 S. Ct. at 2257-59.

²⁵. Judicial elections are no longer “low key affairs, conducted with civility and dignity,” Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 IND. L. REV. 819, 819 (2002), but involve highly reported, politicized campaigns marked by million-dollar budgets and heated competition. A substantial majority of the public—often 80 percent or higher—believes that monetary campaign support influence judicial decisions, according to a variety of surveys conducted at both the national and state levels. MICHAEL HENNESSY & BRUCE HARDY, THE ANNENBERG PUBLIC POLICY CENTER OF THE UNIVERSITY OF PENNSYLVANIA, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURT: JUDICIAL SURVEY RESULTS 2 (2007), available at <http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDINGSoc1707.pdf> (“69% [of the public] thinks that raising money for elections affects a judge’s rulings to a moderate or great extent”); CHRISTIAN W. PECK, ZOGBY INTERNATIONAL, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 4 (2007), available at <http://www.ced.org/images/content/events/judicial/zogby07.pdf> (commissioned by The Committee for Economic Development) (finding that 79 percent of business executives believe “campaign contributions have an impact on judges’ decisions”) and more than 80 percent of African-Americans express this view, including 51 percent believing that judicial election contributions carry a “great deal” of influence; TEXAS SUPREME COURT, STATE BAR OF TEX. & TEX. OFFICE OF CT. ADMIN., SUMMARY REPORT: PUBLIC TRUST AND CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS 6 (1998), available at http://www.texasbar.com/Content/ContentGroups/Publications3/Research_and_Analysis3/Statistics/trust99.pdf (finding that 83 percent of Texans believe money has an impact on judicial decisions); TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY: HOW BIG MONEY BUYS ACCESS TO THE TEXAS SUPREME COURT 1 (2001), available at <http://www.tpj.org/docs/2001/04/reports/paytoplay/index.htm> (finding that the Texas Supreme Court is 750 percent more likely to grant discretionary petitions for review filed by contributors of at least \$100,000 than by non-contributors, and 1,000 percent more likely to grant them for contributors of \$250,000 or more); LAKE SOSIN SNELL PERRY & ASSOCIATES, BANNERS FROM A SURVEY OF 500 REGISTERED VOTERS IN THE STATE OF PENNSYLVANIA 5-6 (1998) (commissioned by The Pennsylvania Special Commission to Limit Campaign Expenditures) (finding that voters “overwhelmingly agree that the amount of money in elections and campaigns has caused them to

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

public concerns about the fairness and impartiality of our courts, would applying due process limitations allay those concerns or exacerbate them?

A spirited and hard-fought case, *Caperton* resulted in a 5-4 decision, holding narrowly—based on and perhaps limited to its “extreme facts”²⁶—that refusal to step down in the face of financial support of this magnitude in conjunction with the pendency of a case reasonably certain to come before the judge creates a “serious, objective risk of actual bias”²⁷ that is constitutionally intolerable.

The case involved an appeal from an adverse jury verdict and \$50 million punitive damage award for fraud against A.T. Massey Coal Company, one of the top-ten mining companies in the United States (“Massey”).²⁸ The case brought by Petitioners Hugh Caperton, Harman Mining Corporation, and related companies,²⁹ arose from an alleged course of conduct by Massey that, in other circumstances, might have been characterized as a conspiracy in restraint of trade in violation of the federal antitrust laws.³⁰ Here, however, only state causes of action were

lose a great deal of faith in the political system”); T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, CLEV. PLAIN DEALER, Feb. 15, 2000, at 1A (reporting 1995 Ohio survey where 90 percent of respondents believed campaign support influenced judicial decisions).

²⁶. *Caperton*, 129 S. Ct. at 2265.

²⁷. *Id.*

²⁸. Joan Biskupic, *At the Supreme Court, a Case with the Feel of a Best Seller; Like a Grisham Novel, W.Va. Dispute Examines Conduct of Elected Judges*, USA Today, Feb. 17, 2009, at 1A.

²⁹. To wit: Harman Development Corporation and Sovereign Coal Sales, Inc.

³⁰. The following summary is derived from the factual findings in the trial court. *See generally* Joint Appendix at 63a-65a, 490a-496a, *Caperton*, 129 S. Ct. at 2252 (No. 08-22), 2008 WL 5784213, 2008 WL 5422892 [hereinafter *Joint Appendix*]. Massey had been endeavoring to obtain the business of LTV Steel, one of the principal purchasers of coal from Harman Mining and Sovereign Coal. *Id.* at 492a. LTV preferred the quality of Harman’s coal to Massey’s and refused to purchase the latter. *Id.* Massey purchased the parent of Wellmore Coal Corporation (“Wellmore”), which was the middleman between Harman and LTV and which had an output contract with Harman for its coal. *Id.* Massey’s plan was to substitute its own coal for the Harman Mine coal that Wellmore had been supplying to LTV. *Id.* LTV, however, refused to accept the substitution of Massey coal for Harman coal and severed its business relationship with Wellmore. *Id.* at 492a-93a. Massey, as Wellmore’s new controlling shareholder, then directed Wellmore to invoke—improperly and without justification—the *force majeure* clause in its coal supply agreement with Sovereign

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

pursued, including breach of contract, tortious interference with existing contractual relations, fraudulent misrepresentation, and fraudulent concealment.³¹ The net result was that Harman Mining was intentionally and fraudulently driven out of business, and the jury awarded damages accordingly.³²

Due to the delay generated by Massey's numerous post trial motions (including a challenge to the accuracy of the trial transcript),³³ Massey did not file a petition for review of the trial court's August 2002 \$50 million fraud judgment in the West Virginia Supreme Court of Appeals until October 24, 2006, over four years later.³⁴ In the interim, Massey's Chairman, CEO, and President, Don L. Blankenship, alleged to have been the principal architect of the scheme to destroy Harman, spent (directly and indirectly), and apparently out of his own pocket, at least \$3 million³⁵ supporting the 2004 campaign of Brent D. Benjamin

Coal and Harman Mining, and drastically reduced the amount of coal that Wellmore had agreed to purchase. *Id.* at 65a-66a, 493a. Massey foresaw that this course of conduct would put Harman and Sovereign out of business. *Id.* at 494a. Indeed, Massey exacerbated the situation by deliberately delaying Wellmore's termination of the contract until late in the year, when it would be virtually impossible to find alternate buyers for the coal. *Id.*

Compounding this egregious conduct, Massey itself entered into negotiations to purchase the Harman Mine and then used the confidential information obtained during negotiations to take further actions—such as purchasing a narrow band of coal reserves surrounding the entire Harman Mine—to make the Harman Mine unattractive to others and thereby decrease its value. *Id.* at 494a-495a. Massey then “delayed” consummation of its agreement to purchase the Harman Mine and ultimately walked away from the deal in a manner calculated to force Harman, bereft of any purchaser for either its mine or its coal, into bankruptcy. *Id.* at 495a.

³¹. *Caperton*, 129 S. Ct. at 2257.

³². *See id.*

³³. Joint Appendix, *supra* note 30, at 340a.

³⁴. *Id.*

³⁵. Some press accounts reported higher amounts for the campaign support. *See, e.g.*, Potpourri, CHARLESTON GAZETTE (W. Va.), July 7, 2008, at 4A (“Massey Energy’s president spent \$3.5 million for “attack ads” that enabled . . . Benjamin to win a seat on the state Supreme Court”); Justin D. Anderson, *Court Race Ad Sparks Controversy; French Riviera Photos Resurface in Campaign Spot*, CHARLESTON GAZETTE (W. Va.), May 5, 2008, at 1A (“[Massey CEO] Blankenship spent about \$3.5 million for advertisements, helping to get Justice Brent Benjamin elected”); Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash “in the Courtroom,”* N.Y. TIMES, Apr. 15, 2008, at A22 (reporting that Benjamin, who cast the deciding vote, “declined

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

for a seat on the Supreme Court of Appeals of West Virginia, the very court that would hear the appeal.³⁶ This extraordinary sum represented more than two-thirds of the total money spent on Justice Benjamin's campaign.³⁷ Blankenship also wined and dined then-West Virginia Chief Justice Elliot E. ("Spike") Maynard on the French Riviera and Monaco.³⁸

Aided by this campaign support and the extraordinarily bitter "attack ad" campaign they funded, Benjamin narrowly defeated incumbent Justice Warren McGraw in the November 2004 election.³⁹ After taking his seat on the state high court, Justice Benjamin denied (without any explanatory opinion, at least at that juncture) Petitioners' motion that he recuse himself, and then proceeded to vote, along with Chief Justice Maynard, to overturn the verdict against Massey by a 3-2 vote.⁴⁰ The ruling was controversial and highly criticized as a distortion of West Virginia precedent.⁴¹ After this ruling, photographs of Maynard's junket with Blankenship appeared in the newspapers, and Maynard belatedly recused himself from the case.⁴² (In the ensuing public firestorm Maynard lost his seat on the court when he came in third in the primary and thus could not stand for reelection).⁴³ Before leaving, however, Maynard participated in what has been characterized as an unprecedented departure from the Court's seniority-based practice by choosing Benjamin as Acting Chief Justice.

