

3-15-2010

## Buying a Judicial Seat for Appeal: Caperton v. A.T. Massey Coal Company, Inc., is Right out of a John Grisham Novel

Richard Gillespie

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### Recommended Citation

Richard Gillespie, *Buying a Judicial Seat for Appeal: Caperton v. A.T. Massey Coal Company, Inc., is Right out of a John Grisham Novel*, 30 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1 (2010)

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# **Buying a Judicial Seat for Appeal: *Caperton v. A.T. Massey Coal Company, Inc.*, is Right out of a John Grisham Novel**

**By Richard Gillespie\***

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## I. INTRODUCTION

With judicial elections looming, he decides to try to purchase himself a seat on the Court. The cost is a few million dollars, a drop in the bucket for a billionaire . . . [H]is political operatives recruit a young, unsuspecting candidate . . . and mold him into a potential Supreme Court Justice. Their Supreme Court Justice.<sup>1</sup>

If this storyline seems like it is right out of a legal fiction novel, it's because it is. The history and facts of *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), decided in June of 2009, is eerily similar to John Grisham's *The Appeal*; the main difference being the ending.<sup>2</sup> In both *Caperton* and Grisham's novel, the story starts with a large jury verdict with millions of dollars in damages being awarded against the defendant corporation.<sup>3</sup> The following political and legal actions are what created a literary best seller and a case for the United States Supreme Court.

In *Caperton*, the respondents (Massey) were found by a West Virginia jury to have committed fraud, misrepresentation, concealment, and tortious interference with the petitioner's (Caperton) contractual relations.<sup>4</sup> For these actions, the jury gave a judgment of fifty million dollars in damages to Caperton, from which Massey appealed.<sup>5</sup> During the appeal process, West Virginia had its

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1. John Grisham, *Preface* to JOHN GRISHAM, *THE APPEAL* (2008).

2. *See generally* *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

3. *See generally id.* *See also* Grisham, *supra* note 1.

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

5. *Id.*

2004 judicial elections for the State's Supreme Court.<sup>6</sup> In the outcome of that election, Brent Benjamin (Benjamin), a civil litigator with no prior judicial experience,<sup>7</sup> unseated incumbent Justice Warren McGraw.<sup>8</sup> The election was decided by less than fifty thousand votes.<sup>9</sup> In isolation, this election would not seem to be relevant to the *Caperton* appeal, but because Massey's chairman, chief executive officer, and president, Don Blankenship (Blankenship) donated a total of three million dollars to Benjamin's election campaign,<sup>10</sup> questions of impartiality and a due process

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6. *Id.*

7. Before his election, Benjamin was an attorney with Robinson and McElwee, PLLC in Charleston, West Virginia. Project Vote Smart, Chief Justice Brent D. Benjamin – Biography, [http://www.votesmart.org/bio.php?can\\_id=59134](http://www.votesmart.org/bio.php?can_id=59134) (last visited Feb. 11, 2009). His twenty-year practice at that firm involved general civil litigation, including toxic torts and complex litigation. *Id.* His civil rights practice focused on protecting children from physical and sexual abuse. *Id.* He was elected to the West Virginia Supreme Court of Appeals in November 2004 when he received fifty-three percent of the votes. *Id.* He began a twelve-year term on January 1, 2005, serving as an associate justice from 2005 to 2009, and is currently the chief justice. *Id.*

8. In fairness, Justice McGraw did spend a large amount, around one million dollars, for the campaign and made a "number of controversial claims" that could have hurt his popularity with the voters. See *Caperton*, 129 S. Ct. at 2264

9. *Id.* at 2257.

10. *Id.* Blankenship spent one million dollars more than the total amount spent by the campaign committees of both candidates combined. Blankenship's donations did not break any political or campaign regulations because he was able to spread the donations out through numerous organizations, all which were tied to Benjamin:

In addition to contributing the \$1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost \$2.5 million to 'And For The Sake Of The Kids,' a political organization formed under 26 U.S.C. § 527. The § 527 organization opposed McGraw and supported Benjamin. Blankenship's donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over \$500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements" [sic] —'to support . . . Brent Benjamin.'

*Id.* (citations omitted).

violation quickly made the election and the *Caperton* appeal inseparable.<sup>11</sup>

When the *Caperton* appeal finally made its way before the West Virginia Supreme Court, Justice Benjamin refused to recuse himself upon Caperton's request,<sup>12</sup> stating "that he 'carefully considered the bases and accompanying exhibits proffered by the movants' [b]ut . . . found 'no objective information . . . to show . . . bias for or against any litigant, that this Justice has prejudged the matters . . . or that this Justice will be anything but fair and impartial.'"<sup>13</sup> On appeal, the majority reversed the trial court's decision, based on procedural grounds,<sup>14</sup> and found the fifty million dollar verdict to be non-binding.<sup>15</sup> In their dissents, Justice Starcher stated that "the majority's opinion [was] morally and legally wrong,"<sup>16</sup> while Justice Albright expressed that the majority had applied "sweeping 'new law' into our jurisprudence that may well come back to haunt us, or more likely, haunt the people we are duty-bound to protect under our law."<sup>17</sup> Upon a rehearing, Justice Starcher pushed Justice Benjamin to recuse himself, stressing that "'Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court.'"<sup>18</sup> Again, Benjamin refused.<sup>19</sup> However, Justices Maynard and Starcher did recuse themselves which left Benjamin as the acting chief justice;<sup>20</sup> a position which let

11. *See generally id.*

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

13. *Id.*

14. *Id.* ("[T]hat a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and, second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party.").

