

## OPENING REMARKS

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### PREFACE

On June 8, 2009, the United States Supreme Court issued its decision in *Caperton v. A.T. Massey Coal Co.*, a landmark case that had a substantial role in reshaping existing standards of judicial conduct.<sup>1</sup> The *Caperton* majority clarified that the Fourteenth Amendment’s Due Process Clause requires that judges recuse themselves not only when litigants are able to demonstrate actual bias, but also when certain facts create an unacceptable “probability of bias.”<sup>2</sup> Four Justices sharply dissented, expressing concerns that the rule set forth by the majority would prove unworkably vague and could undermine public faith in the judiciary.<sup>3</sup> The case quickly sparked robust debate among judges, scholars, and other commentators about the scope and application of the new constitutional rule.

Five years later, the *Journal of Legislation and Public Policy* partnered with the Brennan Center for Justice and the American Bar Association Center for Professional Responsibility to examine the effects that the case has had on judicial recusal in the United States. These efforts culminated in a symposium entitled “Courts, Campaigns, and Corruption: Judicial Recusal Five Years After *Caperton*,” which took place on November 14, 2014 at New York University School of Law. Through four separate panel discussions—which featured nearly half a dozen current and former state-court judges, as well as many other prominent voices in the judicial-ethics debate—our participants considered the history of recusal reform, discussed the current legal landscapes in various states, and assessed the future of the struggle for judicial independence.

On behalf of all involved in the symposium, the *Journal* is pleased to introduce Volume 18, Issue 3, which presents both the collected remarks from our panel discussions and timely scholarship by

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1. 556 U.S. 868 (2009).

2. *Id.* at 887–88.

3. *Id.* at 890–91 (Roberts, C.J., dissenting).

panelists on the subject of judicial recusal. This issue comes fresh on the heels of the Supreme Court's recent decision in *Williams-Yulee v. Florida Bar*,<sup>4</sup> which built in part upon the rule set forth by the *Caperton* majority and elaborated on the intersection of the constitutional interests implicated by rules of judicial conduct. With this area of law fast evolving, we have no doubt that the topic of judicial recusal will remain at the forefront of public debate for years to come.

We at *Legislation* wish to extend our sincere thanks to the Brennan Center and the ABA Center for Professional Responsibility, as well as to the many other organizations and individuals who helped make the symposium possible. In particular, we wish to thank our distinguished lineup of panelists and moderators, who generously agreed to allow us to print their remarks. The material herein has been transcribed from recordings of the event, and—where appropriate—has also been very lightly edited to better suit the written form.

Without further ado, we present “Courts, Campaigns, and Corruption: Judicial Recusal Five Years After *Caperton*.”

Amanda J. Sterling  
*Editor-in-Chief*

#### OPENING REMARKS

*Wendy Weiser\**

Good morning everyone, and on behalf of the Brennan Center for Justice at NYU School of Law, I want to welcome you all to “Courts, Campaigns, and Corruption: Judicial Recusal Five Years After *Caperton*.” My name is Wendy Weiser. I direct the Democracy Program at the Brennan Center, and we are delighted to be co-sponsoring this important event with the ABA Center for Judicial Responsibility and the *NYU Journal of Legislation and Public Policy*.

Since our founding, the Brennan Center has focused on fair courts to make sure that our courts system remains fair, impartial, and independent and is perceived to be so. We are focused especially on state courts—not only because they hear the vast majority of cases in this country and are so critically important to our democracy, but also because they face particular challenges, especially in the thirty-nine

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4. 135 S. Ct. 1656 (2015).

\* Director, Democracy Program, The Brennan Center for Justice at New York University School of Law.

states that elect some or all of their judges.<sup>5</sup> Put simply, in recent years, skyrocketing spending has transformed judicial elections across the country, the phenomenon is no longer episodic and is no longer confined to particular states or races. And it's creating challenges for courts seeking to maintain public confidence and to discharge their business of deciding cases fairly and impartially. These issues are receiving increasing public attention and raising increasing public concern, and I'll just name a few top-line facts on recent ones, as you've all undoubtedly heard us say, as the Brennan Center, Justice at Stake, and the National Institute of Money in State Politics<sup>6</sup> have been documenting for over a decade the increase in spending in judicial races across the country.

