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## What Is "(Im)Partial Enough" in a World of Embedded Neutrals?

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# WHAT IS “(IM)PARTIAL ENOUGH” IN A WORLD OF EMBEDDED NEUTRALS?

Nancy A. Welsh\*

*The Supreme Court's decision in Caperton v. A. T. Massey Coal Co. highlighted the fragility of judicial independence and impartiality in the United States. A similar, less-noticed fragility of independence and impartiality exists among the arbitrators, mediators and administrative hearing officers who resolve an increasing number of disputes. Everywhere one looks, there is unremarked yet remarkable evidence of the rise of “embedded neutrals,” particularly in uneven contexts between one-time and repeat players. This phenomenon becomes particularly worrisome when the embedded neutral's role is due to their special relationship with the repeat player, and the one-time player is not as sophisticated as the repeat player, has not voluntarily or knowingly chosen the dispute resolution forum that will be used to resolve their dispute, and is either unaware of the special relationship between the neutral and the repeat player or effectively*

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\* Professor of Law, The Dickinson School of Law of The Pennsylvania State University. My thanks to the following current and former students for their research assistance with portions of this Article, which has been in gestation for a very long time: Carolina Aguilar, Lauren Avallone, Christopher Demetriou, Amy Fernandez, Jen Modjeska, Linas Ledebur, Emily Munn, Frank Pyle, Anthony Rodgers, Kelly Towns, and Travis White. My thanks also go to the following persons for their comments on drafts and early presentations of the article: Larry Backer, Ray Campbell, Tom Carbonneau, Jamie Colburn, Lance Cole, Katrice Bridges Copeland, Michael Foreman, Chris Honeyman, Eileen Kane, Kit Kinports, Bobbi McAdoo, Greg McNeal, Bruce Meyerson, Carla Pratt, Richard Reuben, Catherine Rogers, Andrea Schneider, Jeff Stempel, Jean Sternlight, Laurel Terry, Carl Ver Beek, and Shoba Wadhia. My thanks to Penn State University, Dickinson School of Law for summer research stipends and the funds to employ the many research assistants listed *supra*. And thanks to the following organizations and institutions that provided me with opportunities to present and receive feedback on earlier iterations of this Article: Tilburg University; Marquette University School of Law; University of Nevada-Las Vegas, William S. Boyd School of Law; Northern California ADR Faculty Conference at Stanford Law School; AALS ADR Section's Works-in-Progress Workshop at Arizona State University, Sandra Day O'Connor College of Law; Hamline University School of Law; Hofstra University School of Law; and University of Maryland School of Law. Finally, and as always, my thanks and love go to my wonderful and witty husband, Eric Munck, and our sons, Sean and Daniel, who constantly manage to bring humor, affection, and new discoveries to life in our *Zits*-like home. Any errors contained in this Article are, of course, mine. When you find them, please let me know by writing to me at [nxw10@psu.edu](mailto:nxw10@psu.edu).

unable to challenge it. As dispute resolution becomes a lucrative private business, it is easy to begin to worry about the corrupting influence of repeat business and money on the ability of embedded neutrals to “hold the balance nice, clear and true.” The Supreme Court, however, seems largely oblivious to these concerns. The Court has encouraged deference to the decisions and settlement agreements these neutrals produce and has regularly rejected one-time players’ claims of structural bias. This Article explores whether the analysis in *Caperton* and its antecedents—i.e., conducting a close examination of the volume and flow of monies that may provide direct and indirect benefit to the neutral, their timing, and the plausibility of their effect on an adjudicated outcome, in order to determine whether the risk of actual bias is “too high” to be deemed “constitutionally tolerable”—could be applied to assess the sufficiency of the impartiality offered by embedded neutrals and private dispute resolution organizations when they are treated as adequate—and sometimes superior—replacements for independent and public trial courts.

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## INTRODUCTION

In 2009, the U.S. Supreme Court took the extraordinary measure of announcing that West Virginia Supreme Court of Appeals Justice Brent Benjamin had violated the Due Process Clause of the Fourteenth Amendment when he refused to recuse himself in *Caperton v. A.T. Massey Coal Co.*<sup>1</sup> Writing on behalf of a majority of the Court, Justice Kennedy detailed the nearly \$3 million in campaign contributions that had been directed to Justice Benjamin's campaign by defendant A. T. Massey's board chairman and principal officer, Don Blankenship, the "temporal" relationship among these contributions, Justice Benjamin's electoral victory, and the central role that he played in two decisions that reversed a \$50 million jury verdict against Massey.<sup>2</sup> Ultimately, the Supreme Court concluded that the situation in this case presented "too high" a risk of actual bias to be deemed "constitutionally tolerable."<sup>3</sup>

With its decision, the Supreme Court upheld the exceptionalism of, and public respect for, the independence and impartiality of America's judges. The decision challenged some citizens' perception that judges can be unduly influenced by those with money and power.<sup>4</sup> Such suspicion resonates in the press coverage of a variety of relatively recent events involving the Supreme Court: its decision in *Bush v. Gore*,<sup>5</sup> Justice Scalia's refusal to recuse himself in *Cheney v. U.S. District Court for the District of Columbia*,<sup>6</sup> and even the nomination of Harriet Miers for the Supreme Court.

The press itself, of course, is not immune to accusations of undue influence. Indeed, during the invasions of Afghanistan and Iraq, American citizens were introduced to the concept of the "embedded journalist."<sup>7</sup> Pentagon officials claimed that they were limiting journalists' access in order to ensure their safety and protect secret military operations, but the officials also must have been aware that the journalists' reporting would be influenced by what the military permitted them to see and how the military framed these events.

A similar dynamic is also occurring within the ranks of the neutrals who assist with the resolution of many legal disputes—e.g., administrative adjudicators, arbitrators, and mediators. Today, these are often "embedded neutrals,"<sup>8</sup> whose

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1. 129 S. Ct. 2252 (2009).

2. *Id.* at 2256–60.

3. *Id.* at 2257.

4. See generally Symposium, *Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 215 (2009) (offering various perspectives regarding the underlying reasons for, and implications of, the *Caperton* decision); Jeffrey W. Stempel, *Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249 (2010).

5. 531 U.S. 98 (2000).

6. 541 U.S. 913 (2004).

7. *Newshour: Pros and Cons of Embedded Journalism* (PBS television broadcast Mar. 27, 2003), available at [http://www.pbs.org/newshour/extra/features/jan-june03/embed\\_3-27.html](http://www.pbs.org/newshour/extra/features/jan-june03/embed_3-27.html) (observing that before an embedded journalist may join a battalion, he or she must sign a contract restricting what he or she will report and when).

8. See Marc S. Galanter, *Reading the Landscape of Disputes*, 31 UCLA L. REV.

involvement is the result of their association with one or more of the parties involved in the dispute. Neutrals of this type have long existed to resolve disputes within workplaces,<sup>9</sup> faith communities,<sup>10</sup> or between sophisticated parties who are members of the same trade or profession and have voluntarily chosen to be bound by an arbitrator's decision.<sup>11</sup> Generally, this is not a problem. In these instances, the embedded neutral often represents a wise, respected elder within the community or identity group to which both parties belong. This sort of embedded neutral thus shares the norms that animate both of the disputing parties and can help to resolve their dispute in a manner that both parties are likely to view as principled.<sup>12</sup>

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4, 17 (1983). Galanter first referenced "embedded forums," noting that they range from those which are hardly distinguishable from the everyday decisionmaking within an institution ("I'd like to see the manager.") to those which are specially constituted to handle disputes which cannot be resolved by everyday processes. . . . Resort to embedded forums is encouraged where there are continuing relations between the disputants. Continuing relations raise the cost of exit, they increase the likelihood of some shared norms, and they supply opportunities for application of sanctions—e.g., by direct withdrawal of beneficial relations or by damage to reputation that reduces prospects for other beneficial relations.

*Id.*

9. See CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 41–50 (1996) (describing the "social network mediator" and three variations of the "authoritative mediator"—i.e., benevolent mediator, administrative/managerial mediator, and vested interest mediator).

10. See *Matthew* 18:15–20 (urging someone who has been wronged to first speak to the alleged wrongdoer, then to summon another, and then to refer the matter to the church); JANE E. CALVERT, *QUAKER CONSTITUTIONALISM AND THE POLITICAL THOUGHT OF JOHN DICKINSON* (2008); WILLIAM M. OFFUTT, JR., OF "GOOD LAWS" AND "GOOD MEN": LAW AND SOCIETY IN THE DELAWARE VALLEY, 1680–1710, at 146 (1995) (discussing Quaker "Gospel Order" dispute resolution system that put disputes in the hands of small groups of community members to keep decisions away from outsiders); see also E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1065 (1999) (urging that "[m]inority-culture arbitration not only has great utility as a needed safe harbor from majoritarian bias, it also holds great promise as an instrument of systemic change").

11. See Michael S. Maza, *Arbitrator Selection and Neutrality Under the Railway Labor Act: An Airline Employee's Perspective*, 4 J. AM. ARB. 327 (2005) (describing the arbitration process used by Northwest Airlines and its unionized pilots, focusing on the parties' selection of arbitrator panels that include two "party arbitrators").

12. See Amy J. Schmitz, *Consideration of "Contracting Cultures" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123 (2007). Professor Schmitz contrasts "extra communal contracting cultures" with "intra communal contracting cultures." *Id.* at 145. The former are likely to involve one-time vs. repeat players and noticeable disparities of power. *Id.* at 146. In contrast, "it seems that the more intra communal a culture is, the more likely it is that negotiators within that culture will have cooperative attitudes. Mutual dispute resolution values and needs in more intra communal contracting cultures may counteract uneven economic resources and lead to reasonable arbitration provisions." *Id.* at 165.

But the use of embedded neutrals becomes worrisome when the neutrals' role is due to their special relationship with just one of the parties, usually the more powerful repeat player, in uneven contests between that repeat player and a one-time player.<sup>13</sup> This concern is especially strong when the one-time player is not as sophisticated as the repeat player, has not voluntarily or knowingly chosen the dispute resolution forum that will be used to resolve her dispute, and is either unaware of the special relationship between the neutral and the repeat player or aware of the relationship but effectively unable to challenge it.<sup>14</sup> Consider, for example, the requirement that an individual citizen exhaust the administrative procedures of an agency before a hearing officer who is the employee or paid contractor of the very agency whose policies and practices the individual is challenging.<sup>15</sup> Consider mandatory arbitration conducted pursuant to a clause in a

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13. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter notes the significant advantages that repeat players enjoy in comparison to one-time players—e.g., experience leading to changes in how the repeat-player structures the next similar transaction; expertise, economies of scale, and access to specialist advocates; informal continuing relationships with institutional incumbents; bargaining reputation and credibility; long-term strategies facilitating risk-taking in appropriate cases; influencing rules through lobbying and other use of resources; playing for precedent and favorable future rules; distinguishing between symbolic and actual defeats; and investing resources in getting rules favorable to them implemented—and contrasting these to disadvantages borne by one-time players—e.g., more at stake in given case; more risk averse; more interested in immediate over long-term gain; less interested in precedent and favorable rules; not able to form continuing relationships with courts or institutional representatives; not able to use experience to structure future similar transactions; limited access to specialist advocates. *Id.* at 97–100; see also Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 195 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225–27 (1998) (observing that repeat-player employers fare better in arbitration than one-shot employees, that when repeat-player employers lose, damages are lower than for one-time employers, and generally that enforcement of predispute arbitration agreements allows employers to structure the arbitration process to their advantage); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 874–76 (2008) (observing that the structure of court-oriented mediation has evolved to favor preferences of repeat players).

14. My thanks to my colleague, Catherine Rogers, for her assistance in helping me to clarify these elements.

15. See OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 40 (2003) (describing agency employees "fulfilling judge-like roles but doing so outside the confines" of the Administrative Procedure Act (APA)); Judith Resnik, "Uncle Sam Modernizes His Justice": *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 662–63 (2002) (noting the extent to which agencies are expanding the ranks of hearing officers, hearing examiners and other decisionmakers who do not fall within the protections of the APA); see also Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L. J. AM. U. 65, 70–71 (1996) (regarding non-APA judges in Departments of Justice, Agriculture and Defense); PENN STATE LAW, CTR. FOR IMMIGRANTS' RIGHTS, PLAYING POLITICS AT THE BENCH: A WHITE PAPER ON THE JUSTICE DEPARTMENT'S INVESTIGATION INTO THE HIRING PRACTICES OF IMMIGRATION JUDGES (2009)

boilerplate contract when the more-powerful employer or financial services company creates the contract, inserts the arbitration clause, specifies that the arbitration will be conducted by its own trade association<sup>16</sup> or an organization that solicited inclusion in the contract, and refuses to permit an employee or consumer to opt out of the arbitration process.<sup>17</sup> Even consider voluntary mediation offered by an employer, hospital, or agency as an alternative to litigation, arbitration,<sup>18</sup> negotiation, or investigation when the mediators have been admitted to the repeat players' panel because they possess the particular experience, knowledge, and/or approach that the repeat player values.<sup>19</sup>

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(raising concerns regarding the politicized hiring of unqualified immigration judges and proposing reforms).

16. See, e.g., *Harter v. Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000) (in dispute between corn farmer and operator of grain elevators, contract provided for arbitration by National Grain & Feed Association; operator was a member of NGFA, paid more than \$26,000 annually in dues, and had a top employee on NGFA's board; court nonetheless found that "[e]ven if all these facts are true, they do not establish the direct, definite, demonstrable bias required"); *Dolton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 935 A.2d 295 (D.C. 2007) (after losing nearly \$300,000, investors brought action against brokerage firm for failure to diversify holdings after alleged repeated requests to do so; complaint was brought before NASD Dispute Resolution, Inc., which denied claim; lower court and D.C. Court of Appeals refused to vacate the award, finding insufficient evidence); *Hottle v. BDO Seidman, LLP*, 846 A.2d 862 (Conn. 2004) (employee subjected to arbitration before a five member panel of partners from his accounting firm).

17. Suspicion heightened after some ADR firms announced that they would not enforce boilerplate waivers of class action arbitrations, then "back[ed] down" in the face of objections from lenders and other financial services institutions. See Alan S. Kaplinsky & Mark J. Levin, *Is JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?*, 61 BUS. LAW. 923 (2006); Erick Bergquist, *JAMS Backs Down on Class-Action Arbitration*, AM. BANKER, Mar. 11, 2005, at 1-5.

18. See, e.g., Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. ON DISP. RESOL. 329 (2006).

19. See, e.g., Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in THE HANDBOOK OF DISPUTE RESOLUTION 381 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (describing how mediation and other dispute resolution processes have been co-opted by managers to reassert their authority); Nancy A. Welsh, *Stepping Back Through the Looking Glass*, 19 OHIO ST. J. ON DISP. RESOL. 573, 591-93, 660 (2004) (describing measures used by the U.S. Postal Service to ensure conformity with transformative model of mediation and selection criteria used by the Pennsylvania Special Education Mediation Service); Leah Wing, *Mediation and Inequality Reconsidered: Bringing the Discussion to the Table*, 26 CONFLICT RESOL. Q. 383 (2009); Howard Gadlin, *Addressing the Thornier Complexities of Racial Discrimination Complaints in the Workplace*, DISP. RESOL. MAG., Spring 2009, at 25-26 (expressing uneasiness about use of mediation to respond to employment discrimination claims and noting that "most people in the field are quick to dismiss neutrality as a myth and to challenge the ideal of impartiality as illusory even while those terms continue to be employed in most formal and informal mediator job descriptions"); Christopher Guadagnino, *Malpractice Mediation Poised to Expand*, PHYSICIAN'S NEWS DIG., Apr. 2004, available at <http://www.physiciansnews.com/cover/404.html> ("The first institution in Pa. to adopt a formal co-mediation program is Drexel University College of Medicine in Philadelphia, which recently became self-insured after its previous malpractice insurer pulled out of the medical malpractice line of business, according to Drexel's Chief Counsel Tobey Oxholm,

As alternative dispute resolution (ADR)—and access to the role of neutral—has become institutionalized by repeat players, it has also become a lucrative private business, at least for some.<sup>20</sup> There are now notable instances of judges leaving the bench or retiring to become private arbitrators and mediators.<sup>21</sup> Very recently, the American Bar Association reported that an arbitrator charged \$900 per hour for his services and assessed a total fee of \$400,000 after casting his vote for a pay increase for New York City transit workers.<sup>22</sup> Other mediators charge similarly high rates.<sup>23</sup>

Commentators have begun to object to the corrupting influence—or, at the very least, the *appearance* of a corrupting influence—of repeat business and money on embedded neutrals' ability to "hold the balance nice, clear and true,"<sup>24</sup> particularly in uneven contests between unsophisticated one-time players and the powerful repeat players who require participation as a condition of doing business with them. While commentators have raised such concerns in the administrative law realm,<sup>25</sup> and other commentators are beginning to raise such concerns about in-house<sup>26</sup> or agency-connected<sup>27</sup> mediation programs, the most significant concerns have involved private, binding, mandatory arbitration.<sup>28</sup>

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Esq.”).

20. See, e.g., Linda R. Singer & Michael K. Lewis, *Looking Forward in Mediation: Today's Successes and Tomorrow's Challenges*, DISP. RESOL. MAG., Spring/Summer 2008, at 15, 16 (reporting that “JAMS, the only national for-profit company offering the services of full-time, professional neutrals, maintains 23 offices across the country, with approximately 200 full-time mediators and arbitrators. It currently generates approximately \$100 million in annual revenue.”); Chris Serres, *Arbitrary Concern for the National Arbitration Forum*, STAR TRIB., May 10, 2008 (reporting that public documents show that NAF earned \$10.14 million in 2006 on revenues of \$39.37 million), available at <http://www.startribune.com/business/18812529.html>. Admittedly, however, some sectors of the dispute resolution field—e.g., community mediation, victim-offender mediation, special education mediation—remain a public service or avocation.

21. See, e.g., Michael D. Hausfeld, Michael P. Lehmann & Megan E. Jones, *Observations from the Field: ACPERA's First Five Years*, 10 SEDONA CONF. J. 95, 107 (2009) (describing retired Honorable Daniel Weinstein of JAMS as “one of the nation's preeminent mediators of complex civil disputes”).

22. See Martha Neil, *Lawyer's \$900/Hour Arbitration Fee Angers Transit Board Members*, A.B.A. J., Oct. 28, 2009, available at [http://www.abajournal.com/news/article/lawyers\\_900hour\\_arbitration\\_fee\\_angers\\_transit\\_board\\_members/](http://www.abajournal.com/news/article/lawyers_900hour_arbitration_fee_angers_transit_board_members/).

23. See Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257, 267–68 (2009) (reporting that most mediators provide services on a part-time basis, but perhaps 1000 mediators gross \$200,000 or more per year; a much smaller number consistently bill more than \$1 million per year).

24. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

25. See John Hardwicke & Thomas E. Ewing, *The Central Panel: A Response to Critics*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 231, 232 (2004) (arguing that any system in which decisionmakers are embedded within the agency creates the potential for “pressure on [decisionmakers] to produce decisions favorable to the agency”), cited in Emily M. Rector, *Removing the State from Administrative Agencies*, 84 NOTRE DAME L. REV. 2269 (2009).

26. See Howard Gadlin, *Addressing the Thornier Complexities of Racial*



*Discrimination Complaints in the Workplace*, DISP. RESOL. MAG., Spring 2009, at 27 (“I think the EEO ADR process results in grievance settlement rather than discrimination reduction. One would be hard pressed to find objective data or subjective reports that discrimination has been reduced as a result of mediation programs, or even that the racial climate in most agencies has improved.”); Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in THE HANDBOOK OF DISPUTE RESOLUTION 371 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

27. See Welsh, *supra* note 19, at 651–70 (raising concerns within the context of Pennsylvania’s special education mediation program).

28. In addition to the debate dealing directly with the advantages and disadvantages of mandatory arbitration clauses, described in the text, many courts and commentators have addressed these concerns in discussing unconscionability and arbitrator bias. See, e.g., *Mercuro v. Superior Ct. of Los Angeles County*, 116 Cal. Rptr. 2d 671, 678–79 (Cal. Dist. Ct. App. 2002) (making repeat-player effect part of substantive unconscionability analysis and observing: “the fact that an employer repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual employee . . . [which include] knowledge of the arbitrators’ temperaments, procedural preferences, styles and the like and the arbitrators’ cultivation of further business by taking a ‘split the difference’ approach to damages” and finding it significant that the arbitration agreement provided for arbitral hearings “to be held within the federal judicial district in which the employee was last employed by the company” because there were only eight NAF arbitrators with offices in the Central District of California, thus making the likelihood of the repeat-player effect more significant though not sufficient by itself to make the arbitration agreement unconscionable); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8 (Mont. 2002) (articulating eight factors for when an arbitration provision would be unconscionable, including whether “arbitrators tend to favor ‘repeat players,’ as opposed to workers or consumers who are unlikely to be involved in arbitration again”); Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 487 (1997); Catherine A. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L.J. 341 (2007); Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT’L L. 53 (2005); Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73 (2006); David S. Schwartz, *If You Love Arbitration, Set It Free: How “Mandatory” Undermines “Arbitration,”* 8 NEV. L.J. 400 (2007) [hereinafter Schwartz, *If You Love Arbitration*]; David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 401, 406, n.44–45, n.52 (2008) [hereinafter Stempel, *Mandating Minimum Quality*]. In a series of cases, the Montana district court, in applying the factors from *Kloss*, accepted the testimony of Professor William Corbett that “arbitrators tend to favor repeat players in securities arbitrations” and denied U.S. Bancorp Piper Jaffray’s motions to compel arbitration. See *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, No. DV-02-77 Mont. Dist. LEXIS 1122 (Nov. 9, 2006); *Mett v. U.S. Bancorp Piper Jaffray, Inc.*, No. DV-02-29 Mont. Dist. LEXIS 1255 (Apr. 22, 2005); *Estate of Alice A. Franey v. U.S. Bancorp Piper Jaffray, Inc.*, DV-02-36 Mont. Dist. LEXIS 2170 (Apr. 22, 2004); *Tomazich v. U.S. Bancorp Piper Jaffray, Inc.*, DV-02-131 Mont. Dist. LEXIS 3702 (Apr. 7, 2004); *Willems v. U.S. Bancorp Piper Jaffray, Inc.*, DV-03-25 Mont. Dist. LEXIS 3691 (Apr. 7, 2004); *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, DV-02-77 Mont. Dist. LEXIS 3704 (Apr. 7, 2004). In three different decisions, three different courts concluded that the arbitration provider that Ryan’s Family Steak Houses decided to use, Employment Dispute Services, Inc. (EDS), was biased in favor of repeat players. See *Penn v. Ryan’s Family*

In part, this critical focus on mandatory arbitration is the result of California's statutory requirement<sup>29</sup> that arbitral organizations make public disclosures of information that might indicate personal favoritism toward repeat players, as well as potential bias on the part of the provider organizations with which the arbitrators are associated.<sup>30</sup> Drawn to the data that these disclosure requirements produced, advocacy groups and academics began looking for patterns. Within the last couple of years, they have released position papers and reports grounded in California data.<sup>31</sup> In turn, reporters,<sup>32</sup> legislators,<sup>33</sup>

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Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000); *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 924 (M.D. Tenn. 2003) (observing that Ryan's paid half of the organization's gross income in a year); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 995 (S.D. Ind. 2001). In two out of the three cases, the court denied Ryan's motion to compel because it found that the arbitration provision was unconscionable due to repeat-player bias. In *Penn.*, the court found that the EDS system was not inherently biased, but denied the motion to compel based on a finding that the agreement lacked "mutuality of obligation" thus rendering the contract unenforceable. 269 F.3d at 759. In refusing to enforce the arbitration clause, the court took notice of the finding that that EDS's sole business was employment disputes thus making it inappropriately dependent on garnering business from employers. The court thus distinguished EDS from AAA and NAF which had other sources of business. The court's primary focus, however, was on EDS's control over the arbitration procedures. *Id.* at 757. EDS had the right under its rules to set the time and location of the arbitration proceedings, could modify and interpret its rules, and had complete control over the names of potential arbitrators from which the employer and employee chose. *Id.* According to the court, this level of discretion rendered the employee's role in selection of the arbitrator essentially meaningless. *Id.* at 759.

29. Legislation was introduced after a series of newspaper articles revealed apparent inequities in the arbitration of disputes between securities firms and their employees. See Reynolds Holding, *Millions Are Losing Their Legal Rights*, S.F. CHRON., Oct. 7, 2001, at A1; Reynolds Holding, *Can Public Count on Fair Arbitration?*, S.F. CHRON., Oct. 8, 2001, at A15; Reynolds Holding, *Judges' Actions Cast Shadow on Court Integrity*, S.F. CHRON., Oct. 9, 2001, at A13.

30. See Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343, 347 (2003); Ruth V. Glick, *California Arbitration Reform: The Aftermath*, U.S.F. L. REV. (2009); Richard Chernick, *Imposed-Arbitration Reforms Threaten To Stifle Strengths of Commercial Arbitration*, DISP. RESOL. MAG., Fall 2002, at 16; Jay Folberg, *Arbitration Ethics: Winds of Reform Blowing from the West?*, DISP. RESOL. MAG., Fall 2002, at 5 (describing reasons underlying establishment of new disclosure requirements for arbitrators in California); Gail Hillebrand, *Should California's Ethics Rules Be Adopted Nationwide?*, DISP. RESOL. MAG., Fall 2002, at 10.

