

The *Caperton* Caper and the Kennedy Conundrum

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Introduction

*Caperton v. Massey Coal*¹ typifies the old maxim that hard cases make bad law. In *Caperton*, the Supreme Court created a new, largely unworkable standard for judicial recusal, then elevated it to a matter of constitutional due process. But this is not all. *Caperton* has the potential to erode the Supreme Court's traditional protection for independent political speech in election campaigns dating back to at least *Buckley v. Valeo*,² and may one day threaten the Court's recent decision on free speech in judicial elections, *Republican Party of Minnesota v. White*.³

In this article, we argue that the events in *Caperton* are best handled under state recusal procedures, and that elevating them to matters of constitutional due process is both unnecessary and unwise. We will argue that the "probability of bias" standard adopted by the Supreme Court in *Caperton* is a marked departure from the Court's due process standard, and suggest that the standard—based as it is upon "debts of gratitude" to campaign speakers—will prove to be largely unworkable. We will then show how court holdings that independent expenditures cause bias in a judge are contrary to cases holding that independent expenditures do not cause corruption in candidates, and thus, if followed by the Court in future cases, will

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¹ *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009).

² 424 U.S. 1 (1976).

³ 536 U.S. 765 (2002).

tend to threaten independent political speech. Lastly, we will examine the *Caperton* opinion itself and suggest that Justice Anthony Kennedy's opinion for the Court, with its emphasis on the "extraordinary" facts of the case, was an attempt to reverse a hard case without creating bad law. By referring to independent political expenditures as campaign "contributions" instead of "independent expenditures," Justice Kennedy's opinion attempts to address a case that, on its facts, seemed to shock the conscience—without damaging Kennedy's longstanding position in campaign finance cases that judicial elections are much like other elections, and that independent election expenditures enjoy the highest constitutional protection.⁴

Facts

Caperton v. Massey Coal has its roots in a complicated tale of political and corporate intrigue between two coal companies, Harman Mining Co., owned by Hugh Caperton, and A.T. Massey Coal Company. In 2002, a West Virginia jury returned a verdict against Massey Coal for "tortious interference with . . . contractual relations, fraudulent misrepresentation [and] fraudulent concealment," and assessed compensatory and punitive damages in the amount of more than \$50 million for actions taken by Massey at the direction of its CEO, Don L. Blankenship.⁵ Blankenship swore publicly that he would appeal. While awaiting the trial court's final disposition of several post-trial motions, Blankenship, owner of 250,000 shares (0.035 percent) of Massey stock, made independent expenditures⁶ of approximately \$3 million from his personal funds—not Massey funds—to oppose the reelection of incumbent Justice Warren McGraw to the West Virginia Supreme Court of Appeals.⁷ McGraw's opponent,

⁴ See *Buckley*, 424 U.S. 1 (1976); *White*, 536 U.S. 765 (2002).

⁵ Brief of Petitioner at 5, *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009).

⁶ We will describe Mr. Blankenship's independent speech and his contributions (or donations as the case may be) to "And for the Sake of the Kids" as "independent expenditures," though the record indicates that not all of the communications may have contained express words of election or defeat. See *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam). While the express advocacy distinction is of critical importance to campaign finance law, clarifying the distinction while describing the events in *Caperton* is less critical.

⁷ Brief of Petitioner, *supra* note 5, at 7 ("Mr. Blankenship had donated \$2,460,500 to And For The Sake Of The Kids" and "spent another \$517,707 of his personal funds on independent expenditures"). West Virginia has no intermediate appellate courts, so appeals from a trial court judgment go directly to the state supreme court.

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Brent Benjamin, won that election and later joined the 3-2 majority that threw out the verdict against Massey.

To read press accounts of the matter, one might think that Blankenship gave the money to Benjamin directly, and that the *Caperton* Court had thus struck a major blow against corrupt businessmen in favor of judicial impartiality.

Caperton was a “Supreme Court case with the feel of a best seller,” proclaimed *USA Today*, stating that after Massey Coal was ordered to pay \$50 million in a fraud lawsuit, Blankenship “contributed \$3 million to help unseat incumbent Democratic Judge Warren McGraw in his race against a Republican, Charleston lawyer Brent Benjamin . . .” and that “Benjamin cast a crucial vote to overturn the verdict that had favored *Caperton*.”⁸

Other news articles depicted the facts in a similar light. *Slate* stated that, “While the appeal was still pending, Massey’s CEO, Don Blankenship, spent \$3 million of his own money to remove one state supreme-court justice and seat another—his *contributions* amounting to more than two thirds of all funds raised.”⁹ Numerous other press organizations, including the *Wall Street Journal*, *New York Times*, *Congressional Quarterly*, *National Law Journal*, and *The Atlantic Monthly*, also directly stated or strongly implied that Blankenship contributed \$3 million directly to Benjamin’s campaign.¹⁰ Even the

⁸ Joan Biskupic, Supreme Court Case With the Feel of a Best Seller, *USA Today*, February 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm (emphasis added).

⁹ Dahlia Lithwick, The Great *Caperton* Caper, *Slate*, June 8, 2009, available at <http://slate.com/id/2220031/pagenum/all/#p2> (emphasis added).

¹⁰ See Ashby Jones, Pregaming the Massey Coal Arguments: A Spotlight on the Lawyers, *Wall Street Journal Law Blog*, February 18, 2009, available at <http://blogs.wsj.com/law/2009/02/18/pregaming-the-massey-coal-arguments-spotlighting-the-lawyers>. (Saying the case “ask[ed] the Court to lay down a constitutional rule to define when a campaign donation is so big that the judge who received it must recuse.”); Adam Liptak, Justices Tell Judges Not to Rule on Major Backers, *N.Y. Times*, June 9, 2009, at A1. (“[J]udges routinely accept contributions from lawyers and litigants who appear before them, and they seldom disqualify themselves for cases involving donors.” The fact that Blankenship contributed merely \$1,000 directly to Benjamin’s campaign was mentioned only in passing thirteen paragraphs later.); Keith Perine, Conflict-of-Interest Decision Could Reverberate Among State Justices, *CQ Politics Legal Beat Blog*, June 8, 2009, available at http://blogs.cqpolitics.com/legal_beat/2009/06/high-court-rules-on-judicial-r.html. (Saying Blankenship “engineered massive financial contributions to Benjamin’s election effort.”); Tony Mauro, Supreme Court Issues Landmark Ruling on Judicial Recusal, *The National Law Journal*, June 8, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ>.

ABA Journal, which one might expect to be more attuned to the legal nuances between contributions given directly to Benjamin and expenditures made independently of Benjamin, stated repeatedly that Blankenship made contributions that were “accepted” by Benjamin.¹¹

The press depiction of the *Caperton* facts is enough to horrify anyone who believes in impartial justice. It is also completely incorrect. Such easy facts as bribing a judicial candidate or sale of public office did not make up the record in *Caperton*. Caperton asserted, and the press regularly reported, that Brent Benjamin was “a previously unknown lawyer,” perhaps in the hope that the Court would infer—or that the Court would worry the public would infer, much as John Grisham wrote in a novel loosely based on the case—that Blankenship plucked Benjamin from obscurity to run against Blankenship’s nemesis, Justice McGraw, all for the price of voting for Massey when the time came.¹² In fact, Benjamin was a senior partner in one the state’s largest law firms and had previously served as the treasurer of the West Virginia Republican Party. The race was also targeted by the U.S. Chamber of Commerce as one of the most important Supreme Court races of the year, all but assuring that a challenger would be well funded.¹³ In any event, such subjective conjecture could not form the basis of the Court’s holding in the case. If Blankenship handpicked Benjamin to run for a seat on the West Virginia Supreme Court of Appeals in exchange for an eventual vote in the case, *Caperton* would not have been before the U.S.

jsp?id=1202431304207&Supreme_Court_issues_landmark_ruling_on_judicial_recusal&slreturn=1 (describing the money as an “outsized campaign donation”); Marc Ambinder, Out of a Grisham Novel: Supreme Court Invalidates Judicial Election, *The Atlantic*, June 8, 2009, available at http://politics.theatlantic.com/2009/06/out_of_a_grisham_novel_supreme_court_invalidates_judicial_election.php (expressing skepticism by putting “independent” in quotation marks, and in the same sentence describing the \$3 million as a “contribution”).

