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JUDICIAL DISQUALIFICATION IN THE AFTERMATH OF *CAPERTON V. A.T. MASSEY COAL CO.*

Ronald D. Rotunda[†]

CONTENTS

INTRODUCTION	247
I. THE HISTORICAL DUE PROCESS REQUIREMENTS OF JUDICIAL DISQUALIFICATION BEFORE <i>CAPERTON</i>	249
A. <i>The Judge with a Direct Personal Financial Interest in the Case</i>	249
B. <i>The Judge Who Acts as Prosecutor, Jury, Complaining Witness, Victim, and Judge</i>	253
II. THE THIRD CATEGORY	255
A. <i>Campaign Contributions and Corrupt Justice—the Empirical Connection</i>	256
B. <i>Contributions to Candidates Versus Independent Expenditures by Individuals</i>	258
1. <i>A Debt of Gratitude</i>	263
III. BEYOND THE CONTRIBUTION-EXPENDITURE DISTINCTION	267
A. <i>The Complicated Scenarios that Lead to Caperton</i>	268
B. <i>Justice Benjamin in Other Cases Involving A.T. Massey</i> ...	270
C. <i>Blankenship’s Financial Exposure in Caperton</i>	271
D. <i>A Close Election?</i>	272
E. <i>Why McGraw Lost His Reelection Bid</i>	272
F. <i>The Lawyers’ and Newspapers’ Endorsements</i>	273
G. <i>McGraw’s “Scream at Racine”</i>	274
H. <i>“And for the Sake of the Kids”</i>	275
CONCLUSION.....	276

INTRODUCTION

While there are many statutory or judge-made rules governing judicial disqualification, the instances where the Constitution mandates judicial disqualification are few.¹ Historically, there have been two types of cases where the Supreme Court requires a judge to recuse himself under the Due Process Clause. First, the judge must recuse

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1. See discussion in RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* 1267-605 (2008).

himself if he has a “direct, personal, substantial pecuniary interest” in the case.² The second disqualification that the Due Process Clause mandates arises when a judge presides over a criminal contempt case that resulted from the defendant’s hostility towards the judge.³ That judge may not rule on the criminal contempt because no judge should simultaneously be prosecutor, complaining witness, jury and judge.⁴

That all changed in *Caperton v. A.T. Massey Coal Co.*⁵ A divided Court (five to four) held that

there is a serious risk of actual bias—based on objective and reasonable perceptions—when *a person with a personal stake in a particular case* had a significant and *disproportionate influence* in placing the judge on the case by raising funds or *directing the judge’s election campaign* when the case was pending or imminent. 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* 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.⁶

Four justices dissented and appeared to reject the common sense notion that there is an obvious problem of judicial bias when, “without . . . the consent [of the other parties]—*a man chooses the judge in his own cause*.”⁷ Why? As I explain below, it turns out that each of the italicized statements in the majority opinion is incorrect or seriously misleading.

Before considering this case further, let us look at the historical reasons for disqualification as a matter of constitutional law. Then, we can look at this case and try to understand what happened.

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

3. *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971).

4. *Id.* at 464-66.

5. 129 S. Ct. 2252, 2266 (2009).

6. *Id.* at 2263-64, 2265 (emphasis added).

7. *Id.* at 2265, 2267 (Roberts, J., dissenting) (emphasis added).

I. THE HISTORICAL DUE PROCESS REQUIREMENTS OF JUDICIAL DISQUALIFICATION BEFORE *CAPERTON*

A. *The Judge with a Direct Personal Financial Interest in the Case*

It has long been the rule that due process does not allow a judge to preside in a criminal case if he is “paid for his service only when he convicts the defendant.”⁸ Lawyers may charge contingent fees in tort cases because charging the fee does not conflict with the interests of the client; indeed, the contingency nature motivates the lawyer because she is only paid if she is successful. The inevitable motivation of the lawyer is congruent with the interests of the client. This inevitable motivation is why contingency fees are not appropriate for judges.

The leading case is *Tumey v. Ohio*.⁹ An Ohio state law provided that the mayor sat as a municipal judge when trying defendants accused of violating the Ohio Prohibition Act.¹⁰ This statute also stated that the mayor’s court has “final jurisdiction to try such cases upon such affidavits without a jury, unless imprisonment is a part to the penalty.”¹¹ The problem was that the mayor had a financial incentive to convict defendants.¹² The law made that clear:

Money arising from fines and forfeited bonds shall be paid one-half into the state treasury credited to the general revenue fund, *one-half to the treasury of the township, municipality or county where the prosecution is held*, according as to whether the officer hearing the case is a township, municipal, or county officer.¹³

Another law made the financial incentive to convict even clearer. It provided that the mayor should “retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases.”¹⁴ But there is “no way” that the mayor can collect his costs unless the mayor convicts the defendant.¹⁵

The end result was that the state was paying the municipal

8. *Tumey v. Ohio*, 273 U.S. 510, 531 (1927).

9. *Id.* at 520.

10. *Id.* at 516.

11. *Id.* at 517 (quoting OHIO REV. CODE ANN § 6212-18. (1926)).

12. *Id.* at 520.

13. *Tumey*, 273 U.S. at 517 (quoting OHIO REV. CODE ANN § 6212-19) (emphasis added).

14. *Id.* at 519.

15. *Id.* at 520. In *Connally v. Georgia*, 429 U.S. 245, 245, 251 (1977) (per curiam), the Court held that there was a violation of the Fourth and Fourteenth Amendments when a Georgia Justice of the Peace issued a search warrant, where that same Justice of the Peace was not salaried and his compensation was set up so that he earned a fee for issuing a warrant but nothing for denying a warrant.

judge/mayor based on his conviction rate!¹⁶ The municipal judge/mayor deprived defendants of due process when he heard their cases, because “the judge . . . has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case.”¹⁷

Similarly, *Ward v. Village of Monroeville* held that due process concerns prevented a mayor from sitting as a magistrate to hear ordinance violations and traffic offenses when the budget situation demonstrated that the mayor had an interest in “maintain[ing] the high level of contribution from the mayor’s court.”¹⁸ Between 1964 and 1968, the fines, forfeitures, costs and fees that the mayor’s court had imposed supplied between one-third and one-half of the Village of Monroeville’s annual revenue.¹⁹ One does not need a degree in particle physics to understand the mayor’s financial incentive to convict—the mayor also had responsibilities for revenue production and law enforcement—was inconsistent with his duties as a disinterested and impartial judicial officer.

This same financial rule applies to civil cases as well as criminal. Consider, for example, *Aetna Life Insurance Co. v. Lavoie*.²⁰ In that situation, the plaintiff submitted a health insurance claim to Aetna, which paid approximately half of the amount requested (\$1,650.22 out of \$3,028.25).²¹ Aetna refused to pay the remainder, claiming that the length of the hospitalization was unnecessary.²² When the plaintiff complained, the national office of Aetna instructed its local office to continue to deny the request for full payment, but “if they act like they are going to file suit,” then the office should reconsider.²³

Plaintiff sued, seeking compensatory damages—the unpaid bill of \$1,378.03—and “punitive damages for the tort of bad-faith refusal to pay a valid claim.”²⁴ The jury agreed and awarded \$3.5 million in punitive damages.²⁵ The Alabama Supreme Court affirmed (five to four) in an opinion written by Justice Embry.²⁶

16. See *Tumey*, 273 U.S. at 520.

17. *Id.* at 523.

18. 409 U.S. 57, 60 (1972).

19. See *id.* at 58.

20. 475 U.S. 813, 825 (1986).

21. *Id.* at 815.

22. *Id.*

23. *Id.* (internal quotation marks omitted).

24. *Id.* at 816.

25. *Lavoie*, 475 U.S. at 816.

26. *Id.*

2010] **Judicial Disqualification after *CAPERTON*** 251

The problem was that Justice Embry was more than a disinterested bystander to this lawsuit.²⁷ While the *Lavoie* case was pending before the Alabama Supreme Court, Justice Embry had himself filed two actions against other insurance companies making similar allegations and seeking punitive damages.²⁸ He refused to disqualify himself.²⁹

Chief Justice Burger, speaking for Supreme Court, held that due process would not require disqualification merely because of Embry's "general frustration with insurance companies."³⁰ Only "in the most extreme of cases" does the Constitution mandate disqualification for bias or prejudice, and "appellant's arguments [based on the judge's general hostility toward insurance companies] here fall well below that level."³¹ Many of us experience frustration with insurance companies, and that general reaction does not mandate disqualification.

However, Justice Embry exhibited much more than general hostility to insurance companies. The legal issue before the court did not involve a settled principle of law.³² This was the first case where the Alabama Supreme Court clearly established that the right of action upon which Justice Embry was seeking to rely in his own simultaneous litigation.³³ In fact, Justice Embry obtained a favorable settlement in his own lawsuit several months *after* the Alabama Supreme Court handed down its decision in *Lavoie*.³⁴

A decision that the judge rendered under these circumstances

27. *See id.* at 817.