15. *Id.*

16. *Caperton v. A.T. Massey Coal Co.*, 2007 W. Va. LEXIS 119, at \*104 (W. Va. Nov. 21, 2007) (Starcher, J., dissenting).

17. *Id.* (Albright, J., dissenting) ("Congratulations to the majority. It has decided this case for the sake of Massey by protecting A.T. Massey Coal Company.").

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

19. *Id.*

20. Justice Maynard recused himself on appeal after vacation pictures from the French Riviera surfaced showing Maynard and Blankenship together; the vacation occurred during the pendency of the trial. *Id.* at 2258. Justice Starcher

him name the replacements for the vacant court seats.<sup>21</sup> In a final attempt to exclude Justice Benjamin from hearing the case, Caperton again filed for Justice Benjamin's recusal, stating he had applied an "incorrect legal standard" for recusal, in that West Virginia requires recusal when "a reasonable and prudent person, knowing the[] objective facts, would harbor doubts about [a judge's] ability to be fair and impartial."<sup>22</sup> Justice Benjamin again refused, and again on appeal found the trial court's decision to be erroneous.<sup>23</sup> Justice Benjamin defended his interpretation of the West Virginia laws dealing with recusal, and justified his decision to deny such action by stating that "[a]dopting 'a standard merely of appearances . . . seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.'"<sup>24</sup> In the dissent, Justices Albright and Cookman—replacement justices for one of the two justices who had been recused—voiced their concern of a due process violation stemming from Justice Benjamin's refusal to recuse himself.<sup>25</sup> That refusal of

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seemingly recused himself for a more admirable cause, because of his public criticism of Blankenship's role in the 2004 elections; he did not want his duty of impartiality to be questioned. *See id.*

21. *Id.* ("Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices.").

22. *Id.* Caperton supplied additional support for the recusal motion when the court was given the findings of a West Virginia opinion poll taken on the matter:

Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial. Justice Benjamin again refused to withdraw, noting that the "push poll" was "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification."

*Id.*

23. *Id.*

24. *See id.* at 2259.

25. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 264 (2008) (Albright, J., dissenting) ("The new test was applied . . . with gross disregard for the due process rights of the litigants. Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority."), *rev'd en banc*, 129 S. Ct. 2252 (2009).

recusal (I know it sounds funny when you say it out loud) and the concerns over a lack of due process led the Supreme Court to grant a Writ of Certiorari, and to review Justice Benjamin's decision to hear the dispute between Caperton and Massey.<sup>26</sup>

The Supreme Court's decision and its law-expanding implications are analyzed in this case note. However, this note not only considers the legal impact of the *Caperton* decision, but also includes the possible political and societal impacts which join those legal ones. Section II of the note shows the different areas which have traditionally governed judicial recusal, and how the decision in *Caperton* affects those areas.<sup>27</sup> Section III discusses the relevant case-law which the Court relied upon in granting its decision.<sup>28</sup> Section IV analyzes the majority and dissenting opinions.<sup>29</sup> Section V compares *Caperton* with another of the Court's recent rulings and discusses their differences, along with the possible effects and implications which the *Caperton* decision could have on many Americans.<sup>30</sup> Section VI concludes the note.<sup>31</sup> While this note may not be a John Grisham novel, hopefully the details and possible outcomes will spark your intrigue to realize the effects are farther reaching than a single case or even a New York Times best seller. Imagination isn't needed with these types of facts; enjoy.

## II. RESOURCES TO DRAW UPON FOR JUDICIAL RECUSAL

### A. *The Fourteenth Amendment's Due Process Clause and Locating Precedent*

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."<sup>32</sup> Due process was challenged

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

27. See *infra* notes 32–92 and accompanying text.

28. See *infra* notes 93–139 and accompanying text.

29. See *infra* notes 140–231 and accompanying text. Note that there were no concurring opinions in the *Caperton* decision.

30. See *infra* notes 232–259 and accompanying text.

31. See *infra* notes 260–263 and accompanying text.

32. U.S. CONST. amend. XIV, § 1. The due process clause guarantees due process of the law applies to the individual states as well as the federal government. See Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early*

in *Caperton* because of the appearance of impartiality, which was caused by the large amounts of political contributions received by Justice Benjamin from Massey's president, Blankenship.<sup>33</sup> Justice Benjamin's insistence on hearing the appeal between Caperton and Massey, despite his possible appearance of bias, caused too much noise and fear of unfair deprivation of property for the Supreme Court to ignore.<sup>34</sup> Accusations that Justice Benjamin had been "bought" and was being controlled by Massey, or at least that Benjamin owed too great a debt of gratitude to let him be impartial, sparked concerns (to put it mildly) of a Due Process violation.<sup>35</sup>

However, the matter was not a clear due process infringement, because never before had the Due Process Clause been applied to require judicial recusal when dealing with political contributions to a judicial campaign.<sup>36</sup> This lack of guidance is explained by the Court in the following statement: "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances."<sup>37</sup> In addition, since states and Congress are able to adopt broader recusal standards than the Due Process Clause covers, the Constitution is rarely relied upon in matters concerning judicial recusal.<sup>38</sup> The limited extent of the Fourteenth Amendment's application to judicial disqualification is further shown by the Court's comment from *Aetna Life Ins. v. Lavoie*, which states: "[P]ersonal bias or prejudice alone" is not

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*Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1051 (2000). Additionally, the Due Process Clause of the Fourteenth Amendment incorporates the Fifth Amendment's Due Process guarantees to the states as a part of "selective incorporation." *See id.*

33. *See supra* note 10 and accompanying text.

34. U.S. CONST. amend. XIV, § 1.

35. *See Caperton*, 129 S. Ct. at 2259.