¹¹ John Gibeaut, *Caperton’s Coal*, *ABA Journal*, February 2009, available at http://www.abajournal.com/magazine/capertons_coal/.

¹² *Caperton* failed to explain how “a previously unknown lawyer” could receive the endorsements of all but one of the major West Virginia daily newspapers to offer endorsements shortly before the election, as did Brent Benjamin. See also Brief of Respondent at 5, 54, *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009).

¹³ Scott Wartman, *Some Say Justice Race Most Important*, *The Herald-Dispatch*, May 5, 2004, available at http://www.restorebalancewv.org/news/NewsCoverage/Articles2004/HerDispatch_Race_05052004.htm.

Supreme Court because the law would have dealt with both men severely.¹⁴

In fact, Don Blankenship is a prominent West Virginia businessman with a long history of political activism. He frequently spends large sums of his own money on causes and issues important to him. His independent expenditures, Blankenship said, were not spent with the primary goal of supporting Brent Benjamin, a man with whom he had no personal connections. Rather, the independent expenditures were made to oppose the reelection of Justice McGraw, who Blankenship believed made decisions that harmed the state's economy, depressed wages, and supported trial lawyers over the working class.¹⁵ Blankenship contributed only \$1,000—the statutory maximum—to Benjamin's campaign.¹⁶ That \$1,000 contribution was the only money from Blankenship over which the Benjamin campaign had any control. Blankenship then gave about \$2.5 million to And for the Sake of the Kids, a "527" nonprofit group that opposed McGraw's reelection.¹⁷ Blankenship also directly spent about \$500,000 on advertisements and literature opposing McGraw.¹⁸ Thus, over 99.99 percent of the money Blankenship put towards the West Virginia Supreme Court election was spent without the consent, cooperation, or approval of Benjamin or his campaign. Blankenship's spending is known in campaign finance law as "independent expenditures," money for communications that advocate the election or defeat of a clearly identified candidate for office, but made entirely independently of the candidate, his party, or his agents.

It is unclear whether the independent expenditures were the cause of Benjamin's victory. Benjamin won by a reasonably comfortable seven-point margin. He had received the endorsements of every West Virginia newspaper except for one. Shortly before the election, his opponent gave a strange and widely publicized speech in which

¹⁴ See generally W. Va. Code §§ 61-5A-1 (Bribery and Corrupt Practices Act), 61-5A-3 (making unlawful bribery in official and political matters), 61-5A-4 (unlawful rewarding of public servants for past behavior).

¹⁵ Brief of Respondent, *supra* note 12, at 3.

¹⁶ *Id.* at 4.

¹⁷ "527s" are groups organized under §527(e) of the Internal Revenue Code for political purposes. Such groups often make independent expenditures supporting or opposing candidates or discussing candidates and political issues.

¹⁸ Brief of Respondent, *supra* note 15, at 3–4.

he falsely claimed the West Virginia Supreme Court had approved gay marriage. These factors could have easily led to Benjamin's victory regardless of whether Blankenship had spent money on independent expenditures.

Beyond the mere fact of Blankenship's spending, nothing suggests that these independent expenditures obligated Justice Benjamin to rule in Massey's favor. Courts have recognized for years that independent expenditures, rather than help, can easily backfire, and carry the risk of "provid[ing] little assistance to the candidate's campaign" and perhaps even "prov[ing] counterproductive."¹⁹ More specifically, during the 2004 election, "Benjamin welcomed the support of those who wanted a judge who 'would follow the law' but warned that 'if you want something in return, I'm not your candidate.'"²⁰ In the years between his election and *Caperton* reaching the West Virginia Supreme Court, Justice Benjamin ruled against Massey Coal in other cases "at both the merits stage, and the petition stage."²¹ One decision where Justice Benjamin ruled against Massey Coal "left standing a \$243 million judgment against Massey. . . ."²² That Justice Benjamin had previously upheld a \$243 million judgment but overturned a \$50 million judgment is entirely inconsistent with the assertion that Blankenship's independent expenditures caused Benjamin to make biased judgments in favor of Massey Coal.

In sum, the press portrayal of the facts in *Caperton* was and has continued to be one-sided and misleading. Blankenship did not pluck Benjamin from obscurity to serve as his handpicked opponent to McGraw. He did not contribute \$3 million to Benjamin's campaign or coordinate his expenditures with the campaign to ensure Benjamin's victory. The money was spent independently, with no input, advice, or approval from Benjamin or his campaign committee. Despite the independent expenditures, Justice Benjamin, once elected, ruled against the Massey Coal company in a case with a verdict nearly five times as large as the sum at stake in *Caperton*.

¹⁹ *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

²⁰ Brief of Respondent, *supra* note 15, at 5 (quoting JA319a).

²¹ Brief of Respondent, *supra* note 15, at 5–6 ((citing *McNeely v. Independence Coal Co.*, No. 04156 (W. Va. Feb. 9, 2005) and *Brown v. Rawl Sales and Processing Co.*, No. 070889 (W. Va. Sept. 11, 2007)).

²² Brief of Respondent, *supra* note 15, at 9.

Benjamin fell under none of the traditional standards requiring recusal. He made no public comments on the case or the principals involved. He had no pecuniary interest in the outcome. At no point in the proceedings did he exhibit bias. Nonetheless, the Court found that Benjamin's failure to recuse violated the Fourteenth Amendment's Due Process Clause.

Judicial Recusals

Given that Justice Benjamin did not act improperly under West Virginia's recusal canons, Caperton argued that Benjamin's failure to recuse violated the United States Constitution—particularly the Fourteenth Amendment's Due Process Clause. Caperton and various amici argued for a "probability of bias" standard on the idea that independent spending in a judicial campaign can be so "outsized" that it creates a "debt of gratitude" that must be repaid by the candidate once elected. It would have been better had the Supreme Court rejected this argument and left the matter of future recusal questions of this kind to state law.

Most matters "relating to judicial disqualification [do] not rise to a constitutional level."²³ The vast majority are handled by way of various recusal canons adopted by the several states. Federal case law teaches that the recusal standard "is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."²⁴ The ABA Model of Judicial Conduct provides that a "judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might *reasonably* be questioned."²⁵ The standard, therefore, is largely in the eye of the beholder, and depends largely upon the life experience of the observer. "If the 'reasonable observer' must take into account State-to-State differences in deciding on which side of the sometimes line a particular item of support falls—whether or not it gave rise to a 'debt of gratitude' that, in turn, created a disqualifying 'probability of bias'—surely it makes more sense to leave recusal specifics to state policymakers, who are intimately familiar with state history

²³ *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948).

²⁴ *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000).