28. *See id.*

29. While *Lavoie* was pending before Embry's court, he filed two lawsuits against insurance companies, both alleging the same cause of action: bad-faith refusal to pay a claim. *Id.* He sued Maryland Casualty Company because of its alleged failure to pay for the loss of a valuable mink coat. *Id.* His second lawsuit was a class action. *Id.* He was the class representative of a class of all Alabama state employees insured by a Blue Cross-Blue Shield of Alabama group plan. *Id.* This suit alleged "a willful and intentional plan to withhold payment on valid claims." *Id.* In both cases, Embry sued for punitive damages. *Id.* The *Lavoie* plaintiff also challenged the participation of the other justices because this class action included "apparently, all justices of the Alabama Supreme Court." *Id.* The Court rejected that claim. These justices might have "a slight pecuniary interest," but it was not "direct, personal, substantial, [and] pecuniary." *Id.* at 825-26 (quoting *Ward v. Village of Monroeville*, 409 U.S.57, 60 (1972)) (footnote omitted).

30. *Lavoie*, 475 U.S. at 821.

31. *Id.*

32. *See id.* at 822.

33. *See id.* at 822-23.

34. *Id.* at 818-19 (emphasis added). Justice Embry settled his claim against Blue Cross \$30,000, under the settlement agreement on a "basic compensatory claim of unspecified amount." *Id.* Maryland Casualty also settled, sometime earlier, Embry's suit against by the payment of Justice Embry's claim. *Id.* at 818 n.1.

violates due process.³⁵ “Justice Embry’s opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case,” Burger said.³⁶ “We hold simply that when Justice Embry made that judgment, he acted as ‘a judge in his own case.’”³⁷

The majority considered it significant that this situation involved a case “when a disqualified judge casts the deciding vote.”³⁸ It was a point that the majority made several times. In this case, “Justice Embry’s vote was decisive in the 5-to-4 decision.”³⁹ Justice Embry “cast the deciding vote”; there was a “close division in deciding this case”; and when “Justice Embry cast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law.”⁴⁰

There were no dissents, but two justices concurring in the judgment made the common sense point that they would have found Justice Embry’s participation improper (1) even if his had not been the deciding vote in the case, and (2) even if he had not written the majority opinion.⁴¹

Whether it is necessary under due process that the disqualified judge must be the deciding vote is an issue that may not yet be resolved because it was not necessary for the *Lavoie* to decide it.⁴² Still, one can easily appreciate the concern of the two justices concurring.⁴³ One does not know—before the court decides and publishes its opinion—whether or not one vote would be the “deciding vote.” A lawyer who wishes to move to disqualify the judge should make that motion before the judges render their opinion, not afterwards, or it looks like the lawyer is

35. *Lavoie*, 475 U.S. at 825.

36. *Id.* at 824.

37. *Id.* (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). This principle is hardly new. Nearly 40 years earlier, John Frank summarized the common law rule as follows:

The common law of disqualification, unlike the civil law, was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else. Although Bracton tried unsuccessfully to incorporate into English law the view that mere “suspicion” by a party was a basis for disqualification, it was Coke who, with reference to cases in which the judge’s pocketbook was involved, set the standards for his time in his injunction that “no man shall be a judge in his own case.” Blackstone rejected absolutely the possibility that a judge might be disqualified for bias as distinguished from interest.

John P. Frank, *Disqualification of Judges*, 56 *YALE L.J.* 605, 609-10 (1947).

38. *Lavoie*, 475 U.S. at 828.

39. *Id.* (footnote omitted).

40. *Id.* at 822.

41. *Id.* at 831 (Blackmun, J., concurring).

42. *See id.* at 823 (majority opinion).

43. *Lavoie*, 475 U.S. at 831 (Blackmun, J., concurring).

planting error, seeking to hold in reserve an argument that he only will use if the opinion comes out wrong from his client's perspective. For the litigants, it would be a strange rule that says that they do not know whether they were eligible to move to disqualify the judge until after they had read the published decision.

The judges, of course, will know if one judge would be the deciding vote before they publish their opinion. But, it still would be an unusual rule that says that the judge need not disqualify himself until after he has learned that his view tips a delicate balance. That would apparently mean that after he has learned that his legal arguments during the bench conference were persuasive to almost half the court, but not the other half, only then should the judge, *sua sponte*, recuse himself. Whether or not Justice Embry was the deciding vote, he participated in the decision-making process.⁴⁴ Even if the state court were closely divided, Embry's participation could well have influenced the outcome.⁴⁵

Hence, one should not conclude that *Lavoie* is limited to cases that are closely divided. Although the Court has not yet decided that precise question, a wise lawyer should move to recuse in a *Lavoie* situation before the judges issue their ruling, or his client may be estopped from raising the disqualification issue.

B. The Judge Who Acts as Prosecutor, Jury, Complaining Witness, Victim, and Judge

The second scenario when the Due Process Clause mandates judicial disqualification occurs when the judge is multitasking, by being prosecutor, complaining witness, jury and judge.⁴⁶ Due process requires the judge to recuse himself when he presides over a criminal contempt case that resulted from the defendant's hostility towards the very same judge who now sits in judgment of the person whom that same judge accused.⁴⁷

44. *Id.* at 817 (majority opinion).

45. *Id.* at 831 (Blackmun, J., concurring) (“[T]he constitutional violation in this case should not depend on the Court’s apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court’s analysis. For me, Justice Embry’s mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court’s opinion—posed an unacceptable danger of subtly distorting the decisionmaking process.”). *Id.*

46. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

47. *See id.* at 466.

The facts in *Mayberry v. Pennsylvania* illustrate the problem.⁴⁸ The state prosecuted the defendant and two others for a prison breach and for holding hostages in a prison.⁴⁹ The defendant—who was representing himself pro se at the trial—directed a steady stream of expletives and *ad hominem* attacks at the judge.⁵⁰ For example, he referred to the judge as a “hatchet man for the State,” a “dirty sonofabitch” and “dirty, tyrannical old dog” who “ought to be [in] Gilbert and Sullivan.”⁵¹ (One doubts that the judge was amused by this incongruous literary allusion.)

But there is more: when the judge prepared to give his instructions to the jury, the defendant—speaking in the third person—interrupted and warned the judge:

Before Your Honor begins the charge to the jury defendant Mayberry wishes to place his objection on the record to the charge and to the whole proceedings from now on, and he wishes to make it known to the Court now that *he has no intention of remaining silent while the Court charges the jury*, and that he is *going to continually object* to the charge of the Court to the jury throughout the entire charge, and *he is not going to remain silent. He is going to disrupt the proceedings verbally throughout the entire charge* of the Court, and also he is going to be objecting to being forced to terminate his defense before he was finished.⁵²

The judge then ordered the defendant removed from the courtroom.⁵³ The defendant later returned when he was gagged.⁵⁴ Still, the defendant “caused such a commotion under gag” that the judge ordered defendant removed to an adjacent room where he could hear the proceedings through a loudspeaker.⁵⁵

Justice Douglas, for the Court, acknowledged that the defendant engaged in “brazen efforts to denounce, insult, and slander the court and to paralyze the trial,” and used “tactics taken from street brawls and transported to the courtroom.”⁵⁶ Nonetheless, when the judge charged that defendant with criminal contempt, the Court concluded that he “should be given a public trial before a judge *other than the one reviled*

48. *Id.* at 455.

49. *Id.*

50. *See id.* at 456-61.

51. *Mayberry*, 400 U.S. at 456-57.

52. *Id.* at 462 (emphasis added).

53. *Id.* at 462.

54. *Id.*

55. *Id.*

56. *Mayberry*, 400 U.S. at 462.

by the contemnor.”⁵⁷

Justice Douglas added that the rule may be different for situations where the judge responds immediately.⁵⁸ He conceded that the Court was not saying that “the more vicious the attack on the judge the less qualified he is to act,” because no defendant should be able to drive a judge out of case.⁵⁹ The law should not benefit a defendant who baits the judge in his case.

Thus, it is important when the judge acts. The judge has the power to keep order in his courtroom if he acts immediately when the defendant engages in the contumacious conduct. But, if the judge waits until the end of the trial, *Mayberry* concludes that “it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place.”⁶⁰ The judge in *Mayberry*—the one who suffered the personal stings—decided to become the judge, jury, prosecutor, victim and complaining witness.⁶¹ That is efficient, but due process is not about efficiency; it is about fairness.⁶²

II. THE THIRD CATEGORY

Until *Caperton v. A.T. Massey Coal Co.*, there were but these two categories where due process mandated disqualification.⁶³ The judge had a direct, personal, substantial pecuniary interest in the case, or the judge acted as judge, jury, prosecutor, and complaining witness when there was no need for an instant response.⁶⁴

That was where the law stood, as a matter of due process. That does not mean the judges never recused themselves. Besides these due process restrictions, there are a host of statutes, rules of court, professional codes, and regulations that impose other grounds for disqualification.⁶⁵ As the Court has explained, “matters of kinship,

57. *Id.* at 466 (emphasis added); *accord, e.g.*, *Taylor v. Hayes*, 418 U.S. 488, 499-500 (1974) (holding that a trial judge violated due process in proceeding summarily after trial to punish a lawyer for contempt committed during trial without giving that lawyer an opportunity to be heard in defense or mitigation; moreover, another judge should have tried the judge rather than the judge who initiated the contempt).