31. See *infra* Part II.

32. See Wade Goodwyn, *Rape Victim's Case Shows Failings of Arbitration*, NPR, June 9, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=105153315> (describing Public Citizen report and story of Halliburton employee who was allegedly raped by other employees and now seeks to bring suit against Halliburton while Halliburton is requiring employee to pursue claim through arbitration).

33. See Press Release, Congressman Dennis Kucinich, *Kucinich Applauds Bank of America for Abandoning Mandatory Arbitration* (Aug. 13, 2009) (referencing subcommittee investigation and report), available at [http://oversight.house.gov/index.php?option=com\\_content&task=view&id=4040&Itemid=3](http://oversight.house.gov/index.php?option=com_content&task=view&id=4040&Itemid=3)

academics,<sup>34</sup> public attorneys,<sup>35</sup> and even bloggers<sup>36</sup> have begun to cite to these position papers and reports, often to invoke them as calls to action.

Many others, however, have urged that all is well and that alternative processes are inherently superior to<sup>37</sup>—or at least no worse than<sup>38</sup>—those offered by the courts. The U.S. Supreme Court has clearly aligned itself with this side of the debate. Indeed, with its arbitral<sup>39</sup> and administrative law<sup>40</sup> jurisprudence, the

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34. See, e.g., Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803 (2009).

35. The Office of the City Attorney in San Francisco filed an action against NAF alleging unfair business practices in arbitrations and in making consumers pay court costs and undetermined civil penalties. The credit card unit of Bank of America and a collection company also were named as defendants in the complaint in the action. Sam Zuckerman, *S.F. Sues Credit Card Service, Alleging Bias*, S.F. CHRON., Apr. 8, 2008, available at [http://articles.sfgate.com/2008-04-08/business/17143343\\_1\\_national-arbitration-forum-credit-card-dispute-resolution](http://articles.sfgate.com/2008-04-08/business/17143343_1_national-arbitration-forum-credit-card-dispute-resolution).

36. See, e.g., Nancy Welsh, *The Rise of the “Embedded Neutral?”*, ADR PROF BLOG, Dec. 5, 2007, <http://www.indisputably.org/?p=46#more-46>.

37. See Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 397 (2009) [hereinafter Carbonneau, *Triumph of Arbitration*] (urging that “arbitration personifies due process and justice” and “enables society to resolve disputes and to prosper by dedicating its resources to other activities”); Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343 (2009).

38. See SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION: PRELIMINARY REPORT 109–11 (2009), available at [http://www.searlearbitration.org/p/full\\_report.pdf](http://www.searlearbitration.org/p/full_report.pdf) [hereinafter SEARLE ARBITRATION REPORT].

39. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Professor Thomas Carbonneau has remarked that “[i]n its decisional law, the Court is bent upon delegating as much of the burden of civil litigation as possible to arbitration.” Carbonneau, *Triumph of Arbitration*, *supra* note 33, at 396 n.3.

40. See generally *NLRB v. Matros Automated Elec. Constr. Corp.*, No. 09-2249-ag(L) 2010 U.S. App. LEXIS 2788 (2d Cir. Feb. 11, 2010) (following *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (holding that factual findings of an ALJ are entitled to a standard of review based on the substantial evidence test, a highly deferential standard where these findings can only be overturned if they are not supported, or are contradicted by the record); John S. Kane, *Refining Chevron – Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 554 (2008) (immigration judges on the Board of Immigration Appeals can act as fact finders subject to judicial review under the substantial evidence test); Patricia M. Wald, *Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges’ Findings and Opinions*, 67 WASH. U. L.Q. 661 (1989) (describing the great deference accorded to administrative law judges’ fact-finding, resulting in growing power). *But see* *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); Patrick M. Garry, *Judicial Review and the “Hard Look” Doctrine*, 7 NEV. L.J. 151, 161–62 (2006) (“The purpose of the hard look doctrine ‘involves providing

Court has encouraged both the development of embedded neutrals and deference to the decisions and settlement agreements that these neutrals produce. The Court has also regularly rejected one-time players' general claims of structural bias, requiring instead that parties prove the existence and impact of such bias in their cases.<sup>41</sup>

Change, however, may be in the air. The oft-introduced,<sup>42</sup> oft-ignored Arbitration Fairness Act<sup>43</sup>—which would ban the use of mandatory pre-dispute arbitration clauses in consumer, employment, franchise, and civil rights matters, among others—has been introduced again in the House and Senate and may be making progress. The Minnesota Attorney General, meanwhile, recently gathered sufficient information<sup>44</sup> to sue the largest U.S. provider of consumer arbitration

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substantive judicial check on agency power, through which the courts become a sort of partner in the policy-making process, guaranteeing that agency decisions serve the public interest. Under such an approach, only by a vigorous judicial review can society ensure that administrative agencies act responsibly and democratically.”).

41. See, e.g., *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)) (rejecting “generalized attacks on arbitration” as “far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes”); *Mitsubishi*, 473 U.S. at 626–28 (“By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

42. See *Arbitration—Congress Considers Bill To Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees—Arbitration Fairness Act of 2007*, S. 1782, 110th Cong. (2007), 121 HARV. L. REV. 2262 (2008); *Arbitration Fairness Act of 2007*, S. 1782, 110th Cong. (2007) (banning the use of predispute arbitration agreements in consumer, employment and franchise contracts); *Consumer Fairness Act of 2007*, H.R. 1443, 110th Cong. (2007) (treating unilaterally imposed arbitration clauses as unfair and deceptive trade practices and prohibiting use in consumer transactions); *Predatory Mortgage Lending Practices Reduction Act*, H.R. 2061, 110th Cong. (2007) (amending Consumer Credit Protection Act to render unenforceable any predispute arbitration agreement in a consumer contract); see also William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT’L ARB. 75, 129–30 (2002). Park observes that Congress could enact statutory safeguards to protect ill-informed individuals and that

one can still appreciate how arbitration can become an instrument of injustice when an arbitral institution dominated by a single industry nominates arbitrators whose reappointment (thus compensation) indirectly depends on the satisfaction given to the industry. . . . [M]y goal is simply to emphasize that without limits on spillover from domestic to international arbitration, the latter may not reach its full potential due to uncertainty about the level of freedom from judicial intervention. A separate statute would help to insulate arbitration from the undue judicial intervention that is inevitable in consumer and employment cases.

*Id.*; Schwartz, *If You Love Arbitration*, *supra* note 28 (observing that legislative proposals have also included modifying the standard of judicial review for arbitral awards and arguing against the ineffective “blue-penciling” of overreaching arbitration clauses).

43. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

44. Complaint at 5, *State v. Nat’l Arbitration Forum* (D. Minn. filed July 14, 2009); see also *Complaint, California v. Nat’l Arbitration Forum*, (S.F. Co. Super. Ct. filed Mar. 24, 2008).

services, National Arbitration Forum (NAF), for violation of Minnesota statutes prohibiting consumer fraud, deceptive trade practices, and false advertising.<sup>45</sup> A settlement quickly ensued in that case, and NAF agreed to cease its consumer credit-card arbitration services nationwide.<sup>46</sup> The venerable American Arbitration Association (AAA) subsequently announced the suspension and re-examination of its arbitration services for consumer debt collection disputes.<sup>47</sup>

Recently, in October 2009, the *Wall Street Journal* published a front-page story based on the Minnesota lawsuit against NAF.<sup>48</sup> It presents a fascinating yet depressing story of NAF's complex relationship with a web of other organizations involved in debt collection and the ambition of the CEO of one such company (Accretive) to "build a billion dollar empire in the realm of consumer-debt disputes . . . stand[ing] at the center of a complex arrangement linking America's biggest arbitrator of consumer credit-card disputes with another business that collects debts in some of those same cases."<sup>49</sup>

Now, as some dispute resolution infrastructures begin to crumble and stories begin to emerge of greed or the quest for power apparently overtaking good sense, it seems an appropriate time to explore models that exist for effectively safeguarding the impartiality of embedded neutrals. This Article will consider whether the analysis in *Caperton*<sup>50</sup>—conducting a close examination of the volume and flow of money, its timing, and the plausibility of its effect on an adjudicated outcome in order to assess the risk that substantial campaign contributions can present to the legitimacy of courts conducting a close examination of the volume and flow of money, its timing, and the plausibility of its effect on an adjudicated outcome—may serve as one such model. In order to explore this possibility, this Article will begin by examining the factual details and analysis of *Caperton*. Part II will then discuss the use and perceptions of embedded neutrals, especially in mandatory arbitration of consumer, employment and securities disputes. Part III describes the allegations against NAF contained in the complaint in the Minnesota lawsuit and applies *Caperton*'s constitutional, risk-based objective standard to a hypothetical individual NAF arbitrator to determine whether NAF's corporate and financial structure presented such a probability of bias that it made an individual arbitrator's service inconsistent with the provision of due process. Then in Part IV

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45. Complaint at 39–41, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

46. Carrick Mollenkamp et al., *Turmoil in Arbitration Empire Upends Credit-Card Disputes*, WALL ST. J., Oct. 15, 2009, at A1, A20. The National Arbitration Forum and related companies have also been sued recently by a putative class of individuals who had consumer debt and whose cases were resolved through binding arbitration, conducted primarily by the National Arbitration Forum. See *In re Nat'l Arbitration Forum Trade Practices Litig.*, Civ. No. 09-1939, 2010 U.S. Dist. LEXIS 15178, at \*2–5 (D. Minn. Feb. 22, 2010) (denying defendants' 12(b)(6) motion). Finally, the National Arbitration Forum has been sued by a former employee alleging fraudulent and corrupt practices. *Id.* at 1 (referencing allegations in *Richert v. Nat'l Arbitration Forum*, Civ. No. 09-763, 2009 U.S. Dist. LEXIS 96160 (D. Minn. Oct. 13, 2009)).

47. Mollenkamp et al., *supra* note 46, at A20.

48. See *id.*

49. *Id.*

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

this Article will turn to the precedents upon which *Caperton* rests in order to explore the point at which an arbitral *institution* could be deemed so biased that its continued involvement as a decision-making body—or its failure to establish structural protections from such potential bias—could also violate the Constitution.

There are many challenges in the approach taken in this Article. Chief among them is the reality that arbitral institutions are generally private, rather than public, dispute resolution bodies. Thus, it is problematic to apply the requirements of the Constitution directly to them. Nonetheless, this Article and the risk-based objective standard established in *Caperton* and its antecedents offer an important approach to assessing the sufficiency of the impartiality offered by embedded neutrals, particularly when they—or those providing them with access to disputes—urge that such bodies should be treated as adequate replacements for independent and public trial courts.

### I. THE DICKENSIAN TALE OF *CAPERTON V. A.T. MASSEY COAL CO.*

The facts of *Caperton v. A.T. Massey Coal Co.*,<sup>51</sup> as described by Justice Kennedy in his majority opinion, are so essential<sup>52</sup> to understanding the Court's decision to grant certiorari and to reverse the decision of West Virginia's highest court that this Article will begin with a brief recapitulation.<sup>53</sup> In 1998, Hugh Caperton, Harman Development Corporation, Harman Mining Corporation and Sovereign Coal Sales ("Caperton") sued A.T. Massey Coal Co. and its affiliates ("Massey") in West Virginia state court for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations.<sup>54</sup> The case went to trial before a jury.<sup>55</sup> On August 1, 2002, the jury found Massey liable and awarded Caperton approximately \$50 million in compensatory and punitive damages.<sup>56</sup> In post-trial motions filed soon afterwards in August 2002, Massey challenged both the verdict and the damages award.<sup>57</sup> Nearly three years later in March 2005, the state trial court denied these motions, "finding that Massey 'intentionally acted in utter disregard of [Caperton's] rights and ultimately destroyed [Caperton's] businesses because, after conducting cost-benefit analyses, [Massey] concluded that it was in its financial interest to do so.'"<sup>58</sup>

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51. *Id.*

52. The people and events involved also would seem to be the stuff of fiction, not real life. Indeed, John Grisham has suggested that the events involved in this case served as partial inspiration for his 2008 novel *The Appeal*. See Blake Fleetwood, *The Best Judge \$3 Million Can Buy*, HUFFINGTON POST, June 12, 2009, [http://www.huffingtonpost.com/blake-fleetwood/the-best-judge-3-million\\_b\\_214639.html](http://www.huffingtonpost.com/blake-fleetwood/the-best-judge-3-million_b_214639.html).

53. The corporate transactions, contract terms, governmental regulations, closing of a Pittsburgh coke plant, Virginia lawsuit, and general pattern of strategic risk-taking that preceded this lawsuit are described in some detail in *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2007 W. Va. LEXIS 119 (Nov. 21, 2007).

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

55. For a more complete description of the procedural history, see *id.* at \*19–20.

56. *Id.* at \*20.

57. *Caperton*, 129 S. Ct. at 2257. Massey had moved for judgment as a matter of law, new trial or in the alternative, remittitur. *Caperton*, 2007 W. Va. LEXIS 119 at \*5.

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

Don Blankenship, Massey's chairman, CEO, and president, played a central role in the events leading up to the West Virginia lawsuit and in the events that led from the adverse jury verdict to the U.S. Supreme Court.<sup>59</sup> At some point after the jury verdict in 2002 but before the denial of the company's post-trial motions in 2005, Blankenship decided to lend financial support to Brent Benjamin, a Charleston attorney<sup>60</sup> seeking election to a seat on the Supreme Court of Appeals of West Virginia, the state's highest court. The seat was held at that time by Justice Warren McGraw. Blankenship made a direct contribution of \$1000 to Benjamin's campaign, the maximum permitted by statute.<sup>61</sup> Much more significantly, Blankenship contributed nearly \$2.5 million to And For the Sake of the Kids, a political organization that opposed McGraw and supported Benjamin.<sup>62</sup> Further, Blankenship spent a little more than \$500,000 of his own money in direct support of Benjamin, accomplished through mailings, letters soliciting donations, and television and newspaper advertisements.<sup>63</sup> In all, Blankenship spent approximately \$3 million to support Benjamin's bid for a seat on the Supreme Court of Appeals of West Virginia.

In his opinion on behalf of a majority of the U.S. Supreme Court, Justice Kennedy<sup>64</sup> chose to put these contributions into the following perspective:

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59. Don Blankenship has been described as a "coal baron" who has proven to be "tougher than bedrock" in his all-out battles with citizens, politicians, and regulators who fear the environmental and health effects of King Coal's blasting of the state's mountaintops. Michael Shnayerson, *The Rape of Appalachia*, VANITY FAIR, May 2006, at 140.

60. Mr. Benjamin, who is now Chief Justice of the West Virginia Supreme Court of Appeals, had practiced civil litigation for twenty years in state and federal courts. His specialty areas included toxic torts, complex litigation, and civil right litigation involving the protection of children from physical and sexual abuse. See Justice Brent D. Benjamin, <http://www.state.wv.us/wvsca/benjamin.htm> (last visited Feb. 20, 2009).

61. *Caperton*, 129 S. Ct. at 2257. West Virginia law provides:

No person may, directly or indirectly, make any contribution in excess of the value of one thousand dollars in connection with any campaign for nomination or election to or on behalf of any statewide office, in connection with any other campaign for nomination or election to or on behalf of any other elective office in the state or any of its subdivisions, or in connection with or on behalf of any person engaged in furthering, advancing, supporting or aiding the nomination or election of any candidate for any of the offices.

W. VA. CODE § 3-8-12 (2009).

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

63. *Id.*

64. The choice of Justice Kennedy to write the majority opinion is interesting. He has previously said: "The law makes a promise of neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob." AM. BAR ASS'N, STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS vi (July 2001) (quoting J. Anthony Kennedy, Speech at the ABA Symposium on Judicial Independence (Dec. 1998)), available at <http://news.findlaw.com/hdocs/docs/aba/abajudfinrpt072001.pdf>, cited in James Andrew Wynn & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 778 (2004).

Blankenship's donations accounted for more than two-thirds of the total funds [And For the Sake of the Kids] raised . . . [and] Blankenship's \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times [or 300%] the amount spent by Benjamin's own committee.<sup>65</sup>

In its brief to the Supreme Court, Caperton added that Blankenship's expenditures on Benjamin's behalf were so large that they exceeded—by \$1 million—“the total amount spent by the campaign committees of both candidates combined.”<sup>66</sup> There is no doubt that Blankenship was committed to the success of Benjamin's campaign.

In the general election held in 2004, Benjamin defeated McGraw 53.3% to 46.7%, by a margin of 47,735 votes.<sup>67</sup> Massey did not enter its appeal of the trial court's adverse decision on the motion for judgment as a matter of law until 2006.<sup>68</sup> Nonetheless—and perhaps consistent with the history of strategic risk-seeking demonstrated by both parties in the events leading up to this case<sup>69</sup>—Caperton moved to disqualify then-Justice Benjamin in October 2005, relying on the Due Process Clause of the Fourteenth Amendment and the West Virginia Code of Judicial Conduct.<sup>70</sup>

In April 2006,<sup>71</sup> Justice Benjamin denied Caperton's motion for disqualification.<sup>72</sup> He observed that he had carefully reviewed Caperton's submissions and found “no objective information” showing that he had a bias “for or against any litigant[,]”<sup>73</sup> that he had prejudged the case, or that he would be “anything but fair and impartial.”<sup>74</sup> Finally, in October 2006, Massey filed its petition for appeal to challenge the adverse jury verdict, and the West Virginia Supreme Court of Appeals granted review. Nearly another year passed before the court announced its decision in November 2007 to reverse the \$50 million verdict against Massey.<sup>75</sup> It was a 3–2 decision. The majority consisted of Justice Benjamin, along with then-Chief Justice Robin Davis and Justice Elliot Maynard. The dissenters were Justices Larry Starcher and Joseph Albright. Interestingly, the three judges in the majority found that Massey should have lost on substantive grounds, stating that “Massey's conduct warranted the type of judgment rendered

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

66. *Id.*

67. *Id.*

68. Apparently, there had been additional delays in the case due to difficulties with the trial transcript. See *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2007 W. Va. LEXIS 119 at \*20 n.20 (Nov. 21, 2007).

69. *Id.*

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

71. This was just a few months before the circuit court certified the trial transcript, on August 23, 2006, with the appeal to the West Virginia Supreme Court of Appeals filed on October 24, 2006. See *Caperton*, 2007 W. Va. LEXIS 119, at \*20 n.20.

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

73. *Id.* at 2258.

74. *Id.* at 2257–58.

75. *Id.* at 2258.



in this case.”<sup>76</sup> The reversal, however, was based on procedural grounds—“that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia and . . . that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party.”<sup>77</sup>

Caperton sought rehearing, and both parties then moved for the disqualification of selected justices. Justice Starcher had apparently made public pronouncements criticizing Blankenship’s role in the 2004 judicial elections.<sup>78</sup> Meanwhile, photos had appeared showing Blankenship and Justice Maynard vacationing together in the French Riviera while the case was pending.<sup>79</sup> The motion for disqualification of Justice Benjamin rehashed the arguments that had been made and rejected earlier.<sup>80</sup>

Both Justices Starcher and Maynard granted the parties’ recusal motions.<sup>81</sup> In his recusal memorandum, Justice Starcher apparently reached out to Justice Benjamin and observed that “Blankenship’s bestowal of his personal wealth, political tactics, and ‘friendship’ have created a cancer in the affairs of this Court.”<sup>82</sup> Justice Benjamin either did not read his colleague’s memorandum or was not persuaded by its analysis. He denied Caperton’s recusal motion.<sup>83</sup>

76. *Id.*

77. *Id.* These procedural decisions may deserve study all by themselves.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Order of Justice Starcher Regarding Recusal at 8, *Caperton v. A. T. Massey Coal Co.*, No. 33350, 2007 W. Va. LEXIS 119 (Nov. 21, 2007) [hereinafter *Starcher Recusal Memorandum*]. Justice Starcher added:

And I have seen that cancer grow and grow, in ways that I may not fully disclose at this time. At this point, I believe that my stepping aside in the instant case might be a step in treating that cancer—but only if others as well rise to the challenge. If they do not, then I shudder to think of the cynicism and disgust that the lawyers, judges, and citizens of this wonderful State will feel about our justice system.

*Id.* at 9. Clearly, this controversy had become personal and painful. Justice Starcher observed, for example, that Mr. Blankenship had “sporting a ‘Get Starcher’ ball cap announcing me as his ‘next target’ as he publicly celebrated spending millions to influence elections in our State,” *id.* at 3, and that

this type of “big money” . . . has been and continues to be directed at wounding our State’s judiciary with false claims portraying West Virginia as a “judicial hellhole,” false claims that facts do not support and false claims that have been refuted by academic researchers at West Virginia University. These claims are simply false, but truth and accuracy mean nothing to people who want to skew the justice system in their favor.

*Id.* at 7–8.

83. *Caperton*, 129 S. Ct. at 2258. Justice Benjamin’s 2008 concurring opinion does not indicate whether he was aware of the magnitude of Blankenship’s campaign contributions at the time they were made. *Id.* at 2259. The question is whether Justice Benjamin should have known or was required to conduct an investigation of some sort. Such obligations are imposed in other contexts. See, for example, FED. R. CIV. P. 11(b),

In the subsequent rehearing, Justice Benjamin served in the capacity of acting chief justice<sup>84</sup> and thus was responsible for selecting two new justices to replace the recused justices. During this time, he also denied a third recusal motion, in which Caperton argued that recusal was required under West Virginia law and introduced new evidence: “a public opinion poll indicating that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial.”<sup>85</sup> Justice Benjamin again refused to withdraw, attacking the credibility of the poll.<sup>86</sup>

Another few months passed and in April 2008, the court again issued a 3-2 decision and again based its decision on the two procedural grounds described above.<sup>87</sup> Justices Benjamin and Davis were again in the majority, joined by one of the newly assigned justices.<sup>88</sup> Justices Albright and Cookman dissented, observing: “Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.”<sup>89</sup> A month after Caperton filed its petition for writ of certiorari with the U.S. Supreme Court, Justice Benjamin filed a concurring opinion which included a defense of his decision not to recuse himself.<sup>90</sup> He relied, as he had previously, on Caperton’s failure to show that he had a “‘direct, personal, substantial, pecuniary interest’ in this case.”<sup>91</sup> Further, Justice Benjamin asserted that “[a]dopting ‘a standard merely of “appearances” . . . seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.”<sup>92</sup>

#### *A. The Court’s Analysis in Caperton*

The issue before the U.S. Supreme Court was whether a justice who was in the majority in a 3–2 decision to reverse a jury verdict of \$50 million violated the Due Process Clause of the Fourteenth Amendment when he denied a recusal motion based on his direct and indirect receipt of “campaign contributions in an extraordinary amount from, and through the efforts of the board chairman and

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requiring lawyers’ certification that “to the best of [their] knowledge, information, and belief formed after an inquiry reasonable under the circumstances[,]” pleadings, written motions and other papers meet certain requirements.

84. Justice Starcher’s recusal memorandum indicated that there had been a recent vote “to remove two justices from the Chief Justice rotation order, materially affecting the appointment of replacement judges in cases involving Mr. Blankenship’s companies” and that Justice Benjamin had been one of the judges voting in favor of that removal. Starcher Recusal Memorandum, *supra* note 82, at 4.

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

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 284 (W. Va. 2008) (Albright & Cookman, JJ., dissenting)).

90. *Id.* at 2259.

91. *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 295 (W. Va. 2008)).

92. *Id.* (quoting *Caperton*, 679 S.E.2d at 306).

principal officer of the corporation found liable for the damages.”<sup>93</sup> Finding that “there are objective standards that require recusal when ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable[.]’”<sup>94</sup> a majority of the Court found that Justice Benjamin’s refusal to recuse himself had indeed violated the Due Process Clause.

It must be noted that the Supreme Court’s decision was based only on a violation of the Due Process Clause, not on a violation of the West Virginia Code of Judicial Conduct.<sup>95</sup> And throughout his opinion, Justice Kennedy made it clear that the Supreme Court’s determination of a constitutional violation was required by the “extreme facts”<sup>96</sup> of the case that pushed the “probability of actual bias”<sup>97</sup> to “an unconstitutional level.”<sup>98</sup> We can thus infer that with less extreme facts, a majority of the Supreme Court would have left the matter to be remedied by the West Virginia Legislature, which could have taken legislative action after noticing that the state’s highest court refused to find a violation of the West Virginia Code of Judicial Conduct. It appears, perhaps significantly, that the West Virginia Legislature had not taken such action despite the many opportunities presented by the excruciatingly slow unfolding of events in this case.<sup>99</sup>

Justice Kennedy’s opinion returns repeatedly to the need to determine whether recusal was required in this case as an “objective matter.”<sup>100</sup> If a judge has a “direct, personal, substantial, pecuniary interest,” this clearly violates the objective standard.<sup>101</sup> But *Caperton*’s innovation comes in finding that admittedly legal campaign contributions can nonetheless create “circumstances ‘in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”<sup>102</sup> Precedent revealed two types of circumstances that present this grave danger. First, the individual judge can share such a strong identity of interest with an organization that his

93. *Id.* at 2256–57.

94. *Id.* at 2257 (quoting *Withrow v. Larkin*, 412 U.S. 35, 47 (1975)).

95. *Id.* at 2267.

96. *Id.* at 2265–66.

97. *Id.* at 2259, 2262, 2265.

98. *Id.* at 2265.