²⁵ ABA Model Code of Judicial Conduct Rule 2.11(A) (2007) (emphasis added).

and practice, as well as citizens' collective expectations" than to federal appellate courts.²⁶

The states have ensured impartiality through various mechanisms. These include recusal rules and judicial canons, in place in almost every state. Over a dozen states currently permit litigants "peremptory" challenges to judges.²⁷ Nearly every state that holds judicial elections has in place contribution limits.²⁸ Some states, such as Alabama, have tied recusal rules to campaign contributions.²⁹ Proposals exist for publicly financed judicial elections.³⁰ The West Virginia legislature has even proposed amending the state's constitution to put in place a three-member "Judicial Recusal Commission" to issue binding decisions on "whether a . . . judge [or] justice should be recused from hearing, deciding or participating in deciding" a given case.³¹

A state's remedy against an unwanted but not unconstitutional appearance, should it want one, is in recusal canons more rigorous than due process requires; there need not be a due process violation for West Virginia to have a remedy.³² Ironically, West Virginia's proper remedy is provided in the words of Justice Kennedy:

²⁶ Brief of the States of Alabama, Colorado, Delaware, Florida, Louisiana, Michigan, and Utah as Amici Curiae in Support of Respondents, *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08–22, 129 S. Ct. 2252 (2009).

²⁷ See Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* 789–822 (2d. ed. 2007).

²⁸ See American Judicature Society, *Judicial Campaigns and Elections: Campaign Financing*, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state (visited August 9, 2009).

²⁹ Ala. Code §§ 12-24-1, -2 (2008).

³⁰ Deborah Goldberg, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts*, *Judicial Independence Series*, available at <https://www.policyarchive.org/bitstream/handle/10207/8737/publicfundingofjudicial.pdf?sequence=1> (visited August 9, 2009). "In direct response to the controversy surrounding Justice Benjamin's non-recusal . . . West Virginia amended its campaign finance laws related to judicial elections. See 2005 W. Va. Acts, Ch. 9. The new law requires [Internal Revenue Code] §527 groups to register and disclose their financing, and further, establishes a \$1000-per-election cap on individual contributions to §527 groups operating in West Virginia." See Brief of the States, *supra* note 26, at 17. Any contribution limit, it is worth mentioning, would likely be unconstitutional. See *California Medical Assn. v. FEC*, 453 U.S. 182, 201 (1981) (Blackmun, J., concurring); *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008).

³¹ H.R. J. Res. No. 104, 78th Leg. Sess. (W. Va. 2008).

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[West Virginia] may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. *It may adopt recusal standards more rigorous than due process requires*, and censure judges who violate those standards. *What [West Virginia] may not do*, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer.³³

West Virginia “cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.”³⁴ Similarly, the state cannot opt for an elected judiciary and then assert that judicial impartiality can occur only in the absence of speech.³⁵

Despite the fact that rigorous recusal standards were the more workable remedy—and the one more in line with the Court’s jurisprudence—the Court instead chose to stretch its due process jurisprudence beyond recognition.³⁶

³² See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Court need not “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied”) (citations omitted).

³³ *White*, 536 U.S. at 794 (Kennedy, J., concurring) (emphasis added).

³⁴ *Id.* at 795.

³⁵ Justice O’Connor has suggested that a “State’s claim that it needs to significantly restrict . . . speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.” *White*, 536 U.S. at 792 (O’Connor, J., concurring).

³⁶ *Massey Coal*, in a brief opposing certiorari, mentioned that if, under operation of a rigorous recusal canon, “lawyers and litigants knew that their contributions or [independent] expenditures might force a judge’s recusal, then they could be chilled from exercising their First Amendment rights.” Brief of Respondent in Opposition to Certiorari at 22, *Caperton v. A.T. Massey Coal Co., Inc.*, 08-22, 129 S. Ct. 2252 (2009). But this is incorrect. The interest of the citizen who runs independent expenditures in judicial elections is in convincing his fellow citizens of the better judge(s) to sit on the bench in his state. He has no interest or right in having a particular judge hear his case, just as a judge has no right to hear a particular case. Just as a litigant possesses no right to have his case heard by a particular judge, see *Sinito v. United States*, 750 F.2d 512, 515 (6th Cir. 1984) (collecting cases), see also 46 Am. Jur. 2d *Judges* § 25 (“litigants have no right to have, or not have, any particular judge of a court hear their cause”), and a judge possesses no right to hear or decide a particular case unless it is assigned to him pursuant to the standard procedures used in his jurisdiction. As the Court said in passing over 80 years ago, “In [being recused from a case] there is no serious detriment to the administration of justice nor inconvenience

Stretching the Bias Standard

Generally speaking, “bias” offends constitutional due process, thus requiring judicial recusal, in two instances. The first occurs when an adjudicator has a “direct, personal, substantial, pecuniary interest in reaching a conclusion against [a litigant] in [the] case.”³⁷ “Bias” also occurs in special cases, such as contempt proceedings, where the adjudicator has “been the target of personal abuse or criticism from the party before him.”³⁸

Justice Benjamin did not have a direct, substantial, pecuniary interest in Blankenship’s independent expenditures. Nor was Benjamin the target of personal abuse or criticism from Harman Mining when it appeared before him in the underlying appeal. The record shows no relationship or interest between Blankenship and Benjamin other than lawful \$1,000 contributions to Justice Benjamin’s campaign committee by Mr. Blankenship³⁹ and Massey’s PAC,⁴⁰ which even Caperton conceded are not evidence of bias on the part of Justice Benjamin.⁴¹

Nothing in the record suggests that Blankenship handpicked Benjamin to run against Justice McGraw, either directly or through an intermediary. Benjamin chose to campaign to be a justice of the West Virginia Supreme Court independently of Blankenship and with no promises or even discussions of support. Likewise, Blankenship chose to run independent expenditures independently of Benjamin,

worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?” *Berger v. United States*, 255 U.S. 22, 36 (1921).

³⁷ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

³⁸ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). For a detailed explanation of due process, the bias standard, and the infirmity of any so-called “appearance of bias” or “probability of bias” standards, see Brief of Respondent, *supra* note 12 at 15–27.

³⁹ See Brief of Center for Competitive Politics as Amicus Curiae in Support of Respondents at 2, 6, *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22., 129 S. Ct. 2252 (2009).

⁴⁰ *Id.*

⁴¹ See Brief of Petitioners at 16, 26, *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009) (“It is not the case that recusal is constitutionally required whenever a judge receives campaign support from a litigant . . . especially where that support represents only a small fraction of the total support for the judge’s campaign.”).

and may have done so regardless of the identity of McGraw's opponent.⁴² There is no suggestion that Blankenship coordinated his independent spending with Benjamin or with any member of his campaign.⁴³ Blankenship's independent spending did not go to Benjamin personally, or even to Benjamin's campaign account, beyond the \$1,000 contributions that petitioners conceded raised no due process issue.⁴⁴

The actual facts of *Caperton*, as opposed to the hyperventilating press accounts, are easily distinguished from the Court's line of due process cases, which require a "direct, personal, substantial, pecuniary interest" on the part of a judge or adjudicator before constitutional due process is offended.⁴⁵ For example, *Tumey v. Ohio* involved a mayor, sitting as judge in Mayor's Court, who earned a percentage of every fine he assessed bootleggers.⁴⁶ *Aetna Life Ins. Co. v. Lavoie* involved a state supreme court justice who would receive damages in a pending bad-faith claim against his insurer only if he first upheld the constitutionality of bad-faith claims against all insurers.⁴⁷ *Mayberry v. Pennsylvania* involved a judge who had a personal stake in protecting his reputation from a litigant that attacked him in court, personally and repeatedly, calling him a "dirty, tyrannical old dog," and a "dirty sonofabitch."⁴⁸ And in *Ward v. Village of Monroeville*, by fining more traffic offenders, the mayor sitting as magistrate in Mayor's Court would directly—and with certainty—further his responsibilities for revenue production and law enforcement.⁴⁹

⁴² See *id.* at 2.

⁴³ See *id.* at 17 (arguing that "Justice Benjamin[s] . . . debt of gratitude in this case is not diminished by Mr. Blankenship's use of independent expenditures, rather than direct contributions"); see *id.* at 34 (acknowledging that "Justice Benjamin[s] . . . 'campaign was completely independent of any independent expenditure group,' including And For The Sake Of The Kids") (citation omitted).