58. *See Mayberry*, 400 U.S. at 463-64.

59. *Id.* at 463.

60. *Id.* at 464; *see also In re Murchison*, 349 U.S. 133, 139 (1955) (holding that it violates due process for a judge to serve as a one-man grand jury and then preside over the criminal contempt hearing).

61. *See Mayberry*, 400 U.S. at 465.

62. *See Cooke v. United States*, 267 U.S. 517, 539 (1925).

63. 129 S. Ct. 2252, 2267 (2009).

64. *See id.*

65. *E.g.*, *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (“Of course, most questions

personal bias, state policy, remoteness of interest,” are “matters merely of legislative discretion,” not constitutional law.⁶⁶

Caperton added a third category when due process requires judicial recusal.⁶⁷ Sometimes a judge must disqualify himself because of campaign contributions or independent expenditures by an individual who is not a lawyer or party before the Court but has an interest in a case that is before the court.⁶⁸ The question is when? *Caperton* does not answer that with any precision, except to say that it all depends.⁶⁹

A. *Campaign Contributions and Corrupt Justice—the Empirical Connection*

Caperton responds to the fact of life in many states. While the President appoints federal judges, who serve for life, that is not the typical scenario among the states.⁷⁰ About three-quarters of the states choose their judges by popular election.⁷¹ The people who typically give money to a judicial campaign are lawyers and parties who may appear before the judge. They are the ones most interested in the result of the judicial election.⁷²

Because of contributions to judicial elections, commentators, judges, and the general public are concerned that judges can be bought. Polls typically show that the great majority of voters are concerned that campaign contributions may influence judicial decisions.⁷³ “These poll results raise serious concern, for an impartial judiciary is crucial to the rule of law. Yet, do the polls reflect the way things are in fact, or

concerning a judge’s qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.”) (emphasis from original omitted) (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

66. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (citing *Wheeling v. Black*, 25 W. Va. 266, 270 (1884)).

67. See *Caperton*, 129 S. Ct. at 2256-57.

68. *Id.*

69. See *id.* at 2267.

70. See Ronald D. Rotunda, *Judicial Campaigns in the Shadow of Republican Party of Minnesota v. White*, 14 PROF. LAW. 2, 2 (Fall 2002).

71. See *id.*

72. Lawyers’ contributions are important, but they do not constitute the lion’s share of contributions. Lawyers contribute, on average, about 26% of campaign funds to judges. Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1238 (2008) (footnote omitted).

73. See Ronald D. Rotunda, *A Preliminary Empirical Inquiry into the Connection Between Judicial Decision Making and Campaign Contributions to Judicial Candidates*, 14 PROF. LAW. 16, 16 (Winter 2003).

merely the way that many people fear that they may be?”⁷⁴

Surprisingly, the empirical evidence is inconclusive. Judges frequently rule against law firms or parties that contributed money to the judge’s judicial election campaign.⁷⁵ In fact, some of the lawyers who contributed substantial amounts to a judge are surprised how un-influential they are.⁷⁶ One lawyer who, together with his law partners, gave \$63,000 to judges who ruled against him, told a reporter, “[h]ad I known ahead of time that the candidates were going to take two-thirds of the cases and decide them in favor of [the defense], I would have donated the money to a good charity.”⁷⁷

Even though “there is no statistical correlation between the major contributors to the campaigns of justices of the Illinois Supreme Court and success before that court—the fact that major contributors were *just as likely to lose cases before these justices*—does not preclude an argument that the contributions are corrupting.”⁷⁸ Perhaps if these lawyers had not given money, they would have lost even more.⁷⁹ Or, perhaps this lack of connection merely reflects the old wisdom that a friend in power is a friend lost.

States recognize that, when judges assume office by popular election, the judges will have to raise campaign contributions. In an effort to avoid the taint of corruption, states typically impose restrictions on campaign fundraising. The typical judicial ethics rule prohibits the judicial candidate from personally soliciting campaign funds.⁸⁰ Instead, the candidate must establish a campaign committee.⁸¹ That committee (but not the judge personally) may solicit funds.⁸² The rules then limit how much in campaign contributions a judge’s campaign committee

74. *Id.*

75. *See id.* at 16-18 (examining three states: Illinois, Michigan, and Wisconsin). For a contrary view for a different jurisdiction, *see* Adam Liptak & Janet Roberts, *Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at 1; Roy A. Schotland, *National Summit on Improving Judicial Selection: Summit on Improving Judicial Selection Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1363-65 (2001), which explains the flawed methodology in studies that assume that correlation is sufficient to prove causation.

76. *E.g.*, Rotunda, *supra* note 73, at 18.

77. *Id.* (quoting Daniel C. Vock, *Dem Majority Aside, High Court Leans Right*, CHI. DAILY L. BULL., Sept. 3, 2002, at 1).

78. *Id.*

79. *Id.*

80. *E.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2007), *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2009 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 585 (Foundation Press, 2009).

81. *Id.* at R. 4.4(A).

82. *Id.* at R. 4.4(B)(1).

may solicit or accept.⁸³ If the judge knows or learned that a party or a party's law firm contributed more than a set amount, the judge must disqualify herself.⁸⁴

The ABA Model Code of Judicial Conduct does not indicate what that amount should be.⁸⁵ That is left to the individual states. In the case of West Virginia—the state from which *Caperton* arises, the contribution maximum is a relatively modest \$1,000.⁸⁶

One can understand the concern—even if the empirical research is inconclusive—that parties or their lawyers may try to “buy” a judge with their campaign contributions to their favorite candidate, but that could not have occurred in this case because no party, no litigant, no lawyer, and no one else connected to the *Caperton* case gave more than \$1,000, the statutory maximum.⁸⁷

B. Contributions to Candidates Versus Independent Expenditures by Individuals

Justice Kennedy, for the Court, summarized what the majority regarded as the issue it decided:

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice *had received campaign contributions in an extraordinary amount* from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.⁸⁸

Later, Kennedy emphasized the importance of the contributions

83. *E.g., id.* at R. 4.4(A)-(B).

84. *Id.* at R. 2.11(A)(4).

85. *Id.* at R. 4.4(B)(1).

86. Under West Virginia law, an individual may give to a campaign no more than \$1,000 per election cycle. W. VA. CODE ANN. § 3-8-12(f) (LexisNexis 2009). Campaign contributors who contribute \$250 or more identify themselves and provide their address and business affiliation. W. VA. CODE ANN. § 3-8-5a(a)(3). The law prohibits anonymous contributions. W. VA. CODE ANN. § 3-8-5a(h). Corporations may not contribute to a candidate's campaign. W. VA. CODE § 3-8-8(a) (2006). The law also regulates Section 527 Groups (i.e., Independent Expenditure Groups) and imposes registration requirements. W. VA. CODE ANN. § 3-8-12(g).

87. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2273 (2009) (Roberts, J., dissenting).

88. *Id.* at 2256-57 (majority opinion) (emphasis from original omitted) (second emphasis added).

that Mr. Blankenship made to the election campaign of Justice Benjamin: “[t]he 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*.”⁸⁹

The Court decided (five to four) that there was a violation of due process in this case.⁹⁰ A typical news report—and the typical claim of the party seeking reversal as well as many of the amici briefs⁹¹—announced: “[a] *West Virginia judge ruled in favor of a major contributor to his campaign*, saving the man’s company millions of dollars. Your opinion: 93% thought that the judge should not have been allowed to hear the case. The Supreme Court: agreed 5-4.”⁹²

When one reads this report, one is surprised to learn that there were any dissenters, much less four Justices.⁹³ How could the dissent possibly object to the principle that Justice Kennedy embraced: “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.”⁹⁴ “A West Virginia judge ruled in favor of *a major contributor to his campaign*, saving the man’s company millions of dollars.”⁹⁵ Of course the beneficiary of those contributions should disqualify himself from cases involving his major benefactor. Justice should not be for sale. That is not a difficult proposition to accept; nonetheless, there were four dissents.⁹⁶

89. *Id.* at 2264 (emphasis added).

90. *See id.* at 2267.

91. *E.g.*, Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners at 9, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 27299 (“at a minimum, the clear appearance of bias resulting from Mr. Blankenship’s massive contributions to Justice Benjamin’s campaign”); Brief of Justice At Stake & American Judicature Society et al. as Amici Curiae in Support of Petitioners at 7, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45976 (“a less direct financial incentive, like continued campaign contributions or enhanced professional position, may count as a pecuniary interest and suffice to deny a party her constitutional right to ‘a neutral and detached judge.’”); Brief of the American Bar Association as Amicus Curiae in Support of Petitioners at 1, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45978 (“[The ABA submits this brief] to provide guidance concerning the requirements imposed by the Due Process Clause of the Fourteenth Amendment on a judicial recusal decision where a judge has received a substantial and proximate campaign contribution from a party in a case before the judge.”).