99. Before the Supreme Court announced its decision in *Caperton*, there were proposals for judicial election reform in West Virginia. See John O’Brien, *Public Financing of W. Va. Election to be Weighed in Legislature*, LEGAL NEWSLINE.COM, Mar. 8, 2009, <http://www.legalnewsline.com/news/219689-public-financing-of-w.va.-election-to-be-weighed-in-legislature>. The Governor’s Office announced plans to study judicial reform, however, and requested suspension of legislative efforts. See Walt Williams, *Governor’s Opposition Slows Public Financing Bill*, ST. J., Apr. 2, 2009, available at <http://statejournal.com/story.cfm?func=viewstory&storyid=55763>. To date, there have not been any changes to the procedures or standards governing judicial recusal or to judicial elections in the state. See N.Y. UNIV. SCHOOL OF LAW: BRENNAN CTR. FOR JUSTICE, 2009 JUDICIAL DISQUALIFICATION INITIATIVES IN THE STATES (Jan. 20, 2010) and 2009 JUDICIAL SELECTION IN THE STATES (Jan. 20, 2009), [http://www.brennancenter.org/content/resource/state\\_judicial\\_reform\\_efforts\\_2009/](http://www.brennancenter.org/content/resource/state_judicial_reform_efforts_2009/).

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

101. *Id.*

102. *Id.* at 2257 (quoting *Withrow v. Larkin*, 412 U.S. 35, 47 (1975)).

concern for the financial well-being of the organization is likely to “affect [his] judgment.”<sup>103</sup> Second, the judge may have been so personally offended or affected by his interaction with a party in a prior, private proceeding that it will be “difficult if not impossible . . . to free himself from the influence of what took place”<sup>104</sup> in that prior proceeding. In both of these instances, the risk is too great that the judge will be unable to maintain the detachment needed to be sufficiently independent and impartial to provide a process that avoids violating the Due Process Clause.<sup>105</sup> The language of *Tumey v. Ohio*,<sup>106</sup> quoted in *Caperton*, is particularly evocative here:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.<sup>107</sup>

Justice Kennedy put his own gloss on the test enunciated in *Tumey* by explaining it in the contemporary language of risk management<sup>108</sup>: “The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”<sup>109</sup> Elsewhere, he wrote: “In defining these standards the Court has asked whether, ‘under a realistic appraisal of psychological tendencies and human weaknesses,’ the interest ‘poses such a risk of actual bias or

103. *Id.* at 2260 (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

104. *Id.* at 2261 (citing *In re Murchison*, 349 U.S. 133, 138 (1955)).

105. *See* Wynn & Mazur, *supra* note 59, at 778 (observing that “judicial independence is predicated on a neutralizing distance between the judge and the legal dispute”).

106. 273 U.S. 510.

107. *Caperton*, 129 S. Ct. at 2260 (citing *Tumey*, 273 U.S. at 532) (emphasis added).

108. Risk analysis, which is dependent upon probability assessments and psychological factors, is a staple of decision-making and dispute resolution literature and practice. *See, e.g.*, Marjorie Aaron, *For the General Practitioner: Dispute Resolutions: Do's and Don'ts for Mediation*, GP SOLO, Mar. 2006, at 30; John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1138 (2009) (surveying research regarding the factors that trigger risk-averse and risk-seeking behavior in considering settlement); Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1116–17 (2003) (explaining prospect theory, analyzing its use in the legal field, and concluding that the theory is a valuable tool in analyzing legal issues); Jason S. Johnston, *Paradoxes of the Safe Society: A Rational Actor Approach to the Reconceptualization of Risk and the Reformation of Risk Regulation*, 151 U. PENN. L. REV. 747, 768, 780 (2003) (examining the “phenomenon of increasingly widespread and yet increasingly consequence-free risk taking” in the U.S. and suggesting the establishment of “regulatory populism”); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 274 (1979); Jeffrey Senger, *Decision Analysis in Negotiation*, 87 MARQ. L. REV. 723 (2004).

109. *Caperton*, 129 S. Ct. at 2262.

prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”<sup>110</sup>

The challenge was then to apply these precedents to the facts of *Caperton*, involving the influence of money in judicial elections. Repeatedly referring to *Caperton*’s facts as “exceptional,” Justice Kennedy examined the “relative size”<sup>111</sup> of Blankenship’s (and Massey’s) contributions to Justice Benjamin’s campaign and the “apparent effect”<sup>112</sup>—as distinct from the *actual, provable* effect—such contributions had on the election results. Though \$3 million may seem a small amount to invest in order to save \$50 million, Blankenship’s donations dwarfed the monies that were contributed by others interested in this judicial campaign.<sup>113</sup> Justice Kennedy also acknowledged that other events may have played a role in Benjamin’s electoral victory,<sup>114</sup> but nonetheless concluded that “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 and disproportionate influence on the electoral outcome.”<sup>115</sup> The risk that Blankenship’s influence engendered actual bias was sufficiently substantial that it “must be forbidden if the guarantee of due process is to be adequately implemented.”<sup>116</sup>

Justice Kennedy then examined the “temporal relationship”<sup>117</sup> between the campaign contributions, the justice’s election, and the pendency of Massey’s appeal.<sup>118</sup> He concluded that it was “reasonably foreseeable” to Blankenship when he made his donations that the appeal of the \$50 million judgment against

110. *Id.* at 2263 (citing *Withrow v. Larkin*, 412 U.S. 35, 47 (1975)). Chris Guthrie and Jeff Rachlinski have written many articles examining the cognitive and other biases that affect judicial decision-making. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Chris Guthrie, Jeffrey Rachlinski & Andrew Wistrich, *Blinking On the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420 (2007); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge’s Mind*, 86 B.U. L. REV. 1227 (2006); Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 567 (Derek J. Koehler & Nigel Harvey eds., 2004); *see also* Richard P. Larrick, *Debiasing*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 567 (Derek J. Koehler & Nigel Harvey eds., 2004).

111. *Caperton*, 129 S. Ct. at 2264.

112. *Id.*

113. *Id.* at 2257.

114. *Id.* at 2264.

115. *Id.*

116. *Id.* (quoting *Withrow*, 412 U.S. at 47).

117. Justice Kennedy uses very interesting phrasing here. “Temporal” evokes both relatively simple issues of timing and the much more complex matter of acknowledging human beings’ earthly, non-divine natures. *See* Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/netdict/temporal> (last visited Mar. 12, 2010) (defining “temporal” as “of or relating to time as opposed to eternity,” “of or relating to earthly life,” “lay or secular rather than clerical or sacred”).

118. *Caperton*, 129 S. Ct. at 2264.

his company would ultimately end up before Justice Benjamin.<sup>119</sup> Under these circumstances:

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.<sup>120</sup>

Both the objectively significant and comparatively disproportionate size of Blankenship's contributions, along with the worrisome "temporal relationship" suggested by the timing of these contributions, the election, the appeal and its results signaled an unconstitutional potential for bias. A majority of the Justices of the Supreme Court concluded that this case represented a situation in which an average judge—who, despite his or her ceremonial robe,<sup>121</sup> is a human being just like the rest of us<sup>122</sup>—would be unconstitutionally tempted "not to hold the balance nice, clear and true."<sup>123</sup>

It is notable that four Justices dissented. This Article will not examine their reasoning in any detail. In a sense, however, both the majority and two dissenting opinions seem to be indirect responses to the many criticisms and expectations directed at individual judges and the judicial branch in general within the past decade.<sup>124</sup> Indeed, all three opinions suggest that the Justices agree that the

119. *Id.* at 2264–65.

120. *Id.* at 2265.

121. Which is meant to symbolize and remind the wearer of his or her obligation to live up to his or her sacred role and duties. *See, e.g.,* Raymond Daniell, *Elizabeth II Crowned in Abbey; Millions Cheer Parade in Rain; Ruler Bids Subjects Look Ahead*, N.Y. TIMES, June 2, 1953, available at <http://www.nytimes.com/learning/general/onthisday/big/0602.html> ("The ceremony of coronation, anachronistic as it may seem, harking back to the symbols of an age that is dead and gone, is an important factor in holding the heterogeneous British family of nations together. It stems from ancient superstitions and belief in the magic properties and symbolism of what Broadway would call 'props' but the fact is that it works.").

122. Literature and music are filled with tales of temptation. Usually, the devil seems to win—but perhaps that is because tales of forbearance are not nearly as interesting. Compare, for example, the Bible's depiction of the Devil's temptation of Jesus in the desert with Goethe's *Faust*, Charlie Daniels' *The Devil Went Down to Georgia*, and Robert Johnson's *Crossroads Blues*. *Matthew* 4:1–11; Johann Wolfgang von Goethe, *Faust: Part One* (David Luke trans., Penguin 1998) (1808); CHARLIE DANIELS, *The Devil Went Down to Georgia*, on *MILLION MILE REFLECTIONS* (Epic 1979); ROBERT JOHNSON, *Crossroad Blues*, on *THE COMPLETE RECORDINGS* (Columbia 1990) (1937).

123. *Caperton*, 129 S. Ct. at 2264 (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

124. *See* THE JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 1 (2006) (noting that the Chief Justice Rehnquist had established the Committee, with Justice Breyer as its Chair, to look into the implementation of the Judicial Conduct and Disability Act of 1980 as a result of recent criticism from Congress regarding

institution of the judiciary is in danger of losing its legitimacy or standing and thus requires some form of protection. The Justices' disagreement involved their differing assessments of the best means to achieve that protection. Instead of recognizing a constitutionally significant, judicially cognizable harm, the dissenters would have accomplished this goal by forcing Caperton to either live with the court's result or seek help from the West Virginia Legislature or Governor.<sup>125</sup> (Another option, not mentioned by the dissenters but certainly encouraged by the Supreme Court's arbitral jurisprudence, is that Caperton and those in a similar position should elect to opt out of the judicial system for the resolution of future contentious disputes.) In contrast, the majority concluded that the best protection for the judiciary was to require an individual judge to bear the consequences of his tone deaf decisions and swallow the bitter tonic of a public (though relatively gentle) rebuke. The majority did not declare Caperton the winner in this contest. It simply reversed and remanded to give Caperton the chance to have his appeal heard one more time by a panel of the West Virginia Supreme Court of Appeals that did not include Justice Benjamin.<sup>126</sup> Presumably, this decision might also have provided Caperton and Massey with the opportunity to reach a mutually agreeable settlement, though that is not what actually happened when the case returned to West Virginia.<sup>127</sup>

## II. THE RISE AND PERCEIVED EFFECTS OF THE EMBEDDED NEUTRAL IN THE ARBITRATION CONTEXT

It is now time to turn from judges to the embedded neutrals who produce outcomes in administrative adjudication, arbitration, and mediation and explore the data that have developed regarding one-time players' perceptions of the fairness of the procedures that these neutrals oversee or facilitate. These perceptions and their implications will help to explain why there is a need to do more to manage the use of embedded neutrals. They also establish the need to explore the question of whether *Caperton's* reasoning—particularly its establishment of a constitutional, objective standard based on “a realistic appraisal of psychological tendencies and

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the handling of allegations of judicial misconduct within the federal judiciary).

125. *Caperton*, 129 S. Ct. at 2268–69 (Roberts, C.J., dissenting) (“States are, of course, free to adopt broader recusal rules than the Constitution requires . . .”); *see also id.* at 2275 (Scalia, J., dissenting) (“The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule.”).

126. *Id.* at 2267 (remanding to the West Virginia Supreme Court of Appeals for proceedings not inconsistent with the majority opinion).

127. On November 12, 2009, the West Virginia Supreme Court of Appeals again determined that the state circuit court had erred in denying Massey's motion to dismiss, based on the existence of a forum selection clause in a contract that “directly related to the conflict giving rise to the instant lawsuit.” *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2009 W. Va. LEXIS 107 (Sept. 8, 2009). Despite winning before the U.S. Supreme Court, Hugh Caperton lost again in West Virginia. He has since filed a petition for rehearing. *See Jeffrey V. Mehalic, Caperton Files Petition for Rehearing with WV Supreme Court*, W. VA. BUS. LITIG., Dec. 2, 2009, <http://www.wvbusinesslitigationblog.com/2009/12/articles/appellate-decisions/caperton-files-petition-for-rehearing-with-wv-supreme-court/>.

human weaknesses”<sup>128</sup> and contemporary principles of risk management—might be applied to NAF and its arbitrators.

Dispute resolution processes that were once viewed as “alternative” are now ubiquitous in American life. In disputes with agencies, courts now require citizens to exhaust administrative procedures before they may file a lawsuit.<sup>129</sup> The courts also grant substantial deference to the decisions of administrative adjudicators.<sup>130</sup> Similarly, courts enforce mandatory arbitration clauses in a wide variety of boilerplate contracts. When consumers buy computers or cell phones, receive a credit card, or even enter into a contract to receive professional services,<sup>131</sup> they will often find that any disputes that arise must be resolved through arbitration. Based primarily on the language of the Federal Arbitration Act,<sup>132</sup> courts generally are more deferential to the decisions of arbitrators than they are to administrative adjudicators.<sup>133</sup> Courts are now beginning to enforce mediation clauses—between employers and employees<sup>134</sup> and between corporate purchasers and

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128. *Caperton*, 129 S. Ct. at 2264.

129. See 5 U.S.C. § 704 (2006) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”); see also *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772 (10th Cir. 2006) (holding that the appellate court did not have jurisdiction because the Silverton Snowmobile Club did not exhaust their administrative remedies); Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L. J. 981, 1006 (1938) (“Administrative remedies must be exhausted before resort is had to the federal courts.”); 2 AM. JUR. 2D *Administrative Law* § 474 (2010). But see Rebecca L. Donnellan, *The Exhaustion Doctrine Should Not Be a Doctrine with Exceptions*, 103 W. VA. L. REV. 361 (2001) (describing exceptions to the exhaustion requirement, including where resort to those remedies may prejudice a subsequent judicial challenge of the agency action, the agency’s remedy may be inadequate, an administrative remedy would be inadequate because the administrative agency is shown to be biased or to have otherwise predetermined the issues before it, or administrative remedies would be futile).

130. 5 U.S.C. § 706(2) (2006). But see Garry, *supra* note 40.

131. See, e.g., D.C. Bar, Ethics Op. 218 (2001), available at [http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion218.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion218.cfm).

132. 9 U.S.C. § 10 (2006).

133. In addition to the grounds for vacatur provided directly in the FAA, three common law grounds have developed: manifest disregard of the law, arbitrary or capricious or irrational, and violation of public policy. The status of manifest disregard is somewhat unclear. See *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) (calling “manifest disregard” into question by stating that it may not be new grounds for review but a way to refer to all of standards collectively); *Bosack v. Soward*, 573 F.3d 891, 899 (9th Cir. 2009) (“Arbitrators exceed their powers when they express a ‘manifest disregard of law,’ or when they issue an award that is ‘completely irrational.’”); see also Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 34–40 (observing that appellate courts vacate trial court decisions three times more often than they vacate arbitral awards; also noting different levels of deference extended to employee wins versus employer wins in arbitration as well as arbitral awards in Title VII matters versus breach of contract cases).

134. See Jason Schatz, *Imposing Mandatory Mediation of Public Employment Disputes in New Jersey to Ameliorate an Impending Fiscal Crisis*, 57 RUTGERS L. REV. 1111, 1124 (2005) (noting that voluntary mediation programs sponsored by employers have been deemed enforceable).



sellers<sup>135</sup>—with analyses that are similar to those they have used for arbitration clauses. With some instructive exceptions,<sup>136</sup> courts also generally seem ready to defer to the mediators who have brokered settlement agreements, regardless of whether the mediations were conducted as part of a court-connected mediation program<sup>137</sup> or on an ad hoc, private basis.<sup>138</sup>

A worrisome percentage of these examples involve uneven contests. On one side is the individual, one-time player. On the other side is the institutional, repeat player. As is true in traditional litigation, the repeat player often is more powerful, with greater access to resources and more familiarity with these types of disputes and the procedures to resolve them. What is new—or perhaps, more accurately, what is a modern variation of a dynamic that is very, very old<sup>139</sup>—is courts' support for the control exerted by institutional repeat players over the selection of the organization that will provide the dispute resolution services, the procedures that will be used, and the criteria that will be used to determine the pool of neutrals who will decide cases or facilitate their resolution.<sup>140</sup>

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135. See, e.g., *Gate Precast Co. v. Kenwood Towne Place, LLC*, 2009 WL 3614931 (S.D. Ohio Oct. 28, 2009) (ordering mediation pursuant to clause).

136. See, e.g., *Valchine v. Valchine*, 793 So.2d 1094 (Fla. Dist. Ct. App. 2001).

137. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

138. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 73, 75 (2006) (describing research conducted on mediation litigation cases from 1999–2003, which revealed that courts enforced disputed mediated agreements in 62% of cases; also noting that courts in California use public judicial powers to resolve private disputes in an ad hoc manner, although the majority of the resulting opinions emanating from these disputes are unpublished, and California courts do not allow parties to cite or rely on unpublished opinions; as a result, most of the jurisprudence in the mediation process comes from the private arena); James R. Coben & Peter N. Thompson, *Mediation Litigation Trends: 1999–2007*, 1 WORLD ARB. & MEDIATION REV. 395, 403–05 (observing that nearly half of the opinions in the mediation litigation database involved challenges to the enforcement of mediated settlements, courts enforced 62% of the cases, and that the traditional contract defenses of fraud, mistake, duress, or undue influence were unlikely to be successful).

139. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387–88, 1391 (1985) (stating ADR does little to counter historical and subconscious prejudice, and arguing judicial system should be used to encourage fairness and deter prejudice because such systems are formal, subject to more control, and can reduce prejudice); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing ADR should not be allowed because parties are often coerced to settle and absence of judicial involvement raises various concerns); Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549–50 (1991) (opposing mandatory family mediation because it requires parties to interact in forced setting, women often feel obliged to maintain connection with ex-partner during process, and it is potentially destructive because parties were once involved in intimate relationship); see also Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009).

140. Such control has the potential to reduce the diversity of the pool. See Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409, 1433 (2009) (noting the importance of including

Commentators have increasingly used these concerns to attack mandatory arbitration of consumer, employment, franchise, securities, civil rights, and nursing home disputes as unfair.<sup>141</sup> A couple of years ago, the non-profit organization Public Citizen released a report<sup>142</sup> that was based on California data detailing credit-card companies' nearly 95% win rates in mandatory arbitrations.<sup>143</sup> Public Citizen asserted that these favorable rates were the result of cozy relationships between arbitral firms and credit-card companies.<sup>144</sup> To bolster its charges, Public Citizen highlighted some arbitral firms' reliance upon referrals from particular credit-card companies for the majority of their cases, the large fees paid by some credit-card companies to these firms, and the large numbers of cases handled by a small number of individual arbitrators.<sup>145</sup> For example, Public Citizen reported that during the period from January 1, 2003, through March 31, 2007, 53% of the nearly 34,000 cases handled by NAF in California involved holders of MBNA credit cards.<sup>146</sup> Between January 1998 and November 1999, NAF had received \$5.3 million from just one credit-card company, First USA.<sup>147</sup> And between January 1, 2003, and March 31, 2007, NAF's ten busiest arbitrators heard between 699 and 1332 of the credit-card cases.<sup>148</sup> Public Citizen also reported the experience of one NAF arbitrator, Harvard Law School Professor Elizabeth Bartholet, who stopped receiving referrals from NAF after she awarded \$48,000 to a consumer on his counterclaim against the credit-card company suing for collection.<sup>149</sup> Professor Bartholet subsequently resigned in protest.<sup>150</sup>

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black lawyers because they can serve as representatives and provide "connective links" between black citizens and predominantly white institutions).

141. See Jeffrey W. Stempel, *Mandating Minimum Quality*, *supra* note 28, at 399 n.38 (listing several articles that object to the phenomenon of "mass arbitration").

142. See PUBLIC CITIZEN, HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (Sept. 2007), available at <http://www.citizen.org/publications/release.cfm?ID=7545>.

143. See *id.* at 2 (specifying win rate of 94.7%). But see SEARLE ARBITRATION REPORT, *supra* note 38, at xiii (reporting that in actions that consumers filed in AAA consumer arbitrations, consumers won some relief 53.3% of the time and business claimants—likely not limited to only credit-card companies—won some relief 83.5% of the time; also reporting some evidence of a repeat-player effect but suggesting that this reflected repeat players' better understanding of when to settle prior to the arbitration); see also Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 DISP. RESOL. MAG., Fall 2008, at 30, 31 (citing Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357 (1990)) (observing that in collection cases, the consumer almost certainly owes the debt and that this explains credit-card companies' high win rates in both arbitrations and traditionally litigated cases); Matthew C. McDonald & Kirkland E. Reid, *Arbitration Opponents Barking Up Wrong Branch*, 52 ALA. LAW. 56, 60 (2001)).

144. PUBLIC CITIZEN, *supra* note 142, at 4.

145. *Id.* at 13–27.

146. *Id.* at 14.

147. See *id.*

148. *Id.* at 16.

149. *Id.* at 17, 30–31.

150. See PUBLIC CITIZEN, *supra* note 142, at 31. Richard Neely, former justice on the West Virginia Supreme Court of Appeals, also served as an NAF arbitrator. Observing that NAF provided its arbitrators with a judgment form that was already completed and

Public Citizen's analysis of the data certainly was catalytic, provoking responses from academics and public policy analysts defending the overall integrity of arbitration. While admitting the existence of some problems with consumer arbitration, for example, Professor Sarah Cole and colleagues pointed out that most of the cases included in Public Citizen's analysis were collections cases, in which the consumer almost certainly owed the amount claimed.<sup>151</sup> They also noted that a high percentage of these cases result in default judgments and that the "win rate" for credit-card companies in arbitration mirrored their success rate in collections actions in court.<sup>152</sup> Meanwhile, Professor Cole and her colleagues observed that consumers benefited from the quick dispositions produced by arbitration.<sup>153</sup>

The Searle Civil Justice Institute<sup>154</sup> specifically commissioned a Task Force on Consumer Arbitration to study consumer arbitrations administered by the American Arbitration Association. The Task Force, which was led by Professor Christopher Drahozal, produced a preliminary report in March 2009.<sup>155</sup> Though the sample size was relatively small (301 files) and had other acknowledged limitations, the Task Force found that when consumers were claimants, they won some relief 53.3% of the time, while business claimants won some relief 83.6% of the time.<sup>156</sup> The latter category was likely dominated by debt-collection cases, which as noted above, tend to result in awards for the business. The Task Force's close analysis of the award amounts, meanwhile, produced the interesting result that "[i]n 41 of the 51 cases in which a business claimant prevailed, the business recovered between 90.0% and 100.0% of the amount claimed" while "[i]n the 119 cases in which consumer claimants received monetary awards, the consumer recovered 20.0% or less of the amount claimed in 36 cases and between 90.0% and 100.0% of the amount claimed in 37 cases."<sup>157</sup> Finally, while the Task Force found

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required consumers to pay arbitration fees that were substantially higher than court fees, Neely concluded that "[g]odless bloodsucking banks have converted apparently neutral arbitration forums into collection agencies to exact the last drop of blood from desperate debtors." Richard Neely, *Arbitration and the Godless Bloodsuckers*, W. VA. LAW., Sept.–Oct. 2006, at 12, 12.

151. Cole & Frank, *supra* note 143, at 31.

152. *Id.* at 31. Professor Cole and Mr. Frank also noted that Public Citizen had studied only those cases that went to arbitration, thus removing from their sample the cases that creditors decided to dismiss before the selection of an arbitrator, and did not acknowledge consumers' success in achieving reductions in the amount owed. *Id.* at 31–32. Their article also summarizes relevant findings from several other studies. See Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN. ST. L. REV. 1051, 1058–59 (2009) (profiling NAF arbitrator Jonathan Krotinger who discounted awards by approximately 30% yet continued to receive a large number of referrals from NAF).

153. See Cole & Blankley, *supra* note 136, at 1072–73.

154. Established in 2008 as a division of the Searle Center on Law, Regulation and Economic Growth at Northwestern University School of Law.

155. SEARLE ARBITRATION REPORT, *supra* note 38.

156. *Id.* at 67–68.

157. *Id.* at 70 (observing that this "bimodal" pattern of relatively clear winners and losers is consistent with studies of AAA commercial arbitration awards and international arbitration awards).

support for the existence of a repeat-player advantage in terms of “win rates,” the evidence further suggested that this discrepancy was due to effective case screening by repeat businesses rather than arbitrator bias.<sup>158</sup>

In the employment arbitration context, researchers similarly have found that employees win less frequently than employers in arbitrations conducted pursuant to mandatory arbitration provisions inserted by employers in personnel manuals or handbooks.<sup>159</sup> Employees’ likelihood of winning is even weaker when their employers are repeat players; their odds are worst of all when their employers have used the same arbitrator more than once.<sup>160</sup> Professor Alexander Colvin reviewed the California data to determine the results of employment arbitrations conducted by AAA arbitrators pursuant to mandatory arbitration clauses in employer-promulgated agreements. He found that employees won only 19.7% of these cases<sup>161</sup> and were even less successful when their employers were repeat players, then winning only 13.9% of the time.<sup>162</sup> Employees fared better when their employers were also one-time players, winning 32% of these cases.<sup>163</sup> Professor Colvin also found cases involving repeat-player employers who had used the same arbitrator more than once. Employees had the worst odds in these cases, winning only 11.3% of the time.<sup>164</sup> Like Public Citizen, Professor Colvin also considered the income received by employment arbitrators. He found that while the mean arbitral award for employees was \$23,233<sup>165</sup> (reflecting the many cases in which no damages were awarded to the employee), the mean arbitrator fee was a fairly substantial \$10,351<sup>166</sup> in cases involving a hearing and award, regardless of whether the employee was awarded damages.