36. *Id.* at 2262 ("This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.").

37. *Id.* at 2267.

38. *Id.* at 2267-68. ("The Due Process Clause demarks only the outer boundaries of judicial disqualification.") In his dissent, Justice Roberts noted that "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.").



enough to impose a constitutional requirement of judicial recusal under the Due Process Clause.<sup>39</sup> Even with the clear appearance of possible bias and impropriety from Massey's large contributions to Justice Benjamin's campaign, due process was not a "perfect fit."<sup>40</sup>

With the lack of direct case guidance for the Supreme Court to rely on in determining if political contributions could constitute a due process violation, they used numerous, somewhat comparable, past Supreme Court holdings to make the *Caperton* case analogous with the Court's precedent.<sup>41</sup> The Court "cut and pasted" the facts from several past judicial due process cases to make a comparable framework for constitutional grounds.<sup>42</sup> This action allowed the Court to have "federal question" jurisdiction so they were able to hear the case.<sup>43</sup> To explain their need to broaden the constitutional application of due process in regards to the disqualification of judges, the Court relied upon the knowledge of past Supreme Court Justice White and his quote from the 1975 holding in *Withrow v. Larkin*:

[N]ew problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter,

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39. *Id.* at 2259 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986)). See also *infra* note 119 and accompanying text.

40. See *supra* notes 36-39 and accompanying text.

41. See *Caperton*, 129 S. Ct. at 2262 ("[W]e turn to the issue before us. This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.").

42. See *id.*

That temptation, *Caperton* claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and *Monroeville* when a mayor-judge (or the city) benefited financially from a defendant's conviction, as well as the conflict identified in *Murchison* and *Mayberry* when a judge was the object of a defendant's contempt.

*Id.*

43. Federal question jurisdiction is a term used to refer to the situation in which a United States federal court has subject-matter jurisdiction to hear a civil case because the plaintiff has alleged a violation of the Constitution, a law of the United States, or treaties to which the United States is a party. BLACK'S LAW DICTIONARY 394 (3d ed. 2006).

require recusal. These are circumstances “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”<sup>44</sup>

### *B. State Statutory Laws*

As mentioned above, the reason for the dispute as to whether or not the Constitution is applicable to political contributions in judicial recusal situations is based on the fact that the Constitution’s protections are usually not needed in this regard.<sup>45</sup> The Constitution offers the minimum amount of protection that is guaranteed to United States citizens, but states are able to provide additional safeguards to their populace, which most states do.<sup>46</sup> In fact, states such as Alabama and Mississippi have created legislation and judicial code which deal directly with situations where judicial campaign contributions over a certain amount or percentage will prohibit a judge from participating in an adjudication relating to that donor.<sup>47</sup>

The Alabama code sets specific dollar amounts for judicial campaign contributions given by lawyers which require the recusal of

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44. *Caperton*, 129 S. Ct. at 2259 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). See also *infra* notes 115 and accompanying text.

45. See *supra* notes 37–38 and accompanying text.

46. See *Caperton*, 129 S. Ct. at 2267. “States may choose to ‘adopt recusal standards more rigorous than due process requires’ . . . distinguishing the ‘constitutional floor’ from the ceiling set ‘by common law, statute, or the professional standards of the bench and bar.’” *Id.* (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002)); see also *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

47. *Caperton*, 129 S. Ct. at 2266. See also e.g., ALA. CODE §§ 12-24-1, -2 (2009) (“The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party, and all others described in subsection (b) of Section 12-24-2.”); (Miss. Code of Judicial Conduct, Canon 3E(2) (2008) (“Recusal of Judges from Lawsuits Involving Major Donors. A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.”)).

the judge or justice if that lawyer argues before him.<sup>48</sup> Additionally, the same statute describes to what extent individuals will be bound if a corporation which they are a part of is the donor.<sup>49</sup> However, some latitude is still given to the court when dealing with the size of judicial contributions which do not come from a lawyer.<sup>50</sup> This judicial determination is shown by the language of the statute which states: "The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a *substantial contribution* from a party to the case."<sup>51</sup> The lack of a "bright line" dollar amount gives the court some interpretational purpose, and avoids the possible "loop hole" which donors could take advantage of by giving just under that bright line set amount.<sup>52</sup>

The legislatures made sure to emphasize that they "in no way intend to suggest that any sitting justice or judge of th[e] state would be less than fair and impartial in any case," but none the less, the law assures public that they are protected from even the chance of impropriety.<sup>53</sup> Furthermore, the law requires that all judges or

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48. ALA. CODE § 12-24-2(c) (2009).

If the action is assigned to a justice or judge of an appellate court who has received more than four thousand dollars (\$4,000) . . . , or to a circuit judge who has received more than two thousand dollars (\$2,000)[,] . . . any opposing party . . . shall file a written notice requiring recusal of the justice or judge.

*Id.*

49. ALA. CODE §12-24-2(b). "Any holder of five percent (5%) or more of a corporate party's stock, any employees of the party acting under that party's direction, any insurance carrier for the party which is potentially liable for the party's exposure in the case." *Id.*

50. See ALA. CODE § 12-24-1.

51. *Id.* (emphasis added).