The case was reargued. Justice Larry Starcher, one of the dissenters in the first decision, voluntarily recused himself from the case

to recuse himself despite owing his election to the court to more than \$3 million spent by Mr. Blankenship").

³⁶. *Caperton*, 129 S. Ct. at 2257.

³⁷. *Id.*

³⁸. Anderson, *supra* note 35 at 1A.

³⁹. *See Caperton*, 129 S. Ct. at 2257.

⁴⁰. *Caperton*, 129 S. Ct. at 2257-58.

⁴¹. Joint Appendix, *supra* note 33, at 340a; *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5422892.

⁴². *Caperton*, 129 S. Ct. at 2258.

⁴³. *Vacation Photos End Maynard's Re-Election Bid*, CHARLESTON GAZETTE (W. Va.), May 15, 2008.

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

based on concern that the strength of his rhetoric condemning Maynard and Benjamin for failing to recuse themselves might cause his impartiality reasonably to be questioned.⁴⁴ Again petitioners sought Benjamin's recusal, again he denied it,⁴⁵ and again the judgment against Massey was overturned by a 3-2 vote (with the vacancies on the court having been filled by Benjamin as Acting Chief Justice).⁴⁶

The dissenting justices, in addition to their disagreement on the merits, were critical of Justice Benjamin's failure to recuse himself and opined that serious federal due process issues were presented under the circumstances of the case but had not been addressed.⁴⁷

The United States Supreme Court granted certiorari,⁴⁸ though not before the case materials were distributed for five conferences;⁴⁹

⁴⁴. *Caperton*, 129 S. Ct. at 2258.

⁴⁵. On neither occasion did Justice Benjamin give any reasons for his denial of the disqualification motion. It was not until July 28, 2008, over four months after the opinion of the West Virginia Supreme Court of Appeals was filed in the case, that he belatedly issued a 58-page opinion defending his decision. See *Caperton v. Massey*, No. 33350, (W.Va. filed July 28, 2008) (Benjamin, Acting C.J., concurring), available at, <http://www.state.wv.us/wvsc/docs/spring08/33350c4.pdf> [hereinafter Benjamin Concurring Opinion].

⁴⁶. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W. Va. 2008), *rev'd*, 129 S. Ct. 2252 (2009). West Virginia allows justices on the Supreme Court of Appeal to be replaced in cases where they are disqualified by lower court judges. This distinguishes that Court from the U.S. Supreme Court, where any recusal diminishes the number of Justices sitting and voting on the case, as Justice Scalia explained in his denial of a motion to disqualify him from hearing a case involving former Vice President Cheney, who was part of a large duck-hunting party that included Scalia. See *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 915-916 (2004) (mem.) (Scalia, J.) (denying recusal motion). There is, incidentally, no hint of any impropriety in Acting Chief Justice Benjamin's selection of the two replacements in the *Caperton* case. As a matter of fact, after rehearing, one voted with the majority and the other joined the dissent.

⁴⁷. *Caperton*, 129 S. Ct. at 2258-59.

⁴⁸. 555 U.S. ___, 129 S. Ct. 593 (2008). Notwithstanding the rather extreme facts of the case, the grant of certiorari was by no means an odds-on favorite, since "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). Indeed, the Court had previously denied certiorari on three previous occasions in cases where judges had refused to recuse themselves in the face of large campaign support. See *Avery v. State Farm Mutual Auto Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Consol. Rail Corp. v. Wightman*, 715 N.E.2d 546 (Ohio 1999), *cert. denied*, 529 U.S. 1012

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

apparently, therefore, getting four votes to hear the case was a close call, though of course the inside politics will forever be cloaked in secrecy. The oral argument was spirited and furthered the impression that the case was too close to call, with both sides looking for a fifth vote.⁵⁰ So it turned out: The Court handed down a 5-4 decision with an extremely narrow holding. That seems entirely appropriate from a doctrinal point of view, particularly given the federalism concerns that lurk where, as here, state election procedures, the conduct of state courts, and the independence of state judiciaries are all implicated in a single case.

THE MAJORITY OPINION

The majority opinion, authored by Justice Kennedy,⁵¹ holds little more than that the due process clause of the Fourteenth Amendment does have applicability—albeit only in extreme cases—to disqualification and recusal decisions by a state court judge in cases where a litigant has contributed very substantial sums of money in support of the judge’s election.⁵² After briefly reviewing the cramped, somewhat unimaginative common law approach to judicial disqualification,⁵³ the Court traced the evolution of its due process jurisprudence in two generic areas where “experience teaches that the

(2000); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied*, 485 U.S. 994 (1988).

⁴⁹. See Marcia Coyle, *Hot Recusal Case Debated: Justices Will Decide What Standard Due Process Requires*, NAT’L L.J. at 1.

⁵⁰. See Transcript of Oral Argument, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf

⁵¹. *Caperton*, 129 S. Ct. at 2256-67.

⁵². *Id.* at 2265.

⁵³. The common law rule, *nemo iudex in causa propria sua debet esse* (“no man should be a judge in his own cause”), has been part of Anglo-American jurisprudence since *Dr. Bonham’s Case*, 8 Co. Rep. 114, 77 Eng. Rep. 646 (C.P. 1610). See *Tumey v. Ohio*, 273 U.S. 510, 524 (1927). This maxim was discussed in *THE FEDERALIST* No. 10, at 47 (J. Madison) (J. Cooke, ed., 1961) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”). It was not, however, broad enough to permit disqualification for bias or prejudice. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986).

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable”⁵⁴; (1) where a judge had a financial interest in the outcome of the case, even though less than an interest that would have been considered personal or direct at common law;⁵⁵ and (2) where the judge’s interest in the case involves his adjudicating a criminal contempt in which the judge himself had been reviled by the defendant or had previously served as a “one-man grand jury” in indicting the defendant.⁵⁶

Applying these teachings to the context of campaign support in judicial elections, the Court properly acknowledged that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal” but equally correctly observed that this is “an exceptional case.”⁵⁷ The inquiry will perform be fact-sensitive and will be based on objective standards, not the judge’s subjective assessment of whether or not he is biased.⁵⁸

“We conclude,” the Court said:

[T]hat there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by

⁵⁴. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (emphasis added).

⁵⁵. *Tumey v. Ohio*, 273 U.S. 510, 524 (1927) (judge’s assessment of civil fines went into his pocket); *Ward v. Village of Monroe*, 409 U.S. 57 (1972) (mayor’s adjudication of traffic fines affected his salary and contributed to city finances); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (administrative board of optometrists had pecuniary interest in the outcome of hearings against optometrists with whom they were in competition); *Lavoie*, 475 U.S. at 820 (high court judge voting for novel state cause of action against insurer had similar claim against an insurance company pending in lower court).

⁵⁶. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (judge reviled by defendant also presided over his contempt trial); *In re Murchison*, 349 U.S. 133 (1955) (judge who presided over a “one-man grand jury” on contempt charges also presided over resulting contempt proceeding).

⁵⁷. *Caperton*, 129 S. Ct. at 2263.