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158. See *id.* at 76–82.

159. But see Richard A. Bales & Jason N.W. Plowman, *Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example*, 26 HOFSTRA LAB. & EMP. L.J. 1 (2008) (describing the Anheuser-Busch dispute resolution program as reasonably fair, though also admitting a lack of comparative data regarding outcomes or perceptual data from employees who have used the program); Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, N.Z. J. INDUS. REL., June 1998, at 5, 11–12, cited in Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 412–13 (2007) (observing that these were predominantly claims brought by managers or executives under individually-negotiated contracts).

160. Colvin, *supra* note 159, at 414–15 (describing other studies that found a lower win rate for employees in claims based on employee handbooks rather than individually-negotiated contracts).

161. Colvin, *supra* note 159, at 418. In contrast, employees arbitrating as a result of individually negotiated contracts do quite well. In one study, they won 68.8% of the time. In another, they won 61.3% of their cases. The employees arbitrating pursuant to individually negotiated contracts tend to be highly paid managers and executives. The employees arbitrating pursuant to personnel manuals or handbooks are likely to be lower-paid and lower-ranking employees. See *id.* at 413–14.

162. See *id.* at 430.

163. See *id.*

164. See *id.*

165. See *id.* at 433.

166. See *id.* at 425.

Importantly, in the employment arbitration context, commentators continue to debate whether mandatory arbitration produces significantly different results from courts. Researchers have been unable to find such a difference when comparing higher-paid employees' claims.<sup>167</sup> On the other hand, they *have* uncovered disparity when comparing lower-paid employees' claims.<sup>168</sup> It is possible that because employment arbitration is often free, more of these lower-paid employees choose to use the process, even for frivolous claims.<sup>169</sup> This could explain the lower-paid employees' low win rate. In some instances, it appears that the employers who have adopted employment arbitration have also institutionalized other dispute resolution processes that screen out the strongest cases, leaving only the weakest to proceed to arbitration.<sup>170</sup> Another possibility, which also has empirical support, is that employers who have suffered defeat in litigation—or avoided such defeat by agreeing to a settlement<sup>171</sup>—have changed their procedures in order to reduce the likelihood of future litigation. Despite all of these potential explanations for lower-paid employees' experience in employment arbitration, it is also possible that employer-mandated employment arbitration has developed a structure that works to the disadvantage of employees. And it is almost certain that the numbers uncovered by Professor Colvin provided additional ammunition to critics of employment arbitration skeptical of the impartiality of a mandatory, employer-controlled process that delivers low employee win rates and low damage awards.<sup>172</sup>

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167. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003-Jan. 2003, at 44.

168. See Schwartz, *Mandatory Arbitration and Fairness*, *supra* note 28, at 1287–99 (reporting the results of the Eisenberg and Hill study, *supra* note 167). But see Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, AM. BAR ASS'N. LITIG. SEC. CONFLICT MGMT., Winter 2003, at 11.

169. See Colvin, *supra* note 142, at 419.

170. See Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 323, tbl.2 (Samuel Estreicher & David Sherwyn eds., 2004); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 9; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 807–08 (2003).

171. See, e.g., Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 112–13 (explaining that USPS national mediation program was part of the settlement of a racial discrimination class action). USPS managers report that they have improved in their ability to deal with issues with their employees, primarily by being more willing to listen. See Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601, 607–08 (1997).

172. Although he also has referenced similar data, Professor David Schwartz urges that the data ultimately do not matter in determining whether or not mandatory arbitration is fair. Schwartz, *Mandatory Arbitration and Fairness*, *supra* note 24, at 1340–

In the securities arbitration area, as well, there has been cause for concern for consumers (or customers). Evidence indicates that customers' win rates have declined, as have their recovery rates.<sup>173</sup> Customers fare particularly poorly when facing large brokerage firms or when their arbitrators are attorneys who represent brokerage firms or brokers in other arbitrations.<sup>174</sup> Research also has shown that the selection of pro-industry arbitrators has increased.<sup>175</sup>

Within this area, however, the Financial Industry Regulatory Authority (FINRA)<sup>176</sup> and the Securities Industry Conference on Arbitration (SICA) have been admirably proactive. In a report commissioned by SICA, Professors Jill Gross and Barbara Black described perceptions of arbitral partiality among customers.<sup>177</sup> Even though a strong majority of customers and "non-customers" (i.e., primarily industry representatives) responding to a survey perceived that their arbitration panels were competent to resolve the disputes before them,<sup>178</sup> the research also revealed significant divergences between customers and non-customers in securities arbitration.<sup>179</sup> Customers were much less likely than non-customers to perceive the arbitration panel as open-minded (28% vs. 49%),<sup>180</sup> much less likely to perceive the arbitration panel as impartial (25% vs. 48%),<sup>181</sup> and, ultimately, much less likely to view the arbitration process as fair (27.84% vs. 50.64%).<sup>182</sup> Indeed, 60% of customers disagreed with the statement "I have a favorable view of securities arbitration for customer disputes,"<sup>183</sup> and 61% disagreed with the statement that "[a]rbitration was fair for all parties."<sup>184</sup> The customers' skepticism regarding arbitrators' open-mindedness and impartiality makes it unsurprising that they also doubted the arbitration process's fairness.

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41. Instead, he points out that both those who impose mandatory arbitration clauses and those who resist them consistently *behave* as though mandatory arbitration is not fair; thus the process is not fair. *Id.*

173. See Jill I. Gross & Barbara Black, *Perceptions of Fairness of Securities Arbitration: An Empirical Study* 5 (Univ. of Cincinnati Coll. of Law, Pub. Law & Research Paper Series, No. 08-01, 2008) [hereinafter Gross & Black, *Perceptions of Fairness*].

174. See *id.*

175. See *id.* at 6.

176. According to its website, FINRA is "the largest independent regulator for all securities firms doing business in the United States." Financial Industry Regulatory Authority, <http://www.finra.org/AboutFINRA/index.htm> (last visited Mar. 12, 2009). The organization was established in July 2007 with the consolidation of the National Association of Securities Dealers ("NASD") and "the member regulation, enforcement and arbitration functions of the New York Stock Exchange." *Id.*

177. See Gross & Black, *Perceptions of Fairness*, *supra* note 173; Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349 [hereinafter Gross & Black, *When Perception Changes Reality*].

178. See Gross & Black, *When Perception Changes Reality*, *supra* note 177, at 383.

179. *Id.* at 387-89.

180. See *id.* at 385.

181. See *id.*

182. See *id.* at 378.

183. See *id.* at 390 n.119.

184. See *id.* at 390.

Participants with recent experience in a civil court case also were asked to compare the fairness of securities arbitration with the fairness of the court process. A whopping 75.55% of customers found that arbitration was “very unfair” (62.96%) or “somewhat unfair” (12.59%) when compared with their court experience.<sup>185</sup> Following this and other empirical research referenced earlier, FINRA has begun changing the procedures used for selecting securities arbitrators.<sup>186</sup>

Procedural justice research and theory easily explain the divergence in perceptions between the securities customers and non-customers/industry representatives, as well as the skepticism displayed by other critics of mandatory arbitration in the consumer and employment contexts. Four process characteristics reliably predict perceptions of fairness: (1) the opportunity for people to tell their stories (“voice”); (2) demonstrated consideration of these stories by the decisionmaker (“being heard”); (3) the involvement of a decisionmaker who is trying to be open-minded and fair; and (4) dignified, respectful treatment.<sup>187</sup> Perhaps because people realize that these procedural characteristics can be manipulated, they tend to be on high alert for “sham” procedures.<sup>188</sup> The arbitrations described *supra* are conducted pursuant to contracts that are written by the repeat players, with arbitration clauses inserted by the repeat players, with arbitrators coming from the repeat players’ industry or trade associations or from ADR firms that must solicit the repeat players’ business. The one-sided nature of these circumstances is likely to raise doubts regarding the likelihood of real consideration from arbitrators who are open-minded and fair.

Procedural justice matters because if people perceive a dispute resolution or decision-making process as procedurally fair, they also are more likely to perceive the outcome as substantively fair.<sup>189</sup> Perceptions of procedural justice also strongly influence compliance and perceptions of the legitimacy of the institution that provides or sponsors the process.<sup>190</sup> Why do people care so much about procedural justice? First, people want to be reassured that the decisionmaker had access to and considered the information needed to make a good, fair decision. If the decisionmaker had and considered the information, then the outcome is more deserving of trust and respect. Second, procedures themselves communicate whether the people using the procedures are deserving of respect. If the neutral in a

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185. *See id.*

186. *See New Securities ADR Pilot Launches, Allowing Industry Arbitrator Removal*, 26 ALTERNATIVES TO HIGH COST LITIG. 191, 191 (noting FINRA’s adoption of a pilot program that allows investors to elect arbitrator panel consisting entirely of public arbitrators, thus excluding any industry arbitrator).

187. *See Nancy A. Welsh, Perceptions of Fairness*, in THE NEGOTIATOR’S FIELDBOOK 165, 169 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006) [hereinafter *Welsh, Perceptions of Fairness*]; Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52 (2004); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 820–21 (2001).

188. *See Welsh, Perceptions of Fairness*, *supra* note 187, at 170.

189. *See id.*

190. *See id.*

dispute resolution process listens to the disputants before him or her and consistently demonstrates both respect and a sincere attempt to be open-minded, these behaviors signal to the disputants that they are valued members of the group, regardless of whether that group is a nation, a local community, or a workplace.<sup>191</sup> Refusal to listen or closed-mindedness signals a lack of respect.

More recent research has revealed that people who find themselves in situations that accentuate hierarchy and unequal status—situations that then trigger strong suspicions that scarce resources will be allocated on the basis of identity-based status rather than situation-specific merit<sup>192</sup>—are even more likely to notice if they are treated in a procedurally just manner.<sup>193</sup> Again, the one-sided nature of many of the structural characteristics of consumer, employment, and securities arbitration strongly suggests the presence of hierarchy and the potential for inequality—i.e., that nothing should be taken for granted when it comes to the fairness of the dispute resolution procedure or its result.

This cursory description of procedural justice research and theory, along with the data that have emerged from consumer, employment, and securities arbitration, reveal why consumer and employee advocates, along with academics and some ADR advocates, have raised concerns about the existence and consequences of structural bias among embedded neutrals. However, it has been relatively easy for courts to brush aside these objections as the overblown fantasies of people who like to complain or the frivolous objections of those who are attempting to avoid an inevitable loss on the merits.<sup>194</sup>

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191. See *id.* at 170–71.

192. Though I am clearly privileging one of these bases for the allocation of resources, I recognize that both can be viewed as grounded in equity. See Welsh, *Perceptions of Fairness*, *supra* note 187, at 166.

193. See *id.* at 170; Jody Clay-Warner, *Perceiving Procedural Injustice: The Effects of Group Membership and Status*, 64 SOC. PSYCHOL. Q. 224 (2001); Kristina A. Diekmann et al., *Does Fairness Matter More to Some Than to Others? The Moderating Role of Workplace Status on the Relationship Between Procedural Fairness Perceptions and Job Satisfaction*, 20 SOC. JUST. RES. 161, 163 (2007); Jan-Willem Van Prooijen et al., *Procedural Justice and Intragroup Status: Knowing Where We Stand in a Group Enhances Reactions to Procedures*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 664 (2005).

194. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) (declining “to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators”); *Doctor’s Assocs., Inc. v. Jabush*, 89 F.3d 109 (2d Cir. 1996) (affirming lower court’s refusal to enforce arbitration provision based on repeat-player effect, finding that plaintiff had failed to show any facts that AAA or its arbitrators were biased); *Doctor’s Assocs., Inc. v. Stuart*, 85 F.3d 975 (2d Cir. 1996) (same); *Doctor’s Assocs., Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998) (reaching same); see also *Miller v. Equifirst Corp.*, No. 2:00-0335, 2006 U.S. Dist. LEXIS 63816 (S.D. W. Va. Sept. 5, 2006). The Plaintiff argued that the fee-per-case system used by NAF creates incentive for NAF arbitrators to rule in favor of lenders to garner repeat business. *Id.* The court also pointed to NAF solicitation materials flaunting close ties to financial services industry and lawyers, as well as amicus briefs filed by NAF to support lenders’ arguments. *Id.* The court, in denying the plaintiff’s argument, stated that the NAF procedures included adequate protections for those who were not repeat players including “prior to the selection of the arbitrator, the



names and qualifications of potential arbitrators are provided to the party . . . [.] the arbitrator is required to be 'neutral and independent' . . . [, and] in the arbitrator selection process each party has one peremptory challenge and unlimited challenges for cause." *Id.* The court also pointed to a number of other decisions which have similarly found that the NAF is not biased in favor of repeat players including *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000); *Hutcherson v. Sears, Roebuck & Co.*, 793 N.E.2d 886, 898 (Ill. 2003). *Id.*; see also *MLDX Invs., Inc. v. Parse*, No. 2:06-CV-00121 PGC, 2006 U.S. Dist. LEXIS 36613, at \*22 (D. Utah June 1, 2006) (finding that "there has been no showing that such [NASD/NYSE] arbitration panels disproportionately favor brokers"). California courts repeatedly cite *Mercurio* for the proposition that the repeat-player effect is not enough by itself to find an arbitration agreement unconscionable. See *Imagistics Int'l, Inc. v. Dep't of General Servs.*, 150 Cal. App. 4th 581 (2007) (finding no showing of the oppressive procedural unconscionability present in *Mercurio*); *Hogan v. Nordstrom, Inc.*, No. A113160, 2007 Cal. App. LEXIS 4651 (June 11, 2007) (finding no evidence to refute Nordstrom's contention that the AAA has thousands of arbitrators that can be called to arbitrate any given dispute); *Husky v. Hollywood Entm't Corp.*, No. H029401, 2006 Cal. App. LEXIS 5752 (June 30, 2006) (noting that concerns in *Mercurio* not present); *Meoli v. AT&T Wireless Servs., Inc.*, No. A106061, 2005 Cal. App. LEXIS 4366 (May 18, 2005); *Belinsky v. BPM Goldman Fin. Design, LLC*, No. A104645, 2004 Cal. App. LEXIS 10595 (Nov. 18, 2004) (finding no factual showing for the court to find a "repeat player effect"); *McManus v. CIBC World Markets Corp.*, 109 Cal. App. 4th 76 (2003) (finding no evidence that the NASD/NYSE rules regarding disclosure garner a "repeat player effect"). Under New York law, in a former partner's action to recover retirement benefits from the partnership, the trial court correctly concluded that it did not have sufficient information to conclude that an arbitration panel that included two members of the board of directors and three other partners would be biased. *BDO Seidman, LLP v. Bee*, 970 So. 2d 869, 877 (Fla. Dist. Ct. App. 2007). With respect to the provision of arbitrators, under New York law, "parties may not complain merely because the arbitrators named were known to be chosen with a view to a particular relationship to their nominator or to the subject-matter of the controversy." *Astoria Med. Group v. Health Ins. Plan*, 182 N.E.2d 85, 89 (N.Y. 1962). In *Westinghouse Electric Corp. v. N.Y. City Transit Authority*, the court noted:

[I]t has long been the policy of New York courts to interfere as little as possible with the freedom of consenting parties, '[t]herefore, strange as it may seem . . . a fully known relationship between an arbitrator and a party, including one as close as employer and employee . . . will not in and of itself disqualify the designee.'

623 N.E.2d 531, 534 (N.Y. 1993). The court found the designation of an employee of one of the parties as the arbitrator of disputes not to be substantively unconscionable. *Id.* Relying on *Westinghouse*, the court in *Greenwald v. Weisbaum*, 785 N.Y.S.2d 664 (N.Y. Sup. Ct. 2004), upheld the validity and enforceability of the BDO arbitration provision. The court noted:

The arbitration provision safeguards the arbitration proceeding by requiring the panel to consist primarily of non-Board Members and that no member can be from the same office as the complaining partner, nor be otherwise involved in the controversy or dispute. Additionally, since every partner of BDO may be compelled in the future to arbitrate a dispute before such a panel, this dramatically illustrates that there is certainly a reasonable expectation that the arbitration will not be unfair.

*Id.* at 670. The Connecticut Supreme Court came to the same conclusion in *Hottle v. BDO Seidman, LLP*, 846 A.2d 862 (Conn. 2004), applying New York law. Both cases distinguished an earlier case, *Cross & Brown Co. v. Nelson*, 167 N.Y.S.2d 573 (N.Y. App.

The objections became more difficult to brush aside, however, after Minnesota Attorney General Lori Swanson filed a state court complaint<sup>195</sup> in 2009 against the National Arbitration Forum (NAF). An analysis of that case, as described in the Minnesota complaint,<sup>196</sup> will provide the opportunity to test the application of the rule emerging from *Caperton* to a situation involving an embedded neutral.

### III. THE SPECIAL CASE OF THE NATIONAL ARBITRATION FORUM<sup>197</sup>

NAF, a for-profit corporation, was founded in Minnesota in 1986.<sup>198</sup> NAF received very substantial business from credit-card companies, as well as mortgage lenders, retailers that make loans to purchasers of their products, debt buyers, and cell phone companies.<sup>199</sup> NAF solicited this business and—according to allegations contained in the Minnesota complaint—made some of the following claims to persuade repeat players to insert mandatory arbitration clauses in their boilerplate agreements:

[Benefits of arbitration include a] marked increase in recovery rates over existing collection efforts. (PowerPoint presentation to bank.)<sup>200</sup>

The customer does not know what to expect from Arbitration and is more willing to pay.

They [customers] ask you to explain what Arbitration is then basically hand you the money.

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Div. 1957), on which *Bee* relies; see also Roger J. Perlstadt, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983 (2002) (urging that institutional bias objections should be allowed to be raised early).

195. See Complaint, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

196. This Article will use allegations made against NAF and statements made in deposition testimony as if they are true. This Article is *not* asserting the truth of such allegations or statements. Instead, the allegations and statements are being used to consider the potential application of *Caperton* to embedded neutrals. In a sense, the approach taken by this Article is consistent with the Supreme Court instruction to trial courts in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). When confronted with motions to dismiss for failure to state a claim, judges must assume that the allegations are true and view them in the light most favorable to the plaintiff. They must then determine whether the allegations present a plausible cause of action—not just a conceivable claim, but a plausible claim. This Article takes the same approach—accepting the Minnesota complaint's allegations as true and then determining whether they present a plausible claim under the 14th Amendment's Due Process Clause, as interpreted by the Supreme Court most recently in *Caperton*.

197. Or egregious tip of the iceberg? My thanks to Christopher Honeyman for suggesting this different perspective in his comments to a different article involving similarly creative parties.

198. Mollenkamp et al., *supra* note 46, at A20.

199. Complaint at 5, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

200. *Id.* ¶ 95.

You have all the leverage and the customer really has little choice but to take care of this account.<sup>201</sup>

It is unclear when these representations allegedly were made and by whom. Nonetheless, by 2006, NAF had become this country's largest provider of consumer debt arbitration services, handling 214,000 claims in that year alone.<sup>202</sup>

Accretive LLC, a private equity firm, approached NAF in 2006 and apparently expressed its interest in some form of partnering.<sup>203</sup> Accretive officials communicated to NAF that they saw the ADR organization as having the "potential to blossom into a billion-dollar business."<sup>204</sup> Further, they perceived that "[b]y expanding beyond credit-card disputes to resolving disagreements between hospitals and patients, NAF had the potential to be 'the center of a broad arbitration ecosystem . . .'"<sup>205</sup>

According to the Minnesota complaint, NAF was interested, but some of its officials worried about the repercussions if its relationship with Accretive became public. By e-mail (attached to the complaint), Mike Kelly, NAF's chief operating officer, recommended "that any Accretive stake in NAF be acquired through 'a new fund as the investment vehicle' [and that] there should be 'no public information connecting Accretive with the fund that ultimately acquires and holds the minority interest' in NAF."<sup>206</sup> Accretive and NAF signed a letter of intent in 2007.<sup>207</sup> In response to Kelly's concerns, Accretive formed several wholly-owned entities called Agora which then paid \$42 million for a 40% ownership stake in a new company, Forthright.<sup>208</sup> NAF took a 58.3% stake in the company.<sup>209</sup> NAF and Agora also entered into an agreement giving Agora the right

201. *Id.* ¶ 96.

202. *Id.*

203. It is unclear who initiated this contact. In a November 20, 2008 e-mail from Mike Kelly of NAF to Madhu Tadikonda of Accretive, Kelly indicates that Accretive will need to pay "[a] non-refundable fee to take us off the market during negotiations." E-mail from Michael Kelly, CEO, Nat'l Arbitration Forum, to Madhu Tadikonda, Gen. Partner, Accretive Tech. Partners, LLC (Nov. 20, 2008) (on file with author). This suggests that NAF had positioned itself as a target for acquisition or merger.

204. Mollenkamp et al., *supra* note 46, at A20.

205. *Id.*

206. *Id.*

207. Complaint at 18, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

208. *Id.*

209. *See id.* at 15, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

The remaining 1.7% are allegedly in endowments of major academic institutions. *Id.* at 32 (reporting that an NAF spokesperson said: "Following its spin-out from the FORUM, interested investors acquired a noncontrolling, passive, minority position in Forthright. These several investors are primarily high net-worth individuals and endowments of major academic institutions.") I thank my colleague Lance Cole for pointing out that even though Agora appeared to play an influential role, it demanded only a minority share of Forthright and thus was not in legal control of the company.

to appoint two of the members of Forthright's five-person board.<sup>210</sup> NAF's in-house counsel became in-house counsel for Forthright.<sup>211</sup>

Pursuant to a Services Agreement required by Accretive's principals, Forthright then took over most of the tasks involved in administering arbitrations and mediations.<sup>212</sup> One task that clearly remained with NAF was the *retention* of the neutrals.<sup>213</sup> It is less clear whether NAF or Forthright was responsible for *paying* the neutrals<sup>214</sup> and administering the process of *selecting* neutrals for cases. In return for these administrative services, NAF paid Forthright a "monthly seven-figure fee and a 'success fee' based on a formula related to the amount of revenue received by NAF."<sup>215</sup> According to the complaint, "95 percent of [NAF's] revenue" went to Forthright "after direct-arbitrator (mediator) costs."<sup>216</sup> Agora, Accretive, and its principals appear to have profited directly from the arbitrations conducted by NAF based on revenues generated by the Services Agreement and its ownership of Forthright. Forthright thus served as a vehicle for Accretive's investment in NAF while permitting Accretive to avoid direct involvement in the provision of arbitration services.

NAF's concern about concealing Accretive's investment likely was motivated by Accretive's simultaneous decision to invest in another company engaged in consumer debt collection. Specifically, Accretive entered into a financial relationship with employees of Mann Bracken, a large debt-collection law firm.<sup>217</sup> This firm represented credit-card companies in a large percentage of NAF's arbitrations involving collection actions against consumers.<sup>218</sup> Accretive joined with members of the Mann Bracken firm to create Axiant LLC.<sup>219</sup> Mann Bracken contributed most of its assets and liabilities associated with telephone collections service operations, "including non-attorney personnel," to Axiant.<sup>220</sup> Accretive owned 68.7% of Axiant, while the Mann Bracken firm members owned 31.3%.<sup>221</sup>

In a very real sense, with these two investments, Accretive had created a vertically integrated dispute resolution business.<sup>222</sup> Credit-card companies brought

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210. *Id.* at 22.

211. *Id.* at 17.

212. *Id.* at 14.

213. *Id.* at 16.

214. *See id.* at 15; *see also* Mollenkamp et al., *supra* note 46, at A20.

215. Complaint at 16, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

216. *Id.*

217. *Id.* at 17.

218. *Id.* at 10.

219. *Id.* at 2.

220. *Id.* at 25.

221. *Id.* at 11, 17, 24–25, 27–28.

222. *See* PHILLIP E. AREEDA & DONALD F. TURNER, 3 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 194–95 (1978) (defining vertical integration as the "inclusion within a single firm of two or more stages in the production and distribution of an end-product"); JAMES WALKER & DOUGLAS FERGUSON, THE BROADCAST TELEVISION INDUSTRY 214 (1998) (defining vertical integration as "[a]n

their collection matters to Mann Bracken, which attempted debt collection. If that did not work, Mann Bracken lawyers referred the cases to NAF for arbitration. According to the Minnesota complaint, in some instances, NAF even helped to draft claims against consumers.<sup>223</sup> NAF/Forthright referred the cases to NAF's arbitrators, who then conducted arbitration proceedings. NAF's arbitrators found for the credit-card companies nearly 95% of the time. The credit-card companies then turned to the courts, which transformed the arbitral awards into judgments. Axiant then took over and proceeded to collect on these judgments. Arbitration had become just another part of the debt collection business.

Importantly, NAF created a "Chinese wall" (now known as a "screen"<sup>224</sup>) to protect its arbitration services from contact with the operations conducted by Forthright/Mann Bracken.<sup>225</sup> NAF's chief operating officer also established separate office spaces—though perhaps in the same building—for these operations, with secure key-card access and separate information-technology infrastructures.<sup>226</sup> He apparently concluded that these actions sufficiently removed any potential conflicts of interest and permitted the relationship with Accretive to proceed.

In July 2009, the Minnesota Attorney General brought her action against NAF, relying on Minnesota statutes.<sup>227</sup> NAF quickly agreed to end its consumer debt arbitration business.<sup>228</sup> Based on the volume, flow, and timing of money detailed above, could the rule emerging from *Caperton* provide a constitutional basis for attacking NAF's arbitrators as insufficiently impartial—or as creating too strong a probability of bias? Perhaps more usefully, could the reasoning in *Caperton* be used to erect more effective protections of both the reality and the appearance of impartiality in the procedures involving embedded neutrals?