52. A bright-line rule (or bright-line test) is a clearly defined rule or standard, generally used in law, composed of objective factors, which leaves little or no room for varying interpretation. BLACK'S LAW DICTIONARY 81 (3d ed. 2006). The purpose of a bright-line rule is to produce predictable and consistent results in its application, and to resolve issues "simply and straightforwardly, sometimes sacrificing equity for certainty." *Id.*

53. See ALA. CODE § 12-24-1.

justices provide the secretary of state with a “statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office.”<sup>54</sup> Contributions from political committees must also be included in this statement.<sup>55</sup> Other states such as, but not limited to, Georgia, Texas, New York, Montana, Massachusetts, Oregon, Utah, and Louisiana have created, or are in the process of ratifying similar legislation to that of Alabama’s.<sup>56</sup>

### C. Codes of Judicial Conduct

Besides legislation, many states rely upon their code of legal ethics and judicial canons to deal with matters like the one presented in *Caperton*.<sup>57</sup> As noted above, Mississippi, like many other states, directly deals with the possibility of judicial impropriety resulting from campaign contributions to a judge or justice through its Judicial Codes of Conduct (Mississippi Judicial Code).<sup>58</sup> Canon three of the Mississippi Judicial Code allows for a party to file a recusal motion against a judge if an “opposing party or counsel of record for that party is a major donor to the election campaign of such judge.”<sup>59</sup> Similar to the language of the Alabama statute, discussed previously, the Mississippi Judicial Code does not define what donation amount would make a person a “major donor.” Instead, it leaves the governing authority with the ability to judge the matter on a case-by-case basis.<sup>60</sup> Moreover, the statute allows the participating parties to

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54. ALA. CODE § 12-24-2(a).

55. *Id.*

56. For a full list of state statutes dealing with Judicial disqualifications on grounds related to political contributions, see generally National Center for State Courts, *Focus: Judicial Recusal Due to Campaign Contributions*, GAVEL TO GAVEL: A REVIEW OF STATE LEGISLATION AFFECTING THE COURTS, Mar. 12, 2009, [http://www.ncsconline.org/D\\_Research/gaveltogavel/G%20to%20G%203-11.pdf](http://www.ncsconline.org/D_Research/gaveltogavel/G%20to%20G%203-11.pdf).

57. *Caperton*, 129 S. Ct. at 2266–67 (“[S]ome States require recusal based on campaign contributions similar to those in this case . . . . [M]ost disputes over disqualification will be resolved without resort to the Constitution.”).

58. See *supra* note 48.

59. MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(2) (2008).

60. The governing authority would most likely be the state bar association.

waive the possible conflict after full disclosure.<sup>61</sup> This waiver furthers the idea that, even with ties to a party who gave large campaign contributions, judges are presumed to be honest and serve with integrity.<sup>62</sup>

The American Bar Association's Model Code of Judicial Conduct (ABA Code) has similar restrictions to Mississippi's.<sup>63</sup> While the ABA Code's commentary prefers a judicial appointment system over a judicial election system, partially because the appointed system avoids this exact problem, the ABA Code recognizes that, in those jurisdictions where judicial campaigns are held, candidates are forced to raise money in order to pay for the high costs of the elections.<sup>64</sup> The ABA Code forbids the candidate from being directly involved with the campaign fundraising, but does allow him to set up campaign committees to do the work, with the caveat that the candidate will be "subject to discipline" for any improper conduct by his campaign committee.<sup>65</sup> In addition, the campaign committee may only accept "reasonable campaign contributions," and may not start to accept or solicit any contributions until the election is within a

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61. MISS. CODE OF JUDICIAL CONDUCT Canon 3F.

A judge who may be disqualified by the terms of Section 3E may disclose on the record the basis of the judge's possible disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

*Id.*

62. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

63. *See supra* notes 59–61 and accompanying text. The Mississippi's Judicial Code is similar to the ABA Code because the Mississippi code is based on the ABA Code.

64. MODEL CODE OF JUDICIAL CONDUCT R. 4.4 cmt 1 (2007).

65. *Id.*

year's time.<sup>66</sup> Even with these precautions, the ABA Code identifies the possibility of abuse which would require recusal, because of the contribution's source and size.<sup>67</sup> In an attempt at full disclosure, elected judicial figures must file a statement with the proper state authority which lists the "name, address, occupation, and employer of each person who has made campaign contributions to the committee whose value in the aggregate exceed[s]" a pre-determined amount which the state will set.<sup>68</sup> The ABA Code lists many protections to ward off abuse, or its appearance, from campaign contributions, and some states, such as Mississippi, have adopted at least some of these recommendations.<sup>69</sup> However, many states still lack regulations which deal specifically with campaign contributions and their potential for judicial abuse, as is shown by the actions of the West Virginia Supreme Court in its dealings with the *Caperton* matter.<sup>70</sup>

As stated, *Caperton* originated in West Virginia, which has since amended its Code of Judicial Conduct (Virginia Code) to somewhat rectify the shortcoming of its silence when dealing with improper judicial campaign contributions, which the case emphasizes.<sup>71</sup> Before the amendment, West Virginia relied upon Canon 3(E)(1), which as a general provision, requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."<sup>72</sup> Almost every state's code of judicial conduct has a similar provision, but many, including West Virginia, also incorporate specific instances which call for a judge or justice's

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66. MODEL CODE OF JUDICIAL CONDUCT R. 4.4(B)(1) ("A . . . candidate . . . shall direct his or her campaign committee: (1) to solicit and accept only such campaign contributions as are reasonable, in any event not to exceed, in the aggregate, [\$] from any individual or [\$] from any entity or organization.").

67. See *supra* notes 64–65. "Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his . . . campaign committee to be cautious . . . with such contributions, so they do not create grounds for disqualification if . . . elected to judicial office." MODEL CODE OF JUDICIAL CONDUCT R. 4.4 cmt 3.