⁵⁸. *Id.*

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

raising funds or directing the judge's election campaign when the case was pending or imminent.⁵⁹

The extraordinary facts of the *Caperton* case, which the majority identified as being important to their decision, included:

- the relative size of the support “in comparison to the total amount of money contributed to the campaign”;⁶⁰
- “the total amount spent in the election”;⁶¹
- the apparent effect of the support on the outcome of the election;⁶² and
- the temporal relationship between the support, the judge's election, and the pendency of litigation before the judge that involves the contributor.⁶³

As to the first three points, the Court concluded that Blankenship's direct and indirect campaign support “had a significant and disproportionate influence in placing Justice Benjamin on the case. . . . [They] eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee.”⁶⁴ In the aggregate, these factors “offer[ed] a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.”⁶⁵ The Court said:

In an election decided by fewer than 50,000 votes (382,036 to 334,301), . . . Blankenship's campaign contributions – in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election – had a significant

⁵⁹. *Id.* at 2263-64.

⁶⁰. *Id.* at 2264.

⁶¹. *Id.*

⁶². *Id.*

⁶³. *Id.*

⁶⁴. *Id.* The Court also noted Petitioners' claim that Blankenship's total support exceeded by more than \$1 million the total amount of support to the campaigns of *both* candidates for the seat on the West Virginia high court. *Id.* (citing Pet. Br. 28).

⁶⁵. *Id.* (citing *Tumey*, 273 U.S. at 532).

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."⁶⁶

On the fourth and final point, the Court found it "reasonably foreseeable" that the appeal of the jury verdict would be before Justice Benjamin.⁶⁷

The \$50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company \$50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a *serious, objective risk of actual bias* that required Justice Benjamin's recusal.⁶⁸

Finally, the majority's rejoinder to the dissenters' floodgates argument (see below) states that the Constitution will require recusal only in truly extraordinary situations, that the *Caperton* facts comprise just such an extraordinary situation and are, in fact, "extreme by any measure," and then goes on to observe that the Court's previous due process recusal cases (to wit: *Lavoie*, *Mayberry*, *Monroeville*, and *Murchison*) did not lead to a torrent of due process-based

⁶⁶. *Id.* (quoting *Withrow*, 421 U.S. at 47) (citation omitted).

⁶⁷. *Caperton*, 129 S. Ct. at 2264-65.

⁶⁸. *Id.* at 2265 (emphasis added).

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

disqualification motions.⁶⁹ Furthermore, the Court noted the importance of ongoing judicial reform efforts by the American Bar Association and the states to “eliminate even the appearance of partiality.”⁷⁰

CHIEF JUSTICE ROBERTS’S DISSENT⁷¹

The dissenting opinion of Chief Justice Roberts is remarkable for its enumeration of forty questions that he believes are raised by the absence from the majority opinion of any standard for adumbrating the “probability of bias” test.⁷² In essence, the dissenters’ fear that the Court’s decision will open the floodgates for due process-based disqualification motions, most of them frivolous, that will inundate the courts and perversely undermine that public confidence that the majority opinion seeks to promote.⁷³

The forty questions themselves are somewhat disjointed, and a few of them seem little more than filler. Nonetheless, the cumulative effect of such an enumeration creates a strong impression that much about the due process implications of judicial disqualification remains to be discussed and debated and casts doubt on the wisdom of applying those

⁶⁹. *Id.* at 2265-66.

⁷⁰. *Id.* at 2266 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004) (sometimes hereinafter referred to as the “Model Code”); Brief of the American Bar Association as Amicus Curiae in Support of Petitioners (merits stage) 14 & n.29, *Caperton v. Massey*, 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 45978).

⁷¹. *Caperton*, 129 S. Ct. at 2267-74. Justice Scalia also filed a brief dissenting opinion, criticizing the majority’s opinion as reinforcing the public perception that he deems most corrosive—at least in the thirty-nine states that have some form of judicial elections—to public confidence in the judicial system, *i.e.*, that “litigation is just a game, that the party with the most resourceful lawyer can play it to win, [and] that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.” *Caperton*, 129 S. Ct. at 2274 (Scalia, J.) Justice Scalia amplified on this with a quote from the Talmud, leading one online journalist to quip, “Scalia is clearly teaching Bar Mitzvah classes somewhere this year.” Dahlia Lithwick, *The Great Caperton Caper: The Supreme Court Talks About Judicial Bias*. *Kinda.*, SLATE, June 8, 2009, available at <http://www.slate.com/id/2220031/pagenum/all>.

⁷². *Caperton*, 129 S. Ct. at 2269.

⁷³. *See id.* at 2272. In that regard, the dissent appears overblown. How many times, after all, did Justice Kennedy, writing for the majority, use for describing the facts of this case such adjectives as “extreme” or “extraordinary”?

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

principles to monetary support for judicial election campaigns.⁷⁴ Even less than a full forty would have served the same purpose, since in our view, any number of questions in excess of twenty would be sufficiently ample to generate the same reaction.

For the sake of facilitating that discussion and debate, we have rearranged the forty questions below into six broad categories presented in a two-column tabular format. The categories are (1) Support Levels, (2) What Campaign Support Counts?, (3) Characteristics of the Case, (4) Characteristics of the Judge, (5) Characteristics of the Decision, and (6) Procedural Issues. The questions themselves have sometimes been paraphrased to make them more concise or more accurate.⁷⁵ Many of the questions seem to have, at least to us, readily apparent answers; others are more thought-provoking and admit of no ready answers. Our commentary on (and, where appropriate, suggested answers to) most of the individual questions may be found in the endnotes following the table. To some of the questions we have appended no commentary, but nothing of substantive import should be inferred from the absence of comment to any particular question.

CHIEF JUSTICE ROBERTS' FORTY QUESTIONS IN <i>CAPERTON</i> v. <i>MASSEY</i>	
I. Support Levels	IV. Characteristics of the Judge
1. How much is "too much" such that it gives rise to a "probability of bias"? ⁱ	6. Does it make a difference if the judge sits on a trial court, intermediate appellate court, or

⁷⁴. *Id.* at 2269-72.

⁷⁵. The number appearing beside each item in the text corresponds to the numbering of the questions in Chief Justice Roberts's dissenting opinion in *Caperton*, 129 S. Ct. at 2269-72 (Roberts, C.J., with Scalia, Thomas & Alito, JJ., dissenting). The categories and decisions as to categorization are the authors'. The annotations appear as endnotes (using roman numerals) that follow the table below, but their numerical order moves from left to right across both tabular columns rather than downward chronologically in each column.

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

	state high court? ⁱⁱ
2. What is the meaning of “disproportionate”? ⁱⁱⁱ	17. What if the judge disclaims the support? ^{iv}
4. Does it matter whether the litigant has supported other candidates or donated large amounts of support in connection with other elections? ^v	21. Does a close personal friendship between a judge and a party or lawyer give rise to a “probability of bias”? ^{vi}
23. Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections? ^{vii}	26. Is the due process analysis less probing for a victorious incumbent, who typically has an advantage in elections? ^{viii}
25. What about the causal link between the amount of support and the judge’s victory in the election? Did the judge win in a landslide? ^{ix} What if the victory is attributable to the opponent’s mistakes? ^x	30. Does it make a difference if it is a retention election or a nonpartisan election? ^{xi}
II. Which Campaign Support Counts?	V. Characteristics of the Decision
3. Independent, non-coordinated vs. direct support? Indirect donations to outside groups that support a candidate? ^{xii}	13. Must the judge’s vote (on the merits) ^{xiii} be outcome-determinative? ^{xiv}
8. Disproportionately large support by trade union, industry association, plaintiffs’ bar, etc.? Recusal in all cases affecting association’s interests? Member’s? ^{xv} Depend on how much the litigant contributed to the association? ^{xvi}	14. Does it make a difference whether the decision is clearly correct/incorrect on the merits? ^{xvii}
10. Candidate draws “disproportionate” support from a particular racial, religious, or other	15. Does it make a difference if the judge’s decision on the merits is affirmed by an appellate