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industry in which the owners of the means of production also own the means of distribution"); Note, *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643, 2644 n.10 (2004) (citing HENRY A. WALLACE CTR. FOR AGRIC. & ENVTL. POL'Y AT WINROCK INT'L, MAKING CHANGES: TURNING LOCAL VISIONS INTO NATIONAL SOLUTIONS: AGRICULTURAL AND RURAL DEVELOPMENT POLICY RECOMMENDATIONS FROM THE AGRICULTURE POLICY PROJECT 11 (2001) (defining vertical integration in agriculture as "the coordination or ownership of various levels of production, processing, and distribution of farm products under one decisionmaking unit").

223. Complaint at 3, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

224. See MODEL RULES OF PROF'L CONDUCT R. 1.0(k) (2006) (describing effective screening mechanisms); *Id.* R. 1.10(a)(2)(i) (requiring firm's timely screening of lawyer who is disqualified from representing a client due to conflict of interest, as well as no apportionment of fee received from such client).

225. Complaint at Exhibit 2, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

226. See Mollenkamp et al., *supra* note 46, at A20.

227. Complaint at 3, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

228. Mollenkamp et al., *supra* note 46, at A20.

### A. Caperton's Potential Application to NAF

#### 1. A Necessary Tangent—The Necessity of State Action

It is essential to begin this discussion by noting that unlike the situation in *Caperton*, which involved a West Virginia judge, it is not certain that the Due Process Clause of the Fourteenth Amendment would apply to actions taken by a for-profit corporation such as NAF or by any of its individual, private arbitrators. The Due Process Clause provides: “nor shall any state deprive any person of life, liberty, or property, without due process of law.”<sup>229</sup> The elements of a due process claim thus include (1) deprivation, (2) by a state actor, (3) of the life, liberty or property, (4) of a person, (5) without due process of law. *Caperton*, and the cases upon which it relies, establish that the last requirement can be met when a court concludes that the amount and timing of financial contributions made to help ensure the installation of a judge will, as an objective matter, present too great a risk of tempting the average man not to hold the balance “nice, clear and true.”<sup>230</sup>

The difficulty here is that the Due Process Clause—like other requirements of the Constitution—generally does not apply to private parties. In other words, private action generally does not need to meet the requirements of due process.<sup>231</sup> NAF is a private party, providing individual arbitrators who conduct arbitrations in private contract disputes and issue arbitral awards to individual consumers and for-profit corporations. On the face of these events, there is no state action or state actor involved.

Professors Jean Sternlight, Richard Reuben, and others have argued, however, that consistent judicial enforcement—and even encouragement—of mandatory arbitration clauses, along with consistent judicial enforcement of arbitral awards, implicate the public function and entanglement exceptions to the state action doctrine.<sup>232</sup> Under the circumstances that characterize today’s

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229. U.S. CONST. amend. XIV, §1

230. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2255 (2009) (quoting *Ward v. Village of Monroe*, 409 U.S. 57, 60 (1972))

231. *United States v. Morrison*, 529 U.S. 598 (2000); *The Civil Rights Cases*, 109 U.S. 3 (1883).

232. See Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73, 76 (2005) [hereinafter Cole, *Fairness in Securities Arbitration*] (arguing that “the SEC’s involvement in the SRO arbitration process transforms the private SROs that directly administer the arbitration process into state actors for purposes of arbitration”); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 615–19 (1997); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 994–1009 (2000) (explaining public function and entanglement exceptions, applying them to “private” ADR procedures and urging that state action should be found in the event of “statutory delegation of a traditionally exclusive public function or the partnership of public and private actors in facilitating unconstitutional conduct”) [hereinafter Reuben, *Constitutional Gravity*]; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 40–47 (1997) (arguing that state action exists at least to the extent legislatures and courts are relying on a preference for arbitration over litigation to interpret the validity and

enforcement of arbitration clauses and awards, the line between the public justice system and private dispute resolution is difficult to discern.<sup>233</sup> As Professor Sarah Cole recently pointed out, it is even more difficult to establish a public-private divide when a public regulatory body plays a significant role in the operations of an industry and its resolution of disputes.<sup>234</sup> Rather than repeating the arguments made by these colleagues and others on these points, this Article will simply incorporate them by reference, just for the purpose of creating the possibility that the Due Process Clause could be applied directly to NAF and its arbitrators.<sup>235</sup> For

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scope of arbitration agreements). *But see In re National Arbitration Forum Trade Practices Litigation*, No. Civ. 09-1939, 2010 WL 605710 (D. Minn. Feb. 22, 2010) (granting defendants' 12(b)(6) motion to dismiss due process claim, based on finding that "NAF is a private entity" and though "[i]t may have been engaged in quasi-judicial functions . . . that does not mean it is a state actor"); Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1 (arguing against state action). Professor Larry Backer has recently linked sovereign immunity and state action:

Thus, sovereign immunity is criticized because it preserves a space in law where the apparatus of state is not treated like other objects of law (the common citizen or legal subject), and state action is criticized for insulating individuals and other non-state entities from obligations otherwise imposed on the state. There is a strong principle of levelling, of horizontal equity, inherent in these criticisms. The criticisms also mark a strong mutation of rule of law notions to one that suggests a substantive governance component of equal treatment and equal obligation among public and private entities. Perhaps also, the criticisms suggest the ways in which the state has ceased to be "special" and different. This last point is especially powerful in the context of the recent push to privatize traditional governmental functions either by delegation (through contract) or by leaving areas of behavior regulation to the "market."

Larry Backer, *On State Action and Sovereign Immunity*, LAW AT THE END OF THE DAY, June 11, 2007, <http://lbackerblog.blogspot.com/2007/06/on-state-action-and-sovereign-immunity.html>.

233. Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117 (2004). Richard Reuben urges that

[A] unitary theory of public civil dispute resolution joins trial and some of what is now called private ADR into a single system of interrelated dispute resolution processes, with the intensity of constitutional force decreasing the further removed the dispute resolution process becomes from the purview of the government. This constitutional force, or gravity, is determined by reference to the nature of the ADR process, the nature of the constitutional values at risk in the process, and the coerciveness of the role of the state in that process.

Reuben, *Constitutional Gravity*, *supra* note 232, at 1047. There also seems to be increasing fuzziness in the relationship between our "justice" system (formerly understood as public and dominated by the courts) and "risk management" system (formerly understood as private and dominated by insurers). See Nancy A. Welsh, *I Could Have Been a Contender: The Potential Effects of Twombly and Iqbal on Pre-Litigation Negotiation and Other Forms of Early, Consensual Dispute Resolution*, 114 PENN ST. L. REV. (forthcoming 2010).

234. See Cole, *Fairness in Securities Arbitration*, *supra* note 232, at 83–97.

235. I will save for another day an exploration of case law interpreting federal statutes, court rules, or judicial canons of ethics that might also reveal an approach to

the limited purposes of this Article,<sup>236</sup> then, we may either assume that the Due Process Clause could be found to apply directly to NAF and its operations through relevant exceptions to the state action doctrine, or alternatively—and much less provocatively—we may adopt the approach used by the Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*<sup>237</sup> There, Justice Black observed that he could “see no basis” for refusing to find in “the broad statutory language [of the Federal Arbitration Act or FAA] that governs arbitration proceedings” the “constitutional principle” of impartiality applicable to courts.<sup>238</sup> Thus, even if the Due Process Clause does not apply directly, we may import its jurisprudence into the FAA.

With this assumption in place, we are now ready to determine whether NAF’s corporate and financial structures resulted in a situation in which an average NAF arbitrator would be *unconstitutionally tempted* “not to hold the balance nice, clear and true.”<sup>239</sup>

## 2. Finding a Temptation That Is Unconstitutionally Strong

We will continue to assume, as we have thus far and for the limited purpose of testing the potential application of *Caperton* to embedded neutrals, that the allegations contained in the Minnesota Attorney General’s complaint are true. If we accept these allegations as true, it is clear that very substantial money flowed into NAF from Accretive, by way of Agora, and that Accretive personnel began to play a significant role in NAF’s governance, administration, business development, marketing, and perhaps even its self-identity. It is also clear that Agora personnel were given access to highly confidential information about

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safeguarding due process that is similar to the one taken by the majority in *Caperton*.

236. And recognizing that others may quite legitimately disagree with a relatively freewheeling approach to collapsing the public–private divide. See generally Richard Reuben, *Constitutional Gravity*, *supra* note 232; Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL’Y 111 (2005).

237. 393 U.S. 145 (1968). *But see* Linas Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN ST. L. REV. 899, 908 (2009) (noting the Justice White’s concurring opinion is cited much more frequently than Justice Black’s even though Justice White had also joined Justice Black’s opinion).

238. *Commonwealth Coatings Corp.*, 393 U.S. at 148. Justice Black added:

It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.

*Id.* at 148–49; see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2268 (2008) (“The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.”). *But see* *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653–54 (1990) (noting that the Due Process Clause had not been specifically invoked and that the statute at issue did not specifically require the procedural protections being demanded by LTV).

239. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2255 (2009).



NAF's arbitration business, including data regarding "claim volume and revenue trends, . . . finances, personnel, judgment trends, [and] arbitrator credentials."<sup>240</sup> Finally, if we accept the complaint's allegations as true, it seems reasonable to assume that Accretive's profits were affected by the success of Axiant, its joint venture with the law firm of Mann Bracken—and that Axiant's success in performing its debt collection function depended upon Mann Bracken's success in acquiring arbitral awards.<sup>241</sup> Though the Minnesota complaint describes a complex web of corporate structures and financing, it is clear that Accretive was affiliated financially and in terms of governance with NAF, and that Accretive also had a direct financial interest in ensuring that the arbitrations conducted by NAF *assisted* debt collection. The relevant question, though, is *not* whether *Accretive* would have been able to hold the balance nice, clear and true. Our focus is on the ability of the individual NAF arbitrator to maintain that balance.

It seems quite likely, meanwhile, that Accretive and Agora influenced *NAF*. As noted above, Agora was able to appoint two of the five directors on Forthright's board, and Forthright became the entity that collected the income, paid the expenses, and distributed 58.7% of the net profits to NAF's principals. In 2006, Mann Bracken, whose employees were partial owners of Axiant (along with Accretive), was responsible for over 50% of the consumer debt collection arbitration claims that resulted in filings, income, and net profits for NAF's principals.<sup>242</sup> In addition, Accretive/Agora principals fed NAF's dreams and ambitions. Accretive/Agora "promised to 'launch' the Forum into new lines of business";<sup>243</sup> described NAF as "sit[ting] at the center of a broad arbitration ecosystem";<sup>244</sup> helped NAF principals imagine "[a]rbitration expand[ing] to become a comprehensive, alternative legal system";<sup>245</sup> discussed at a Forthright board meeting "methods to increase the number of large batch claims being processed by arbitrators, and changes in the process that would provide filers access to working capital";<sup>246</sup> assisted NAF in developing bids for new business;<sup>247</sup> and invested \$42 million in NAF.<sup>248</sup> Even though ADR has become a big business, \$42 million is still a lot of money. It seems quite likely that with Accretive's encouragement, NAF began (or continued) to evolve from a company that modeled itself after the courts—an image that remained dominant in the representations on the company's website<sup>249</sup>—to one that had re-imagined itself as a successful and efficient business focused on a profitable, high-volume segment

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240. Complaint at 18–19, *State v. Nat'l Arbitration Forum* (D. Minn. filed July 14, 2009).

241. *Id.* at 29–31.

242. *Id.* at 29.

243. *Id.* at 13.

244. *Id.*

245. *Id.* Exhibit 1 ("NAF-Strategic Vision").

246. *Id.* at 23.

247. *Id.* at 24.

248. *Id.* at 2.

249. *Id.* at 7–9.

of the dispute resolution market. That change in self-image likely resulted in a change in values and normative anchors.<sup>250</sup>

But does Accretive's investment of the "extraordinary" sum of more than \$42 million in NAF and its influence on the governance and direction of the organization, occurring at about the same time that Accretive invested heavily in the debt-collection industry, meet the objective standard of creating a "probability of actual bias on the part of" NAF that "is too high to be constitutionally tolerable?"<sup>251</sup> This question is also not the relevant question to be answered, at least not at this point in the Article. The focus in *Caperton* was *not* on the West Virginia court *as a whole* and whether it was likely to be biased as a result of the support it received from a particular individual or set of interests.<sup>252</sup> Instead, the focus in *Caperton* was on the strength of such influence upon an *individual justice*.<sup>253</sup> Was *his* refusal to recuse himself constitutionally suspect because of the source and timing of the campaign contributions that helped *him* to gain something *he* coveted—a seat on the West Virginia Supreme Court of Appeals?

Thus, the *Caperton* analysis requires us to examine the individual arbitrator and assess the *probability* that NAF's reliance on the repeat business of credit-card companies and its financial connection to the debt collection industry—through Accretive and its various investment vehicles—would have affected the *arbitrator's* ability to hold the balance nice, clear and true. But *Caperton* also poses a limitation in making this inquiry: it establishes an objective, not a subjective, standard for the violation of due process. We are *not* examining the character of any particular NAF arbitrator or even the character of all of those on NAF's panel, just as *Caperton* did not examine the character of Justice Benjamin

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250. See Jill M. Purdy & Barbara Gray, *Conflicting Logics, Mechanisms of Diffusion, and Multilevel Dynamics in Emerging Institutional Fields*, 52 ACAD. MGMT. J. 355 (2009) (describing stages of evolution of emerging fields and diffuse actors' selective use and exploitation of ideas that serve their own interests).

251. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

252. This is an important question, however, and one that deserves (and will receive) closer study.

253. This focus is consistent with the general notion that the "culture" of the U.S. tends to be individualistic rather than collectivist. See JEAN M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 32–34 (2007); Kwok Leung & Michael W. Morris, *Justice Through the Lens of Culture and Ethnicity*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 348 (Joseph Sanders & V. Lee Hamilton eds., 2001) ("[I]ndividualism refers to a tendency to put a stronger emphasis on one's personal interest and goals, whereas collectivism refers to a stronger emphasis on the interests and goals of one's in-group members."); Geert Hofstede, *The Cultural Relativity of Organizational Practices and Theories*, J. INT'L BUS. STUD., Fall 1983, at 75 (finding the U.S. in an extremely high position on the individualism scale). There are very significant variations within American society, however, depending upon the in-groups and subcultures with which individual Americans identify. See Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224, 229 (1991) ("[E]ven in American culture, there is a strong theme of interdependence that is reflected in the values and activities of many of its subcultures."); Welsh, *Perceptions of Fairness*, *supra* note 187, at 167 (observing that collectivists' negotiation choices will depend upon characteristics of the particular contexts in which they are making these choices).

or the character of any other particular justice on the West Virginia Supreme Court of Appeals.

Therefore, we must consider whether NAF's reliance on the repeat business of credit-card companies and Accretive's \$42 million investment and roles in NAF's operations was likely to affect the *average* man's ability to hold the balance nice, clear and true. That brings us to several questions. Did NAF arbitrators rely on the organization for a substantial share of their income? Is there evidence that NAF arbitrators were aware or had reason to be aware of the company's solicitations of credit-card companies and other repeat players? Is there evidence that NAF arbitrators were aware or had reason to be aware of Accretive/Agora's role and influence? What were the NAF "judgment trends" that Accretive/Agora examined as part of its due diligence when deciding whether to invest in NAF? Did NAF arbitrators know that NAF was tracking their judgment trends? Why *did* NAF gather information about judgment trends? Perhaps most importantly, did NAF *do anything differently in referring cases to arbitrators* as a result of its assessment of those judgment trends? Finally, *who* managed the administrative task of determining which arbitrators would receive referrals—and thus receive the resulting fees?

No information from the Minnesota complaint answers any of these questions. Public Citizen's report, however, has information regarding the volume of cases handled by some NAF arbitrators.<sup>254</sup> According to that report, during the approximate four-year period between January 1, 2003, and March 31, 2007, NAF's ten busiest arbitrators heard between 699 and 1332 credit-card cases.<sup>255</sup> They may also have heard other types of cases, but that information was unavailable. This volume of cases suggests the possibility of some reliance on income from NAF and, thus, the potential for a reduced ability to maintain independence and impartiality. Some people now make a very good living serving primarily as neutrals. If NAF had required exclusivity or a non-compete agreement from its neutrals, both common sense and relevant socio-psychological research regarding the influence of group membership upon individual human beings<sup>256</sup> would suggest an increased likelihood that an average person serving as an NAF arbitrator could find his or her judgment affected by NAF's business needs and aspirations. It is not clear, however, that the money involved here would affect an average man's or woman's judgment *enough* to be viewed by the current Supreme Court as "constitutionally [in]tolerable."

Public Citizen's allegations regarding NAF arbitrators' knowledge of NAF's solicitation of business from credit-card companies and NAF's reliance on

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254. PUBLIC CITIZEN, *supra* note 142, at 16.

255. *Id.* But see E-mail from Mark Fellows, Legal Counsel, Forthright, to Nancy Welsh, Professor, Penn State University, Dickinson School of Law (April 21, 2010) (on file with author) (noting that "[a]verage FORUM arbitrator compensation in 2008 equaled less than 5% of the national average annual salary of an attorney with 15 years of practice experience").

256. See Ronald J. Fisher, *Intergroup Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION 166, 171–72 (Morton Deutsch & Peter T. Coleman eds., 2000) (describing social identity and its effects). E-mail from Mark Fellows, *supra* note 255 (explaining that the FORUM did not impose exclusivity requirements).

such referrals for a significant share of its business were widely publicized within the dispute resolution community and, more broadly, in the business community. It thus seems likely that NAF arbitrators would have known about such concerns.<sup>257</sup>

In contrast, there is *no* evidence that NAF's arbitrators were aware or had reason to be aware of Accretive/Agora's extraordinary investment in NAF or of its role in NAF's operations. Indeed, given the care and cleverness with which NAF, Accretive, and Mann Bracken disguised their corporate and financial relationship, there is every reason to presume that NAF arbitrators did *not* know about this. Again, this suggests that the money involved and, more importantly, its "temporal relationship" with an average person serving as an NAF arbitrator was not enough to represent a sufficiently "serious, objective risk of actual bias" to violate due process.<sup>258</sup>

Finally, Public Citizen reported the "noisy withdrawal"<sup>259</sup> of Harvard Law School Professor Elizabeth Bartholet from the organization, along with her concern about NAF's "apparent systematic bias in favor of the financial services industry."<sup>260</sup> This story was publicized widely within the dispute resolution community. Bartholet's withdrawal provides additional guidance on whether the flow of money into NAF—from Accretive/Agora, Mann Bracken and the credit-card companies—and this money's temporal relationship with any particular NAF arbitrators or arbitrations should lead to a finding of an unconstitutionally strong risk of biased decision-making by an arbitrator.

Professor Bartholet is a longtime arbitrator. She has served on labor and commercial panels for the AAA, MREP, JAMS-Endispute, the Massachusetts Commission Against Discrimination, and, beginning in early 2003, for NAF.<sup>261</sup> In

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257. See Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BUS.WK., June 16, 2008, at 72; Nathan Koppel, *Arbitration Firm Faces Questions Over Neutrality*, WALL ST. J., Apr. 21, 2008, at A3; Roger S. Haydock, Letter to the Editor, *Arbitration Forum Is Fair and Balanced*, WALL ST. J., May 3, 2008, at A10 (Haydock is the managing director of NAF); Serres, *supra* note 20, at 1D.

258. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2264–65 (2009).

259. A lawyer's "noisy withdrawal" from the representation of a client has long been understood as ethical, under certain conditions. Its use became much more problematic when the SEC incorporated the concept into the Sarbanes-Oxley bill. See *Lawyer Conduct and Corporate Misconduct*, 117 HARV. L. REV. 2227, 2244 n.114 (2004) (citing George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597, 607 (1998) ("Rule 1.16, together with other provisions of the Model Rules and comments to the Rules, has been interpreted to allow such 'noisy' withdrawal where the lawyer's work product is being used or will be used to perpetrate a fraud."); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1270 (2003) (arguing that noisy withdrawal is the ABA's "own invention" and noting that Model Rule 1.6 has always "allowed a withdrawing lawyer to disaffirm any document produced during the representation"); DongJu Song, Note, *The Laws of Securities Lawyering After Sarbanes-Oxley*, 53 DUKE L.J. 257, 260, 286, 278–79 (2003) (noting that "comment 14 to [Model Rule 1.6] explicitly contemplates and permits giving notice of a withdrawal and disaffirmance of opinions, documents, and affirmations").

260. PUBLIC CITIZEN, *supra* note 142, at 31.

261. Transcript of Deposition of Elizabeth Bartholet at 8–9, Carr v. Gateway, No. 03-L-1271 (3d Cir. Ct. Ill. Dec. 12, 2007) [hereinafter Bartholet Deposition].

eighteen of nineteen credit-card arbitrations she received, she ruled for the credit-card company, requiring the consumer to pay the money owed.<sup>262</sup> In the nineteenth case, Professor Bartholet dismissed the credit-card company's claim on the merits.<sup>263</sup> None of these arbitrations involved a hearing. Only in the twentieth case that she arbitrated for NAF did the consumer request a hearing and assert a counterclaim.<sup>264</sup> After the hearing and considering "a fair number of papers" that the consumer submitted, Professor Bartholet ruled against the credit-card company on its claim and for the consumer on the counterclaim.<sup>265</sup> On March 5, 2004, she issued her decision ordering the credit-card company to pay "\$48,000 plus some" to the consumer.<sup>266</sup> Professor Bartholet decided two more cases, to which she had been assigned long before, neither involved a credit-card company as a party.<sup>267</sup> And then, in the next eleven cases to which she had been assigned, Professor Bartholet received notices from NAF that it had either chosen to remove her or the credit-card company had dismissed its collection action.<sup>268</sup> She had never been removed before,<sup>269</sup> and not all of these cases involved the credit-card company that had been a party to her previous arbitrations.<sup>270</sup> Professor Bartholet was suspicious that her \$48,000 award in favor of the consumer in one case had been disclosed to other credit-card companies and that these companies were, as a result, choosing to avoid using her as an arbitrator.<sup>271</sup> In addition, in at least three of the cases in which NAF chose to remove Professor Bartholet, it reasoned that she had a "scheduling conflict." Puzzled because she had never asserted such a conflict, Professor Bartholet called a case administrator<sup>272</sup> at NAF "because the letter was untrue and because [she] suddenly found [her]self disqualified."<sup>273</sup> Professor Bartholet described the conversation as follows:

Q: What did you and Miss Broberg discuss during your call?

A: I told her about my concern that I felt I was being removed based on the fact that I had decided a single significant case against credit-card company X after having decided a whole lot for them which I knew was somewhere between one and two dozen. I didn't know the exact number at that time and I told her of my concern that this letter was untrue and would be misleading to the parties. This was a letter addressed to the parties and would be misleading to the parties, particularly the creditor [actually the debtor or consumer, per a clarification later in the deposition] party who would be misled as to the reason that I would not be hearing the case.

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262. *Id.* at 21–22.

263. *Id.* at 22.

264. *Id.*

265. *Id.*

266. *Id.* at 22, 30.

267. *Id.* at 31.

268. *Id.* at 34.

269. *Id.* at 40.

270. *Id.* at 117.

271. *Id.* at 118.

272. *Id.* at 45.

273. *Id.* at 38.

Q: Did Miss Broberg give you any reason why this letter had been sent?

A: Yes, she did.

Q: What did she say?

[Various objections]

...

A: Say. In response to my statement that was roughly do you think there could be any reason for them disqualifying me other than the fact I ruled against them in Case Y. She said no. She basically agreed that that was the reason and in response to my concern about this misleading letter about my unavailability having been sent out, she said that it was a form letter that was simply regularly sent out in all of the cases and it hadn't been—I mean the implication was, therefore, it had not been done particularly in this case. It was just a form letter that was sent out in all the cases.<sup>274</sup>

Professor Bartholet subsequently received a call from Colleen Askvig, who she understood to be NAF's legal counsel, responsible for supervising the case administrators.<sup>275</sup> Though Ms. Askvig apparently thought that Professor Bartholet was concerned that parties might be engaging in inappropriate "arbitrator-shopping," Professor Bartholet's "fairness" concerns actually revolved around the danger of systemic, structural bias at NAF:

The fairness concern I expressed was that the repeat player credit card company was allowed to eliminate an arbitrator that they found coming out against them and that if that went on a repeated basis, then you would be left with a panel of arbitrators that would be systematically biased . . . . With NAF[,] you have a repeat player which you might have in certain court situations[,] but with NAF you not only have the repeat player who at least in the cases I got was, you know, the same repeat player engaged in debt collection . . . you also have a private system of justice where the arbitrators are not elected or appointed for terms or for life as

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274. *Id.* at 38–41. *But see* E-mail Attachment from Roger Haydock, Managing Dir., Nat'l Arbitration Forum, to Jean Sternlight, Professor, UNLV Boyd School of Law, Debunking Myths about Arbitrator Selection—Responding to Neely and Bartholet (April 2, 2008) (on file with author). The e-mail attachment asserts that erroneous notice documents were sent "purely as the result of a clerical mistake" and were sent

on the same day by the same case coordinator who was new to the FORUM. Fortunately, the proper documents notifying the parties that Bartholet had been removed as arbitrator by the claimant were also mailed to the appropriate parties. . . . Far from illustrating any systematic manipulation, the Bartholet deposition transcript simply reports that she was removed as an arbitrator under FORUM Rule 21(C) three times on April 20, 2004—the sort of procedural maneuvering that has long been practiced in the courts—and then an incorrect notice document was sent to the responding parties by accident.