68. MODEL CODE OF JUDICIAL CONDUCT R. 4.4(B)(3).

69. See *supra* notes 59–61 and accompanying text.

70. See generally *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). See also *supra* note 56.

71. See generally *Caperton*, 129 S. Ct. at 2252.

72. W.VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1) (2009).

recusal.<sup>73</sup> Specific examples requiring recusal include, but are not limited to: a judge having a direct pecuniary interest,<sup>74</sup> having a personal relationship with one of the parties,<sup>75</sup> or having worked for one of the firms whose lawyer is an advocate in the case.<sup>76</sup> However, many of these defined regulations seem to also be covered by the Fourteenth Amendment's Due Process clause, so their addition to Canon law appears superfluous.<sup>77</sup>

West Virginia has amended its Code of Conduct with Canon 5(C)(2), which addresses the *Caperton* problem by stating that "[a] candidate shall not personally solicit or accept campaign contributions, . . . [a] candidate may, however, establish committees of responsible persons . . . [who] may solicit and accept *reasonable* campaign contributions."<sup>78</sup> The section's advisory commentary connects the rule with Canon 3(E), in that abuse or appearance of abuse can call for judicial disqualification.<sup>79</sup> West Virginia has taken some steps to address the issue raised by *Caperton*, but has not adopted the more rigorous standards laid out in the ABA's Code,<sup>80</sup> nor has the State gone as far as other states such as Mississippi.<sup>81</sup>

Recent proposals to more clearly delineate and strengthen state regulations dealing with recusal on matters tied with campaign

73. See, e.g., CAL. CODE OF JUDICIAL CONDUCT Canon 3(E)(5) (2010).

74. CAL. CODE OF JUDICIAL CONDUCT Canon 3(E)(5)(d) (stating, "[d]isqualification of an appellate justice is also required [if] . . . [t]he appellate justice, or his or her spouse or registered domestic partner, or a minor child residing in the household, has a financial interest . . . in the proceeding.").

75. W.VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(d)(i) (stating, "[a] judge shall . . . disqualify himself or herself in a proceeding in which . . . the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding.").

76. W.VA. CODE OF JUDICIAL CONDUCT, Canon 3(E)(1)(b).

77. *Caperton*, 129 S. Ct. at 2259 ("[T]he Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, [or] pecuniary interest' in a case." (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927))).

78. W.VA. CODE OF JUDICIAL CONDUCT, Canon 5 (C)(2) (emphasis added).

79. *Id.* at cmt ("campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may . . . [be relevant to] disqualification . . . under Section 3E.").

80. See *supra* note 68 and accompanying text.

81. See *supra* note 59 and accompanying text.

contributions include: allowing litigants peremptory challenges against judges for cause —much the way lawyers are able to exclude potential jurors during voir dire;<sup>82</sup> changing the standard of review to de novo during interlocutory appeals so the review can be more “searching” and offer better “safeguard[s] against partiality infecting decisions on recusal;”<sup>83</sup> and independent adjudicators having the “final say” on requests for recusal, so that judges who may have a personal stake in the outcome of the case aren’t allowed to determine their own fate with regards to being allowed to judge the matter.<sup>84</sup> Other proposals also include: “per se” limits on campaign contributions which require automatic recusal or disqualification of the adjudicator if the limits are exceeded and the party who made the contribution is connected to the litigation;<sup>85</sup> and at the beginning of litigation, requiring more extensive disclosure by judges related to campaign contributions and any other ties to parties involved in the dispute.<sup>86</sup>

While West Virginia has not gone as far as some states when dealing with recusal reform, there are other states, such as Michigan, who have not even incorporated the ABA Code’s general “disqualification clause.”<sup>87</sup> California, often viewed as a liberal state that has not shied away from providing additional safeguards to its participants in the judicial process, seems to have taken a position

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82. See Brennan Center for Justice, *Recusal Standards after Caperton v. Massey*, [http://www.brennancenter.org/content/resource/recusal\\_standards\\_after\\_caperton\\_v\\_massey/](http://www.brennancenter.org/content/resource/recusal_standards_after_caperton_v_massey/) (July 16, 2009). Voir dire is the process by which prospective jurors are questioned by a judge or lawyer about their backgrounds and potential biases; the process is used to determine if the “prospect is qualified and suitable to serve on a jury.” BLACK’S LAW DICTIONARY 764 (3d ed. 2006).

83. See Brennan Center For Justice, *supra* note 82. De novo review refers to the appellate court’s authority to review the trial court’s conclusions on questions of the application, interpretation, and construction of law giving the reviewing court great authority to fully consider all aspects of the case on appeal. BLACK’S LAW DICTIONARY 392 (3d ed. 2006).

84. See Brennan Center For Justice, *supra* note 82.

85. See MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007).

86. See *supra* note 68.

87. See MODEL CODE OF JUDICIAL CONDUCT OF JUD. CONDUCT R. 2.11 (“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned”).



similar to West Virginia by stating that the Code's general disqualification clause can apply to campaign contributions whose size or source could give an "appearance of impropriety."<sup>88</sup> California could simply amend its Code of Judicial Conduct to make Canon 4(D)(5) applicable to campaign contributions, but many view that step as being too harsh.<sup>89</sup> That section of California's Code forbids a judge or justice from receiving any gifts given to them or their family by a party, or their relation, who might reasonably come before the judge.<sup>90</sup> The problem with applying such a sweeping rule to campaign contributions is that, as the ABA Code notes, judicial elections are expensive and fundraising is often needed in order for a candidate to even be competitive in an attempt to secure a seat on the bench.<sup>91</sup> All the same, the *Caperton* case has brought recusal reform to the forefront of legal debate but, as shown, states are addressing the issue using greatly varied means.<sup>92</sup>

## II. CASE PRECEDENT

As mentioned, no single case provided clear precedent for the *Caperton* Court.<sup>93</sup> Nonetheless, the majority supports its holding by

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88. See CAL. CODE OF JUD. CONDUCT Canon 5(A)(3) cmt (2010) (stating, "In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided.").