92. J. Scott Orr & Brooke Lea Foster, *The Supreme Court Agrees with You*, *PARADE MAGAZINE*, July 19, 2009, at 8 (emphasis added).

93. *Id.*

94. *Caperton*, 129 S. Ct. at 2265.

95. Orr & Foster, *supra* note 92, at 8 (emphasis added).

96. *Id.*

Typically, five to four decisions in the Supreme Court are signs of a difficult case. There often is a conflict in the lower federal courts or in the state courts; reasonable parties disagree. The Supreme Court must decide this conflict. Yet, given what the newspapers and the majority said about this case, it should not have been be a difficult issue and it should not have drawn four dissents.

Obviously, a judge should not rule in favor of a major contributor (we are talking about millions of dollars), thus “saving the man’s company millions of dollars.”⁹⁷ That is an easy economic decision; one man (Don Blankenship) contributes over \$3 million; his candidate, Judge Benjamin, is elected, and casts the deciding vote that reverses a \$50 million judgment against Blankenship’s company.⁹⁸ Spend \$3 million; save \$50 million.⁹⁹ That is a nearly a 17-fold increase.¹⁰⁰ That is a good return on anyone’s money.

Yet, four justices dissented, and Justice Kennedy’s majority opinion is full of caveats.¹⁰¹ These qualifications and admonitions are surprising given Kennedy’s summary of the facts. How can there be cautionary warnings to the axiom that no man, “without the consent of the other parties,” should be able to choose “the judge in own cause”?¹⁰²

In spite of that truism, Kennedy’s majority opinion stressed that the holding of *Caperton* is narrow and limited one. This, he said, “is an exceptional case.”¹⁰³ The facts are “extreme.”¹⁰⁴ “Our decision today addresses an extraordinary situation where the Constitution requires recusal.”¹⁰⁵ Because the facts are so extreme, “[a]pplication of the constitutional standard implicated in this case will thus be confined to rare instances.”¹⁰⁶

Later, Kennedy emphasized: “[t]he facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign *contributions* that presents a potential for bias comparable to the circumstances in this case.”¹⁰⁷

If the facts are so extreme, why did four Justices not see the light?

97. *Id.*

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

99. *Id.*

100. *See id.*

101. *Id.* at 2267.

102. *Id.* at 2265.

103. *Caperton*, 129 S. Ct. at 2263.

104. *Id.* at 2265.

105. *Id.*

106. *Id.* at 2267.

107. *Id.* at 2265 (emphasis added).

How can anyone get away with giving massive campaign contributions when West Virginia law already limits campaign contributions to a mere \$1,000?¹⁰⁸ And, how did A.T. Massey Coal Company contribute anything given that West Virginia law prohibits corporations from contributing to a candidate's campaign?¹⁰⁹

The problem is that Justice Kennedy's majority opinion is fast and loose with the facts of this case. The opinion states that Mr. Blankenship *contributed* \$3 million dollars to Judge Benjamin's campaign.¹¹⁰ That is incorrect. In fact, Blankenship only contributed the maximum allowable under state law, \$1,000—a figure that places him a mere shadow in the crowd of contributors.¹¹¹ None of the parties before the Court made any contributions to any judicial candidate.

Blankenship said that he opposed McGraw because he “was not for the working man” but instead supported “the trial lawyers.”¹¹² Hence, Blankenship personally spent a lot of his own money (what the Court calls “independent expenditures”) to attack Benjamin's opponent.¹¹³ Moreover, these expenditures were truly “independent.” No one argued that Blankenship coordinated with Justice Benjamin's campaign or even that Blankenship and Benjamin were friends.

The distinction between “contributions”—giving money to, or coordinating with the candidate—and “expenditures”—spending one's own money to advocate what one feels like advocating—is hardly technical. It is of constitutional dimension. Independent expenditures—those not coordinated with the candidate—are constitutionally protected as free speech.¹¹⁴ “Money talks.”¹¹⁵ In contrast, the state has much greater leeway in regulating and limiting contributions.¹¹⁶ “Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.”¹¹⁷ Blankenship was

108. West Virginia law provides that an individual may give no more than \$1,000 per election cycle to a campaign. W. VA. CODE ANN. § 3-8-12(f) (West 2009).

109. W. VA. CODE ANN. § 3-8-8(a).

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

111. *See id.* at 2273 (Roberts, J., dissenting).

112. Brief for Respondents at 3, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165.

113. *E.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 134-35 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000); *Buckley v. Valeo*, 424 U.S. 1, 22 (1976).

114. *E.g.*, *Buckley*, 424 U.S. at 24-25 (citations omitted).

115. *Id.* at 262 (White, J., concurring in part and dissenting in part).

116. *Id.*

117. *Id.* at 48 (footnote omitted).

exercising core First Amendment speech when he paid for attack-advertisements against Justice McGraw, the sitting Justice whom Benjamin defeated.

The state cannot ban Blankenship's independent expenditures anymore than it can ban a political activist from purchasing a megaphone so that the crowd can hear his message more clearly.¹¹⁸ Those who have more money—e.g., George Soros—can buy more expensive advertisements or rent a bigger hall to propagate their views. Those of us who do not have such deep pockets can associate with each other in an effort to pool our resources in order to promote our views. The idea that “government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”¹¹⁹

The state can regulate and limit contributions. Blankenship “contributed” only \$1,000 directly to Benjamin's campaign.¹²⁰ The PAC (political action committee) of A.T. Massey Coal Company contributed \$1,000 to Benjamin's campaign. However, neither A.T. Massey Coal Company (nor any of its subsidiaries) contributed any money to Benjamin's campaign, nor made any independent expenditure of funds that either supported Benjamin or criticized his opponent. Nor did Massey or any of its subsidiaries provide any money to *And for the Sake of the Kids* (ASK),¹²¹ an organization that Blankenship funded from his personal funds. ASK published attack-advertisements against McGraw, as discussed below.

Kennedy never explains why he blurred the distinction between contributions and expenditures. All we know is that Kennedy acknowledges (only once) that Blankenship engaged in “independent expenditure.”¹²² But then, a dozen times he repeatedly re-labels these “independent expenditures” as “contributions.”¹²³ He discusses the

118. See RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.51(b)(i), (b)(iii), (b)(v), (c)(ii), (d)(viii) (Thomson-West, 2008) (6 volumes).

119. *Buckley*, 424 U.S. at 48-49.

120. Joint Appendix, Vol. I at 208a, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213 (Benjamin for Supreme Court Committee, State of West Virginia Campaign Financial Statement (Long Form) in Relation to 2004 Election Year).

121. ASK was an organization established under 26 U.S.C. § 527(e).

122. *Caperton*, 129 S. Ct. at 2257 (“independent expenditures”).

123. See *id.* at 2256 (“[T]he justice had received *campaign contributions* in an extraordinary amount from, and through the efforts of, the board chairman.”); *id.* at 2257 (“Blankenship's \$3 million in *contributions*”); *id.* at 2263 (“Not every *campaign contribution* by a litigant or attorney creates a probability of bias that requires a judge's

precedent in disqualification cases, and quotes the relevant portions of those cases as referring to “contributions” to the judge,¹²⁴ not independent expenditures. Yet, he treats the two words as synonyms and never explains why.

Blankenship’s independent expenditures against McGraw were hardly unusual for him. Blankenship is an activist who has made other independent expenditures to support his favored causes in West Virginia elections on issues entirely unrelated to Massey. For example, Blankenship spent millions to unseat candidates who opposed abolishing sales tax on food.¹²⁵ He also spent millions to defeat a bond referendum.¹²⁶

1. *A Debt of Gratitude*

Petitioners certainly realized that there was a constitutional distinction between independent campaign expenditures (which the state may not limit, because of free speech) and campaign contributions (which the state may regulate). Hence the petitioners argued that Justice Benjamin must have felt “[‘]predisposed[’] toward and [‘]indebted[’]” to Mr. Blankenship because of the independent expenditures.¹²⁷ Petitioners emphasized that Mr. Blankenship “is a

recusal”); *id.* at 2264 (“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.”); *id.* at 2264 (“Blankenship *contributed* some \$3 million to unseat the incumbent and replace him with Benjamin. His *contributions* eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin’s campaign committee”); *id.* (“Whether Blankenship’s campaign *contributions* were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry”); *id.* (“Blankenship’s *campaign contributions*—in comparison to the total amount *contributed* to the campaign”); *id.* (“The temporal relationship between the *campaign contributions*, the justice’s election, and the pendency of the case is also critical.”); *id.* (“when the *campaign contributions* were made”); *id.* at 2265 (“Although there is no allegation of a quid pro quo agreement, the fact remains that Blankenship’s extraordinary *contributions* were made.”); *id.* (“The parties point to no other instance involving judicial *campaign contributions* that presents a potential for bias comparable to the circumstances in this case.” This comment is intriguing. Of course the parties point to no other case—there is no precedent because Justice Kennedy created the rule for the first time in this case. One could just as well say, there is no precedent supporting Caperton’s position. That is a fact of life, not a reason why petitioner should win.); *id.* at 2266 (“[S]ome states require recusal based on *campaign contributions*.”) (emphasis added in all cases; Court’s original emphasis of “quid pro quo” removed).