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

group and case involves an issue of importance to that group? ^{xviii}	court with no “debt of gratitude” to the supporter? ^{xix}
20. Does a “debt of gratitude” for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How to measure whether such support is “disproportionate”? ^{xx}	19. Does it make a difference if the judge’s denial of a disqualification motion is subject to independent review, <i>e.g.</i> , by a panel of other judges? ^{xxi}
22. Does it make a difference whether campaign support comes from the party or the party’s attorney? If the latter, must the judge recuse in every case involving that attorney? ^{xxii}	24. Under the majority’s “objective test,” do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge? ^{xxiii}
11. What if a supporter is not a party but his interests will be affected by the decision? ^{xxiv}	27. Finality of pending case—recusal required only if the issue is ultimate liability? What if the issue is only class certification? ^{xxv}
12. What if a case involves a regulatory issue of importance to a supporter not a party before the court? ^{xxvi}	VI. Procedural Issues
18. Does it make a difference if, instead of support, the litigant spent money to oppose the judge’s candidacy? ^{xxvii}	33. Are <i>Caperton</i> claims raisable only on direct review? In an action in federal district court under 42 U.S.C. § 1983 for deprivation of civil rights under color of state law? If the latter, who would be the defendant(s)? ^{xxviii}
29. Are there any imputation rules, <i>e.g.</i> , campaign support from a corporation imputed to its executives, or vice-versa, or by one family member to other family members? ^{xxix}	34. What about issues of repose? Is collateral relief available in federal court under § 1983? What statute of limitations should apply?

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

31. Does monetary support to fund or promote voter registration count?	35. What is the appropriate remedy? Vacate lower court decision in its entirety? Retain any of it? ^{xxx}
32. Does it make a difference if it is a primary or a general election? If the campaign support was given to a different candidate in the primary?	36. Can the due process claim be waived if a litigant who knows of it waits until after the decision to raise it? Or does ripeness depend upon the judge's action suggesting a probability of bias? ^{xxx}
III. Characteristics of the Case	37. Are parties entitled to discovery with respect to the judge's disqualification decision? ^{xxxii}
5. Is the amount at stake relevant? What if only non-monetary relief is sought? ^{xxxiii}	38. What is the standard of review? Can it be harmless error? ^{xxxiv}
9. What if the case involves a social or ideological, rather than a financial, issue? ^{xxxv}	39. Can the judge respond to allegations of bias, or must the decision be based solely on parties' pleadings? ^{xxxvi}
28. Must the case be pending at the time of the election or reasonably certain to be brought? ^{xxxvii} Does it make a difference if the case were unanticipated? ^{xxxviii}	40. If <i>Caperton</i> claims are settled as part of overall settlement, does the judge have an opportunity to salvage his reputation? ^{xxxix}

NOTES FOR TABLE:

i. *Caperton*, 129 S. Ct. at 2269. This is not a question that any court can (or should) decide *a priori*. The answer will differ from one state to the next and may depend upon idiosyncratic electoral circumstances. Would \$3 million, a lot of money in West Virginia, raise eyebrows in California or Texas? In Alabama, for example, multi-million dollar Supreme Court races have become commonplace. Cf. *Randall v. Sorrell*, 548 U.S. 230, 252-56 (2000) (taking into account local practice in assessing constitutionality of campaign regulation in Vermont).

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

For these very reasons the ABA, in its amicus briefs in *Caperton*, argued that the Court need not prescribe any particular dollar amount as the constitutional “floor” in order to determine, as the majority did, that due process concerns were raised by the extraordinary facts of the case. *See, e.g.*, Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioners (certiorari stage) 14, *Caperton v. Massey*, 129 S. Ct. 2252 (2009), 2008 WL 3199726.

ii. *Caperton*, 129 S. Ct. at 2269. From a due process point of view, the level at which the judge sits makes little difference. The question does, however, highlight the issue whether one even reaches the due process issue in the first place. Refusals to recuse by lower court judges can often be subject to appellate review, where a reversal would moot the constitutional question. Where the recusal decision is vouchsafed to the sole discretion of a state high court judge, however, due process concerns are heightened.

iii. *Id.* The short answer to this question is itself a question: How many individuals do you know who contribute over \$3 million of *their own funds*—not corporate funds—to a state judicial election campaign? Another short answer was offered by Justice Stevens at oral argument, by recalling Justice Potter Stewart’s famous definition of hard-core pornography (to wit: “I know it when I see it.”) Transcript of Oral Argument 29-30, *Caperton v. Massey*, 129 S. Ct. 2252 (2009) (No. 08-22) (comment of Stevens, J.), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf [hereinafter “Argument Transcript”].

i’. *Caperton*, 129 S. Ct. at 2270. This is a fascinating and difficult question. Politics makes strange bedfellows and is often a seedy, if not downright ugly, process. Surely a person running for judicial office might involuntarily find support from a person or organization that he or she finds personally repugnant or that represents a point of view with which he or she disagrees. The judge could refuse the contribution, or direct his committee to return it, but what if, as in *Caperton* itself, the contribution (or a large part of it) is made to a third party to use for television or print media ads supporting the judge’s candidacy? The appearance problem persists. Surely the litigant seeking disqualification would argue that if, as in *Caperton*, the contribution is pivotal to getting the judge elected, the judge, notwithstanding the disclaimer, would nevertheless feel a “debt of gratitude” to the contributor. Yet to rule automatically against the judge opens the door to strategic contributions by interest groups (including possibly lawyers or groups of lawyers) who do not, in fact, support the judge but who are hedging against the possibility of his victory and creating for themselves a paper record that would support future disqualification motions. This specter of abusive “*Caperton* motions” haunts the decision and underlies many of the dissenters’ concerns. *See Caperton*, 129 S. Ct. at 2272.

v. *Id.* at 2269. We must assume, for present purposes, that when the Chief Justice used the word “large” he meant both (A) an order of magnitude of constitutional moment and (B) a sum that would be “disproportionate” within the purview of the majority opinion. *See id.* Our answer to this question is a resounding “No.” The public has become accustomed to seeing “large” contributors to elections in the two political branches receive some kind of quid pro quo, *e.g.*, a cabinet position, an ambassadorship, in the case of the President of the United States (recall Pamela Harriman’s appointment by President Clinton as Ambassador to France), or some kind of legislative reward in the case of members of Congress. Likewise, governors and state legislatures are capable of distributing the spoils of victory as largesse to their most significant supporters. Public expectations for the judicial branch are quite different and demand both the

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

reality and the appearance of fairness and impartiality. Thus the spectacle of large expenditures to support judicial election campaigns creates the specter of partiality and impropriety that is profoundly injurious to public perception of the judiciary. That is true regardless of whether the source is one who makes only one such expenditure or many. Indeed, a multiplicity of such expenditures would only enhance the perception that the person making them believes that judges can be bought.

^{vi} *Id.* at 2270. This is a nagging question that long antedates the *Caperton* decision. As one of the authors noted in an article several years ago, former Canon 3E (now recast as Rule 2.11 in the current version) of the Model Code provides: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” The Rule then lists some specific instances where recusal or disqualification is mandated, *i.e.*, whenever:

- (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding;
- (2) The judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:
 - (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - (b) acting as a lawyer in the proceeding;
 - (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
 - (d) likely to be a material witness in the proceeding.
- (3) The judge knows that he or she, individually or as a fiduciary, or the judge’s spouse, domestic partner, parent, or child, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding;
- ...
- (6) The judge:
 - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association

MODEL CODE OF JUDICIAL CONDUCT, R. 2.11(A)(1)-(3), (6)(a) (2007).

While the provision and the commentary explicate that this enumeration is not intended to be exclusive, the very specificity of the black letter language suggests myriad hues of gray. For example, what if a lawyer with whom the judge previously practiced law represents the party *now*, as opposed to “during such association”? What about a lawyer with whom the judge did not practice law but who has been a longstanding personal and professional friend? What if the lawyer is the spouse of such a friend? What if the lawyer

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

is an officer of the bar association, and has had occasion, in that capacity, to present awards or other honors to the judge? The complete list of “what if” variations on this theme would obviously be quite long. On the other hand, making allegations of negative appearances is quite easy, so evaluation of these situations will of necessity be quite fact-specific.

Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J. L. REFORM 1017, 1118-19, n. 395 (2004). For a general discussion, see Leslie W. Abramson, *Appearances of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55 (2000).

^{vii}. *Caperton*, 129 S. Ct. at 2270. This seems almost a silly question, unworthy of the Chief Justice’s intellect. Of course the due process line in the sand will vary from state to state. A contribution may be high by relative standards though not by absolute standards; thus, as we noted above in connection with Question 1, campaign contributions in the millions of dollars might be unusual in West Virginia but not in Texas, Illinois, New York, or California. Judicial elections and judicial campaign contributions in the normal course do not violate due process. Model Code Rule 2.11(A)(4) leaves it to the individual states to determine what size “aggregate contributions” (both words are terms of art defined in the Model Code’s Terminology section) from a party or lawyer involved in a case mandates recusal of the presiding judge. Implicit in the Rule is that, at *some* support level, fundamental fairness concerns of actual or apparent bias are triggered. These are the very considerations that underlie the Due Process Clause’s insistence on the appearance, as well as the reality, of judicial impartiality.

^{viii}. *Id.* at 2271. We think not. Money is money, and it is all about the appearance. Moreover, to ask this question is unduly to dismiss the majority’s point that due process analysis will not be the norm but the *rara avis*. The decision in *Caperton* underscores the need for the states to fill this gap by statute, by adoption of Model Rule 2.11(A)(4) or some similar mechanism, or by some other method or combination of methods that will obviate the need for due process challenges. One alternative to mandating disqualification dollar amounts for very large private sector contributions is to deter them by providing for public campaign financing of judicial elections, though this approach also must overcome First Amendment hurdles. *See, e.g.*, *N. Carolina Right to Life Comm. Fund for Ind. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir.), *cert. denied sub nom. Duke v. Leake*, 129 S. Ct. 490 (2008). The approach is also imperfect, in the sense that public finance not only may not be feasible in states like Wisconsin, or in the larger states, but also will not deter independent spending and may even increase it. (Our thanks to Roy Schotland for this observation).

^{ix}. *Caperton*, 129 S. Ct. at 2271. No causal link to a victorious outcome is necessary. It suffices that the extraordinary campaign expenditures were made at all. What gave rise to this question was a bit of sloppiness in the majority opinion, mistakenly identifying “the apparent effect [the] contribution had on the outcome of the election” as a component of the inquiry. *Id.* at 2264. We think this is, in fact, irrelevant to the inquiry. Campaign support that is “disproportionate” in terms of the total amount received by an individual candidate and the total amount spent in the election will almost certainly affect the outcome of the election, but even if it does not, the appearance problem remains. One could argue, for example, that the break-in at the Watergate building had no apparent effect on the outcome of the 1972 Presidential election,

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

since Nixon defeated McGovern by a landslide and certainly would have done so even had the planned espionage on the Democratic National Committee turned out to be a success rather than an historical debacle. Yet surely no one would argue that this lack of apparent effect on the electoral outcome indicates the break-in had no relevance to public perception of the candidate and should simply have been ignored.

^x. *Id.* at 2271. This adds nothing to the analysis. *Errare humanum est*: All candidates make mistakes during the campaign. Some of them are fatal to the candidacy. Indeed, such an argument was made by Respondents in *Caperton*. See Brief for Respondents at 5, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165 (“On Labor Day 2004, Justice McGraw delivered a widely discussed speech in which he made a number of bizarre claims, including that this Court had ‘approved gay marriage’ Justice Benjamin’s opponent cost himself the election. Justice McGraw was already a polarizing figure in West Virginia politics . . . ; his refusal to give interviews or debate Justice Benjamin before the election raised eyebrows . . . ; and a bizarre speech, in which McGraw accused Benjamin of trying to ‘destroy democracy’ and claimed that this Court had ‘approved gay marriage,’ may well have tipped the balance.”). Similar arguments were raised in Justice Benjamin’s overly lengthy (and belated) concurring opinion seeking to justify his denial of the disqualification motion. . See *Caperton*, 129 S. Ct. at 2264 (quoting from Justice Benjamin’s belatedly filed concurrence). All were rightly rejected by the majority.

Whether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias.

Id.

^{xi}. *Caperton*, 129 S. Ct. at 2271. This seems another makeweight question. From a due process vantage point, the character of the election should make little or no difference. Ask yourself if, on the facts about the campaign contribution in *Caperton*, the outcome would (or should) have been different had the election been partisan or had it been a retention election.

^{xii}. *Id.* at 2269. These are not distinctions of constitutional moment. They all count.

^{xiii}. *Id.* at 2270. The question makes sense only with this parenthetical gloss, which is not included in the original version posed by Chief Justice Roberts. Naturally, a judge’s vote on the motion to disqualify will frequently be outcome determinative, unless it is subject to appeal. That was not the case in *Caperton*, as Justice Benjamin’s denial of the disqualification motion was not reviewable other than by the exceptional avenue of review by the U.S. Supreme Court on certiorari (as occurred in this remarkable case).

^{xiv}. *Id.* at 2270. Obviously, a trial judge’s decision on the merits—at least in a non-jury matter—is “outcome determinative” in a sense, though subject to appellate review. At the other extreme, the decision of a high court judge sitting as part of a collegial body cannot really be meaningfully described as “outcome determinative.” In *Caperton*, Petitioners and their allies argued that Justice Benjamin cast the “deciding vote,” but was that necessarily the case? After

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

all, in a 3-2 decision, any of the three judges in the majority can be said to have cast the “deciding vote.”

^{xv}. *Id.* at 2269. This is an excellent question, extremely thought-provoking, and one that, unlike most of the other forty questions, was actually used by the Chief Justice during oral argument. The advocates had difficulty answering this question, and so it remains one of the dissenters’ most legitimate concerns (and one of the small fraction of the forty thieves we find most difficult to subdue!). In fact, at argument the question came up several times. *See* Argument Transcript at 8-10, 13-15 (colloquy between Roberts, C.J. and Petitioners’ counsel); *id.* at 28-29 (colloquy between Stevens, J. and Respondents’ counsel).

The authors believe this to be a factual matter that would be part of the total mix of factors to be considered in a particular disqualification setting. At one end of the spectrum, campaign support from a national trade association, like the American Bankers Association or the Securities Industry Association, would be unlikely to create an appearance problem merely because an individual bank or individual securities firm was a party in litigation before the judge. Similarly, it would be ludicrous to suggest that a large level of support from the plaintiffs’ bar would mandate disqualification in every case. Apart from the practical absurdity of such a result, one can point to the extraordinarily attenuated linkage between bar contributions and a particular law firm or member of the bar. Most of the time, campaign support is “too remote and insubstantial” to create the requisite appearance problem. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-26 (1986). At the other end of the spectrum, extremely large campaign support from an ad hoc association of a handful of large manufacturers sharing common concerns about punitive damage awards in products liability cases in a particular jurisdiction might raise due process eyebrows.

Here again we see the importance of the states stepping up to the regulatory plate, as a level of support within limits set by a state statute or rule would not likely be offensive to due process. Yet, even there, the ramifications can be complex. Suppose, for example, that every lawyer in a large law firm were to contribute the maximum permissible dollar amount so that, as a result of the firm’s size, the aggregate contribution amounted to 75 percent of a judicial candidate’s campaign funds. Depending on the magnitude of total support – if, for example, this hypothetical 75 percent support amounted to only \$10,000, it is unlikely that due process concerns would arise – a due process argument might be made that that judge should be disqualified from hearing any cases involving that law firm. Knowing this, and knowing therefore that the level of their support might be, in a sense, self-defeating, such firms would be careful to limit the scope of their attorneys’ support. That seems an appropriate result. Nothing is perfect, however, because the scenario just described leaves open the possibility of the law firm engaging in strategic behavior—making the maximum contributions to a judicial candidate for which it (or its clients) have great antipathy, in order to lay the groundwork for future disqualification motions in the event that candidate should be successful in the election.