89. See CAL. CODE OF JUDICIAL CONDUCT Canon 4(D)(5).

Under no circumstance shall a judge accept a gift, bequest, or favor if the donor is a party whose interests have come or are reasonably likely to come before the judge. A judge shall discourage members of the judge's family residing in the judge's household from accepting similar benefits from parties who have come or are reasonably likely to come before the judge.

*Id.*

90. See *id.*

91. See *supra* note 64 and accompanying text.

92. See *supra* notes 59–90 and accompanying text.

93. See *supra* note 41 and accompanying text.

fusing together different aspects of several decisions.<sup>94</sup> This medley of prior case rulings and the resulting analysis expands the reach of the Due Process Clause.<sup>95</sup>

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

In *Tumey v. Ohio*, the Supreme Court reversed a man's prohibition violation conviction by ruling that the defendant's due process rights, which are guaranteed by the Fourteenth Amendment, were violated when the judge who adjudicated the matter had a "direct, personal, substantial, [or] pecuniary interest in reaching [his] conclusion."<sup>96</sup> That judge's decision violated the Fourteenth Amendment's Due Process Clause because the "defendant . . . had [a due process] . . . right to be have an impartial judge."<sup>97</sup> In *Tumey*, the mayor – who also acted as the town's judge – had a financial interest in the case outcome because he was paid more for convictions than for acquittals.<sup>98</sup> Actually, the mayor was only compensated for trying the case if a conviction was given.<sup>99</sup> Additionally, the town's

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94. The cases include: *Tumey v. Ohio*, 273 U.S. 510; *Ward v. Monroeville*, 409 U.S. 57 (1972); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *In re Murchison*, 349 U.S. 133 (1955). See *infra* notes 96–139 and accompanying text.

95. See *Caperton*, 129 S. Ct. at 2256–67 (discussing the majority's reasoning for their holding).

96. *Tumey*, 273 U.S. at 523 ("[It] deprives a defendant . . . of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.").

97. *Id.* at 535.

98. *Id.* at 517 ("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 . . .").

99. *Id.* at 520.

[N]o fees or costs in such cases are paid [the Mayor] except by the defendant if convicted. There is, therefore, no way by which the Mayor may be paid for his service as judge, if he does not convict those who are brought before him; nor is there any fund from which marshals, inspectors and detectives can be paid for their services in arresting and bringing to trial and furnishing the evidence to convict in such cases . . .

treasury and multiple town workers were paid from the fines imposed from the convictions.<sup>100</sup> Furthermore, the mayor was permitted to try the case without a jury unless imprisonment was the punishment sought.<sup>101</sup>

The Court in *Tumey* was not persuaded by the State's argument that the compensation was so insignificant that it could not affect the judge's ability to be impartial.<sup>102</sup> In fact, the fines "handed out" by the judge from prohibition violations exceeded twenty thousand dollars for just a seven month time period.<sup>103</sup> From that amount, the mayor received just under seven hundred dollars.<sup>104</sup> To put into context what seven hundred dollars was worth at that time, if a defendant was not able to pay the fine, he would pay it off in jail time at a rate of sixty cents a day.<sup>105</sup>

Nor was the Court convinced that judges were without fault, or above acting on temptation, which is illustrated by Chief Justice Taft's comment:

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*Id.*

100. *See id.* at 518. The law allowed "secret service funds" from the village to be paid to detectives, officers, marshals, and attorneys "for services in securing evidence necessary to convict[] and prosecute[] violat[ors]" of prohibition laws. *Id.* The fund which paid these parties was financed by fees and fines distributed by the major when finding defendants guilty. *Id.* Therefore, these parties would not be paid without such rulings. *See id.*

101. *Tumey*, 273 U.S. at 516–17 (noting the mayor, any other municipal judge or "police judge, probate, or common pleas judge within the county," was given final jurisdiction to try possible offenders of prohibition laws without a jury).

102. *Id.* at 524 (stating "compensation is so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty, or as prejudicing the defendant in securing justice, even though the magistrate will receive nothing if the defendant is not convicted.").

103. *Id.* at 521 (noting that "[b]etween May 11, 1923 and December 31, 1923, the total amount of fines for violation of the prohibition law, collected by this village court, was upwards of \$ 20,000.").

104. *Id.* at 522 (noting that "Mayor Pugh received \$ 696.35 from these liquor cases during that period, as his fees and costs, in addition to his regular salary.").

105. *Id.* at 516 (stating "[t]he Mayor exercised [authority] in this case, to order that the person sentenced to pay a fine shall remain in prison until the fine and costs are paid. At the time of this sentence, the prisoner received a credit of sixty cents a day for each day's imprisonment.").

[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.<sup>106</sup>

Chief Justice Taft concluded the opinion by stating: “No matter what the evidence was against him, he had the right to have an impartial judge.”<sup>107</sup>

The Court in *Caperton* relied on the *Tumey* decision because the Mayor’s interest in the outcome of the case “was less than what would have been considered personal or direct at common law.”<sup>108</sup> The mayor’s “pecuniary interest,” along with his ambition to raise money for the town, was enough to surpass the common law’s requirement of disqualification for an adjudicator having a “personal interest” in the outcome of the case. This distinction was furthered in *Ward v. Monroeville*, where, like in *Tumey*, the judge was also the mayor.<sup>109</sup> The Court in *Monroeville* found that, even though the judge had no pecuniary interest in the outcome of the case, his “executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to those finances] from the mayor’s court.”<sup>110</sup> Similar to what the majority did in

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106. *Id.* at 532.