This year, fundraising and TV spending records were broken in four states.<sup>7</sup> Total TV spending in judicial races for 2014 was nearly \$14.5 million, which dramatically exceeds the \$12.2 million in 2010.<sup>8</sup> Special-interest and partisan groups dominated spending in many of the races; for one example, an initiative by the Republican State Leadership Committee put at least \$3.4 million into judicial races in five states.<sup>9</sup> And much of the spending in these races comes from interests and individuals that are likely to appear before the court and the lawyers who represent them. In 2011–2012, more than fifty percent of judicial candidate contributions came from lawyers and business interests.<sup>10</sup> And almost ninety percent of Americans believe that campaign contributions and outside spending in judicial races are impacting judges' decisions.<sup>11</sup>

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5. See, e.g., Mark Hansen, *Fast Track: Carlton Moves Quickly to Mobilize ABA Efforts to Find Better Ways to Elect Judges*, 88 A.B.A. J. 68 (2002) (observing that thirty-nine states continue to select judges via elections of some type); see also Adam Liptak, *Judges on the Campaign Trail*, N.Y. TIMES (Sept. 27, 2014), <http://www.nytimes.com/2014/09/28/sunday-review/judges-on-the-campaign-trail.html> (noting that judicial elections currently take place in thirty-nine states).

6. NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org> (last visited Mar. 11, 2015).

7. Seth Hoy, *TV Ad Spending Reaches Nearly \$14 Million in 2014 State Supreme Court Races*, BRENNAN CTR. FOR JUST. (Nov. 5, 2014), <http://www.brennancenter.org/press-release/tv-ad-spending-reaches-nearly-14-million-2014-state-supreme-court-races>.

8. *Id.*

9. *Id.*

10. See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, JUSTICE AT STAKE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–12: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS 15 (2013), <http://newpoliticsreport.org/content/uploads/JAS-NewPolitics2012-Online.pdf>.

11. *Id.*

This points to a critical problem that we need to address both in fact, or in risk, and in perception. Judicial recusal is one vital tool to ensure that the flood of spending does not undermine the promise of fair and impartial justice that is central to our system of government. When judges are required to step aside in cases, in circumstances where conflict may be reasonably perceived, it promotes confidence that our courts will treat everyone fairly and equally. And indeed, more than ninety percent of Americans think that judges who receive major contributions in election support from a party to a case should step aside from deciding that case.<sup>12</sup>

In *Caperton*, the Supreme Court made clear that there are some circumstances where due process requires recusal. But the Court's decision not only affirmed recusal as an important limiting principle to protect public confidence in the courts, but it also set it as a minimum standard, a floor.<sup>13</sup> And in doing so, it allowed states to set higher standards than those that are required by the due process floor. In August, the American Bar Association passed a resolution calling on states to adopt recusal rules that address campaign spending and that ensure that there are fair procedures for considering those requests.<sup>14</sup> Designing effective recusal rules raises some really difficult questions. The rules must address the reality of how money is spent in judicial elections, accounting for the rise of independent expenditures, the use of outside groups that do not report their donors. And it should be directed especially toward the kinds of election spending that are most likely to create an appearance of bias. At the same time, rules must also be fair and administrable and use procedures that ensure timely, fair, and independent consideration of recusal requests.

This is a difficult task, but it is one that must be done. And the five-year anniversary of *Caperton* is an ideal moment to consider these questions. What are the best approaches to judicial reform? Are there lessons to be learned from state experiences so far? How far have we come since *Caperton*, and how much farther do we need to go? Today, we bring together an incredible lineup of judges, scholars, and legal experts to take on this challenge. We're going to look at the existing state of judicial recusal across the country—including recent

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12. *Id.*

13. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009).

14. AM. BAR ASS'N, RESOLUTION 105C (2012), [http://www.americanbar.org/content/dam/aba/images/abanews/2014am\\_hodres/105c.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/105c.pdf); see also Debra Cassens Weiss, *Changes to Model Ethics Rules Clarify Lawyers' Obligations When Using Outsourcing*, A.B.A. J. (Aug. 6, 2012, 8:05 PM), [http://www.abajournal.com/news/article/changes\\_to\\_model\\_ethics\\_rules\\_clarify\\_lawyers\\_obligations\\_when\\_using\\_o/](http://www.abajournal.com/news/article/changes_to_model_ethics_rules_clarify_lawyers_obligations_when_using_o/) (providing an overview of Resolution 105C).

reforms in the states—and we’re going to consider what has worked, what could be improved, and the areas where reform is most urgently needed. We hope this conversation will help lay the groundwork for improving recusal rules and procedures across the country.