⁴⁴ See *id.* at 7 ("Mr. Blankenship had donated \$2,460,500 to And For The Sake Of The Kids" and "spent another \$517,707 of his personal funds on independent expenditures").

⁴⁵ See, e.g., *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

⁴⁶ See generally *Tumey v. Ohio*, 273 U.S. 510 (1927).

⁴⁷ See generally *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

⁴⁸ *Mayberry v. Pennsylvania*, 400 U.S. 455, 456–57 (1971).

⁴⁹ *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

Whether Justice Benjamin would have won but for Blankenship's actions, on the other hand, is highly speculative. Setting aside any actions by Blankenship, Benjamin raised over \$800,000 for his campaign. Other groups and individuals besides Blankenship made hundreds of thousands of dollars in independent expenditures. Every daily newspaper in the state save one endorsed Benjamin for the office. Moreover, having been elected to office with no quid pro quo or even vague understanding owed to Blankenship, Benjamin could not be at all certain that his reelection more than eight years hence would result if he ruled for Massey Coal—particularly if Blankenship were the unscrupulous and ruthless character, lacking in loyalty or fair play, that the press and Caperton himself portrayed. The idea that Justice Benjamin would obtain a “direct, personal, substantial, pecuniary” benefit by finding for Massey Coal is at best “highly speculative.”⁵⁰

Despite the press reports suggesting otherwise, Brent Benjamin did not “get” \$3 million. The most that can be said that he “got” was elected, though this was necessarily the result of many factors, not the least of which were the intervening decisions of hundreds of thousands of West Virginia voters. While candidate Benjamin could control contributions made directly to his campaign account (and had the ability to refund them), he had no control over independent expenditures made by third parties, and no ability to refuse or refund them. Nothing in the record supported the conclusion that Justice Benjamin's ruling was a payoff for Blankenship's spending. And as the independent expenditures—made two years before this case ever reached the West Virginia Supreme Court—could not be undone, Blankenship could neither withhold nor demand refund of the \$3 million he had spent had Justice Benjamin ruled against Massey in the underlying appeal. As it is said in contract law, more in recognition of reality than as an aspiration, “Past consideration is no consideration.”⁵¹ That statement is at least equally true when, as in *Caperton*, there was not even the allegation of an agreement between the Blankenship and Benjamin.

⁵⁰ Lavoie, 475 U.S. at 822 (citation omitted), 826.

⁵¹ See, e.g., *Murray v. Lichtman*, 339 F.2d 749, 752 n.5 (D.C. Cir. 1964) (citing *Glascok v. Comm'r of Internal Revenue*, 104 F.2d 475, 477 (4th Cir. 1939) and 1 *Williston on Contracts* § 142 (3d ed. 1957)).

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Furthermore, if reelection or defeat were all that was at stake for Justice Benjamin eight years hence, Benjamin's actions, the resulting media firestorm, and anger throughout West Virginia and many quarters of this nation, may far from ensure his reelection but rather damage his prospects for it. In short, Benjamin's failure to recuse in *Caperton* may actually make him vulnerable at reelection time.⁵²

⁵² See, e.g., Allan N. Karlin & John Cooper, Editorial, Perception That Justice Can Be Bought Harms the Judiciary, *The Sunday Gazette Mail* (Charleston, W. Va.), Mar. 2, 2008, at 3C ("It is time to say publicly what attorneys across the state are saying privately: Justice Brent Benjamin needs to . . . step down from hearing cases involving Massey Energy and its subsidiaries. His continued involvement in Massey litigation endangers the public perception of the integrity of the Supreme Court of Appeals."); Editorial, Finally, *Register Herald* (Beckley, W. Va.), Feb. 18, 2008 ("Benjamin clearly was aided by Blankenship's multi-million dollar campaign against incumbent Warren McGraw and even[] though the justice has stated unequivocally he isn't influenced by Blankenship, it just doesn't look good."); Editorial, Bravo, *Charleston Gazette* (W. Va.), Feb. 16, 2008, at 4A ("Benjamin remains the only Massey-connected justice still presiding over Massey cases. Clearly, for the sake of impartiality, he should . . . recus[e] himself from all Massey cases."); William Kistner, Justice for Sale, *American RadioWorks* (2005), available at <http://americanradioworks.publicradio.org/features/judges> ("One of [Justice Benjamin's] major backers was the CEO of Massey Energy Company, the largest coal producer in the region. The company happened to be fighting off a major lawsuit headed to the West Virginia Supreme Court. That prompted many in these parts to say that Massey was out to buy itself a judge."); Cecil E. Roberts, Editorial, Blankenship's Hollow Rhetoric: His Money Defeated McGraw, Now He Must Help Miners, *Charleston Gazette* (W. Va.), Dec. 13, 2004, at P5A ("Give us a break, Don. . . . The real reason you bought the state Supreme Court seat is because Massey will soon stand before that court to try to rid itself of a \$50 million jury penalty for putting . . . Harman Mining, out of business."); Edward Peeks, Editorial, How Does Political Cash Help Uninsured?, *Charleston Gazette* (W. Va.), Nov. 9, 2004, at 2D ("[T]hese voices raise the question of vote buying to a new high in politics. . . . It's a new day in political campaign financing for party, candidate and message by any and every means. . . . [T]he U.S. Supreme Court has said spending one's money on a political message is a right of free speech."); Brad McElhinny, Next Court Race Could Be Just As Nasty: Justice Larry Starcher Could Be a Target in 2008 If He Seeks To Stay on Bench, *Charleston Daily Mail* (W. Va.), Nov. 4, 2004, at 1A (quoting former West Virginia Supreme Court Justice Richard Neely as stating: "It's an absolute disaster for the judiciary. . . . Now every seat on the Supreme Court is for sale. . . . Judges will be required to dance with the one that brought them. . . . When someone like Don Blankenship offers you \$3 million, you can't turn it down."); Carol Morello, W. Va. Supreme Court Justice Defeated in Rancorous Contest, *Wash. Post*, Nov. 4, 2004, at A15 (quoting Beth White, a coordinator with West Virginia Consumers for Justice, a group that ran pro-McGraw ads during the campaign, as stating: "It proves that West Virginia Supreme Court seats were for sale."); Cf. Adam Liptak, Judicial Races in Several States Become Partisan Battlegrounds, *N.Y. Times*, Oct. 24, 2004, at A1; Paul J. Nyden, Coal Companies Provide Big Campaign Bucks: Brent

Justice Benjamin was almost certainly aware of this at the time he heard the Massey matters, both on the merits and in recusal motions. As Justice Sandra Day O'Connor has stated while criticizing the election of judges generally, "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."⁵³ For years, in the face of numerous studies that have found that campaign contributions play no statistically significant role in legislator behavior,⁵⁴ those favoring restrictions on political speech in the form of campaign contributions and independent expenditures have argued that the influence to be feared comes in issues outside the limelight.⁵⁵ If, however, there was ever a judicial "issue" of high public interest, the *Caperton* case was it. Justice Benjamin will face a tough reelection contest for his alleged role in the Massey affair and his failure to recuse—and he knew it at the time he decided not to do so.⁵⁶ If we are to presume a bias or a "probability of bias," it would as likely have been to rule *against* Massey in the underlying action, not for it.

In reaching its decision, the Court stepped well beyond its pecuniary-interest and contempt-proceeding precedents to broaden due process violations to ill-defined areas.

***Caperton's* Effects on Campaign Finance**

For all the problems the Court's opinion may create for due process jurisprudence and judicial credibility, the remaking of due process

Benjamin Raking in Heaviest Contributions, *Charleston Gazette* (W. Va.), Oct. 15, 2004, at 1A.