124. *Id.* at 2260 (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)).

125. Brief for Respondents, *supra* note 112, at 6.

126. *Id.*

127. Reply Brief for Petitioners at 13, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 476570.

substantial stockholder in Massey”—not true, as discussed below—and that Justice Benjamin had “a compelling reason” to “repay his debt of gratitude to Mr. Blankenship.”¹²⁸

Kennedy summarized and agreed with Caperton’s argument that Benjamin “would nevertheless feel a *debt of gratitude* to Blankenship for his extraordinary efforts to get him elected.”¹²⁹

That is an amazing assertion. If Benjamin felt a debt of gratitude to Blankenship—who independently spent money to attack Benjamin’s opponent—surely any federal judge must feel a debt of gratitude to the President who selected him, or the Senator who proposed him. Yet, federal judges routinely hear cases involving those who appointed them.¹³⁰ One would think that Kennedy would have discussed this issue a bit more, instead of just asserting it and reversing the state court.

The issue extends beyond the President. Consider the lawyers in the Department of Justice who vetted selection of the nominee. Add to that mix the private practitioners who wrote letters on behalf of the nominee, or testified on her behalf to the Judiciary Committee, or the bar committees that routinely vet nominees and give their report to the Judiciary Committee. Does *Caperton* now require that these lawyers recuse themselves because the sitting judge may have a debt of gratitude to those who supported her, and a debt of ingratitude to those who opposed her?

These questions are not hypothetical. Christopher Arguedas, the defense lawyer for Barry Bonds, is part of a committee advising California Senator Barbara Boxer on whom she will ask the President to nominate to become the next U.S. Attorney in San Francisco.¹³¹ Arguedas, thus, has a role in nominating the U.S. Attorney—the prosecutor—who will decide whether to pursue a criminal case against Bonds for lying to a grand jury in 2003.¹³² Arguedas also was a

128. Brief for Petitioners at 17, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5433361.

129. *Caperton*, 129 S. Ct. at 2262 (emphasis added).

130. See generally *Clinton v. Jones*, 520 U.S. 681 (1997) (Ginsburg & Breyer, JJ., both appointed by Clinton); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977) (Burger, C.J., Blackmun, Rehnquist, & Powell, JJ., all appointed by Nixon); *United States v. Nixon*, 418 U.S. 683 (1974) (Burger, C.J., Blackmun & Powell, JJ., all appointed by Nixon); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Vinson, C.J., Burton, Clark, & Minton, JJ., all appointed by Truman).

131. Posting of Amir Efrati to Wall Street Journal Law Blog, *Barry Bonds’s Lawyer to Help Pick Next U.S. Attorney in NorCal*, <http://blogs.wsj.com/law/2009/07/20/barry-bondss-lawyer-to-help-pick-next-us-attorney-in-norcal/?mod=djemWEB&reflink=djemWEB> (July 20, 2009, 14:19 EST).

132. See *id.*

member of Boxer's committee that helped nominate Susan Illston to the federal bench in 1995.¹³³ Illston is the trial judge overseeing the Bonds trial.¹³⁴ Should the trial judge disqualify herself?

What about a debt of ingratitude? How should a judge apply the *Caperton* holding to a case where a party or has actively opposed (rather than supported) a particular judge's candidacy? Must Justice Clarence Thomas disqualify himself in every case where Anita Hill is on the brief for a party? Recall that Anita Hill was a major witness against Justice Thomas at his confirmation hearings. She accused him (and he denied her accusations) of sexual harassment. Judges—prior to *Caperton*—have not disqualified themselves on such grounds.¹³⁵

If you think that, after *Caperton*, the answer to this question is yes, then Ms. Hill can rest assured that her future employment as a lawyer is secure, for any party who would not like Justice Thomas to sit on a case will hire her to be one of the lawyers on the brief. And, in the future—if this is the brave new world that *Caperton* creates—major institutional litigants will find it useful to hire a lawyer to attack the judicial nominee, so that this litigant can hire the attack-lawyer to be on the brief whenever the party seeks to recuse the judge. These strategic recusals already exist with respect to judge's relatives.¹³⁶ Now, does *Caperton* extend that problem to debts of ingratitude? Only time will tell.

133. *Id.*

134. *Id.*

135. *See, e.g.*, United States v. Helmsley, 760 F. Supp. 338, 339, 340 (S.D.N.Y. 1991) (Walker, Circuit Judge, sitting by designation, denied a disqualification motion by a lawyer who had testified against Walker's nomination to the court of appeals), *aff'd*, 963 F.2d 1522 (2d Cir. 1992); Grievance Adm'r v. Fieger, 714 N.W.2d 285, 286 (Mich. 2006) (Markman, J., denied a disqualification motion by a lawyer who had opposed the judge's reelection to the state supreme court).

136. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 10.2-2.11(f) (Disqualification When the Judge or Related Person Is a Party or Lawyer, Has an Interest in, or Is a Witness in the Proceeding), § 10.2-2.11(f)(3)(ii)(3) (Remedies) (2009); *see, e.g.*, Grievance Adm'r v. Fried, 570 N.W.2d 262, 263 (Mich. 1997). In this case, two judges in a county had close relatives who practiced there. *Id.* If a client desired that his case be reassigned from one judge to the other, local lawyers advised the clients to hire the relevant relative as co-counsel to force the recusal of the judge. *Id.* at 26-64. The Attorney Disciplinary Board dismissed the charges against the lawyers but the Michigan Supreme Court reversed and remanded for further proceedings. *Id.* The Supreme Court held that a lawyer is subject to discipline if that lawyer participates as co-counsel in a suit for the sole purpose of obtaining the recusal of a judge because of the lawyer's familial relationships with the judge. *Id.* at 268; *see also* Robinson v. Boeing Co., 79 F.3d 1053, 1055-56 (11th Cir. 1996) (discussing the district court's suspicion "that in this district the choice of lawyers may sometimes be motivated by a desire to disqualify the trial judge to whom the case has been randomly assigned").

Kennedy's opinion does not reject the Court's long line of cases holding that an individual such as Blankenship has a constitutional right to spend as much of his personal fortune as he wishes on independent expenditures.¹³⁷ The Court is not reversing its prior case law.¹³⁸ But, Kennedy appears to say, if Blankenship exercises his constitutional right to engage in independent expenditures, that carries a penalty: if Blankenship is an employee of a party, the judge who was not the target of Blankenship's attack-advertisements must disqualify himself. Kennedy reaches this result by treating independent expenditures as creating a "debt of gratitude," even though the Court has repeatedly told us that there is a distinction of constitutional dimension between expenditures and contributions.¹³⁹ Although the Supreme Court has held that independent expenditures often do not help a candidate and may hurt him,¹⁴⁰ it now tells us that such expenditures create a debt of gratitude.

Given this merging of contributions and expenditures, there is little the judge can do to avoid disqualification. He cannot reject the "contribution" because there is no contribution to reject or accept. He cannot change the content of these attack-advertisements because, by hypothesis, these third-party expenditures are not his expenditures; they are truly "independent."

Indeed, the public may react negatively to the attack-advertisements and there is little that Justice Benjamin could have done about that either, because he had no control over how Blankenship spent his money. History shows that such independent expenditures often backfire against those who make them, hurting the candidate that they were meant to help.¹⁴¹ Does that mean that if Benjamin had lost the

137. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009).

138. *See generally id.* at 2252.

139. *Id.* at 2262.

140. *See Buckley v. Valeo*, 424 U.S. 1, 47 (1976) ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. 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 given as a quid pro quo for improper commitments from the candidate.").

141. *See 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):

Ohioans know that the Chamber's effort against Justice Alice Resnick backfired, helping her to a 57% win. (What a shame that the able judge who challenged the able Justice is tarred by some of what was done on his behalf.) Two other Chamber candidates also suffered the Chamber's back-firing support. The Chamber's ads for Mississippi's Chief Justice enabled her opponent to win 52%-48% by attacking her outside support. (That

race, then the A.T. Massey Coal Company could have forced the recusal of the man who won, because he would have felt a debt of gratitude that Blankenship's attack-advertisements backfired?