*Id.*

275. Bartholet Deposition, *supra* note 261, at 44.

different state judges might differently be[,] but with arbitrators you have people for whom to some degree the job of decision making is a job that they may or may not get the next day, the next week, the next year as opposed to judges who have regular business and regular salaries[,] so I argued to her [Colleen Askvig], as I tried to argue to Kelly Broberg also, that there was—that this preemptory challenge rule had the potential for unfairness in a different way in the arbitration process and that NAF was in a position to see that happening as I had seen it happen and to do something about it in its rules by[,] for example[,] changing the preemptory challenge process.”<sup>276</sup>

Professor Bartholet never arbitrated for NAF again. She sent a letter of resignation to NAF as a result of her belief that NAF’s system was “systematically biased in favor of the credit card companies . . . .”<sup>277</sup> She did not know exactly what was going on, but she felt she knew enough to remove—or in essence, recuse—herself from future cases.<sup>278</sup>

What does Professor Bartholet’s deposition testimony suggest about the extent to which the average person would have been able to continue to hold the balance nice, clear and true under the circumstances presented? Professor Bartholet is not an average woman. She is a Harvard Law School professor with

276. *Id.* at 47, 116.

277. *Id.* at 15.

278. My colleague, Professor Ray Campbell, has suggested that, just as many evolutionary processes can be understood in terms of game theory (i.e., if organisms with a certain characteristic are more likely to survive in a given challenging environment, that characteristic will tend to become dominant after a very few iterations), NAF’s or the credit-card companies’ alleged selection of arbitrators with particular characteristics also would be likely to impact the arbitrator pool after a few iterations:

In the strong case, assume that NAF or some similar party only selects arbitrators that bring in decisions in favor of the credit card companies. Think of it as there being two kinds of arbitrators, which we will call hawks (pro credit card companies) and doves (pro consumer) to track the language of standard game theory . . . . If the only strategy that gets you to the next round is to be a hawk, pretty soon the dove gene disappears . . . . Note that this happens without consciousness on the part of the hawks and doves that the game is being played. Now, think of a less absolute game—let’s say the hawk gene wins 95% of the time, and the dove gene wins 5%. If you work through the game theory, at some mix both genes survive, but one will predominate. The point is, it doesn’t matter that the arbitrators knew about NAF[’s] relationship with the collection agencies. What matters is that those selecting arbitrators knew, and [allegedly] selected arbitrators with a bias.

E-mail from Ray Campbell to Nancy Welsh (Nov. 23, 2009) (on file with author). This further suggests the need to deal with “garden variety” bias promptly in certain settings because a laissez-faire response threatens to permit “exceptional” bias to emerge fairly quickly, especially when there are large volumes of cases and the turn-around time is short. Similarly, dominance of a particular gene will emerge much more quickly in the insect world, characterized by extreme fecundity, than among mammals, which tend to reproduce more slowly.

substantial experience as an arbitrator with other well-respected organizations and with a national reputation in her field. She did not need her relationship with NAF in order to be recognized, respected, and hired as an arbitrator. And though nearly every academic feels underpaid, it would be difficult to believe that she was desperate for the income she could earn from NAF. How would the average man or woman, in contrast to Professor Bartholet, have responded to repeated misrepresentations in NAF's letters and the repeated decisions of credit-card companies to dismiss their cases rather than appear before him or her?

This is a close call—much closer than in the situation presented by *Caperton*. And that is significant. Justice Kennedy repeatedly emphasizes the “extraordinary” and “extreme” nature of *Caperton*'s events.<sup>279</sup> It is a tale of epic greed and hubris. The tale of NAF and Accretive/Agora may turn out to be a similarly salacious tale, but NAF arbitrators did not know about these transactions among NAF, Accretive/Agora, Mann Bracken, and Axiant. Once the focus shifts to the individual NAF arbitrator, the scale changes dramatically, at least from the perspective of a third-party observer. And that is the perspective that must be used when applying the objective standard announced in *Caperton*.

Even though the allegations and testimony described in this Article suggest that the average person arbitrating consumer credit-card disputes would have been tempted not to hold his or her balance nice, clear and true, the risk of bias does not seem “overwhelming” enough under *Caperton* to constitute an unconstitutional violation of due process. And perhaps our inquiry should end there.

However, *Caperton* was not the first case in which the Supreme Court found that money, despite the indirectness of its flow, created a constitutionally intolerable risk of bias. The Supreme Court has faced this issue before, in a string of cases involving mayor-judges and other administrative decisionmakers. This Article will now examine these cases before reaching a final conclusion about the application of *Caperton*'s objective standard to an average man or woman serving as an NAF arbitrator—or to NAF itself.

#### IV. RECONSIDERING THE PRECEDENTIAL SHOULDERS UPON WHICH *CAPERTON* STANDS

The recent due process cases arising out of the detention of alleged enemy combatants in the War on Terror<sup>280</sup> showcase the federal judiciary's struggle to maintain its role in response to attempts by the legislature and executive to avoid the adjudicative function or exercise this function themselves.<sup>281</sup> These cases could

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279. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009).

280. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *see also Boumediene v. Bush*, 553 U.S. 723 (2008).

281. *See* Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2149–50 (2009) (“More generally, it might be impossible to understand the current structure of our judicial system, and the limits on how it might be altered, without appreciating the separation of powers concerns that arise when tribunals *other* than the Article III courts are in a position to have the final say—and when access to the Article III courts is denied.”).



suggest that the Constitution's protections should be invoked only in the event of epic transgressions. The Supreme Court's earlier due process jurisprudence, upon which *Caperton* stands, demonstrates that due process protections should be invoked even in the face of mere "garden variety" incidents of structural bias.

*Caperton* dealt with a judge on a state's highest court, but much of the precedent upon which Justice Kennedy relied arose out of the challenges presented by federal, state, or local administrators acting essentially as trial judges. In an influential series of lectures published as a book, Professor Roscoe Pound described adjudication by such administrators as an affront to the spirit of the common law.<sup>282</sup> He viewed this form of adjudication as the embodiment of a totally different theory of lawmaking, based on abstract theory and application of bureaucratic rules, rather than grounded in careful and customized analysis of complex human experience.<sup>283</sup> Another difference, of course, is that administrators' primary role requires them to focus on their agency's chosen course of action and its economic and political survival, while judges are supposed to be shielded by tenure and temperament to be disinterested, impartial, and focused on the needs of the cases and parties before them.<sup>284</sup>

This Part examines due process concerns that have arisen regarding adjudicators' ability to maintain *sufficient* disinterest and impartiality in three related, but distinct, administrative settings: (1) when it appears that an *individual* administrator-judge may be unconstitutionally biased as a result of his own pecuniary or personal interests or his shared identity with the interests of his institution; (2) when it appears that an *entire administrative adjudicative entity* may be unconstitutionally biased as a result of the pecuniary or personal interests of the entity itself or the shared pecuniary or personal interests of the entity's individual members; and (3) when an administrative entity has pecuniary or personal interests in its allocation of benefits and has *delegated* decision-making and the adjudication of resulting disputes to *private contractors*. The first category is, of course, most like *Caperton*, at least as the situation was framed by Justice Kennedy. Justice Benjamin had a personal interest in winning (and thus funding) his election campaign, and this led to the perception that his decision was biased. The last category, due to its outsourcing of the adjudicative function to private actors, bears the greatest resemblance to the situation involving the credit-card industry, NAF and its arbitrators. All three categories of cases, however, may provide additional guidance in considering the application of due process requirements to NAF and its individual arbitrators.

#### ***A. The Temptation of the Individual Administrator-Judge Not to Hold the Balance Nice, Clear, and True***

In a series of cases, the Supreme Court confronted Ohio mayors acting as judges pursuant to a state statute and effectively using their role to supplement

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282. See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW (1921).

283. See *id.*

284. We know, of course, that this image is not—and probably never was—accurate. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing the courts' unique ability "to say what the law is").

their own or their municipality's income. In *Tumey v. Ohio*,<sup>285</sup> the mayor-judge personally received a portion of the fines he assessed for violations of the state's prohibition law. The Supreme Court found this to be a clear violation of the Due Process Clause of the Fourteenth Amendment because the mayor had a "direct, personal, substantial pecuniary interest in reaching a conclusion against" each criminal defendant.<sup>286</sup> The Court invoked norms of judicial behavior, noting that "officers acting in a judicial or quasi-judicial capacity" must excuse themselves if they have a pecuniary interest.<sup>287</sup> Administrative adjudicators like this mayor-judge were to be held to the same standards as judges, and judges were not permitted to have a pecuniary interest in the verdict.

As noted above, *Tumey* was the source of the language invoked by Justice Kennedy in *Caperton* regarding the need to consider whether organizational procedures or structures "offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused."<sup>288</sup> Regarding the argument that the amount of money at issue in the particular case before the court was relatively small and thus undeserving of due process consideration, the Court opined:

There are doubtless mayors who would not allow such consideration as \$12 costs in each case to affect their judgment in it, but *the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.*<sup>289</sup>

Thus, *regardless of the amount at issue*, if administrators were serving in an adjudicative role, they were obligated to behave like judges and avoid the temptation of bias.

In 1928, just one year after *Tumey* was decided, the Court dealt with a second Ohio mayor.<sup>290</sup> Although this mayor also acted as a judge pursuant to Ohio's statute, he was on a fixed salary and did *not* receive direct compensation based on his decisions.<sup>291</sup> He also was just one member of a five-person commission that exercised legislative powers while the city manager exercised executive powers.<sup>292</sup> Based on these circumstances, which helped to insulate the mayor-judge from direct responsibility for the finances and fiscal policies of the city, the Court determined that it could not presume that this mayor would be

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285. 273 U.S. 510 (1927).

286. *Id.* at 524.

287. *Id.* at 523.

288. *Id.* at 532 (quoted in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009)).

289. *Id.* (emphasis added).

290. *Dugan v. Ohio*, 277 U.S. 61 (1928).

291. *Id.* at 61.

292. *Id.* at 63.

unconstitutionally biased toward the conviction of those who came before him as judge.<sup>293</sup>

Many years passed before the next Ohio mayor appeared before the Supreme Court. During that time, Congress established a vast web of federal agencies to implement the New Deal, fight World War II, and manage the home front. Congress also passed the Administrative Procedures Act (APA).<sup>294</sup> To help protect the impartiality of adjudicators in formal adjudicative proceedings, the APA established certain salary and employment protections for administrative law judges.<sup>295</sup> In the midst of another growth spurt of the administrative state in the 1970s, the Supreme Court decided *Goldberg v. Kelly*,<sup>296</sup> which specifically identified an impartial tribunal as an essential element of the due process to be provided by administrative agencies.<sup>297</sup> This element, however, was not the focus of the case.

In 1972, in *Ward v. Village of Monroeville*,<sup>298</sup> the Supreme Court dealt with its third Ohio mayor serving as a judge. Like the second mayor, he did not receive any personal income from the fines he assessed.<sup>299</sup> Also like the second mayor, he merely had an interest in the financial health of his village.<sup>300</sup> But this mayor was required to “account[] annually to the [village] council respecting village finances,”<sup>301</sup> and “[a] major part of village income [was] derived from the fines, forfeitures, costs, and fees imposed by him in his mayor’s court.”<sup>302</sup> The evidence showed that between 1964 and 1968 such fines accounted for at least 35% and sometimes more than 50% of the village’s revenues.<sup>303</sup> The mayor had even directed the chief of police to charge suspects under village ordinances, rather than state statutes, whenever possible in order to insure the flow of monies to the village’s coffers.<sup>304</sup> Despite this evidence, Ohio’s Supreme Court had found that the mayor did not have the sort of “direct, personal, substantial pecuniary interest” that paralleled the situation in *Tumey* and that the village’s reliance on the income generated by the mayor’s court did “not mean that a mayor’s impartiality is so diminished thereby that he cannot act in a disinterested fashion in a judicial capacity.”<sup>305</sup>

293. *Id.* at 65.

294. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

295. See 5 U.S.C. §§ 554, 5362, 4301 (1978) (providing for separation of adjudicative, investigative, and prosecutorial functions, removing agency control over tenure and compensation decisions, and exempting ALJs from certain performance ratings). The protections are not provided to hearing examiners or other non-ALJs.

296. 397 U.S. 254 (1970).

297. *Id.* at 271 (“And, of course, an impartial decision maker is essential.”).

298. 409 U.S. 57 (1972).

299. *Id.* at 59–60.

300. *Id.*

301. *Id.* at 58.

302. *Id.*

303. See *id.*

304. *Id.* at 59.

305. *Id.*

A majority of the U.S. Supreme Court was not so trusting of the mayor's ability to maintain his detachment and impartiality under these circumstances. First, the Court declared that "[t]he fact that the mayor [in *Tumey*] . . . shared directly in the fees and costs did not define the limits of the principle" regarding the relationship between impartiality and the guarantee of due process of law.<sup>306</sup> Second, the Court reasserted the test that had been used in *Tumey*: "whether the mayor's situation is one 'which would offer a *possible temptation to the average man as a judge* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused.'"<sup>307</sup> Third, the Court applied this test and found that based on the circumstances presented:

Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) *necessarily involves a lack of due process of law* in the trial of defendants charged with crimes before him."<sup>308</sup>

The Court also rejected the adequacy of the two procedural safeguards that the village proffered. The first was an Ohio statutory provision that permitted the disqualification of interested, biased, or prejudiced judges in particular cases.<sup>309</sup> The petitioner had apparently failed to object under this provision.<sup>310</sup> The Court brushed aside this statute for a variety of reasons. Most significantly, the Court objected to the requirement that the petitioner present evidence overcoming a presumption of judicial impartiality: "If this means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little."<sup>311</sup> The village also noted that an unfair procedure in the mayor's court could be corrected on appeal to the County Court of Common Pleas, where the standard of review was *de novo*.<sup>312</sup> An apparently outraged Supreme Court objected to the suggestion that due process could be met by eventual justice: "Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance."<sup>313</sup>

Dissenting Justice White, who had been Deputy Attorney General at the U.S. Department of Justice before joining the Supreme Court, certainly understood that *Tumey* was being extended beyond the simple principle that an official may not serve as the judge in a case in which he has a direct financial stake in the

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306. *Id.* at 60.

307. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)) (emphasis added).

308. *Id.* (quoting *Tumey*, 273 U.S. at 534) (emphasis added).

309. *Id.* at 61.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 61–62.

outcome.<sup>314</sup> He also understood that in *Ward* a majority of the Court refused to presume the impartiality of an official who was a public, yet still embedded, neutral.<sup>315</sup> Justice White wrote:

To justify striking down the Ohio system on its face, the Court must assume either that every mayor-judge in every case will disregard his oath and administer justice contrary to constitutional commands or that this will happen often enough to warrant the prophylactic, *per se* rule urged by petitioner. I can make neither assumption with respect to Ohio mayors nor with respect to similar officials in 16 other States. Hence, I would leave the due process matter to be decided on a case-by-case basis . . .<sup>316</sup>

In *Ward*, a majority of the Justices were uncomfortable with the Ohio statute in that it *invited* biased decision-making by city officials struggling to fill local coffers and please their constituents. The structural procedure provided by the statute and the fiscal pressures of the city officials created an unconstitutional probability of bias. Justice White, who indicated more trust in the integrity and the ability of these officials to withstand temptation, would have required an objection and proof that the officials were accepting the structural invitation.

These cases—*Tumey*, *Dugan*, and *Ward*—are all generally consistent with *Caperton*'s emphasis upon the need for adjudicators to avoid circumstances that will tempt them to issue biased decisions. What is striking, however, is the degree to which the Supreme Court in these cases went out of its way to: (1) preempt what it viewed as illegitimate proceedings rather than require the complaining citizen to prove that he had suffered from a decision tainted by actual bias, (2) avoid establishing a presumption of impartiality for these neutrals, and (3) refuse to require *extreme* circumstances in order to find an unconstitutional probability of bias. Instead, the Court was quite ready to be proactive in asserting a constitutional obstacle to “garden variety” temptation of individual administrative adjudicators, perhaps in order to “nip in the bud” the potential for extraordinary temptation.

#### ***B. The Temptation of an Entire Administrative-Adjudicative Body Not to Hold the Balance Nice, Clear, and True***

As the administrative state continued to grow, the Supreme Court confronted the potential for structural bias in the design of an *entire* administrative-adjudicative body. Probably due to the consequences of finding an entire body's decision-making to be unconstitutional, these cases present a more nuanced and complex picture regarding the Court's willingness to be assertive in assuring sufficient impartiality in administrative adjudication.

*Gibson v. Berryhill*,<sup>317</sup> decided by the Supreme Court in 1973 on the heels of *Ward*, seems to represent the high water mark in required impartiality from embedded neutrals. There, the Supreme Court examined the impartiality of an

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314. *Id.* at 62 (White, J., dissenting).

315. *Id.*

316. *Id.*

317. 411 U.S. 564 (1973).

entire state board. The factual details here—like the details in *Caperton*—are important because these details seem to have played a significant role in the Court’s ultimate decision.

At the center of this action was a group of optometrists who practiced as employees of a company—Lee Optical—rather than as independent optometrists.<sup>318</sup> These optometrist-employees faced potential revocation of their licenses by the Alabama Board of Optometry.<sup>319</sup> The Alabama Optometric Association, whose membership was limited to *independent* practitioners of optometry, had filed charges against Lee Optical’s optometrist-employees following the repeal and amendment of a relevant state statute.<sup>320</sup> The Association apparently had urged that the amendment of the statute (which removed reference to commercial stores’ operation of optical departments) made it illegal to practice optometry as an employee of a business corporation and also argued that such employment violated the Association’s professional ethics rules.<sup>321</sup>

Just two days after the Association filed its charges with the Alabama Board of Optometry, the Board brought *its own* action *in state court* against Lee Optical and thirteen of its optometrist-employees.<sup>322</sup> According to Justice White, who wrote the majority opinion for the Supreme Court, the conduct cited by the Board as the basis for its claims against the optometrists was “very similar to that charged by the Association in its complaint to the Board.”<sup>323</sup> The state court dismissed the Board’s claims against the individual optometrist-employees, but enjoined Lee Optical from practicing optometry and employing licensed optometrists.<sup>324</sup> The optometrist-employees would no longer have jobs. The company appealed.

By the time these events had elapsed, nearly six years had passed since the Association had filed its original charges before the Board. While the state action proceeded at the trial court level, the Board suspended its own proceedings against the optometrist-employees.<sup>325</sup> But after winning injunctive relief against Lee Optical in state court, the Board “reactivated” those proceedings and scheduled a series of hearings.<sup>326</sup> The optometrist-employees now countered with their own action in federal court, seeking an injunction against the hearings.<sup>327</sup> They claimed that because membership of the Board was statutorily limited to members of the Alabama Optometric Association—whose membership was

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318. *Id.* at 567.

319. *Id.* at 568.

320. This statute had formerly been understood to permit the existence of commercial stores with optical departments under the direction of optometrist-employees. *See id.* at 565–66.

321. *Id.* at 568.

322. The Board sought to enjoin Lee Optical from engaging in the unlawful practice of optometry and claimed that the optometrist-employees were aiding and abetting the company in its illegal activities. *See id.* at 568–69.

323. *Id.*

324. *Id.* at 569.

325. *Id.*

326. *Id.*

327. *Id.*

limited to independent optometrists—"the Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law."<sup>328</sup> The federal district court agreed with the optometrist-employees and enjoined the Board's hearings.<sup>329</sup> The Supreme Court granted certiorari.

Similar to the defendant village in *Ward*, the Board had apparently argued that the optometrist-employees should be required to participate in the hearings before they could object to them as unconstitutional.<sup>330</sup> The Supreme Court disagreed, noting that if the Board was "incompetent by reason of bias to adjudicate the issues pending before it,"<sup>331</sup> then the Court was "also correct that it need not defer to the Board."<sup>332</sup> Also similar to the defendant village in *Ward*, the Board had apparently argued that the optometrist-employees' federal action was not ripe because any potential deficiency in the Board's proceedings would be cured by de novo judicial review by a state court.<sup>333</sup> The Supreme Court also rejected that argument, but for unclear reasons.<sup>334</sup> The federal district court had concluded "that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events."<sup>335</sup>

In the majority opinion, Justice White carefully summarized the reasoning of the district court, which had applied the test established in *Ward* to the particular factual circumstances before it in order to find the Board's proceedings unconstitutional:

For the District Court, the inquiry was not whether the Board members were 'actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him' . . . . Such a possibility of bias was found to arise in the present case from a number of factors. First, was the fact that the Board, which acts as both prosecutor and judge in delicensing proceedings, had previously brought suit against the plaintiffs on virtually identical charges in the state courts. This the District Court took to indicate that members of the Board might have "preconceived opinions" with regard to the cases pending before them. Second, the court found as a fact that Lee Optical Co.

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328. *Id.* at 570.

329. *Id.*

330. *Id.* at 574-75.

331. *Id.* at 577.

332. *Id.*

333. *Id.*

334. *Id.* ("Nor, in these circumstances, would a different result be required simply because judicial review, de novo or otherwise, would be forthcoming at the conclusion of the administrative proceedings."). In footnote 16, Justice White observed that the district court had found that the revocation of the employee-optometrists' licenses along with the inevitable attendant publicity would result in irreparable damage to the appellees for which no adequate remedy would be afforded by state law. *Id.* at 577 n.16.

335. *Id.* at 571-72 (quoting *Berryhill v. Gibson*, 331 F.Supp. 122, 126 (M.D. Ala. 1971)).

did a large business in Alabama, and that if it were forced to suspend operations the individual members of the Board, along with other private practitioners of optometry, would fall heir to this business. Thus, a serious question of a personal financial stake in the matter in controversy was raised. Finally, the District Court appeared to regard the Board as a suspect adjudicative body in the cases then pending before it, because only members of the Alabama Optometric Association could be members of the Board, and because the Association excluded from membership optometrists such as the plaintiffs who were employed by other persons or entities. The result was that 92 of the 192 practicing optometrists in Alabama were denied participation in the governance of their own profession.<sup>336</sup>

The Supreme Court showed deference to the federal district court while explicitly sidestepping the opportunity here to address the per se constitutionality of administrative agencies' combination of investigative and adjudicatory functions. Instead, the Court noted the split within the federal courts on this issue and deferred its disposition of that issue until another day.<sup>337</sup> Specifically, the Court affirmed the federal district court's finding of unconstitutionality based on the second and third of the three factors identified by the district court above. Interestingly, Justice White combined these factors into one—the “ground of possible personal interest”<sup>338</sup>—by observing that optometrists-employees “accounted for nearly half of all the optometrists practicing in Alabama”<sup>339</sup> while “the Board of Optometry was composed solely of optometrists in private practice for their own account.”<sup>340</sup> As a result:

[T]he Board's efforts [which would result in revocation of the licenses of all optometrist-employees, not just those employed by Lee Optical] would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court, the Board was constitutionally disqualified from hearing the charges filed against the appellees.<sup>341</sup>

Justice White then cited *Tumey* and *Ward* for the principle that “those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes”<sup>342</sup> and added that *Ward* “indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*.”<sup>343</sup> Ultimately, Justice White and a majority of the Supreme Court stood ready to defer to the district court's conclusion:

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336. *Id.* at 571 (quoting *Berryhill v. Gibson*, 331 F. Supp. at 125) (citation omitted).

337. *Id.* 579–80.

338. *Id.* at 579.

339. *Id.* at 578.

340. *Id.*

341. *Id.*

342. *Id.* at 579.

343. *Id.*



[T]he pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose. *As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented, we have no good reason on this record to overturn its conclusion and we affirm it.*<sup>344</sup>

Although Justice White was not ready to assume the bad faith of state administrators based on the mere appearance of partiality, he was apparently persuaded by the evidence gathered and presented that the average independent optometrist on the Board of Optometry would be unconstitutionally tempted not to hold the balance nice, clear and true when confronting the extent of the financial spoils available in Alabama.

There are certainly parallels among the Board of Optometry in *Gibson*, the mayoral office in *Ward*, and NAF. Each had a direct pecuniary interest in adjudicating the dispute(s) at hand. But unlike the situations presented in *Ward* and *Gibson*, NAF had a somewhat less direct interest in the outcome of particular cases and shielded its individual arbitrators from knowledge of the extent of its likely financial interest in arbitral outcomes that were favorable to the repeat players. Perhaps NAF did this for altruistic reasons, to protect the integrity of its arbitration services. Or perhaps NAF did this because it did not want its arbitrators to compare the income they earned in conducting hearings and issuing awards to the income earned by NAF's principals in creating, managing, and promoting their arbitrators' services. The truth likely lies somewhere in between, and it is not clear that NAF's intent matters at all to our legal analysis.