⁵³ White, 536 U.S. at 789 (O'Connor, J., concurring).

⁵⁴ See Stephen Ansolabehere, John de Figueiredo, and James M. Snyder Jr., Why Is There So Little Money in U.S. Politics?, 17 *J. Econ. Perspectives* 105 (2003); see also Stephen Ansolabehere, Rebecca Lessem & James M. Snyder, Jr., The Orientation of Newspaper Endorsements in U.S. Elections, 1940–2002, 1 *Q. J. of Pol. Sci.* 393, 394 & n.2 (2006) (collecting citations and data from a number of studies, and observing that a "range of studies of aggregate election results, survey data, and laboratory experiments find that when endorsements occur they typically increase the vote share of the endorsed candidate by about 1 to 5 percentage points").

⁵⁵ See e.g., E. Joshua Rosenkranz, Faulty Assumptions in 'Faulty Assumptions', 30 *Conn. L. Rev.* 867, 879 (1998) (arguing that studies showing that campaign contributions have little effect on a legislator's behavior should be disregarded because the influence of contributions is found in "stealth issues . . . on which public attention is not focused").

⁵⁶ See Brief of Center for Competitive Politics as Amicus Curiae in Support of Respondents at 11, *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22, 129 S. Ct. 2252 (2009).

jurisprudence may be the less interesting dynamic at play in the *Caperton* case. Indeed, we believe that the real issue in the case, for much of the press, for the American Bar Association, and certainly for some amici, was to chip away at judicial elections in general and at constitutional protections for independent expenditures for all elections in particular.

Caperton argued in the Supreme Court that “[t]he likelihood that Justice Benjamin harbored, and sought to repay [a] debt of gratitude . . . is *not diminished* by Mr. Blankenship’s use of independent expenditures, rather than direct contributions, to furnish his financial support.”⁵⁷

Since *Buckley v. Valeo*,⁵⁸ however, the Court has repeatedly held that independent expenditures, such as those made by Blankenship in the Benjamin-McGraw race, cannot be limited by the legislature.⁵⁹ Contribution limits “prevent[] corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions,” says *Buckley*, “while leaving persons free to engage in independent political expression and to associate actively through volunteering their services.”⁶⁰

Further, the *Buckley* Court noted that, “Unlike [direct candidate] contributions, . . . independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”⁶¹ As the Court explained, the “absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be

⁵⁷ Brief of Petitioner, *supra* note 5, at 17 (emphasis added).

⁵⁸ 424 U.S. 1 (1976).

⁵⁹ The single narrow exception to this statement, so-called “corporate-form corruption,” is not applicable to this case. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (identifying the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas” as “a different type of corruption”).

⁶⁰ 424 U.S. at 25, 28.

⁶¹ *Id.* at 46.

given as a quid pro quo for improper commitments from the candidate.”⁶² The Court’s analysis retains its validity today. For example, Professor Roy Schotland has documented numerous instances in which independent expenditures in state judicial elections have backfired against the preferred candidate.⁶³ Judicial elections are elections, no less so than any other. “The difference between judicial and legislative elections” is “greatly exaggerate[d],” and “the First Amendment does not permit . . . leaving the principle of elections in place while preventing . . . discuss[on concerning] what the elections are about.”⁶⁴

Therefore, even under a “probability of bias” standard to determine whether judicial recusal was mandated by the Fourteenth Amendment’s Due Process Clause, independent expenditures should not create a “probability of bias,” just as independent expenditures do not create “corruption” or even the “appearance of corruption.” The *Buckley* Court held that “large independent expenditures . . . do[] not . . . appear to pose dangers of real or apparent

⁶² *Id.* at 46–47. In his brief to the Supreme Court, Caperton mischaracterized and attempted to rely on a statement from *Federal Election Commission v. Wisconsin Right to Life, Inc.* (WRTL II), 127 S. Ct. 2652, 2672 (2007), to assert that “there is no reason to believe Justice Benjamin is any less likely to feel a debt of gratitude to Mr. Blankenship because . . . his financial support was provided through” wholly independent, rather than direct, means. See *Brief of Petitioners*, *supra* note 41, at 34 (quoting WRTL II, 127 S. Ct. at 2672). In *WRTL II*, Chief Justice John Roberts wrote: “We have suggested that this interest [in preventing corruption] might also justify limits on electioneering expenditures because it may be that, in some circumstances, ‘large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions.’” 127 S. Ct. at 2672 (quoting *Buckley*, 424 U.S. at 45). Chief Justice Roberts, in turn, was quoting *Buckley*, which stated: “First, assuming, *arguendo*, that large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions, [FECA’s expenditure limit] does not provide an answer that sufficiently relates to the elimination of those dangers.” 424 U.S. at 45. So what the Court has really said on the topic is not the unequivocal statement that “in some circumstances, large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions,” but rather the equivocal statement that, *for the purpose of argument*, the Supreme Court has *suggested* that the interest in combating corruption *might* justify *some* limits on expenditures because it *may* be, in *some* circumstances, that they pose a risk of corruption. And then this Court proceeded to strike down expenditure limits in FECA.

⁶³ See, e.g., Roy A. Schotland, Comment on Professor Carrington’s Article “The Independence and Democratic Accountability of the Supreme Court of Ohio,” 30 *Cap. U. L. Rev.* 489, 490 (2002).

⁶⁴ See generally *Republican Party of Minnesota v. White*, 536 U.S. 765, 784–88 (2002).

corruption comparable to those identified with large [direct] campaign contributions.”⁶⁵ So long as a state chooses its judges by popular election, those elections must include the speech of independent speakers. The “power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the state chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”⁶⁶ According participants the free speech and association rights that attach to their roles in judicial elections is no violation of due process, for history shows that “[j]udicial elections were generally partisan during” the 19th and early 20th centuries, with “the movement toward nonpartisan judicial elections not even beginning until the 1870s.”⁶⁷

Caperton argued, however, that Blankenship’s, “strong personal and professional interest in the outcome of the case . . . created a compelling reason for Justice Benjamin to [have and] repay [a] debt of gratitude to Mr. Blankenship by casting the deciding vote in Massey’s favor.”⁶⁸ In short, Caperton argued that candidate Benjamin “benefited” from Blankenship’s spending, was “grateful” for it, and, thus, was *compelled* to repay Blankenship for it.

Before *Caperton*, the U.S. Supreme Court had explicitly rejected the argument that Congress may restrict the funding of independent activity that merely “benefits” a candidate.⁶⁹ The related argument—

⁶⁵ Federal Election Comm’n v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 497 (1985) (“In *Buckley* we struck down the FECA’s limitation on individuals’ independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption. For similar reasons, we also find [the current] limitation on independent expenditures . . . to be constitutionally infirm.”).

⁶⁶ White, 536 U.S. at 788 (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (citation omitted).

⁶⁷ *Id.* at 785.

⁶⁸ Brief of Petitioner at 17, *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22, 129 S. Ct. 2252 (2009).

⁶⁹ See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 156 n.51 (2003) (“Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a benefit on the candidate.”) (emphasis in original) ; see also *id.* at 354–55 (Rehnquist, C.J., dissenting). That the independent groups addressed were members of the institutional press is of no constitutional significance. “[The] purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print

that Justice Benjamin's alleged "gratitude" for Blankenship's independent expenditures caused Justice Benjamin to be unconstitutionally biased on behalf of Massey—would prove too much. Its logic can be extended to find "bias" in any of a range of other independent political activity, in multiple forms and from multiple actors, long recognized as vital to democracy. A group of community organizers that work to get out the vote in neighborhoods that disproportionately support a candidate would "benefit" that candidate and may make him "grateful." But would it violate due process to have those organizations appear in a case before him? What about the community members who lead or participate in the organization?