Our first panel is going to explore the impact of *Caperton* and its importance five years later. Our second panel will discuss recusal reform efforts with representatives for the ABA sections that have worked most extensively on recusal rules. Our lunch panel features current and former state supreme court justices who will provide insight into the judicial perspective of recusal in the context of campaign spending. And our final panel will take a bigger look at how we think about bias and impartiality in other contexts that might inform the conversation in the recusal context.

And so before I turn this over to our emcee, I do want to give very special thanks to our sponsors in helping us put together such an incredible conference. First, the *NYU Journal of Legislation and Public Policy* and especially to the Editor-in-Chief, Sacha Baniel-Stark, and the Symposium Editor, Eddie Rooker. The faculty co-sponsors from NYU I’d like to thank as well, Burt Neuborne and Helen Hershkoff. Second, I would also like to thank the ABA Center for Professional Responsibility and, particularly, Dennis Rendleman and Art Garwin. And this conference was the hard work not only of our co-sponsors but also of the incredibly talented staff of the Brennan Center, and I’d like to just recognize the efforts particularly of Matt Menendez, Alicia Bannon, Kate Berry, Cody Cutting, Jafreen Uddin, Seth Hoy, and Allyse Falce. It was a big team, but they put in an incredible effort and I think we’re all benefitting today. I’m now going to turn it over to Sacha Baniel-Stark, today’s emcee. Sacha is the Editor-in-Chief of the *NYU Journal of Legislation and Public Policy*, and this is a non-partisan periodical specializing in the analysis of state and federal legislation. The *Journal* provides a forum for the discussion of contemporary legislative issues, focusing on legal reform and the organizational and procedural factors affecting the efficiency of legislative decision-making. Thank you so much. I’m going to now turn it over to Sacha.

## INTRODUCTION

*Alessandra Baniel-Stark\*\**

Hi. Good morning, everyone. Thank you all for being here, and thank you, Wendy, for your kind introduction. As Wendy mentioned, I am the Editor-in-Chief of the *NYU Journal of Legislation and Public Policy*. More importantly, I will be your emcee throughout the day. I was elected to my position as Editor-in-Chief last February, and since my first week on the job we've been working with the Brennan Center, and subsequently the ABA, to put on this event. It's been our immense privilege to partner with both of these organizations, and we couldn't be more thrilled to share today's event with you finally, after these months of planning. We at the *Journal* feel particularly honored to get to collaborate not only with the nation's leading democracy think tank and the national representatives of the legal profession, but also with our distinguished panelists, who are some of the leading lights in their fields. They have a breadth of knowledge and experience with the issues of the Symposium that, hubristically, I think probably can't be matched.

As Wendy's remarks made clear, today's Symposium examines a critically underappreciated area in contemporary American democracy and one that is ever more deserving of our reflection. As Wendy said, today's event will proceed in four parts. Between each part we will have a break, and then following the break I will have the privilege of introducing the moderator for the following panel. I have a couple more remarks quickly before we get started. Because the *Journal of Legislation and Public Policy* is committed to shedding light on this issue and helping foment discussion, the remarks from the Symposium will be published in Volume 18 of our journal. We will also publish articles on these topics either from contributors or from any inspired audience members who feel like submitting something to the *Journal*, or for our online companion, *Quorum*.

In addition to thanking everyone whom Wendy has already thanked, I would also like to specially thank the staff of the *Journal of Legislation and Public Policy*, who have worked exceptionally hard to bring this event to light. I also want to thank, from a student perspective, our academic advisors, faculty advisors, Helen Hershkoff, who is also the faculty advisor of the *Journal*, and Burt Neuborne, who helped champion this event as we were proposing it. We'd also like to thank the law school—Paul O'Grady, who is our main administrator,

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\*\* Editor-in-Chief 2014–2015, *New York University Journal of Legislation and Public Policy*.

and Dean Morrison—for being so supportive of this event. I’m also pleased to say that the Dean will be here later today to give closing remarks.

It’s now my distinct pleasure to introduce the moderator for our first panel. In a crowd like this, I doubt he needs much by the way of introduction. I know that I come across his name not infrequently when I’m reading coverage of the Supreme Court. Adam Liptak has been the Supreme Court correspondent for the *New York Times* since 2008, and in fact covered *Caperton* as it came down, I believe. Prior to that illustrious position, Mr. Liptak collaborated on a study of the relationship between campaign contributions in Ohio and judicial decisions by a couple of judges there. His work has appeared in a whole host of publications. So without further ado, I invite the first panel to take the floor.