The timing of the expenditures is also relevant to the analysis. In *Caperton*, for example, the timing was suspect. 129 S. Ct. at 2264-65. Less compelling (witness the denial of certiorari), though still problematic, was an Ohio case in which two justices of the state high court received significant contributions from a law firm only three weeks before voting whether to hear a case in which the firm had a multi-million dollar contingency fee at stake. *Petition for a Writ of Certiorari, Consol. Rail Corp. v. Wightman*, No. 99-950 (Dec. 6, 1999), *cert. denied*,

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

529 U.S. 1012 (2000). (Notably, the Supreme Court of Ohio never even ruled on the disqualification motion.) In *Wightman*, however, the size of the contributions amounted to less than 5 percent of each justice's campaign funds, *id.* at 7, which underscores how extraordinary the facts are in *Caperton*, where Blankenship's contributions amounted to approximately two-thirds of Justice Benjamin's campaign funds. *Caperton*, 129 S. Ct. at 2257.

Another pertinent factor is the linkage between the supporter and the litigant. In *Caperton*, that linkage was all too obvious: Blankenship was Chairman and CEO of Massey. What about the hypothetical ad hoc manufacturers' association mentioned above? Is the linkage sufficient with only a handful of members but diminishing to insufficiency as membership increases? Large membership in itself is not, of course, a guarantee of attenuation, as the Chief Justice's question about the United Mine Workers illustrates. See Argument Transcript at 13-15.

At the end of the day, however, this question, compelling and difficult though it may be, simply serves to underscore the simple truth that law—especially constitutional law—is not a science. There is no formula that will unerringly calculate when due process of law has been violated, just as there is no formula for probable cause determinations under the Fourth Amendment. *Id.* at 42-43 (colloquy between Stevens, J., and Respondents' Counsel).

"[D]ue process," unlike some legal rules, is not a technical conception with fixed content unrelated to time, place, and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149, 162-63 (1951) (Frankfurter, J., concurring). (We are indebted to Roy Schotland for this quote.) Justice Frankfurter also cautioned against "charg[ing] those who secured the adoption of this Amendment with meretricious redundancy by indifference to a phrase—'due process of law'—which was one of the great instruments in the . . . arsenal of constitutional freedom. . . ." *Malinski v. New York*, 324 U.S. 401, 412, 414 (1945) (Frankfurter, J., concurring).

That constitutional adjudication is often difficult is not a reason to avoid it. As Chief Justice Marshall famously enjoined: "It is emphatically the province and duty" of the courts "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

^{xvi} *Caperton*, 129 S. Ct. at 2269. Even though, as mentioned in the preceding note, law is not a science, it may nevertheless be possible for the states to create guidelines for this precise issue. For example, one could propose a statute or rule under which campaign expenditures by an association would be attributed to a member only where that member is deemed to exercise a controlling influence over the association; controlling influence in turn could be defined as a

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

percentage of voting power (e.g., 25 percent, 10 percent) and could be defined differently in each state adopting such an approach.

^{xvii}. *Id.* at 2270. A dubious question, and one that harkens to Justice Benjamin's belatedly filed, 58-page *apologia*. Joint Appendix at 635a., *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5422892. Both miss the essential point. No matter how sedulous Justice Benjamin's lucubrations may have been, no matter whether the decision on the merits was right on the mark, nothing would shake the public perception that justice in West Virginia was for sale.

^{xviii}. *Caperton*, 129 S. Ct. at 2270. To a certain extent, this question is duplicative of what has already been addressed in connection with Question 8, though this focuses more squarely on issue advocacy and not on mere financial interest. *Supra* n. xv. In general, we believe that the answer depends on public perception, as approximated through the lens of that ubiquitous legal construct, the reasonable person. If a reasonable person would believe that a judge could not be impartial on the issue in question, then the judge should be disqualified. That is true whether the source of disqualification is the judge's personal philosophy or the end result of "disproportionate" campaign support from a particular group.

^{xix}. *Caperton*, 129 S. Ct. at 2270. This is simply a variation on the theme of Question 14. *Supra* n. xvii. Affirmance by an appellate court with no "debt of gratitude" merely suggests that the decision by the judge who was the target of a disqualification motion was correct on the merits. So what? Even a biased judge can render a correct decision. Doing so, however, diminishes public confidence not only in the correctness of that particular decision but in the legitimacy of judicial decision making in general. The dissent misses the essential point, as did Justice Benjamin. With so many fine legal minds misunderstanding the overriding importance of public perceptions of fairness and impartiality to the legitimacy of the judiciary itself, it is a small wonder that recusal and disqualification law is in such disarray. Hopefully, the JDP will provide much needed guidance to the states as they reconsider the subjects of recusal and disqualification in the wake of the *Caperton* decision.

^{xx}. *Caperton*, 129 S. Ct. at 2270. An unfortunate, somewhat sloppy aspect of the majority opinion is the "debt of gratitude" notion. It sweeps so broadly as to be virtually meaningless. That, perhaps, is why Justice Scalia harped on it so much during oral argument. See "Argument Transcript" *supra* note iii, at 5-7, 43-45. In our view, the sort of support outlined in this question is unlikely to rise to a level that would create an appearance of partiality or unfairness were the judge to sit on a case involving, say, a newspaper, a politician, or a celebrity that had endorsed his candidacy. It is, of course, possible, for such non-monetary support to have been so extreme that disqualification would be proper; the converse is equally true, where, for example, a newspaper or politician or celebrity extraordinarily strident in opposition to the judge's candidacy ends up as a litigant before him. As the *Caperton* majority recognized, the facts would have to be extraordinary for a refusal to recuse to constitute a denial of due process. In general, we would hope that judges would have enough common sense to recuse themselves voluntarily even in cases that do not pose a due process threat but that threaten public confidence in the judiciary or fairness and objectivity. As for interest groups, that duplicates issues already considered in connection with Questions 8 and 10. *Supra* n. xv-xvi, xviii.

^{xxi}. *Caperton*, 129 S. Ct. at 2270. A related question would be whether it matters if the judge's decision on disqualification is appealable (e.g., as a collateral order) and affirmed on appeal. Some of the issues raised here have already been considered in connection with

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

Questions 14 and 15. *Supra* n.xvii, xix. In the case of independent review by a panel of judges, a lot will depend on the standard of review. If it is *de novo*, then the possibility that there could ever be a denial of due process approaches zero; that is not to say that another judge is incapable of being mistaken, merely that the process accorded – susceptible to error though it may be, as is all human endeavor – would be seen to be fair. The same result would be obtained where the judge whose disqualification is sought simply reviews the motion for facial validity and, assuming it passes that low threshold, passes it on for decision by another judge in the same court. If, however, the first judge’s denial of the disqualification motion is “on the merits” of that motion and the independent review is under a deferential standard such as “arbitrary and capricious” or “abuse of discretion,” then the review is largely illusory and due process concerns may even be heightened. We doubt, as a practical matter, that too many judges would be comfortable ruling that a colleague had abused his discretion in denying a disqualification motion.

In any event, in the wake of the *Caperton* decision, the ball is now firmly in the courts of the 39 states that have some form of judicial elections to implement prompt and non-illusory review measures so as to obviate the possibility of due process challenges. That is obviously what the majority in *Caperton* anticipates. 129 S. Ct. at 2266-67 (discussing the ABA Model Code standards for disqualification, state adoption of such rules, their importance in maintaining the integrity of the judiciary and the rule of law, and inviting the states to adopt standards more rigorous than due process requires). Possible changes to state rules in this area are part of the JDP, but discussion of those topics exceeds the scope of this article. *Supra* n. xix.

^{xxii}. *Caperton*, 129 S. Ct. at 2270. This is a makeweight question. Either the expenditure rises to the level where it becomes a due process concern or it does not. It makes no difference from a due process perspective whether the money comes from the party or from counsel. If from counsel, then such an extraordinary amount of support for the judge by a repeat player may well demand the judge’s disqualification from any case in which that lawyer appears, unless, perhaps, all opposing parties are willing to waive the matter.

^{xxiii}. *Id.* at 2270. Too cute by half, this is another question unworthy of the Chief Justice. One begins to wonder whether some makeweight questions were included in order to yield the magic total of forty. In any event, it is self-evident that what animates the due process concern, at least in part, is the problem of appearances—appearance of impartiality and appearance of impropriety.