Candidates may enjoy disproportionate popularity among environmentalists, or women, or union members, or residents of a certain geographical area, etc.; the votes of such interest groups are also valuable to the candidate. Does it violate due process for a judge to sit in a case where these organizations, or their members or supporters, appear before him?

Millions of dollars were spent by non-profit organizations in West Virginia opposing candidate Benjamin. One independent opponent organization, West Virginia Consumers for Justice, received approximately \$2 million in contributions, including approximately \$1.5 million from members of the plaintiffs' bar, as well as \$10,000 from Caperton himself and \$15,000 from the law firm that represented him.⁷⁰ There were other independent groups besides those supported by Blankenship that opposed McGraw. Citizens for Quality Health Care, funded in part by the West Virginia Chamber of Commerce, spent nearly \$370,000 on anti-McGraw advertisements.⁷¹ Citizens Against Lawsuit Abuse also ran critical ads.⁷² Would it violate the

what they will as well as to utter it. '[The] liberty of the press is no greater and no less' than the liberty of every citizen of the Republic." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) (internal quotation marks and citation omitted)).

⁷⁰ See John O'Brien, *Caperton Was Anti-Benjamin From the Start*, W. Va. Record, Jan. 24, 2008, available at <https://wvrecord.com/news/206942-caperton-was-anti-benjamin-from-the-start>.

⁷¹ See Paul J. Nyden, *Coal, Doctors' Groups Donated to Anti-McGraw Effort: Massey President Donald Blankenship Remains Largest Donor*, *Charleston Gazette*, Jan. 7, 2005, at P5A.

⁷² See Juliet A. Terry, *Benjamin Hopes to Shine Light on Justice*, *State J.*, Nov. 5, 2004, at 4.

Fourteenth Amendment's Due Process Clause if Justice Benjamin—or Justice Warren McGraw had he won—were to hear a case involving any of these parties? Or heard a matter involving any of their contributors, members, volunteers, or supporters?

Judicial candidates and officeholders often feel gratitude toward media outlets that endorse their candidacies. Studies of the electoral effects of newspaper endorsements indicate that such endorsements are typically worth between one and five percentage points to a candidate.⁷³ Again, by this logic media outlets could not be permitted to appear before the West Virginia Supreme Court—or, for that matter, any elected bench—against another party while they continue their tradition of judicial candidate endorsements, lest the media outlets open the door to “bias” or its “appearance.”

Evidence, suggests, however, that the public does not perceive “gratitude” or an “appearance of gratitude” to be the pervasive problem asserted by Caperton. A survey conducted by Rasmussen Reports in 2008 found that, “55% believe media bias is more of a problem than big campaign contributions” while just 36% disagree.⁷⁴ The survey also found that just “22% believe it would be a good idea to ban all campaign commercials so that voters could receive information on . . . campaign[s] only from the news media and the internet. Sixty-six percent (66%) disagree and think that . . . it's better to put up with an election-year barrage of advertising rather than rely on the news media.”⁷⁵

Nonetheless, Caperton asserted that “if a litigant’s or attorney’s campaign support for a judge generates an objective probability of bias in favor of one of the parties to a case, due process requires the judge’s recusal.”⁷⁶ In one sense, this assertion merely begged the

⁷³ Stephen Ansolabehere, Rebecca Lessem & James M. Snyder Jr., *The Orientation of Newspaper Endorsements in U.S. Elections, 1940–2002*, 1 Q. J. of Pol. Sci. 393, 394 & n.2 (2006) (collecting citations and data from a number of studies, and observing that a “range of studies of aggregate election results, survey data, and laboratory experiments find that when endorsements occur they typically increase the vote share of the endorsed candidate by about 1 to 5 percentage points”).

⁷⁴ Rasmussen Reports, *55% Say Media Bias Bigger Problem than Campaign Cash*, Aug. 11, 2008, available at http://www.rasmussenreports.com/public_content/politics/election_20082/2008_presidential_election/55_say_media_bias_bigger_problem_than_campaign_cash.

⁷⁵ *Id.*

⁷⁶ Brief of Petitioner, *supra* note 41, at 27.

question: does independent campaign support, “generate[] an objective probability of bias”? The Court’s campaign finance jurisprudence would seem to say no. Moreover, the assertion had already been addressed and rejected by the Court in *White*, when it ruled that, “if . . . it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process.”⁷⁷ But clearly the practice of electing judges is not a violation of due process. Indeed, it is no violation of the federalism principles embodied in the U.S. Constitution.

Another problem with the Court’s decision can be found in considering what would have occurred had Justice McGraw won reelection. Whatever recusal standard would apply to Justice Benjamin would presumably apply equally to his opponent, for in a system of winner-take-all elections, whether the \$3 million was spent independently to support the judicial candidate or to oppose him matters little to the perceived impartiality of the judge. The flip side of spending for Benjamin is spending against McGraw; the flip side of “gratitude” is anger and revenge; of “benefit,” harm. Surely if Justice Benjamin’s involvement created an appearance of bias, so would that of Justice McGraw, the target of Blankenship’s expenditures—only the bias would then have been against Massey Coal instead of for it. Caperton and his amici argued that Blankenship set out to “change the composition” of the West Virginia Supreme Court that would hear Massey’s appeal.⁷⁸ Beyond the implied suggestion that this was somehow an illegitimate goal, it should be apparent that under the Court’s due process and recusal theory, Blankenship would have been guaranteed success in this endeavor, as his independent speech would have rid him of incumbent Justice Warren McGraw in either case! Under the Court’s ruling, either recusal will be a one-way street, or the Blankenships of the world will know how to rid themselves of their Justices McGraw.

Caperton argued that “the timing of Mr. Blankenship’s campaign support strongly suggests that it was intended to influence the outcome of this \$50 million appeal.”⁷⁹ One may certainly conclude that

⁷⁷ *White*, 536 U.S. at 782.

⁷⁸ Brief of Petitioner, *supra* note 5, at 1.

⁷⁹ *Id.*

Blankenship *intended* to defeat incumbent McGraw, or even that Blankenship *intended* that his spending would result in the election of a judge more likely than incumbent Justice McGraw to overturn a verdict in the Massey case. This is, after all, the “intent” of any independent speaker in any election campaign: to defeat one candidate for office and elect another, and many such speakers often “intend”—or at least hope—that after an election the policy or approach of one public official will end and that another will take its place. But historically, the Court has held that “a speaker’s motivation is entirely irrelevant to the question of constitutional protection.”⁸⁰

The Supreme Court in *Buckley* has “already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates.”⁸¹ It should have rejected a test that measures the intent of speakers acting wholly independently of an adjudicator to decide which recusal motions must be granted or rejected under the Fourteenth Amendment’s Due Process Clause. Chief Justice John Roberts argued in his plurality opinion in *Wisconsin Right to Life II*, a test focused on the speaker’s intent could lead to the “bizarre result” that identical ads aired at the same time would be limited for one speaker, but not for another. Similarly, if intent of the spender matters to the due process analysis, identical ads costing the same amount would cause no bias and require no recusal for one group of litigants, but would create bias and demand recusal for another.⁸²

If Independent Expenditures Can Cause “Bias” in a Judge, Might They Cause “Corruption” in a Legislator?

“Corruption,” as defined in *Buckley*, is the danger of quid pro quo arrangements.⁸³ “Bias,” as delineated in this Court’s opinions, seems strikingly similar. For example, in *Tumey v. Ohio*, bias was found when an adjudicator earned a percentage of the penalty upon finding bootleggers guilty.⁸⁴ In *Aetna Life Ins. Co. v. Lavoie*, the Court mandated recusal where a judge upheld the constitutionality of bad-faith claims against all insurers *for* damages while he had pending

⁸⁰ WRTL II, 127 S. Ct. at 2665–66 (citation omitted).