One would think that Kennedy would have at least discussed this question of independent expenditures, the history of attack-advertisements backfiring, and the inability of Benjamin to control what Blankenship did with his own money. Instead, Kennedy assumed a significant factual conclusion—that there would be a debt of gratitude for a third-party independent expenditure that often hurts the candidate. He did that without any hearing on the factual questions. There is an irony and incongruity that Kennedy does not give a hearing on issues in a case where he relies on the Due Process Clause, because the most elemental meaning of due process is notice and a right to be heard.¹⁴²

III. BEYOND THE CONTRIBUTION-EXPENDITURE DISTINCTION

The melding of contributions and expenditures is a surprising feature of *Caperton's* discussion of the facts, but it is merely the prelude. Justice Kennedy's majority opinion referred to only some of the material facts, ignored others, made a few misstatements about the facts, and accepted assertions and presumptions about other facts, as if there had been a trial or hearing on the disqualification issues.¹⁴³ "Judicial notice" and due process take on new meaning when an appellate court can simply assume what the facts are. Kennedy said that "there is no procedure for judicial fact-finding," but that is only because the Court did not remand for a hearing on the relevant facts.¹⁴⁴ He surely cannot mean that if a litigant announces that an employee of the opponent has engaged in independent expenditures that attack the candidate that lost the election, the Court must accept that assertion as fact. If so, we will see a lot of disqualification motions in the coming years.

He did acknowledge: "Due process requires an objective inquiry into whether the contributor's influence on the election under all the

justice had served for 15 years and her challenger had raised only \$9,000 as of mid-October). In addition, the Chamber's ads defeated another candidate running with her. Carrington buys the Chamber's inflated count and its self-congratulation, but its other candidates would have won without it. For example, the three Michigan incumbent Justices who were *re*-elected in landslides were not bought and are not controlled by the Chamber. (internal footnotes and citations omitted) (emphasis in original).

142. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (citation omitted).

143. See generally *Caperton*, 129 S. Ct. 2252.

144. *Id.* at 2264.

circumstances ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”¹⁴⁵ For that proposition he cited *Tumey*, but the facts in that case were much different. Recall, in that case the law paid the mayor based on his conviction rate.¹⁴⁶ The mayor had a financial incentive to convict defendants.¹⁴⁷ That has nothing to do with this case.

The factual background is interesting and shows the nuances that the majority chose to ignore. Let us now turn to those facts. This case arose because a dispute between two subsidiaries of Harman Development Corporation (which Caperton owns) and Wellmore Coal Corporation (which A.T. Massey owns).¹⁴⁸

A. *The Complicated Scenarios that Lead to Caperton*

Wellmore bought coal from Harman and sold it to LTV Steel.¹⁴⁹ There came a point, on July 18, 1997, when LTV stopped buying coal from Wellmore because of EPA changes to its emissions regulations.¹⁵⁰ Wellmore (i.e., A.T. Massey) responded by invoking a *force majeure* clause in its contract.¹⁵¹ Harman (i.e., Caperton) then sued Wellmore in Buchanan County, Virginia.¹⁵² Harman alleged fraudulent misrepresentation and tortious interference with contract and secured a \$6 million judgment.¹⁵³

While that suit was going on, Caperton sued Massey in Boone County, West Virginia, claiming fraudulent misrepresentation and

145. *Id.* at 2264 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

146. *Tumey*, 273 U.S. at 517.

147. *Id.*

148. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 230-31 (W. Va. 2008).

149. *Id.* at 230, 231.

150. *Id.* at 231.

151. *Id.* at 232. In French, “force majeure,” means a “superior force.” The use of this term in a contract typically refers to an unforeseen force beyond control of the parties that frees them from what would otherwise be their contractual obligation, e.g., a war, strike, riot, crime, or an “Act of God” (e.g., earthquake). *See id.* at 231 n.8. In this particular case, the contract defined “force majeure” as “acts of God, acts of the public enemy, epidemics, insurrections, riots, labor disputes and strikes, government closures, boycotts, labor and material shortages, fires, explosions, floods, breakdowns or outages of or damage to coal preparation plants, equipment or facilities, interruptions or reduction to power supplies or coal transportation (including, but not limited to, railroad car shortages) embargoes, and acts of military or civil authorities, which wholly or partly prevent the mining, processing, loading and/or delivering of the coal by SELLER, or which wholly or partly prevent the receiving, accepting, storing, processing or shipment of the coal by BUYER.” *Id.*

152. *Caperton*, 679 S.E.2d at 233.

153. *Id.*

2010] **Judicial Disqualification after *CAPERTON*** 269

tortious interference with contract.¹⁵⁴ Massey moved to dismiss because, first, a forum-selection clause in the coal-supply contract required suit to be filed in Virginia and, second, *res judicata*.¹⁵⁵ The trial court denied the motion, and a jury awarded Caperton approximately \$50 million in compensatory and punitive damages.¹⁵⁶

When the case moved to the West Virginia Supreme Court of Appeals, Caperton moved to disqualify Justice Brent Benjamin because Mr. Don Blankenship was an officer of A.T. Massey Coal Company and of its parent (Massey Energy Company).¹⁵⁷ Justice Benjamin, Caperton argued, should be disqualified because years earlier Blankenship had made large independent expenditures in an effort to defeat Justice Benjamin's opponent in an election before this case was decided.¹⁵⁸

Justice Benjamin refused to disqualify himself, and, in November 2007, he joined the majority in overturning the lower court based on the forum-selection clause in the contract and *res judicata* based on the Virginia judgment.¹⁵⁹ The West Virginia court basically held that the lower court should have dismissed petitioners' case because the forum-selection clause was reasonable and mandatory, and it covered both the claims raised and the parties involved.¹⁶⁰ Moreover, *res judicata* also barred the lawsuit.¹⁶¹ There was a rehearing, with a slightly different panel of justices (because of two recusals), and once again, Justice Benjamin refused to recuse himself.¹⁶² He again embraced the procedural rulings favoring the position that A.T. Massey advanced.¹⁶³ The new panel agreed and reached the same conclusion on the merits.¹⁶⁴

The first time that the West Virginia Supreme Court of Appeals ruled against Caperton was November 21, 2007, *nearly three years after Benjamin assumed the bench*.¹⁶⁵ Three years is a long time to hold a

154. *Id.*

155. *Id.*

156. *Id.*

157. Joint Appendix, Vol. I at 105a, 111a, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213 (Motion of Respondent Corporations for Disqualification of Justice Benjamin).

158. *Id.* at 111a & n.61.

159. Joint Appendix, Vol. II at 357a-58a, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5422892 (Opinion of West Virginia Supreme Court of Appeals).

160. *Id.* at 364a, 370a.

161. *Id.* at 411a.

162. *See Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 223 (W. Va. 2008).

163. *See id.* at 229.

164. *See id.*

165. Opinion of West Virginia Supreme Court of Appeals at 411a, *Caperton*, 129 S.

debt of gratitude. Kennedy does not tell us when the gratitude wears off. We do know that no party alleged any past or present friendship between Blankenship and Benjamin. They were not drinking buddies, did not vacation together and did not know each other, although they knew of each other.

B. Justice Benjamin in Other Cases Involving A.T. Massey

By the time that the *Caperton* case came to the West Virginia Supreme Court of Appeals, Justice Benjamin had decided several cases involving A.T. Massey or one of its subsidiaries.¹⁶⁶ While Kennedy called the facts of *Caperton* “exceptional,” “extreme,” and “extraordinary,”¹⁶⁷ it is interesting that no other litigant opposed to A.T. Massey ever moved to disqualify Justice Benjamin. One wonders why these other lawyers did not see the need to disqualify a Justice when faced with such an “exceptional,” “extreme,” and “extraordinary” fact situation. One wonders how Justice Kennedy knew what all these lawyers—with economic motivation to seek recusal—did not know.

In *Caperton*, Justice Benjamin joined his colleagues in reversing a \$50 million verdict against Massey.¹⁶⁸ Yet, shortly after this decision, he voted to deny West Virginia Supreme Court review in another case, which meant that he was letting stand a \$243 million verdict *against* Massey.¹⁶⁹ The \$50 million verdict against Massey was a very large amount to be sure, but it paled in comparison to the \$243 million that Justice Benjamin approved.

By the way, the State of West Virginia was party in at least two of the cases involving the Massey Company.¹⁷⁰ The Attorney General of West Virginia was Attorney General Darrell McGraw.¹⁷¹ The fact that

Ct. 2252 (No. 08-22), 2008 WL 5422892. The jury returned its verdict against Massey on August 1, 2002, long before Justice Benjamin began his twelve-year term on January 1, 2005. Brief for Respondents, *supra* note 112, at 5. “The jury returned its verdict after an approximately seven (7) week trial on or about August 1, 2002, A.D. The Court thereafter entered its Judgment Order on or about August 15, 2002, A.D.” *Caperton v. A.T. Massey Coal Co.*, 2005 WL 5679073, at *1 (W. Va. Cir. Ct. Mar. 15, 2005).

166. See Brief for Respondents, *supra* note 112, at 5-6 (Justice Benjamin voted against Massey companies at the merits stage (citing *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W. Va. 2005); *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006)), and also at the petition stage (citing *McNeely v. Independence Coal Co.*, No. 042156, slip op. (W. Va. Feb. 9, 2005); *Brown v. Rawl Sales & Processing Co.*, No. 06-1700, slip op. (W. Va. Sept. 7, 2007)).

167. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263, 2265 (2009).

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

169. Brief for Respondents, *supra* note 112, at 9.

170. *Id.* at 51 n.9.

171. *Id.*

he shares the last name with Justice Warren McGraw is no accident. They are brothers.¹⁷² Justice Benjamin, when he was elected to the West Virginia Supreme Court of Appeals, defeated the Attorney General's brother, who was the incumbent justice. If Benjamin has this debt of gratitude towards Blankenship, then one would think that the Attorney General—the brother of the defeated justice—would seek to disqualify Benjamin in a case involving Massey. Surely the Attorney General would seek to disqualify in such a case where the facts requiring disqualification are so “exceptional,” “extreme,” and “extraordinary,” where the case involved Massey, and where the Attorney General is the brother of the man who was the subject of the Blankenship attack-advertisements. That never happened.¹⁷³ One wonders if Kennedy's assertions about this “exceptional,” “extreme,” and “extraordinary” case are true.

C. Blankenship's Financial Exposure in Caperton

Recall that Kennedy said that a man should not be able to choose “the judge *in his own cause*.”¹⁷⁴ That, said Kennedy, is what Blankenship did.¹⁷⁵ He spent \$3 million of his own money and saved \$50 million. That is a nearly a 17-fold increase, and a very a good return on his investment in Justice Benjamin.

Kennedy accepted—without discussion—the argument that this case meant a lot to Blankenship because of Blankenship's financial stake in the outcome.¹⁷⁶ Factually, that is not true. Although Blankenship was a principle officer of Massey—he was the Chairman, CEO, and President of Massey¹⁷⁷—his ownership interest was minor. Blankenship is a wealthy man, but his wealth does not depend on his financial interest in Massey. He owns 0.35% of Massey's stock.¹⁷⁸ If we were to pierce the corporate veil and assume that the proportional share of Caperton's damage claim against Massey came out of Blankenship's personal wallet, his share of the judgment in this case that was reversed by the West Virginia Supreme Court would be only \$175,000.¹⁷⁹ It does not make any sense for him to spend \$3 million of

172. *Id.*

173. *Id.*

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

175. *Id.*

176. *Id.*

177. *Id.*

178. Brief for Respondents, *supra* note 112, at 5.

179. *See id.* (comparing MASSEY ENERGY CO., QUARTERLY REPORT (FORM 10-Q)

his own money in order to save \$175,000. Kennedy's factual assumption was simply wrong.

D. A Close Election?

Kennedy emphasized that Blankenship's support was crucial and the tipping point for Benjamin.¹⁸⁰ The election was "decided by fewer than 50,000 votes," Kennedy stressed.¹⁸¹ Well, 50,000 votes is a narrow victory in a well-populated state like California or New York. But this is West Virginia. Benjamin secured 53.3% of the vote while former-Justice McGraw received only 46.7% of the vote.¹⁸² Benjamin won the election by 9.6 percentage points!¹⁸³ That is a huge difference. In the 2008 election, President Obama enjoyed a solid victory often described as a landslide.¹⁸⁴ Yet, only 52.87% of the voters picked Obama.¹⁸⁵

E. Why McGraw Lost His Reelection Bid

Caperton based its argument, as Justice Kennedy noted, on "Blankenship's pivotal role in getting Justice Benjamin elected."¹⁸⁶ One wonders how one could prove that point, at least without a hearing. Kennedy then announces, "Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case."¹⁸⁷ How does one determine that? Kennedy offers this test:

The inquiry centers on the contribution's relative size in comparison to

(Nov. 7, 2008), <http://secfilings.com/searchresultswide.aspx?TabIndex=2&FilingID=6235842&type=convpdf&companyid=11418&ppu=%2fdefault.aspx%3fticker%3d%26amp%3bname%3dmassey%2benergy%26amp%3bformgroupid%3d2%26amp%3bauth%3d1> (85.1 million shares outstanding), with STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP (FORM 4) (Nov. 18, 2008) (296,935 shares owned by Blankenship)).

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

181. *Id.*

182. *Id.* at 2274 (Roberts, J., dissenting).

183. *Id.*

184. See Andrew Keen, *Obama's Landslide Will Throw Up Conservative Bloggers*, INDEP., Nov. 10, 2008, at 54, available at <http://www.independent.co.uk/news/media/online/andrew-keen-obamasquos-landslide-will-throw-up-conservative-bloggers-1005317.html>; Shaun Mullen, *The Barack Obama Landslide and Leading America Out of the Wilderness*, THE MODERATE VOICE, Nov. 5, 2008, <http://themoderatevoice.com/24085/the-barack-obama-landslide-leading-america-out-of-the-wilderness>.

185. Dave Leip's Atlas of U.S. Presidential Elections, 2008 Presidential General Election Results, <http://uselectionatlas.org/RESULTS/index.html> (last visited Dec. 31, 2009).

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

187. *Id.* at 2263.

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. Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.¹⁸⁸

Were Blankenship's independent expenditures crucial to Benjamin's landslide win? The majority announces yes, but there is no effort to consider why Benjamin had such a landslide victory over the incumbent judge.¹⁸⁹ Kennedy concedes that "what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion."¹⁹⁰ Moreover, he admits that the "test" he is adopting offers "no procedure for judicial fact-finding and the sole trier of fact [Justice Benjamin] is the one accused of bias."¹⁹¹ So, he tells us, "[d]ue process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"¹⁹² The issue, Kennedy says, is whether Blankenship "cho[se] the judge in his own cause."¹⁹³

After that, he simply tells us that, as an objective matter, Blankenship chose his judge in his own cause because Blankenship spent several million of his own money on attack-advertisements against McGraw.¹⁹⁴ Yet, as an objective matter, the facts undercut any notion that Blankenship chose Benjamin or was responsible for Benjamin's landslide victory of 9.6 percentage-points. Let us consider some of the facts that the majority could have discussed.

F. The Lawyers' and Newspapers' Endorsements

The lawyers whom the state bar polled favored Benjamin over McGraw.¹⁹⁵ Every state newspaper, except one, that endorsed a candidate endorsed Benjamin over McGraw.¹⁹⁶ In judicial elections, newspaper endorsements are crucial and worth about 6.11 percentage-

188. *Id.* at 2264.

189. *Id.*

190. *Id.*

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

192. *Id.* (internal citation omitted).

193. *Id.* at 2265.

194. *See id.* at 2257, 2262, 2265.

195. *See Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 301 n.27 (W. Va. 2008) (Benjamin, Acting C.J., concurring).

196. *Id.*

points to the favored candidate.¹⁹⁷ One would think that the Court, if it were really interested in an “objective inquiry into whether the contributor’s influence on the election under all the circumstances,”¹⁹⁸ would at least explain why the overwhelming newspaper endorsements did not affect the “pivotal” role of Blankenship’s independent expenditures. One would think that Kennedy would explain how, as an objective matter, he can conclude that Blankenship “cho[se] the judge in his own cause.”¹⁹⁹

McGraw also refused to debate Benjamin or to give interviews.²⁰⁰ Newspapers, radio, and television could not be pleased with McGraw’s refusal to give interviews or debate his opponent.

Assume that there is a defamation action against a newspaper that endorsed Benjamin. Does *Caperton* require Benjamin’s recusal because of a debt of gratitude? Assume a defamation action against the sole newspaper to have endorsed McGraw and opposed Benjamin. Does *Caperton* require Benjamin’s recusal because of a debt of ingratitude? Before *Caperton*, newspaper endorsements did not trigger recusal;²⁰¹ we are left to wonder if *Caperton* changes that result because of the importance of newspaper endorsements.

G. McGraw’s “Scream at Racine”

In determining to whom Justice Benjamin owed a debt of gratitude, Justice Kennedy never mentioned Justice McGraw—the man that Benjamin defeated. The record showed that McGraw delivered a rather bizarre speech on Labor Day 2004, shortly before the election that ousted him. McGraw said:

They want to tell you that the issue of abortion is one which is

197. See Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 671 (2002) (“Justices who received the editorial endorsement of a newspaper within his or her district received an increase of 6.11 percentage-points over justices who did not receive endorsements, and the results were statistically significant.” This should be expected since newspaper endorsements are an independent source of information that many voters look to in deciding how or whether to vote in a low visibility race such as a judicial retention election.”) (emphasis added).

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

199. *Id.* at 2265.

200. Brief for Respondents, *supra* note 112, at 54.

201. See *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 919 (6th Cir. 1982) (“A newspaper should not feel any hesitation about commenting, either for or against, a judicial appointment based on the effect such comment might have on litigation in which it is interested.”); *Keep Incumbents on Supreme Court*, CINCINNATI ENQUIRER, Oct. 27, 2004, at C6 (In 2004, the Cincinnati Enquirer, endorsed Justices Moyer, O’Donnell, Pfeifer, and Lanzinger. Those justices later participated in a case where that very same newspaper was plaintiff.).

promoted by the Democrats. I say to you that's false! *They want to tell you that members of my party have opposed school prayer. False! Not so! It's the Republican Party!* The members of the Republican Party on the United States Supreme Court, and President of the United States, who gave you those issues when they control the Court and the people over in Washington. Not the Democrats. And just this year, *not more than six months ago, the United States Supreme Court approved gay marriage! Not Democrats!*²⁰²

Did you know that the U.S. Supreme Court, in April 2008, approved gay marriage? Did you know that Democrats oppose free choice in abortions? Did you know that Democrats do not oppose school prayer but Republicans do? Well, now you know.