107. *Id.* at 535.

108. *Caperton*, 129 S. Ct. at 2260.

109. *Ward v. Monroeville*, 409 U.S. 57 (1972). In *Ward*, the mayor sat as a judge for traffic offenses. *Id.* A major part of the village’s income came from the fines, forfeitures, costs, and fees handed down by the mayor. *Id.* at 59. Like *Tumey*, the mayor’s impartiality as a judge was questioned because of the income his court derived for the town. *Id.* The Supreme Court ruled that it violated the defendant’s Fourteenth Amendment Due Process rights “to subject his liberty or property to the judgment of a court, the judge of which ha[d] a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.” *Id.* at 60 (citing *Tumey*, 273 U.S. at 523).

110. *Id.*

*Caperton*, these decisions extended due process protection to areas in which the right had not been applied.<sup>111</sup>

Analogous to the majority's opinion in *Caperton*, Chief Justice Taft stressed the use of an objective, rather than subjective, standard of review.<sup>112</sup> The Chief Justice questioned if the "average man" would be tempted to put his own interest above justice.<sup>113</sup> In *Caperton*, Justice Kennedy used this "average man" test along with its further-developed definition from *Withrow v. Larkin*.<sup>114</sup> The *Withrow* Court clarified the objective test by providing that, "under a realistic appraisal of psychological tendencies and human weakness, [if the interest poses such a risk of actual bias or prejudgment th[en] the practice must be forbidden if the guarantee of due process is to be adequately implemented."<sup>115</sup> The consideration for the Court was not based upon the integrity of the judge in question, or even the character of the average judge, but on a "realistic appraisal of [the] psychological tendencies and human weakness" of the "average man."<sup>116</sup> Justice Kennedy also focuses on this distinction to clarify that Justice Benjamin's subjective findings on his ability to be a fair and disinterested adjudicator are irrelevant when determining the appearance of impartiality.<sup>117</sup>

#### *B. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986)*

The *Caperton* Court also looked to the holding in *Aetna Life Insurance Co. v. Lavoie* to show that a pecuniary interest may be

111. See *Caperton*, 129 S. Ct. at 2260 ("The Court was thus concerned with more than the traditional common-law prohibition on direct pecuniary interest. It was also concerned with a more general concept of interests that tempt adjudicators to disregard neutrality.").

112. See *id.* (citing *Tumey*, 273 U.S. at 532).

113. See *supra* note 106 and accompanying text.

114. See *Caperton*, 129 S. Ct. at 2255 (noting "[t]here 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.").

115. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

116. See *supra* notes 113, 115 and accompanying text.

117. See *supra* note 24 and accompanying text.

more remote than common law had once mandated.<sup>118</sup> In *Lavoie*, the Court found that due process was offended when an Alabama Supreme Court Justice participated in a ruling whose facts were substantially similar to an action the justice was bringing in a lower court of the state.<sup>119</sup> The ruling was decided by one vote, and the opinion was authored by Justice Embry, who had the similar case in the State's lower court.<sup>120</sup> The Alabama Supreme Court found that Aetna Insurance had refused to pay a claim to the Lavoies in bad faith, and upon remand the Lavoie family was awarded compensatory and punitive damages which were consistent with Justice Embry's opinion.<sup>121</sup> The decision by the State's Supreme Court was made even though "earlier opinions of the court had refused to allow bad-faith suits in such circumstances."<sup>122</sup> Justice Embry, while writing the opinion in the case and casting the deciding vote, was suing Blue Cross Insurance for refusal to pay a claim in bad faith and also seeking punitive damages.<sup>123</sup>

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118. See *Caperton*, 129 S. Ct. at 2260 (stating, "[t]he Court in *Lavoie* further clarified the reach of the Due Process Clause regarding a judge's financial interest in a case.").

119. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 817 (1986) ("Justice Embry, one of the five justices joining the *per curiam* opinion, had filed two actions in the Circuit Court for Jefferson County, Alabama, against insurance companies. Both of these actions alleged bad-faith failure to pay a claim. . . . Both suits sought punitive damages.").

120. *Id.* at 818 ("The deposition revealed that Justice Embry had authored the *per curiam* opinion in this case over an 8- or 9-month period during which his civil action against Blue Cross was being prosecuted.").

121. *Id.* at 816 ("On remand, appellees' bad-faith claim was submitted to a jury. The jury awarded \$3.5 million in punitive damages.").

122. *Id.*

123. See *supra* note 120 and accompanying text.

All of these issues were present in Justice Embry's lawsuit against Blue Cross. His complaint sought recovery for partial payment of claims. Also the very nature of Justice Embry's suit placed in issue whether he would have to establish that he was entitled to a directed verdict on the underlying claims that he alleged Blue Cross refused to pay before gaining punitive damages. Finally, the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross suit undoubtedly "raised the stakes" for Blue Cross in that suit, to the benefit of Justice

The majority in *Caperton* used *Lavoie*'s interpretation of the Due Process Clause as it pertained to a judge's pecuniary interests in the outcome of a case.<sup>124</sup> Chief Justice Burger expressed in *Lavoie* that the interest need not be immediate or directly relayed from the litigating parties to the judge.<sup>125</sup> The Chief Justice reiterated the basic protection guaranteed by the Fifth and Fourteenth Amendments of the Constitution and their Due Process Clauses: "A judge may not try a case where he has an interest in the outcome."<sup>126</sup> Justice Kennedy also focused on the *Lavoie* Court's insistence on the use of an objective test in determining a judge's impartiality, which is echoed throughout the majority's opinion in *Caperton*.<sup>127</sup> Chief Justice Burger articulated this point in *Lavoie* with the statement: "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'"<sup>128</sup>

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Embry. Thus, 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.