⁸¹ *Id.* at 2665 (citing *Buckley*, 424 U.S. at 43–44).

⁸² *Id.* at 2666.

⁸³ See 424 U.S. at 26–27.

⁸⁴ 273 U.S. 510 (1927).

his own bad-faith claim against his insurer.⁸⁵ Bias has also been found where a judge found a man guilty *to burnish* his reputation as a one-man grand juror,⁸⁶ or fined a defendant *to burnish* his reputation as the municipality's revenue generator and law enforcer.⁸⁷

But the activity captured in the "bias" standard is more acute or insidious than the activity captured by the "corruption" standard because bias requires a direct, substantial, personal or pecuniary interest in reaching a conclusion against a litigant in the case.⁸⁸ Campaign contributions, however, *cannot* convey a direct, personal, or pecuniary interest in the legislative candidate—campaign finance law forbids it.⁸⁹ Bribery, the sale of votes for personal benefit, covers legislators and is already illegal, as the *Buckley* Court acknowledged when it held that limiting campaign contributions serves a compelling state interest that goes beyond bribery statutes.⁹⁰

Independent expenditures, on the other hand, have historically not been found to pose a threat of "corruption" or the "appearance of corruption"; the *Buckley* Court was clear about that when it said that "[u]nlike contributions, . . . independent expenditures may . . . provide little assistance to the candidate's campaign and . . . may prove counterproductive."⁹¹ Therefore, we are left with the following propositions: (1) Independent expenditures in legislative elections do not pose a threat of "corruption or its appearance"; (2) the "corruption or its appearance" standard must mark activity short of conferring personal benefits on the legislator supported, for the reasons discussed above; but (3) "bias" in the judiciary, *does* require a direct, personal, pecuniary benefit to judge once elected; and yet, after *Caperton*, (4) independent expenditures cause "bias or its probability" in a judge.

The holding in *Caperton*, and the resulting jumble of propositions, suggests that if independent expenditures create the probability of

⁸⁵ 475 U.S. 813 (1986).

⁸⁶ *In re Murchison*, 349 U.S. 133 (1955).

⁸⁷ *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

⁸⁸ See, e.g., *Tumey*, 273 U.S. at 523; accord *Lavoie*, 475 U.S. at 822.

⁸⁹ Federal campaign finance law prohibits the use of contributions for the personal benefit of any person. See 2 U.S.C. § 439a.

⁹⁰ 424 U.S. at 27–28.

⁹¹ 424 U.S. at 47.

bias, they must also create at least the “appearance of corruption,” that is, the possibility that political actors will respond to the wishes of donors rather than constituents.

Indeed, it would seem that if independent expenditures can create “bias” or its “probability” in a judge, then the edifice the Court has painstakingly erected to shelter independent political speakers from the threat of government-imposed limitations would collapse. For if independent expenditures would create the greater, more direct, personal, substantial, pecuniary benefit necessary to a finding of “bias,” then independent expenditures must always create the lesser potential benefit necessary to a finding an “appearance of corruption,” leading inexorably—if taken seriously—to the overruling of *Buckley*, as well as of *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*,⁹² and of *Randall v. Sorrell*.⁹³

The difference between the judicial and legislative functions is a weak distinction for finding that independent expenditures that cannot create a threat of quid pro quo in a legislator *must* create a direct, personal or pecuniary interest in a judge. While it is true that a judge has absolutely no interest in the outcome of the dispute on the specific parties before the bench, in fact judges are increasingly called upon to interpret statutes and constitutional provisions in ways that broadly affect public policy. At the same time, in an age of legislative earmarking, where benefits are granted or denied to specific members of society after intense lobbying and deliberation in much the same way that victory or defeat is given to parties arguing before a court, a tribunal may infer that independent expenditures that would cause bias in a judge must cause corruption in a legislator.

While the Supreme Court has never “assert[ed] nor impli[ed] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,”⁹⁴ we must recognize that if

⁹² 479 U.S. 238 (1986) (contribution limits on independent expenditures funded by individuals unconstitutional).

⁹³ 548 U.S. 230 (2006) (expenditure limits on candidate speech unconstitutional). Moreover, should independent expenditures become limited or prohibited on such a basis, *Buckley*'s holding regarding limits on contributions to candidate campaigns must be reexamined, for that holding relied in part on the idea that First Amendment burdens were minimized because speakers could still make independent expenditures. *Buckley*, 474 U.S. at 28.

⁹⁴ *White*, 536 U.S. at 783.

the mere existence of an independent expenditure campaign in a judicial election creates an unconstitutional threat of “bias” or its “appearance” in a judge, then courts are likely, over time, to infer that the mere existence of independent expenditures in legislative elections must create the threat of “corruption” or its “appearance” in legislators. The *Caperton* Court should have avoided the confusion and the unavoidable weakening of protections for core independent political speech that would flow from such a holding under the Fourteenth Amendment’s Due Process Clause.

We think it fair to suggest that for some of the amici that supported *Caperton*, this case was less about due process than about getting the Court to overrule *sub rosa Buckley*’s protections for independent expenditures in election campaigns⁹⁵ despite the Court’s repeated

⁹⁵ We cannot help but suggest that petitioners’ amici are champing at the bit for any finding in the affirmative, to the eventual detriment of the line drawn consistently by the Court since *Buckley*. Such amici have participated in most any and every effort to impose or further campaign expenditure and/or contribution limits for independent speakers. See, e.g., *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2859 (2008) (Democracy 21, Campaign Legal Center, Brennan Center for Justice, and Public Citizen Amicus Br.); *Federal Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (Brennan Center for Justice Amicus Br.); *Randall v. Sorrell*, 548 U.S. 230 (2006) (Brennan Center for Justice Amicus Br.) (Campaign Legal Center, Democracy 21, and Public Citizen Amicus Br.); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (Brennan Center for Justice, Campaign Legal Center, Democracy 21, and Public Citizen for Intervenor-Defendants Br.) (Center for Responsive Politics Amicus Br.) (Common Cause and AARP Amicus Br.); *Federal Election Comm’n v. Beaumont*, 539 U.S. 146 (2003) (Public Citizen, Common Cause, Democracy 21, Campaign and Media Legal Center, and Center for Responsive Politics Amicus Br.); *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087 (9th Cir. 2008) (Campaign Legal Center Amicus Br.); *Duke v. Leake*, 524 F.3d 427 (4th Cir. 2008) (Campaign Legal Center Amicus Br.); *North Carolina Right to Life, Inc. v. Leake*, 482 F. Supp. 2d 686 (E.D.N.C. 2007) (Campaign Legal Center and Democracy 21 Amicus Br.), *aff’d in part and rev’d in part*, 525 F.3d 274 (4th Cir. 2008); *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, No. 3:08-CV-483, 2008 U.S. Dist. LEXIS 73551 (E.D. Va. 2008) (Campaign Legal Center and Democracy 21 Amicus Br.), appeal pending, No. 08-1977 (4th Cir. notice of appeal filed Sept. 12, 2008, briefing completed Nov. 12, 2008) (Campaign Legal Center and Democracy 21 Amicus Br.); *Ohio Right to Life Society, Inc. v. Ohio Elections Comm’n*, No. 2:08-CV-492, 2008 U.S. Dist. LEXIS 79165 (S.D. Ohio 2008) (Campaign Legal Center and Ohio Citizen Action Amicus Br.); *SpeechNow.org v. Fed. Election Comm’n*, 567 F. Supp. 2d 70 (D.D.C. 2008) (Campaign Legal Center and Democracy 21 Amicus Br.); *Committee on Jobs Candidate Advocacy Fund v. Herrera*, No. C 07-3199 JSW, 2007 U.S. Dist. LEXIS 73736 (N.D. Cal. 2007) (California Clean Money Campaign, California Common Cause, Campaign Legal Center, and Center for Governmental Studies Amicus Br.).

rejection of their overtures in *Randall*, *MCFL*, and *California Medical Association v. Federal Election Commission*,⁹⁶ all the way back to *Buckley*.