Almost every State – West Virginia included – has adopted the American Bar Association’s objective standard: “A judge shall avoid impropriety and the appearance of impropriety.” . . . The ABA Model Code’s test for appearance of impropriety is “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.” Canon 2A, Commentary; see also W. Va. Code of Judicial Conduct, Canon 2A, and Commentary (2009) (same).

Id. at 2266. The underlying concern in each instance is the legitimacy of the judiciary in the eyes of the public. See *id.* at 2266-67 (“The citizen’s respect for judgments depends in turn

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)). Even assuming the unstated premise of the question—namely that a reasonable person could reach a different conclusion than a reasonable lawyer or a reasonable judge, something the majority would be unlikely to concede—it would seem sensible to use the perspective of the reasonable person.

^{xxiv}. *Caperton*, 129 S. Ct. at 2270. A similar factual situation was presented in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), in which the Supreme Court held that participation by a justice of the Alabama Supreme Court in ruling on the validity of a punitive damages award against an insurance company violated due process when the justice was himself in other cases a litigant arguing that insurance companies' failure to pay claims constituted bad faith and entitled the claimants to punitive damages.

^{xxv}. *Caperton*, 129 S. Ct. at 2271. If whatever the judge is called upon to decide—whether final or interlocutory—is important enough for a litigant and counsel to risk filing a motion for disqualification, it is unlikely that the appearance of fairness and impartiality issue would be any less compelling. Class certification, the example given in the question, is by no means an inconsequential decision. Presumably, if the issue were not all that important, no disqualification would be sought.

^{xxvi}. *Id.* at 2270. This scenario is not problematic. First, it offers no appearance of partiality, unfairness, or impropriety vis-a-vis any party or attorney before the court. Second, a great many judicial decisions may have persuasive—and occasionally precedential—value to persons not before the court, some of whom may well have been substantial supporters of various judicial election campaigns. Uncritically to impose some limitation—due process-based or otherwise—on recipients of such funds presiding over such cases would bring the judicial system to a grinding halt. One would require considerably more to make a showing that disqualification was required, such as evidence of *actual* bias or prejudice by the judge for or against a particular interpretation of a statute or regulatory position.

^{xxvii}. *Id.* This question, flipping the “debt of gratitude” coin, is sometimes referred to as the “debt of hostility.” Preliminarily, of course, there is the question of how the judge would know about campaign support for an opponent unless it had been in the form of virulent attack ads with attribution (e.g., “Paid for by the United Mine Workers”) or state law required disclosures that were made available to the candidates. (In West Virginia, for example, Blankenship had to fill out a financial disclosure form on which it says: “Expenditures made to Support or Oppose”; Blankenship underlined the word “Support” and typed in the words “Brent Benjamin.” Argument Transcript at 8; Joint App. 188a, *Caperton v. Massey*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213). Even if the judge does know, the amount of the support would have to be truly “disproportionate” in order to create an appearance problem.

Assuming these preconditions were satisfied, then the answer to the Chief Justice's question is “No.” Conceptually, due process would logically require disqualification for disproportionate campaign opposition just as with disproportionate campaign support. The existence of this negative corollary does not, however, undermine the *ratio decidendi*.

It bears mention that if the opposition is not merely financial but is such as to create some direct animosity or prejudice on the part of the judge, there is precedent to suggest that disqualification is necessary. See, e.g., *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

(requiring disqualification where judge reviled by defendant also presided over his contempt trial). *Cf.* *In re Murchison*, 349 U.S. 133 (1955) (requiring disqualification where judge who presided over “one man grand jury” also presided over contempt proceedings related thereto).

^{xxviii} We think the prospect of federal district court review of a state judge’s denial of a disqualification motion is so wrong-headed and so incompatible with well-known, and fundamental, principles of comity, federalism, and judicial immunity from suit that the notion can be dismissed as not merely remote but, in effect, a red herring.

Normally, a denial of a disqualification motion that rises to the level of a denial of due process should be reviewable under procedures available under the laws of the particular state. An exception might be where the judge who is the target of the motion is a state high court judge and (as in *Caperton*) the high court in question does not provide for review of the denial by the other members of the court. No *a priori* claim for injunctive or declaratory relief, much less for damages, would be possible, because each motion for disqualification is *sui generis*, based on particularized facts and circumstances, and there is no way to establish in advance that the motion will be denied. As far as claims for monetary damages are concerned, judges enjoy absolute immunity as long as they do no act in the clear absence of jurisdiction. *See, e.g.,* *Mireles v. Waco*, 502 U.S. 9 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978). This is so even where the judges’ actions are unlawful, in excess of their jurisdiction, or are alleged to have been done maliciously or corruptly. *Id.* at 356 (citing *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 351 (1872)). Such judicial immunity is designed to allow judges to act upon their own convictions, without apprehension of personal consequences to themselves. *Sparkman*, 435 U.S. at 355 (citing *Fisher*, 13 Wall. (80 U.S.) at 347).

Furthermore, using § 1983 as a substitute for appeal at the trial or intermediate appellate court level, would likely run afoul of various doctrines of federal judicial abstention, which would cause a federal court to dismiss the claim. *See, e.g.,* *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 482 (1983) (holding that federal district courts are without jurisdiction to review final determinations of a state high court – as distinct from, for example, state court rules, such as bar admission rules – which can only be reviewed by the U.S. Supreme Court pursuant to 28 U.S.C. § 1257); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (holding that where constitutional questions in a federal court complaint arose in state court, it was the “province and duty of the state courts to decide them,” that “[u]nder the legislation of Congress no court of the United States other than this court could entertain a proceeding to reverse or modify the [state court] judgment” for legal error, and that “[t]o do so would be an exercise of appellate jurisdiction [whereas the] jurisdiction possessed by the [federal] District Courts is strictly original.”) (citations omitted). Finally, to seek review of a state lower court judge’s denial of a disqualification motion while state appellate avenues are open would run afoul of the abstention doctrine originally announced in *Younger v. Harris*, 401 U.S. 37 (1971), pursuant to which a federal court must, in the interests of comity and federalism, abstain from exercising jurisdiction where doing so would interfere with a pending state proceeding that implicates an important state interest and in which the state provides an adequate forum to adjudicate the claim.

^{xxix} *Caperton*, 129 S. Ct. at 2271. In our comments to Question 8, we suggested that states could enact or promulgate attribution rules in connection with corporate members of associations. *Supra* n.xv. There is no *a priori* reason that rules of the sort suggested in this question could also be created. Indeed, the ABA’s Model Code already applies such an approach in Rule 2.11 in the disqualification context to judges themselves, sweeping into the Rule’s net “the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person . . .” MODEL CODE OF JUDICIAL CONDUCT, R. 2.11(A)(2), or, in another part of the rule, “the judge’s spouse, domestic partner, parent, or child, or any other

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

member of the judge's family residing in the judge's household . . ." *Id.* R. 2.11(A)(3). *See also id.*, Terminology (defining, *inter alia*, the terms "domestic partner" and "third degree of relationship"). Of course, if such a rule is imposed in a particular state, then recourse to due process would be unnecessary. Whether, in the absence of such a rule, due process would mandate such attribution, at least in the sorts of extraordinary cases where due process concerns are implicated, is a provocative if somewhat technical question, but not one, we submit, that suggests a compelling argument (floodgates or otherwise) against the application of due process principles in the campaign support context.

^{xxx}. *Caperton*, 129 S. Ct. at 2271. Unless there is a way to segregate parts of the decision that are untainted by the appearance of partiality, unfairness, or impropriety, the entire decision must be vacated.

^{xxxi}. *Id.* at 2271. To allow parties or their counsel to engage in strategic or opportunistic behavior does little to promote public respect for the judiciary or the judicial system. So litigants who sit on their rights should be estopped from raising disqualification where the basis therefore was known prior to the decision on the merits.

On the other hand, using the classic definition of constitutionally cognizable waiver as the voluntary relinquishment of a known right or privilege, there is no reason why a claim arising from the rare sort of circumstances present in *Caperton* cannot be waived. Indeed, the Model Code specifically contemplates the possibility of waiver. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C).