However, with *Arnett v. Kennedy*,<sup>345</sup> the Supreme Court's assertive protection of the impartiality of administrative adjudicative bodies began to change. The Court began to express more explicit deference to such bodies and presume their impartiality until evidence proved that such a presumption was not deserved. In this case, a nonprobationary federal employee, Wayne Kennedy, brought an action for declaratory and injunctive relief claiming that he had been denied the right to free speech and due process when he was discharged from the Chicago Regional Office of the Office of Economic Opportunity (OEO).<sup>346</sup> Wendell Verduin, the Regional Director of the OEO, presented Kennedy with a "Notification of Proposed Adverse Action" and listed five charges, including one that Kennedy had publicly accused Verduin and his administrative assistant of attempting to bribe a representative of a community action organization with an offer of a \$100,000 grant of OEO funds if the representative would sign a

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344. *Id.* (emphasis added); see also *Cleavinger v. Saxner*, 474 U.S. 193, 204–06 (1985) (holding that members of committee that presided over prison disciplinary proceedings were entitled to qualified immunity only because the committee was composed of members of the prison staff rather than "professional hearing officers" who were "truly independent" and the hearings "contained few of the procedural safeguards" that characterized administrative hearings in *Butz v. Economou*, 438 U.S. 478 (1978)).

345. 416 U.S. 134 (1974).

346. *Id.* at 136–37.

statement against Kennedy and another OEO employee.<sup>347</sup> Kennedy asserted his “right to a trial-type hearing before an impartial hearing officer before he could be removed from his employment . . . .”<sup>348</sup> Verduin notified Kennedy in writing of his removal. Kennedy appealed directly to the Civil Service Commission and brought suit in federal district court.<sup>349</sup> A three-judge panel granted Kennedy summary judgment, finding that the discharge procedure authorized by the Lloyd-La Follette Act for the removal of non-probationary federal employees and accompanying Civil Service Commission and OEO regulations denied Kennedy due process of law for the failure to provide “for the decision on removal or suspension to be made by an impartial agency official, or for Kennedy (by his own means) to present witnesses; or for his right to confront adverse witnesses.”<sup>350</sup>

A majority of the Supreme Court concluded that Kennedy’s due process rights had *not* been violated, but there was no majority for the reasoning underlying that judgment.<sup>351</sup> Justice Rehnquist, joined by the Chief Justice and only one other justice, found that though Congress had chosen to provide federal employees with substantive right of job security under the Lloyd-LaFollette Act, Congress had also chosen in the same Act (even the same sentence) to limit the procedural protections afforded to enforce the right.<sup>352</sup> “[W]e decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement,”<sup>353</sup> he added, “where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.”<sup>354</sup> According to these three Justices, Kennedy’s employer was not required to provide any adjudicator other than Verduin or any process other than the one provided.<sup>355</sup>

Justice Powell, joined by Justice Blackmun, concurred but found that Kennedy did have a property interest in continued employment absent “cause” and was therefore entitled to due process under the Constitution.<sup>356</sup> However, he also found—based on an assessment of the private interest affected by the deprivation and the Government’s interest in summary removal—that a post-removal

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347. *Id.* at 137.

348. *Id.* Kennedy also took advantage of his right under regulations promulgated by the Civil Service Commission to reply to the charges, but did not respond to their substance except to note that his conversations had been “inaccurately set forth in the adverse action.” *Id.* at 138 n.2.

349. *Id.* at 138.

350. *Id.* at 176–77. The Civil Service Commission regulations provided, among other things, that an employee “shall have an opportunity to appear before the official vested with authority to make the removal decision in order to answer the charges against him” and the right to appeal which will involve an evidentiary trial-type hearing. “[I]f the employee is reinstated on appeal, he receives full back pay, less any amounts earned by him through other employment during that period.” *Id.* at 143–46.

351. *Id.* at 163.

352. *Id.* at 152.

353. *Id.*

354. *Id.* at 153–54.

355. *Id.* at 163.

356. *Id.* at 166–67 (Powell, J., concurring).

evidentiary hearing available to Kennedy represented a reasonable accommodation and met the due process requirement of an impartial decisionmaker.<sup>357</sup> He found no requirement of an impartial decisionmaker at the pre-removal stage, based either on the relevant statutes or the Constitution.<sup>358</sup>

Justice White, who had counseled for the presumption of respect for administrative decisionmakers in the past, concurred in part and dissented in part.<sup>359</sup> Like Justices Powell and Blackmun, he disagreed with Justice Rehnquist's assertion that Congress could condition the grant of a substantive right upon the acceptance of otherwise-unconstitutional procedural limitations.<sup>360</sup> Rather, "[w]hile the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition."<sup>361</sup> Justice White went on to find, however, that the relevant statutory and regulatory requirements of thirty days advance notice and the right to make written presentation satisfied the minimal requirements of the Due Process Clause. Then he turned to the demand for an impartial decisionmaker. Very interestingly, he found an unconstitutionally high risk of partiality in this case:

Fairness and accuracy are not always threatened simply because the hearing examiner is the supervisor of the employee, or, as in this case, the Regional Director over many employees, including appellee. But here the hearing official was the object of slander that was the basis for the employee's proposed discharge . . . . In ruling that the employee was to be terminated, the hearing examiner's own reputation, as well as the efficiency of the service, was at stake; and although Mr. Verduin may have succeeded, in fact, in disassociating his own personal feelings from his decision as to the interests of OEO, the risk and the appearance that this was not the case were too great to tolerate. In such situations the official normally charged with the discharge decision need only recuse and transfer the file to a person qualified to make the initial decision. We need not hold that the Lloyd-La Follette Act is unconstitutional for its lack of provision for an impartial hearing examiner. *Congress is silent on the matter. We would rather assume, because of the constitutional problems in not so providing, that, if faced with the question (at least on the facts of this case) Congress would have so provided.*<sup>362</sup>

Ultimately, Justice White stated that he would order reinstatement and back pay, due to the failure to provide an impartial hearing officer at the pre-termination hearing.<sup>363</sup>

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357. *Id.* at 170–71.

358. *Id.* at 170 n.5 (“In my view the relevant fact is that an impartial decisionmaker is provided at the post-removal hearing where the employee's claims are finally resolved.”).

359. *Id.* at 171 (White, J., concurring in part and dissenting in part).

360. *Id.* at 177.

361. *Id.* at 185.

362. *Id.* at 199 (emphasis added).

363. *Id.* at 202.

Justice Marshall dissented and was joined by Justices Douglas and Brennan.<sup>364</sup> After a thorough review of the procedural due process jurisprudence, the dissenters noted that a majority of the Court rejected Rehnquist's argument that Kennedy's statutory entitlement could be conditioned on a statutory limitation of procedural due process protections.<sup>365</sup> Justice Marshall found that removal from employment represented a very significant deprivation and thus, Kennedy should have received the opportunity to confront and cross-examine witnesses, etc.<sup>366</sup> He added:

It also seems clear that for the hearing to be meaningful, the hearing officer must be independent and unbiased and his decision be entitled to some weight. We addressed the importance of this element of due process in *Goldberg* . . . where we found the requirements of due process were not met by the review of a welfare termination decision by a caseworker who was, in effect, also the complainant. . . . The need for an independent decisionmaker is particularly crucial in the public employment context, where the reason for the challenged dismissal may well be related to some personal antagonism between the employee and his superior, as appears to be the case here.<sup>367</sup>

The dissent then focused on the timing of a full evidentiary hearing before an impartial decisionmaker—which was the central issue before the court. Later, however, Justice Marshall returned to the need for an impartial decisionmaker:

The Regional Director assembled the evidence against appellee, proposed the dismissal, then decided it should be effected; he acted as complaining witness, prosecutor, and judge. The meaningless bureaucratic paper shuffling afforded appellee before his discharge would surely not alone satisfy the stringent demands of due process when such an important interest is at stake. The decisions of this Court compel the conclusion that a worker with a claim of entitlement to public employment absent specified cause has a property interest protected by the Due Process Clause and therefore the right to an evidentiary hearing before an impartial decisionmaker prior to dismissal.<sup>368</sup>

For our purposes, it is important to remember that a majority concluded that Kennedy's employer had not violated his due process rights. It is also important to note that only four Justices expressed concern regarding Verduin's likely bias, and that these concerns required careful consideration of the facts and human dynamics involved in the situation. On the other hand, it is quite interesting that Justice White, a former federal administrator, was one of the four Justices who had serious concerns about impartiality.

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364. *Id.* at 206. (Marshall, J., dissenting).

365. *Id.* at 211.

366. *Id.* at 226–27.

367. *Id.* at 216.

368. *Id.* at 226–27.

Justice White had the opportunity to return to a defense of the integrity and authority of state-appointed decisionmakers two years later in *Withrow v. Larkin*,<sup>369</sup> which explicitly established a strong “presumption of honesty and integrity in those serving as adjudicators.”<sup>370</sup> This case is reminiscent of *Gibson* because it involves another citizen claiming violation of his right to due process as a result of adjudication by an administrative tribunal that he perceived as biased. The disposition and resulting rule, however, are strikingly different. In *Withrow*, a physician faced suspension of his license by the Wisconsin Medical Examining Board, a body composed of practicing Wisconsin physicians.<sup>371</sup> The Board had conducted an investigation of the physician and determined that there was probable cause that he had violated criminal provisions and should have his license revoked.<sup>372</sup> This physician’s entire practice in Wisconsin consisted of performing abortions at his office in Milwaukee.<sup>373</sup> The same Board then planned to hold a contested hearing in order to determine whether to suspend the physician’s license.<sup>374</sup> After a series of legal proceedings, a three-member federal district court issued an order for preliminary injunctive relief that prevented the Board from proceeding with its proposed contested hearing.<sup>375</sup> The district court explained:

[F]or the board temporarily to suspend Dr. Larkin’s license at its own contested hearing on charges evolving from its own investigation would constitute denial to him of his rights to procedural due process. Insofar as [the Wisconsin statute] authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decision maker, we concluded that it was unconstitutional and unenforceable.<sup>376</sup>

The district court later limited its decision to enjoin enforcement of the statute against the physician in this case.

The Supreme Court, in an opinion authored by Justice White, disagreed with the district court’s assessment that the physician had a high probability of success on his constitutional claim. Justice White dutifully cited to *Tumey, Ward*, and *In re Murchison* and admitted that “various situations have been identified in which experience teaches that *the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.*”<sup>377</sup> But Justice White then limited these situations to ones “in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.”<sup>378</sup> Justice White distinguished those situations from the case before the Court, which involved only the combination of

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369. 421 U.S. 35, 47 (1975).  
 370. *Id.*  
 371. *Id.* at 38–39.  
 372. *Id.* at 39.  
 373. *Id.* at 38–39.  
 374. *Id.* at 39.  
 375. *Id.* at 41.  
 376. *Id.* at 46.  
 377. *Id.* at 47 (emphasis added).  
 378. *Id.*

two different governmental functions, investigation and adjudication, and a strongly held difference of opinion on moral issues. For a case such as this one, Justice White established a strong presumption in favor of the fitness of those serving as adjudicators—which would require substantial evidence for any complainant to overcome:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weaknesses, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.<sup>379</sup>

The Court's reference to "psychological tendencies and human weaknesses" may have signaled openness to considering social psychological evidence regarding the self-serving bias,<sup>380</sup> but other language in the opinion underscored the heavy burden faced by anyone attempting to overcome the presumption favoring adjudicators—provided that their alleged bias was based on something other than pecuniary interest in the outcome or personal antagonism between the decisionmaker and the person asserting a violation of due process.

For example, Justice White cited to the Supreme Court's decision in *FTC v. Cement Institute*,<sup>381</sup> involving allegations of bias in an adjudicatory proceeding by the Federal Trade Commission (FTC). The same Commission had previously conducted an investigation regarding a pricing system used by the cement industry, and certain Commission members had testified before Congress that they viewed the pricing system as illegal. In contrast to the investigation, the FTC's

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379. *Id.*

380. See Gregory N. Mandel, *Technology Wars: The Failure of Democratic Discourse*, 11 MICH. TELECOMM. & TECH. L. REV. 117, 164 (2005) ("A wealth of empirical data reveal that people have irrationally high confidence in their judgments. . . . Overconfidence is not limited to lay judgment or experimental situations. Various studies have found that experts often exhibit an overconfidence bias, and studies of real world, professional predictions routinely confirm overconfidence as well."); see also Keith Allred, *Relationship Dynamics in Disputes: Replacing Contention with Cooperation*, in THE HANDBOOK OF DISPUTE RESOLUTION 84 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (describing several biases—naive realism, confirmatory bias, accuser and excuser biases, and lone moderate effect—that "lead us to exaggerate other people's hostility and unreasonableness [and] trigger cycles of suspicion and conflict escalation"); Rafeal Efrat, *Attribution Theory Bias and the Perception of Abuse in Consumer Bankruptcy*, 10 GEO. J. ON POVERTY L. & POL'Y 205, 217 (2003) ("As a result of the failure to follow the objective paradigm envisioned in the attribution theory, a person's perception of the cause of another's behavior becomes vulnerable to a number of biases, thus becoming less accurate."); Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 457 (2003) ("[S]tudies show that people who are very successful tend to be especially confident in their abilities.").

381. 333 U.S. 683 (1948).

adjudicatory proceeding directly and fully involved members of the cement industry who were permitted to present evidence and conduct cross-examination. Justice White approvingly quoted the following language from the Supreme Court's opinion in *FTC v. Cement Institute*: "[T]he fact that the Commission had entertained such views [that the pricing system at issue was illegal] as the result of its prior *ex ante* investigations did not necessarily mean that the minds of its members were *irrevocably closed* on the subject of the respondents' basing point practices."<sup>382</sup> Later in the *Withrow* opinion, Justice White asserts:

*No specific foundation has been presented* for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later [and presumably sufficient] adversary hearing. Without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."<sup>383</sup>

Note the contrast between the tests used by the Court in judging the impartiality—and integrity—of the Ohio mayors compared to the tests used for the members of this Wisconsin board. In *Tumey* and *Ward*, the Court considered whether the *average* (and presumably flawed) man would be able to hold the balance "nice, clear and true." On the other hand, in *Withrow*, the Court envisioned "*men of conscience and intellectual discipline*" and required evidence that the adjudicators' minds were "irrevocably closed."<sup>384</sup> The mayors were assumed incapable of detaching themselves sufficiently from their own financial interests, and the financial interests of their constituents and neighbors, to provide a fair procedure to an outsider. The members of the board were granted much greater deference, even though they also were dealing with an outsider. Why this dramatic difference in the trust and deference to these administrative adjudicators? The answers are probably several, some embedded in the words of the opinions and others found in the historical and cultural context of the time.

First, the Court seemed to perceive very different potential influences upon these men. In *Tumey* and *Ward*, the Court was dealing with the powerful and illegitimate influence of money—and men who had allowed themselves to be put in this situation. In contrast, in *Withrow*, money—or access to this doctor's patients—did not seem to be the—or even *a*—motivating factor. Instead, the members of the board were behaving in a manner consistent with their own local morals and principles.

Second and relatedly, the Court seemed to imagine very different sorts of outsiders encountering difficulties with the local decisionmakers. In *Tumey* and *Ward*, we find the innocent, hapless outsider who is exploited inappropriately by

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382. *Id.* at 701 (emphasis added).

383. *Withrow*, 421 U.S. at 55 (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)) (emphasis added).

384. *Id.* at 48, 55.

local officials. In *Gibson*, the innocent outsider may be Lee Optical, a corporation just trying to serve a market in a different and perhaps less expensive manner, or Lee Optical's optometrist-employees encountering professional discrimination based only on their decision to ply their trade as employees rather than solo practitioners. *Withrow* offered a dramatic contrast. Here, the outsider was flouting a local profession's culture and strongly held personal values. Under this reading, the members of the board were not exploiting or inappropriately discriminating against anyone. They were defending their state from an incursion that they viewed as harmful and immoral.

Third, there are institutional considerations. In *Withrow*, Justice White noted that if the courts are to be permitted to function with some level of efficiency, judges themselves could not fully live up to the absolutist expectations expressed in *Tumey* and *Ward*. Again quoting from *FTC v. Cement Institute*, Justice White wrote:

“No decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.”<sup>385</sup>

Justice White listed several additional examples of interim decision-making by judges that did not disqualify judges from presiding over subsequent proceedings.<sup>386</sup> For example, judges retry cases that have been reversed or remanded; judges issue arrest warrants and then may preside over the subsequent criminal trials; judges may issue or deny temporary restraining orders or preliminary injunctions and then preside over the subsequent injunction proceedings; judges rule on motions to dismiss or summary judgment motions and then may preside over subsequent civil trials. If judges can be trusted to change their minds in response to the full presentation of evidence, then why not extend this trust to administrative adjudicators? “We find no warrant for imposing upon administrative agencies a stiffer rule, whereby [administrative hearing] examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.”<sup>387</sup> Reaching a preliminary decision and acting upon it does not imply an inability to listen to a fuller explication of the case in the future—assuming, of course, that such fuller explication occurs.

Indeed, the Court expressed faith in the existence of the “rational man,” who will be painfully aware that his prior opinion is not fully informed and thus will invite all parties to present, will listen carefully to the evidence they present, and will intentionally permit himself to be persuaded to a contrary result if such a result is justified by the evidence. The rational man, provided that he is neither

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385. *Id.* at 48–49 (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702–03 (1948)).

386. *Id.* at 56–57.

387. *Id.* at 49 (quoting *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236–37 (1947)).



psychologically nor economically committed to a particular outcome, is ready, willing, and able to change his mind. Though the Court never specifically referenced the “rational man,” the opinion consistently returns to the psychological question of whether this “rational man” characterizes administrative adjudicative bodies.<sup>388</sup> In the absence of concrete evidence that he does not exist—and thus, in the absence of the influence of money or personal attacks, which are known to be particularly potent to every man, regardless of his rationality—the Court presumes the rational man’s viability:

The risk of bias or prejudice in this sequence of functions [investigation, followed by a finding of probable cause, followed by a full and contested hearing] has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine that appellee’s license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.<sup>389</sup>

In a nod to *Gibson*, the Court also noted:

That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, *does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.* Findings of that kind made by judges with *special insights into local realities* are entitled to respect, but *injunctions resting on such factors should be accompanied by at least the minimum findings* required by Rules 52(a) and 65(d) . . . .<sup>390</sup>

In *Withrow*, unlike *Ward* or *Gibson*, the allegation of prejudice was separated from an allegation of direct or indirect pecuniary interest or of personal antagonism. Prejudgment alone, without a more compelling personal (or temporal) stake, was not a sufficient basis for a finding of unconstitutionality. And according to *Tumey*, *Ward*, and *Gibson*, pecuniary interest had to be concrete and relatively substantial—even if it was indirect—in order to warrant a finding of unconstitutionality.

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388. *See id.*

389. *Id.* at 57–58.

390. *Id.* at 58 (emphasis added).

Finally and perhaps most important, in *Withrow*, the Court references the structural and administrative complexities presented by a growing welfare state. In *Richardson v. Perales*,<sup>391</sup> the Court had upheld a system in which the same Social Security examiner conducted fact-finding and then made decisions regarding disability claims. Justice White wrote: “[T]he challenge to this combination of functions ‘assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.’”<sup>392</sup> Later, he stated that “our cases, although they reflect the substance of the problem [the combination of investigative and adjudicatory functions], offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.”<sup>393</sup> That last statement is incredibly frank. The administrative state and its procedures had become too ubiquitous to permit them to fail. At the same time, these administrative procedures presented problems for a country that was supposed to be governed by the rule of law, not men.

The case of *Mathews v. Eldridge*,<sup>394</sup> decided in 1976, underscored the Supreme Court’s increasingly instrumental view of procedure. Though *Goldberg v. Kelly* was not explicitly overruled, its reach was severely curtailed. *Mathews* established the three-part balancing test that we use today to determine whether the procedure that has been used to deprive a person of life, liberty, or property violates constitutional due process.<sup>395</sup> The three factors to be considered are:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>396</sup>

Obviously, this test explicitly recognized agencies’ administrative and fiscal concerns as a legitimate counterbalance to procedural purity and required the plaintiff to demonstrate both sufficiently grievous harm and the likelihood of erroneous deprivation. As was true with *Goldberg*, *Mathews* did not explicitly deal with the issue of the impartiality of the decisionmaker, though the underlying facts suggest that the decisionmakers there had made up their minds.<sup>397</sup> On the other hand, there was no evidence of personal pecuniary interest influencing the outcome. Ultimately, the Court found no violation of due process.

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391. 402 U.S. 389 (1971).

392. *Withrow*, 421 U.S. at 49–50 (quoting *Richardson*, 402 U.S. at 410).

393. *Id.* at 52.

394. 424 U.S. 319 (1976).

395. *Id.* at 335.

396. *Id.*

397. See Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of A Theory of Value*, 44 U. CHI. L. REV. 28, 29 (1976).

This series of cases is different from the first series discussed above because the real defendants here are the agencies or decision-making tribunals as a whole, not merely an individual adjudicator. The Court appears to tread much more carefully in these cases, likely because finding a constitutional violation could wreak havoc upon the entire administrative infrastructure. On the other hand, the Court continues to find unconstitutionality if the claim of bias is based on *substantiated* allegations of inappropriate *pecuniary* interest or strong personal antagonism.

*C. The Temptation of Case-Dependent Contractors Not to Hold the Balance Nice, Clear and True*

*Schweiker v. McClure*<sup>398</sup> is the last case that this Article will examine in connection with the Supreme Court's due process jurisprudence arising out of allegations of partiality or bias. This case is particularly interesting because it involves an agency's delegation of certain functions to private insurance carriers which then outsourced the adjudicative function to individual hearing officers, much as the credit-card companies outsourced arbitration to NAF which then contracted with individual arbitrators.

In *Schweiker*, the agency involved was the U.S. Department of Health and Human Services.<sup>399</sup> The Department administered the Medicare program, which consisted of two parts: Part A, which provided publicly-financed health insurance to all older or disabled Americans regardless of their financial need, and Part B, which existed to provide the "supplemental" benefits not provided by Part A.<sup>400</sup> Participation in Part B was limited to those individuals who chose voluntarily to enroll and to pay monthly premiums, but the U.S. Treasury also contributed to Part B.<sup>401</sup> The Court described Part B as "consequently resembl[ing] a private medical insurance program that is subsidized in major part by the Federal Government."<sup>402</sup> Twenty seven million individuals participated in Part B at the time that *Schweiker* was decided; 158 million claims had been processed in 1980; and on an annual basis, the Department provided more than \$10 billion in benefits (in 1982 dollars).<sup>403</sup>

In 1965, Congress had authorized the Secretary of the Department of Health and Human Services to outsource the administration of this mammoth program.<sup>404</sup> According to the portions of the legislative record cited by the Court,

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398. 456 U.S. 188 (1982); *see also* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653 (1990) (noting that Due Process Clause had not been specifically invoked and that statute at issue did not specifically require the procedural protections asserted by LTV); Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980) (stating that civil penalty system and return of fines assessed by administrative law judge to federal agency did not violate due process because it was "the administrative law judge, not the [Employment Standards Administration], who performs the function of adjudicating child labor violations").

399. *Schweiker*, 456 U.S. at 189.

400. *Id.* at 189-90.

401. *Id.* at 190.

402. *Id.*

403. *Id.*

404. *Id.*

Congress had done this in order to “make the administration of this sweeping program more efficient”<sup>405</sup> and “to take advantage of . . . insurance carriers’ ‘great experience in reimbursing physicians.’”<sup>406</sup> For California, the Secretary of Health and Human Services had selected Blue Shield of California and the Occidental Insurance Co. to process claims.<sup>407</sup> The carriers were not named parties, though the Supreme Court described them as agents of the agency.<sup>408</sup> Presumably, these carriers were paid for the services they performed on behalf of the agency, but these financial arrangements were not described in the Court’s opinion.

The Court was careful to point out that when Blue Shield or Occidental determined whether to pay claims made under Part B, the carrier followed a “precisely specified process”<sup>409</sup> and paid the claim “out of the Government’s Trust Fund—not out of its own pocket.”<sup>410</sup> Not surprisingly, the carriers did not grant every claim for benefits. They provided any unhappy claimant with de novo review, based on written evidence, by a carrier employee other than the employee who had made the initial decision.<sup>411</sup> If a claimant remained dissatisfied after this initial review and had a claim worth at least \$100, the claimant could proceed to an oral hearing before a “hearing officer” who had not previously participated in the case she was now adjudicating.<sup>412</sup> Importantly, the hearing officer’s decision on Part B claims was not subject to judicial review.<sup>413</sup>

Three claimants, whose appeals were not granted by the carriers’ hearing officers,<sup>414</sup> brought a federal action against the Secretary of Health and Human Services, claiming that the hearings violated their constitutional rights.<sup>415</sup> They were then certified as representatives of a nationwide class.<sup>416</sup> The parties filed cross-motions for summary judgment.<sup>417</sup> The federal district court granted the class’ motion based on the issues of partiality and unappealability and denied the Secretary’s motion on these issues, concluding that the “links between the carriers and their hearing officers [were] sufficient to create a constitutionally intolerable risk of hearing officer bias against claimants.”<sup>418</sup> The district court relied on two alternative rules of law: (1) that tribunals must be impartial in accordance with

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405. *Id.*

406. *Id.* (quoting H.R. REP. NO. 89-213, pt. 1, at 46 (1965)).

407. *Id.*

408. *Id.*

409. *Id.* at 191.

410. *Id.*

411. *Id.*

412. *Id.*

413. *See McClure v. Harris*, 503 F. Supp. 409, 418 (N.D. Cal. 1980).

414. One claimant was denied reimbursement for a sex change operation while the second was denied partial reimbursement for the cost of an air ambulance because he was taken to a specially equipped hospital rather than a hospital closer to his home. The third claimant was denied reimbursement for an appendectomy because the hearing officer reasoned that it was incidental to a cholecystectomy which was done at the same time. *Schweiker*, 456 U.S. at 192 n.2.