West Virginia Public Broadcasting called McGraw's speech "[h]is rant at a Labor Day rally in Racine," which "became known as '*The Scream at Racine*'" and the GOP rebroadcasted it in advertisements.²⁰³

If Justice Benjamin owes a debt of gratitude, he more likely owes it to Justice McGraw and his "Scream at Racine." Justice McGraw certainly regarded his own speech (not Blankenship's attack-advertisements) as the pivotal point of the campaign. McGraw blamed the tone of that speech on an injury from a car crash four months earlier and tried to sue the other driver for causing him to lose the election.²⁰⁴

H. "*And for the Sake of the Kids*"

While McGraw's own speech was certainly significant and perhaps pivotal, other factors led to Benjamin's landslide victory. Blankenship gave about \$2.5 million to an organization called, *And for the Sake of the Kids*, (ASK), a section 527 organization.²⁰⁵ ASK published

202. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 302 n.35 (W. Va. 2008) (Benjamin, Acting C.J., concurring) (emphasis added). You do not have to take his word for it. You can hear it yourself at: YouTube.com, <http://www.youtube.com/watch?v=TQ6nQaE2FM8> (last visited Dec. 31, 2009).

203. Scott Finn, *Caperton v. Massey: What a Long, Strange Case It's Been*, W. VA. PUB. BROADCASTING, June 9, 2009, <http://www.wvpubcast.org/newsarticle.aspx?id=9955>.

204. Chris Dickerson, *Former Supreme Court Justice McGraw Suing Active Member of Navy*, W. VA. RECORD, Sept. 6, 2006, available at <http://www.wvrecord.com/news/184038-former-supreme-court-justice-mcgraw-suing-active-member-of-navy>

205. Brief for Respondents, *supra* note 112, at 4; see also Paul Nyden, *Coal, Doctors' Groups Donated to Anti-McGraw Effort*, CHARLESTON GAZETTE, Jan. 17, 2005, at 5A. ASK is a political organization formed under 26 U.S.C. § 527, which is the statute that regulates "a party, committee, association, fund, or other organization . . . organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1) (2006).

advertisements and hosted events opposing McGraw's reelection.²⁰⁶ Others contributed more than \$1 million to ASK.²⁰⁷ There is no dispute that Blankenship's expenditures to ASK were completely independent of Benjamin's campaign.²⁰⁸

Another organization, *Doctors for Justice* (representing physicians), was also opposed to McGraw and it contributed \$750,000 to anti-McGraw advertisements.²⁰⁹ The West Virginia Chamber of Commerce helped fund yet another group, *Citizens for Quality Health Care*, which spent nearly \$370,000 publishing anti-McGraw advertisements.²¹⁰ *Citizens against Lawsuit Abuse* also ran advertisements critical of McGraw.²¹¹ One can assume, just as the Court did for Blankenship, that these other independent organizations "cho[se] the judge in his own cause."²¹²

After *Caperton*, must Justice Benjamin recuse himself from any medical malpractice case because so many medical doctors were opposed to Justice McGraw on the basis of his medical malpractice decisions? What about business decisions where the members of the Chamber of Commerce are parties?

CONCLUSION

Some court watchers predict a deluge of recusal motions after *Caperton*.²¹³ Justice Kennedy, on the other hand, thought this case was an "extreme" one, and disqualification will be limited to "rare instances."²¹⁴ I hesitate to predict the future, because it is evidence of

206. See Brief for Respondents, *supra* note 112, at 4; see also Joint Appendix, Vol. I at 117a-41a, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213 (And for the Sake of the Kids, Third Quarterly Report of Contributions and Expenditures).

207. Brief for Respondents, *supra* note 112, at 4.

208. *Id.* Blankenship did not have the "the cooperation or consent" of the Benjamin campaign. *Id.* at 3-4; see also Joint Appendix, Vol. I at 187a, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5784213 (Don L. Blankenship, State of West Virginia Campaign Financial Statement in Relation to 2004 Election Year).

209. See Brief for Respondents, *supra* note 112, at 4; see also Nyden, *supra* note 205.

210. *Id.*

211. See Juliet A. Terry, *Benjamin Hopes to Shine Light on Justice*, St. J., Nov. 5, 2004, available at <http://www.allbusiness.com/government/government-bodies-offices-regional-local/11422628-1.html>.

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

213. See generally Molly McDonough, *Court Watchers Predict "Deluge" of Recusal Requests in Light of Caperton*, A.B.A. J., June 11, 2009, available at http://www.abajournal.com/weekly/court_watchers_predict_deluge_of_recusal_requests_in_light_of_caperton.

214. See *Caperton*, 129 S. Ct. at 2265-67.

my fallibility. We do know that the Court is in no hurry to clarify its ruling. It has already refused to hear two cases where it could have shed light on *Caperton*.²¹⁵

What we know is that the Court will disqualify a judge on constitutional grounds if five members decide that the facts are “extreme.” And, in making the determination, as an “*objective* matter,” that a person who was not a party (but was interested in a case) “*cho[se] the judge in his own cause*,”²¹⁶ the five members will not distinguish between campaign expenditures and campaign contributions. They will not consider other factors that, as an objective matter, look a lot more pivotal. What they will consider is something left to future cases.

Granted, not all legal tests have the nice precision of a jeweler’s scale.²¹⁷ Still, the Supreme Court should be able to give judges a better test than “it all depends” in deciding whether the judge must recuse himself as a matter of constitutional law.

What we do know from this case is that laws that require judges to recuse themselves when a party (or a lawyer to a party) contributes more than a certain amount to the judge’s campaign are irrelevant for a *Caperton* recusal motion because *Caperton* involved independent expenditures, not contributions. Blankenship was not a party and—if we were going to pierce the corporate veil—owned only 0.35% of Massey’s stock.²¹⁸ If he were personally liable for his portion of the judgment against Massey, he would owe substantially less than he would have spent on independent expenditures to finance attack-advertisements against Justice McGraw. State courts have not been impressed with the Supreme Court’s efforts to muddy the distinction between contributions and independent expenditures. The Wisconsin Supreme Court, in response to *Caperton*, adopted a rule that says that endorsements, campaign contributions and independently run

215. See *Pinnick v. Corboy & Demetrio, P.C.*, 130 S. Ct. 553 (2009) (cert. denied). The issue was whether there was a violation of due process when one or more state Supreme Court justices hearing the appeal of petitioners received substantial contributions for their election campaigns from the respondents. Petition for a Writ of Certiorari at i, *Pinnick*, 130 S. Ct. 554 (No. 09-168), 2009 WL 2459863. The Illinois Supreme Court denied the petitioner’s Motion for Recusal. *Id.* at 1. In *HCA Health Servs. of Okla., Inc. v. Shinn*, 130 S. Ct. 557 (2009) (cert. denied), the issue was whether the Due Process Clause required a judge to recuse herself when the chair of her ongoing reelection committee is lead counsel in a case before her. Petition for a Writ of Certiorari, *HCA Health Servs.*, 130 S. Ct. 557 (No. 09-311), 2009 WL 2918999.

216. See *Caperton*, 129 S. Ct. at 2265-66 (emphasis added).

217. See generally Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337 (2006).

218. Brief for Respondents, *supra* note 112, at 5.

advertisements in themselves are not enough to force a judge's recusal.²¹⁹

Caperton does tell us that constitutionally-mandated recusals will be rare, but it does not tell us why.²²⁰ We are left to meander until the Court comes to us with a way of determining, as an objective fact, when a person has a relatively small stake in the controversy "chooses" the judge who handles a case by making independent expenditures.

Caperton also does not say that the decision on the merits must come out differently. The Supreme Court merely remanded the case to the West Virginia Supreme Court of Appeals. The state court once again reversed the judgment. Justice Benjamin recused himself, and another West Virginia judge sat in his place by special designation. The West Virginia Court, once again, overturned the \$50 million judgment against Massey Coal, by a lopsided 4 to 1 vote.²²¹ So, after all of the litigation, the case ends up exactly where it was before the U.S. Supreme Court reviewed the case.

219. Patrick Marley, *State High Court Says Campaign Donations Can't Force Recusals*, MILWAUKEE J. SENTINEL, Oct. 28, 2009, available at <http://www.jsonline.com/news/statepolitics/67012672.html>.

220. See *Caperton*, 129 S. Ct. at 2267.

221. *Caperton v. A.T. Massey Coal Co.*, No. 3350, 2009 WL 3806071 (W. Va. Nov. 12, 2009).