^{xxxii} We think not. Allowing discovery would not only be unduly disruptive but would also unduly prolong the case. (Of course, since we do not believe in a separate federal court cause of action here, this discovery question is something of a red herring). Litigants are entitled to have disqualification questions resolved promptly and meaningfully. We believe the best practice would be for denials of disqualification motions, and decisions on appeal from such denials, to be in writing or otherwise on the record and to contain an explanation of the decision.

^{xxxiii}. *Caperton*, 129 S. Ct. at 2269. We perceive no distinction pertinent to the fundamental appearance problem. Where the likelihood of bias exists, neither the size of the amount in controversy nor the equitable nature of the relief requested changes the analysis.

^{xxxiv}. *Id.* at 2272. *See* our observations on the standard of review in our commentary to Question 19. *Supra* n.xxi. As the injury for which redress is warranted is not merely to a party before the court but to the judicial system as a whole, harmless error analysis seems inappropriate.

^{xxxv}. *Caperton*, 129 S. Ct. at 2269. We began this article with Shakespeare's musings on names in the context of a rose. Gertrude Stein's more modern observation is her oft-quoted aphorism: "A rose is a rose is a rose." Gertrude Stein, *Sacred Emily* (1913), *printed in* GERTRUDE STEIN, *GEOGRAPHY AND PLAYS* 187 (1922). We essay the following homage: Impartiality is impartiality, and fairness is fairness is fairness. Lest the point be unclear, let us explicate our answer to this makeweight question: What matter is it if the case involve financial, social, or ideological issues, or any combination of these? The appearance of impartiality and fairness applies with equal force in all instances.

^{xxxvi}. *Caperton*, 129 S. Ct. at 2272. Far be it from us to suggest that a judge whose disqualification is sought has no right to be heard in the matter. That can certainly be part of the totality of facts and circumstances to be weighed in determining whether disqualification is warranted in the usual case or, in the "extreme" or "extraordinary" case, mandated by the due process clause. Where there is an unwillingness voluntarily to recuse without explanation (which is

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

also the judge's right and an easy way to preserve the judge's own privacy), the most appropriate way for the judge to air his views is to put them on the record or to write a reasoned opinion justifying his decision on the disqualification motion. Hopefully, that decision will be more on point than was Justice Benjamin's—when he finally got around to issuing it. (We intimate nothing judgmental when we state the simple facts: The decision of the West Virginia Supreme Court of Appeal was rendered April 3, 2008; Benjamin's concurring opinion was issued four months later, after the petition for certiorari had been filed but before the due date for Massey's Brief in Opposition to the petition). See Joint Appendix 635a, 2008 WL 5422892. Benjamin's opinion not only went out on a limb but proceeded to saw it off after him. Therein he contended—at odds with traditional principles of judicial ethics found in Supreme Court precedent, decisions of myriad other courts, the ABA Model Code of Judicial Conduct, and all state avatars thereof—that due process could never require recusal based on appearances and that only actual bias counts. Cf. *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (observing—even if there is no showing of actual bias in the tribunal—due process is denied by circumstances that create the likelihood or the appearance of bias.); *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias); MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety”); R. 2.11(A) (“A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . .”).

^{xxxvii}. *Caperton*, 129 S. Ct. at 2271. Certainly, the temporal relationship between the case before the court and the conduct giving rise to an appearance problem is one of the important factors. Due process requires an objective inquiry into whether the supporter's influence on the election under all the circumstances “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.” *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). That was true also in *Lavoie*, where an Alabama Supreme Court Justice voted to uphold a punitive damages award against an insurer while he was the lead plaintiff in a nearly identical lawsuit pending in the lower courts. 475 U.S. 813 (1986).

In the *Caperton* situation, Blankenship's campaign support, though admittedly enormous and “disproportionate,” became even more likely to create the appearance problem—a probability or likelihood of bias in the public eye—if the case were pending or about to be pending before the very court on which the candidate (Benjamin) sat. The connection in *Caperton* was even more direct than a situation in which the supporter was planning to initiate litigation in the lower courts that might ultimately find its way up to the state high court. As the majority held:

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.

Caperton, 129 S. Ct. at 2263-64. The majority went on to observe:

[T]he pendency of the case is also critical, for it was reasonably foreseeable that the pending case would be before the newly elected justice. Although there is no allegation of a *quid pro quo* agreement, the

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

Id. at 2264-65.

On the other hand, if (1) at the time of the campaign support, the facts underlying the case have not yet arisen, (2) in the case of a lower court judge, cases are assigned by random selection, or (3) in the case of an appellate judge, the term of the elected judge is not sufficiently long (in West Virginia, state high court judges serve for a 12-year term, *see* W. VA. CONST., art. VIII, § 8, Cl. 2., but in some states it is less) that there can be any assurance that the case will come before that particular judge, the temporal factor may militate against the conclusion that due process requires disqualification.

^{xxxviii} *Caperton*, 129 S. Ct. at 2269. It would certainly make a difference if the non-pending case were unanticipated in the truest sense of that word. Given the sophistication of strategic and long-range planning on corporate boards and committees and among senior management, both with and without the assistance of sophisticated lawyers, investment bankers, and myriad consultants, mere temporal separation would not alone suffice. Normally, one might be inclined to regard litigation brought against the party who made the campaign expenditures years earlier as unanticipated. That need not be so, however. Without meaning to sound unduly Machiavellian or conspiracy-theory smitten, we suggest that the factual underpinnings of the *Caperton* case would not qualify, as the summary, *supra* note 3030, amply illustrates. There, not only did Massey and Blankenship engage in a course of conduct that was certain to lead to litigation, they also engaged in delaying tactics over more than four years in order to put off the appeal date until after a more favorable jurist, Justice Brent Benjamin, was elected (with massive financial support from Blankenship) to the state high court. As for litigation actually brought by the party who made the campaign expenditures, there would likely have to be some unexpected, supervening event giving rise to the need for such litigation before one could say, with any degree of confidence, that it was truly “unanticipated.”

^{xxxix} We question the underlying presumption in this question, namely that a judge's reputation will perforce be sullied by either a motion to disqualify or a petition seeking review – on whatever ground – of that judge's denial of a disqualification motion. For one thing, the motion may have been completely frivolous, such as a motion seeking disqualification based on the judge's race, ethnicity, or religion where these have nothing to do with the issues in the case.

Even sticking with the Chief Justice's predicate of so-called *Caperton* claims, however, and assuming *arguendo* that the underlying facts go well beyond a *de minimis* level of support so that the motion is not patently frivolous, why assume that the judge's reputation is necessarily besmirched? The judge may not, after all, have previously known that his election campaign had received financial support from a particular party or counsel or had information about the level of that support. Politics, as we have noted, makes strange bedfellows, and judges have (and under the First Amendment can have) no control over what individuals and entities may decide to furnish campaign support. In the event a supporter is so unsavory that the judge would prefer not to have the support, the most that can be done is for the judge's campaign committee to disseminate an advertisement of its own to disassociate the campaign from the person or entity in question. That

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the “Forty Thieves,”* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.

tactic, of course, will be rarely employed, inasmuch as such advertising is not only costly but may well turn out counterproductive if it should end up drawing more public attention to the unsavory support than would otherwise have been the case.

Indeed, now that the Court in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), has recently unshackled independent expenditures by corporations and labor unions in general elections from statutory restraints (by holding such restraints violative of the First Amendment), corporations and labor unions will be able to make unlimited expenditures in judicial elections as well, and judges in the future will frequently have even less of an idea than at present whence their support has come. That will only attenuate further any linkage between the identity of a campaign supporter and the judge's reputation.

It is rather by stubborn insistence on presiding over a case in circumstances where, as in *Caperton*, a reasonable person cannot but perceive that the judge's impartiality is called into question, that damage to the judge's reputation can most reliably be assured.

Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "Forty Thieves,"* 1 AKRON STRICT SCRUTINY 63 (2010), <http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justice-roberts-and-the-forty-thieves.pdf>.