415. *Id.* at 192.

416. *Id.*

417. *Id.*

418. *Id.* at 193.

*Tumey*, and (2) that the sufficiency of due process depended upon the three-part balancing test of *Mathews v. Eldridge*.<sup>419</sup>

The district court's decision appears to be grounded in the court's conclusion that the "identity of interest" among the hearing officers, insurance carriers, and Department was too strong. The carriers, of course, were operating under contract with the U.S. Department of Health and Human Services. The carriers involved in disputes with claimants selected and appointed the hearing officers to particular cases. The carriers largely trained the hearing officers.<sup>420</sup> The hearing officers relied upon the carriers for their case-dependent incomes.<sup>421</sup> Most strikingly, the court found that "five out of seven of Blue Shield's past and present hearing officers '[were] former or *current* Blue Shield employees.'"<sup>422</sup> Pointing to other information in the record and returning to *Withrow*'s dual presumption of lack of bias by the administrative adjudicator and the complainant's burden of proving a "disqualifying interest,"<sup>423</sup> the Supreme Court disagreed with the district court's decision to grant summary judgment:

Fairly interpreted, the factual findings made in this case do not reveal any disqualifying interest under the standard of our cases. The District Court relied almost exclusively on generalized assumptions of possible interest, placing special weight on the various connections of the hearing officers with the private insurance carriers. *The difficulty with this reasoning is that these connections would be relevant only if the carriers themselves are biased or interested.* We find no basis in the record for reaching such a conclusion. As previously noted, the carriers pay all Part B claims from federal, and not their own, funds. Similarly, the salaries of the hearing officers are paid by the Federal Government. Further, the carriers operate under contracts that require compliance with standards prescribed by the statute and the Secretary. *In the absence of proof of financial interest on the part of the carriers, there is no basis for assuming a derivative bias among their hearing officers.*<sup>424</sup>

Buried in footnotes, the Court also rejected other evidence proffered by the claimants. For example, the claimants had asserted that the Secretary was "biased in favor of inadequate Part B awards" based on the Department's assistance to carriers in "identify[ing] medical providers who allegedly bill for more services than are medically necessary" and its "warn[ing to] carriers to control overutilization of medical services."<sup>425</sup> This echoes the mayor of Monroeville who urged the chief of police to consider the village's financial situation when deciding whether to charge someone under a village ordinance or a state statute.<sup>426</sup> There was no evidence that the mayor asked the chief of police to

419. *Id.* at 192–93.

420. *Id.* at 193 n.4.

421. *Id.* at 192.

422. *Id.* at 193.

423. *Id.* at 196.

424. *Id.* at 196–97 (emphasis added).

425. *Id.* at 197 n.9.

426. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

charge someone unlawfully, only that he consider the financial implication when deciding which charge to impose. In *Schweiker*, however, the Court required more than this to find bias:

This action by the Secretary is irrelevant. It simply shows that he takes seriously his statutory duty to ensure that only *qualifying* Part B claims are paid. . . . It does not establish that the Secretary has sought to discourage payment of Part B claims that *do* meet Part B requirements. Such an effort would violate Congress' direction. Absent evidence, it cannot be presumed.<sup>427</sup>

The claimants also argued that “for reasons of psychology, institutional loyalty, or carrier coercion, hearing officers would be reluctant to differ with carrier determinations.”<sup>428</sup> The Court rejected this claim by noting a lack of solid evidence<sup>429</sup> and deferring to congressional wisdom in permitting the delegation of public functions to private parties: “Such assertions require substantiation before they can provide a foundation for invalidating an Act of Congress.”<sup>430</sup> Finally, the Court tersely asserted without explanation that “the fact that a hearing officer is or was a carrier employee does not create a risk of partiality analogous to that possibly arising from the professional relationship between a judge and a former partner or associate.”<sup>431</sup> It is a bit unclear why a judge would have more difficulty resisting bias in an interaction with a former professional colleague than would an employee in an interaction with her current employer—or a contractor in an interaction with her current client—knowing that the employer or client must operate within financial constraints. Nonetheless, the Court added, “We simply have no reason to doubt that hearing officers will do their best to obey the Secretary’s instruction manual”<sup>432</sup> including directives that “[t]he parties’ interests must be safeguarded to the full extent of their rights; in like manner, the government’s interest must be protected”,<sup>433</sup> and “[t]he [hearing officer] must make independent and impartial decisions . . . and be objective and free of any influence which might affect impartial judgment as to the facts, while being particularly patient with older persons and those with physical and mental impairments.”<sup>434</sup>

Perhaps this decision reflects the Court’s belief in the detached expertise of agencies and their delegates. One of the footnotes, for example, cited to a portion of the Secretary of Human Services Instruction Manual that stated: “[t]he hearing is non-adversary in nature in that neither the carrier nor the Medicare

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427. *Schweiker*, 456 U.S. at 197 n.9

428. *Id.* at 197 n.10.

429. It is unclear how much discovery had been done prior to the filing of the summary judgment motions in this case.

430. *Schweiker*, 456 U.S. at 197 n.10.

431. *Id.* at 197 n.11.

432. *Id.*

433. *Id.*

434. *Id.*

Bureau is in opposition to the party but is interested only in seeing that a proper decision is made.”<sup>435</sup>

One final piece of evidence, though, was almost undoubtedly central to the Court’s analysis. The lower court acknowledged that the Part B appellate process “frequently result[ed] in reversal of the carriers’ original dispositions”<sup>436</sup>:

[Appellant] establish[es] that between 1975 and 1978, carriers wholly or partially reversed, upon ‘review determination,’ their initial determinations in 51–57 percent of the cases considered. Of the adverse determination decisions brought before hearing officers, 42–51 percent of the carriers’ decisions were reversed in whole or in part.<sup>437</sup>

If the hearing officers ruled against the carriers (in whole or in part) approximately half of the time, how could they be presumed to be biased? The proof, the Court seemed to say, was in the pudding.<sup>438</sup>

It is noteworthy that this case also involved application of the three-part balancing test in *Mathews*. Apparently—and despite all of the risk factors already identified—the lower court only cited to the hearing examiners’ potential lack of training and lack of threshold criteria such as a law degree as the basis for finding a risk of erroneous deprivation.<sup>439</sup> The Supreme Court scoffed at this analysis. The lower court had not identified any “specific deficiencies in the Secretary’s selection criteria”; the evidence showed that the Secretary required the carrier to use “qualified” individuals possessing “ability” and “thorough knowledge.”<sup>440</sup> Last, the Court pointed to the information in the record regarding education and experience of nine of the hearing officers, concluding that “[t]heir qualifications tend to undermine rather than to support the contention that accuracy of Part B decision-making may suffer by reason of carrier appointment of unqualified hearing officers.”<sup>441</sup> Once again invoking a “strong presumption”—this time in favor of the validity of congressional action and consistent with the Court’s recognition of “congressional solicitude for fair procedure”<sup>442</sup>—the Court found that the required showings of the second prong of the three-part balancing test had not been met. The Supreme Court reversed the district court’s granting of the claimants’ summary judgment motion. But the Court did even more than that—it remanded for summary judgment to be entered *in favor* of the Secretary of Health and Human Services.<sup>443</sup>

435. *Id.*

436. *Id.* at 194.

437. *Id.* at 194 n.6.

438. The importance of this factor supports California’s institution of disclosure requirements for arbitration organizations, including the requirement that organizations indicate who won. *See supra* notes 29–30 and accompanying text. Transparency is an effective defense against the appearance of bias.

439. *Schweiker*, 456 U.S. at 194.

440. *Id.* at 199.

441. *Id.* at 199–200.

442. *Id.* at 200 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979)).

443. *Id.*

*Schweiker's* ultimate disposition suggests the implausibility of finding a Constitutional violation by NAF or its individual arbitrators. Importantly, however, the many bases for distinguishing *Schweiker* from *Minnesota v. NAF* suggest the potential application of its reasoning—in combination with that of *Caperton*—to both individual arbitrators and the institutions responsible for managing today's embedded neutrals.

***D. Reconsidering the Application of the Supreme Court's Jurisprudence to NAF's Special Case***

This exploration of the Supreme Court's due process jurisprudence is especially interesting because it becomes clear that the occurrence of partiality—or at least the appearance of partiality—is not extraordinary at all when certain institutions have great power unaccompanied by meaningful accountability mechanisms, and when those institutions, in turn, give *their* members, employees or contractors great power similarly unaccompanied by meaningful accountability mechanisms. A wise soul once said, "Power corrupts, and absolute power corrupts absolutely."<sup>444</sup> There is nothing new here.

A complete review of the Supreme Court's jurisprudence also reveals that quite "ordinary" or "garden variety"<sup>445</sup> circumstances—the sort that likely occur every day in municipalities, federal and state agencies, public schools, and workplaces throughout the nation—have led the Supreme Court to deem some situations "constitutionally [in]tolerable." This has been true particularly when the Court has been persuaded by the evidence that has been gathered to show an inappropriate pecuniary interest in ensuring a particular outcome—even when the amount of money involved has been small or the interest has been indirect. It seems that the Court has been more easily persuaded by this evidence when judging the behavior of an *individual* adjudicator, like the Ohio mayor-judges or even Judge Benjamin in *Caperton*. *Gibson*, however, demonstrates that with sufficient evidence, the Court may also be persuaded that an entire adjudicative entity is not sufficiently impartial to meet the requirements of due process. And despite its outcome, *Schweiker* suggests the potential for a violation of due process when adjudicative functions are delegated to private contractors.

Unlike *Caperton*, which began as a motion for recusal and thus focused attention on an individual judge, *Schweiker*, *Withrow*, *Gibson*, *Kennedy*, and other cases described herein also demonstrate that *institutions* may need to bear responsibility for ensuring due process—and bear the consequences if they fail to take any action when they have reason to suspect that bias is infecting decision-making and dispute resolution by their members, employees, or contractors.<sup>446</sup>

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444. John Emerich Edward Dalberg Acton, known as Lord Acton. Letter from Lord Acton to Bishop Mandell Creighton (Apr. 3, 1887).

445. Though this term is used as a synonym for "ordinary" here, so few people have and tend their own gardens these days that the term may not longer be appropriate. Indeed, just as trial has become the "alternative" dispute resolution process in the U.S., perhaps "garden variety" ought to connote something special and unique—like heirloom tomatoes.

446. See SEARLE ARBITRATION REPORT, *supra* note 38, at xiv (suggesting that in implementing Due Process protocols, AAA has effectively promoted fair procedures by



*Schweiker* is particularly interesting here—and potentially useful—because it involves the use of contractors and subcontractors, just like the “special case” of NAF. Though the Supreme Court refused to find a violation of due process in *Schweiker*, its analysis clearly demonstrates why the profit-oriented cast of NAF’s financial and corporate structure could—and perhaps should—lead to a finding of such violation.

There are striking similarities between *Schweiker* and NAF and its arbitrators. The powerful repeat player in *Schweiker* is Health and Human Services; in NAF’s case, it is the credit-card companies. The insurance carriers likely solicited the opportunity to provide claims processing and dispute resolution services for Health and Human Services; NAF did the same with the credit-card companies. Health and Human Services wanted to be sure that its funds were spent appropriately; the credit-card companies likely were similarly interested in protecting their fiscal resources. And the hearing officers in *Schweiker* played a binding dispute resolution role and relied on referrals from the carriers in much the same manner that NAF’s arbitrators played this role and relied on NAF.

However, there are also significant differences between *Schweiker* and NAF. Unlike the hearing officers in *Schweiker*, NAF’s arbitrators did *not* reject half of the claims brought by credit-card companies against consumers. Instead, NAF’s arbitrators found for the credit-card companies nearly 95% of the time.<sup>447</sup> Admittedly, this is not significantly different from the fate of collection actions in court. It is, however, a higher percentage than the Searle Civil Justice Institute reported for the AAA’s arbitration of consumer disputes brought by businesses.<sup>448</sup> And, of course, Professor Bartholet received no additional referrals after she decided against one credit-card company and awarded \$48,000 to a consumer. Further, unlike the situation in *Schweiker*, Congress did not direct the credit-card companies to insert mandatory arbitration clauses in their boilerplate contracts or establish requirements for arbitrators. This was entirely the work of private actors—the credit-card companies and NAF.

Finally and perhaps most compelling are the public identity of the defendant in *Schweiker* and the public interest served by Health and Human Services’ careful stewardship of its resources. These are related factors. The real defendant in *Schweiker* was a public agency, *not* a private insurance carrier—or a private credit-card company or private ADR provider. The Court found that Health and Human Services had no inappropriate pecuniary interest. As in *Mathews*, this was a federal agency committed to serving its mission—providing coverage under Part B—while also ensuring the appropriate use of taxpayers’ dollars. The

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refusing to administer arbitrations for over 600 companies, based on their violations of the protocols); Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 105, 128 (noting that a study by Bingham and Shimon Sarraf compared outcomes before and after an Employment Due Process Protocol was implemented and found that employers arbitrating based on personnel handbook violations were less successful after the protocol was used than they were before the protocol).

447. See PUBLIC CITIZEN, *supra* note 142, at 2.

448. SEARLE ARBITRATION REPORT, *supra* note 38, at xiii.

insurance carriers were not themselves defendants; they were merely agents for the public agency and thus came within the public mantle. In contrast, if the Minnesota complaint's allegations are accepted as true, it is easy to conclude that the web of private actors involved in the NAF case—Accretive, Agora, Forthright, NAF, Mann Bracken, and Axiant—were not motivated by a public interest but by a shared pecuniary interest in ensuring that consumer arbitration assisted the debt collection process and the production of profits for all of the investors associated with that process.<sup>449</sup>

If we consider the jurisprudence upon which *Caperton* stands, I believe that NAF could be found in violation of the Due Process Clause directly or of the constitutional principles animating the Clause, imported into our understanding of the Federal Arbitration Act.

### CONCLUSION

The field of dispute resolution is at a crucial point in its evolution. With its institutionalization in the courts, agencies, and the private sector, ADR now is a sufficiently profitable business to attract the attention of those who will wish to exploit it. As illustrated, under very narrow circumstances, which may not exist any longer as credit-card companies hurry to change their boilerplate contracts and policies in the aftermath of the NAF settlement, the Constitution may be available to protect the field from others'—or its own—worst excesses.

But do ADR advocates need to wait for such a catastrophe to occur? ADR has so much promise. Arbitration, which has been the focus of this Article, is a process that responds to the real needs of real people. Now is the time to embrace appropriate and rigorous regulation to help protect the best of arbitration and avoid the occurrence of the worst.

There are several options. The stories of Elizabeth Bartholet and many other NAF arbitrators suggest that self-regulation may work, particularly if the institutional framework of dispute resolution organizations is generally sound. But the story of NAF also suggests that we cannot presume the existence of sound structures. And then, individual arbitrators will need support. It can be very difficult to stand firm when one is surrounded by people and a structure that urges exchange of the lonely virtues of integrity and impartiality for the exciting drumbeat of status, fame, and (perhaps) lots of money. The story of NAF, Accretive/Agora, Mann Bracken—joined by the stories of Enron and Wall Street financiers involved in the bundling and sale of subprime mortgages, etc.—counsel skepticism and some form of external accountability. Models exist. On one hand, there is the market—if there truly is easy entry into the market, real competition involving a sufficient number of competitors, and equal access to relevant and understandable information.<sup>450</sup> On the other hand—or perhaps even to assist the

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449. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1647, 1655 (2005) (examining the replacement of public courts with private arbitral bodies and considering practices in other countries).

450. See Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 129–30 (2005); Park, *supra* note 42, at 129 n.218.

operation of the market<sup>451</sup>—there is public regulation. California's disclosure requirements triggered many of the revelations discussed in this Article.<sup>452</sup> In Australia, law firms are now required by the government to have internal systems of checks and balances, and the number of complaints against lawyers there has plummeted by 40%.<sup>453</sup> Efforts are afoot in the U.S., meanwhile, to engage law

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If the loser in such a system [in which the arbitral institution is dominated by a single industry and nominates arbitrators who reappointment and thus compensation indirectly depends on the satisfaction given to the industry] is a large corporation with access to counsel, an award based on an unjust process would normally result in a motion for vacatur, as well as damage to the reputation of the arbitrator and the supervisory institution. The prospect of such checks and balances seems less likely if the loser is a low-paid employee who finds it difficult to muster resources for a challenge or a publicity campaign.

*Id.*; Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 300–01 (2004) (identifying difficulties with the argument that the market offers sufficient accountability).

451. This sort of entanglement could also have the effect of transforming private arbitral providers into state actors and thus result in direct application of the Due Process Clause. *See, e.g., Cole, Fairness in Securities Arbitration, supra* note 232, at 83–97.

452. *See also* CPR-GEORGETOWN COMM'N ON ETHICS & STANDARDS IN THE PRACTICE OF ADR, CPR PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS 9–11 (2002). These principles provide the following disclosure requirements:

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

- a. The nature of the ADR Provider Organization's services, operations, and fees;
- b. The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;
- c. The ADR Provider Organization's policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;
- d. Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and
- e. The method by which neutrals are selected for service. . . .
- f. The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including
  - (i) any financial or other interest by the Organization in the outcome;
  - (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a de facto stream of referrals, or a funding relationship between a party and the organization; or
  - (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

*Id.* The Georgetown CPR Principles have not been cited in any court opinions.

453. Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a*

firms more directly in ensuring ethical practice,<sup>454</sup> while insurers may be using financial incentives to encourage their insureds to increase the accuracy of their awards and reduce conflicts of interest.<sup>455</sup>

A somewhat less direct means of encouraging institutions to establish internal controls to assist their individual arbitrators would be to abandon deferential judicial review when there has been a sufficient showing that: (1) an outcome has been produced by an embedded neutral; (2) the situation involved a

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*Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 510–14 (2009) (reporting on empirical studies showing increased ethical management and a reduction in complaints against Australian lawyers/firms after firms put self-assessment tools into place); Laurel Terry, Nat'l Ass'n of Bar Counsel, A Modest Proposal (Aug. 9, 2008), available at <http://www.personal.psu.edu/faculty/l/s/lst3/presentations%20for%20webpage/nobc%20a%20modest%20proposal.pdf> (regarding firm self-assessment tools—"appropriate management systems"—that are currently available); cf. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 222 (1983) (discussing internal controls as a sound method of producing administrative accuracy). See also Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023, 1072–73 (2008)

In other work, one of us has outlined a variety of concrete mechanisms that can help build an institutional apparatus, and culture, of internal checks and balances. Some of those mechanisms center on the need to change the architecture of the federal bureaucracy—create institutional friction and to play upon it. Just as government can function better when the Departments of State and Defense have overlapping mandates and resulting tensions, so, too, it might be the case that rivalries can be exploited through other agencies, such as the Department of Homeland Security and the Justice Department. Instead of the standard separation of powers—whereby Congress checks the President, and the courts check both—the bureaucracy itself can be structured to create internal checks. . . . Some reforms involve changes within individual agencies themselves. Vibrant civil service protections are often necessary so that employees feel they can do their job without reprisal. Agencies might consider borrowing here from the foreign service, where longstanding policies create the conditions for a bureaucracy that is, comparatively speaking, focused on long-term horizons and the development of balanced policy. Indeed, the State Department has explicit procedures in place that permit foreign service officers to dissent and warn Washington of actions they feel are problematic in the field. The Foreign Service Officer who uses this so-called 'dissent channel' in the most productive way each year wins an award.

*Id.*

454. See, for example, the debates over the ethical obligations of law firms as currently described in Rule 5.1. Professor Ted Schneyer has urged the need to discipline law firms, not just individual lawyers. Ted Schneyer, *Professional Discipline of Law Firms?*, 77 CORNELL L. REV. 1, 13 (1992). This led to proposed revisions to Rule 8.4 in Ethics 2000.

455. See Leo Herzog & Dale E. Colling, *The Chinese Wall and Conflict of Interest in Banks*, 34 BUS. LAW. 73, 114 (1978) (recommending interdepartmental information walls to reduce bank conflicts); Brief for Blue Cross and Blue Shield Association as Amicus Curiae Supporting Petitioner at \*15, *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008) (No. 06-923), 2008 WL 596062 (suggesting that insurers have incentives to reward claims processors for their accuracy).

contest between a powerful institutional repeat player and a less-powerful institutional or individual one-time player;<sup>456</sup> (3) the more powerful repeat-player selected the individual embedded neutral or the dispute resolution organization which employed or contracted with the individual neutral; and (4) the more powerful repeat-player institution failed to establish any meaningful structural counterbalances.<sup>457</sup> Certainly there are other models that could be explored.<sup>458</sup>

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456. Distinguishing between repeat players and one-time players will be difficult, but we can look to other areas of law for guidance. *See, e.g.*, *Vorsheck v. Comm’r*, 933 F.2d 757, 758–59 (9th Cir. 1991) (differential application of tax law to non-sophisticated couple); *Heasley v. Comm’r*, 902 F.2d 380, 381, 385 (5th Cir. 1990) (waiving penalty for couple with no advanced business experience that relied on financial advisor in investing in tax shelter); *MGIC Indem. Corp. v. Cent. Bank of Monroe*, 838 F.2d 1382, 1387 (5th Cir. 1988) (taking notice of line of cases that held consumers to different standard than businesses in certain situations if court found that strict adherence to contract term would produce overly harsh results); *In re Garza*, No. 95-6037, 2005 Bankr. LEXIS 1810 at \*46–47 (Bankr. N.D. Ind. July 22, 2005) (businessmen presumed to know the harm that will result from conversion of secured party’s collateral); *In re Khanani*, No. 6:04-bk-07648-ABB, 2005 Bankr. LEXIS 1876, at \*21 (Bankr. M.D. Fla. Sept. 27, 2005) (experienced business held to higher standard of care). *But see* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 597–98 (1991) (Stevens, J., dissenting) (expressing outrage at enforcement of forum selection clause against elderly couple who resided in Washington but were forced by terms of purchase—which they did not even see until after making purchase—to litigate in Florida); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 488–90 (1985) (Stevens, J., dissenting) (worrying that decision will result in personal jurisdiction over unsophisticated individuals who enter into contracts with sophisticated businesses); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1476, 1485 (D.C. Cir. 1997) (presuming that repeat-player plaintiffs lawyers will police ranks of arbitrators and noting interestingly that “wise employers and their representatives should see no benefit in currying the favor of corrupt arbitrators, because this simply will invite increased judicial review of arbitral judgments”); *Rubino v. Circuit City Stores*, 758 N.E.2d 1, 16 n.3 (Ill. App. Ct. 2001) (Campbell, J., dissenting) (referencing Fair Debt Collection Practices Act to aid unsophisticated consumer); *Llewellyn Joseph Gibbons, Private Law, Public “Justice”: Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 782 (2000).

457. This approach has been used in other contexts, such as trust law. *See, e.g.*, *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2351 (2008).

The conflict of interest at issue here . . . should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits.

*Id.*; *Van Boxel v. Journal Co. Employees’ Pension Trust*, 836 F.2d 1048, 1052–53 (7th Cir. 1987) (“When the members of the tribunal—for example, the trustees of a pension plan—have a serious conflict of interest, the proper deference to give their decision may be slight, even zero . . . . There may be in effect a sliding scale of judicial review of trustees’ decisions more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is.”); *see also* Chad M. Oldfather, *Universal De Novo Review*, 77

The story of NAF is a wake-up call. Will we rise up and do what it takes to reform—and thus protect the integrity of—these “alternative” processes and neutrals? Or will we hit the snooze button one more time and pull those covers back over our faces, returning to our cozy dream of a world of “no possessions . . . no need for greed or hunger, [a] brotherhood of man”<sup>459</sup>? That is a beautiful, alluring dream.<sup>460</sup> But it seems that every utopia that has been created on this earth has the potential to degenerate into a dystopic nightmare. Instead, let’s dream a more realistic dream of checks and balances—throwing off our covers and bracing for both the frightening exhilaration and hard work of the struggle that is the real world.

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GEO. WASH. L. REV. 308, 317, 328–29 (2009) (noting that appellate review reduces error and increases the quality of decision-making); Stempel, *Mandating Minimum Quality*, *supra* note 28, at 428–31 (proposing imposition of same standards of judicial review that are imposed upon trial courts—e.g., clearly erroneous for challenges to fact-finding; abuse of discretion for exercises of judicial discretion; de novo for application of law). *But see* Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 517–18 (2008) (asserting that judicial review is not effective to ensure fairness in arbitration, but SEC oversight is effective).

458. They include: offering “alternative” dispute resolution only through independent, financially stable entities—perhaps public, perhaps the joint venture of normally competing entities; revising the standard that a neutral must use when deciding whether to recuse herself in response to a party’s objection (using 28 U.S.C. § 455(a) as a model); revising the procedure to be used when a party seeks a neutral’s recusal; revising the standard used by courts for vacatur based on partiality; ending quasi-judicial immunity or conditioning the grant of such immunity upon sufficient appearance of impartiality; permitting parties to “strike” a neutral if there is even an appearance of bias; requiring court-connected neutrals to take the judge’s oath to uphold justice; developing and funding effective monitoring and evaluation of neutrals; professionalizing neutrals, so that they share norms, values, and an understanding of best practice; establishing independent dispute resolution regulatory bodies; providing for rescission of mediated agreements within a limited time period or upon a prima facie showing of the appearance of partiality; and providing for a change of burden of proof regarding existence/importance of conflict of interest upon prima facie showing of appearance of partiality.

459. JOHN LENNON, *Imagine*, on IMAGINE (Apple Records 1971).

460. Although not exactly gender inclusive.