As one of these amici in *Caperton* breezily said to the Court, “*distinctions* between contributions and expenditures have only marginal salience when it comes to the fundamental fairness concerns at the core of due process,” and that “[t]his case . . . allows the Court to resolve the due process issues *without any need for inquiry* into the permissibility of restrictions on expenditures supporting a candidate vis-à-vis contributions to a candidate.”⁹⁷

But the distinction is an important one, even in matters of due process. And, if the question of protections for independent speech arise in the future, we would expect these amici to cite *Caperton* for the proposition that independent political expenditures enjoy less constitutional protection.

Can *Caperton* Be Cabined?

The Court began with a broad “standard” in *Caperton*:

We conclude that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.⁹⁸

Kennedy, who wrote the majority opinion in *Caperton*, has stated that “[j]udicial integrity is . . . a state interest of the highest order.”⁹⁹

See also Brennan Center for Justice, *If Buckley Fell: A First Amendment Blueprint for Regulating Money in Politics* (2000).

⁹⁶ 453 U.S. 182, 203 (1981) (Blackmun, J., concurring) (contribution limits on independent expenditures funded by individuals unconstitutional).

⁹⁷ Brief for the Brennan Center for Justice at NYU School of Law, The Campaign Legal Center, and The Reform Institute as Amicus Curiae In Support of Petitioners at 23, *Caperton v. A.T. Massey Coal Co., Inc.*, No. 08-22, 129 S. Ct. 2252 (2009) (emphasis added).

⁹⁸ *Caperton*, 129 S. Ct. at 2263–64.

⁹⁹ *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (Kennedy, J., concurring).

At the same time, Kennedy has been one of the Court's strongest voices for free speech in the realm of campaign finance.

Thus it is almost certainly no accident that Kennedy's *Caperton* opinion struggles to define the case as an outlier that should have no broad precedential value. Interestingly, the *Caperton* opinion did not describe Blankenship's spending as what it was: "independent expenditures." Instead, it repeatedly referred to Blankenship's spending as "contributions." This use of nomenclature may allow the Court to escape the logical problems for the protection of independent expenditures that seem to have been created by the ruling in *Caperton*. Justice Kennedy's opinion for the majority shows every sign of attempting to side for *Caperton* and Harman Coal while saving the Court's traditional distinction between independent expenditures and contributions in the campaign finance realm.

For openers, as noted, Kennedy goes along with the popular press descriptions of the facts and some of the briefs supporting *Caperton*. These descriptions, as we have noted, routinely describe Blankenship's activity in terms of "contributions," "contributed," etc., and Justice Kennedy's opinion likewise calls Blankenship's expenditures "contributions." Collapsing the distinction may reflect poor draftsmanship or even a poor understanding of the facts. It may even reflect a willingness to abandon the contribution/expenditure distinction at the center of post-*Buckley* campaign finance law. But we are inclined to believe the possibility that it is intentional, accepting the plaintiff's legally inaccurate description of the facts in order to avoid doing damage to the Court's traditional protection for independent expenditures.

It is also worth noting that the majority opinion has no concurrences from the Court's liberals—not even from Justice John Paul Stevens, who has long criticized the contribution/expenditure distinction from a pro-regulatory viewpoint. None wrote to say, "This is the problem with independent spending in campaigns." Perhaps, even, Justice Kennedy would not have allowed it.

Whatever the reasons for accepting the language of "contributions" rather than the factually correct language of "expenditures," Kennedy works valiantly to describe the case as a one-of-a-kind endeavor. Eight times he refers to the facts as "extreme" five times he references their "extraordinary" nature, and his opinion eventually notes that the *Caperton* case is one a kind, a *Bush v. Gore* of due

process law: “The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.”¹⁰⁰

Whether Kennedy’s effort to limit *Caperton* to its “extreme” facts will succeed may depend on the interpretation given the case by lower courts and the first few, if any, “*Caperton* motions” to reach the Supreme Court. If the case is interpreted narrowly, *Caperton* motions may be a brief phenomenon, though sporadic cases can be expected to test the limits of *Caperton* over time. As Chief Justice Roberts noted, *Caperton* raises many more questions than it answers.¹⁰¹ And Justice Antonin Scalia is correct that the *Caperton* majority runs into trouble by believing every perceived injustice can be cured by constitutional law.¹⁰² But if *Caperton* motions are regularly granted, they will become a normal weapon in legal practice, and over time each such motion will argue for a racheting down of the type of factual situation requiring recusal.

While due process will never take a backseat to other constitutional considerations, judicial elections, even as we have known them, seem relatively safe for now. *White* makes clear that the standard for speech in judicial elections is strict scrutiny,¹⁰³ and there is little reason to think that *Caperton* will drive the Court to invalidate the states’ power to choose judges by elections rather than by appointments. Nevertheless, if the Court were ever to accept greater limits on speech in judicial elections, the seed of such a decision will have been planted in *Caperton*.

As to whether *Caperton* marks an intention or a willingness to undermine the Court’s campaign finance jurisprudence, we may soon know. Despite its choice of nomenclature—“contributions” instead of “expenditures”—the risk with *Caperton* is that it will cast doubt upon the constitutionality of independent expenditures in judicial, legislative, and executive elections. If independent expenditures can cause bias in a judge, why can’t they cause corruption in a legislator?

¹⁰⁰ *Caperton*, 129 S. Ct. at 2265 (emphasis added).

¹⁰¹ *Id.* at 2267.

¹⁰² *Id.* at 2275.

¹⁰³ *Republican Party of Minnesota v. White*, 536 U.S. 765, 774–75 (2002).

This term, in *Citizens United v. Federal Election Commission*,¹⁰⁴ the Court took the unique step of ordering reargument and supplemental briefing on the questions of overruling *Austin v. Michigan Chamber of Commerce*¹⁰⁵ and the part of *McConnell v. Federal Election Commission*¹⁰⁶ that upheld a ban on pre-election advertising paid for by corporations and unions that was premised on *Austin*. Citizens United ran a video-on-demand documentary criticizing then-presidential primary candidate, Hillary Rodham Clinton. The FEC pulled the plug on *Hillary: The Movie* because the film ran over satellite television too close to a primary election and was paid for with corporate funds. In other words, independent communications were banned, despite their independence.

If the Court takes the opportunity to overrule *Austin*, as we believe it should, it would have to do so based on the independence of the communications made by Citizens United: other rationales in *Austin*, such as the “corrosive and distorting effects of immense aggregations of wealth” obtained via the corporate form currently support contribution bans, rather than the contribution limits upheld in *Buckley*.¹⁰⁷ Therefore, if *Austin* falls, *Caperton*’s potential to damage protections for independent communications will be neutralized. If, on the other hand, the *Citizens United* Court retains *Austin*, the potential will remain that *Caperton* may one day be cited to remove constitutional protections for independent political speech. That this may occur over Justice Kennedy’s objection will be small solice to those who seek to protect free speech in political campaigns.

¹⁰⁴ *Citizens United v. FEC*, 129 S. Ct. 2893 (2009).

¹⁰⁵ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

¹⁰⁶ *McConnell v. FEC*, 540 U.S. 93 (2003).

¹⁰⁷ 494 U.S. at 660.