*Lavoie*, 475 U.S. at 823–24. Before the ruling of the Supreme Court which remanded the *Lavoie* case and required Justice Embry's disqualification, the Justice received a thirty thousand dollar settlement from Blue Cross. *See id.* at 824.

124. *See Caperton*, 129 S. Ct. at 2260.

125. *See Lavoie*, 475 U.S. at 824.

Justice Embry's complaint against Blue Cross sought 'compensatory damage for breach of contract, inconvenience, emotional and mental distress, disappointment, pain and suffering' in addition to punitive damages for himself . . . . Soon after the opinion of the Alabama Supreme Court in this case was announced, Blue Cross paid Justice Embry what he characterized in an interview as 'a tidy sum' . . . . [T]he 'tidy sum' that Justice Embry received directly is sufficient to establish the substantiality of his interest here.

*Id.* at 824–25.

126. *See infra* note 136 and accompanying text.

127. *See infra* notes 152, 170 and accompanying text.

128. *Lavoie*, 475 U.S. at 825 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

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

Justice Kennedy and the majority also looked at the Court's ruling from *In re Murchison* for direction.<sup>129</sup> The judge in *Murchison* did not have a pecuniary interest in conflict with the proceeding, but had charged the defendants with criminal contempt and was then later the judge who tried that contempt.<sup>130</sup> Furthermore, at the contempt hearing, the judge added testimony and information based upon his recollection which was not included in the original court's record.<sup>131</sup> The judge refused the defense's motion to have the new information stricken and, as common sense would dictate, it's highly unlikely that a judge would be convinced by other witnesses that his own interpretation of the event was inaccurate.<sup>132</sup>

In writing the majority opinion in *Murchison*, Justice Black declared: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases."<sup>133</sup> Justice Black also noted actual bias need not be

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

130. *Id.* at 134.

131. *Id.* at 138.

In finding White guilty of contempt the trial judge said, "there is one thing the record does not show, and that was Mr. White's attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his attitude upon the witness stand. . . . Not only was the personal attitude insolent, but it was defiant, and I want to put that on the record."

*Id.*

132. *See id.* In answer to defense counsel's motion to strike these statements because they were not part of the original record the judge said, "That is something . . . that wouldn't appear on the record, but it would be very evident to the court." Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination. *Id.*

133. *In re Murchison*, 349 U.S. at 136.



proven, because the Court must also be wary of the appearance of bias for justice to be best served.<sup>134</sup>

The lack of a pecuniary or family interest in *Murchison* made the ruling relevant to *Caperton*.<sup>135</sup> The basic consideration was that a judge may not “try [a] case where he has an interest in the outcome,” and that interest is dictated by the “[c]ircumstances and relationships” which surround the matter.<sup>136</sup> The prior adverse relationship that existed between the judge in *Murchison* and the defendant was akin to the relationship which existed in *Caperton* between Blakenship and Justice Benjamin. While the relationship between Justice Benjamin and the head of Massey was not adverse like the one in *Murchison*, neither the relationship’s duration nor Justice Benjamin’s belief in his ability to be impartial mattered. The important element, as expressed in *Murchison*, is that with an existing relationship, “it is difficult[,] if not impossible[,] for a judge to free himself from the influence of what [has taken] place.”<sup>137</sup> The Court in *Murchison* stated: “no man can be a judge in his own case.”<sup>138</sup> Justice Kennedy added to the rule by writing: “Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when . . . a man *chooses the judge* in his own cause.”<sup>139</sup>

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134. *See id.* at 136-37 (“But our system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way justice must satisfy the appearance of justice.”) (internal quotation marks omitted).

135. *Caperton*, 129 S. Ct. at 2261 (“where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding.”).

136. *Id.* at 2261 (“It noted that the disqualifying criteria ‘cannot be defined with precision. Circumstances and relationships must be considered.’” (quoting *In re Murchison*, 349 U.S. at 136)).

137. *Caperton*, 129 S. Ct. at 2261 (quoting *In re Murchison*, 349 U.S. at 136).

138. *Murchison*, 349 U.S. at 136.

139. *Caperton*, 129 S. Ct. at 2265 (quoting *In re Murchison*, 349 U.S. at 137) (emphasis added).

### III. ANALYSIS OF THE COURT'S OPINION

#### A. Majority Opinion

"Not every campaign contribution by a litigant or attorney creates a probability of bias which requires a judge's recusal, *but this is an exceptional case*."<sup>140</sup> While writing for the majority, Justice Kennedy might have underestimated the importance of this case by calling it "exceptional."<sup>141</sup> As highlighted in both Chief Justice Roberts' and Justice Scalia's dissents,<sup>142</sup> the Due Process Clause had never before been used to govern political contributions, because it is an area usually controlled by state legislation or canon law.<sup>143</sup> Nonetheless, as Justice Kennedy, who is joined in the opinion by Justices Stevens, Souter, Ginsburg, and Breyer notes, "a fair trial in a fair tribunal is a basic requirement of due process,"<sup>144</sup> and having a judge indebted to a party arguing before him would seem to cast doubt on that guarantee.<sup>145</sup>

While the majority opinion limits the ruling to "extraordinary circumstances," the decision still expands the application of due process in matters dealing with judicial recusal.<sup>146</sup> While the issue had not been addressed by the Court on due process grounds before, the Court finds the Constitution applicable and explains its application to judicial campaigns by stating:

As new problems have emerged that were not discussed at common law, . . . the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances 'in which

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140. *Caperton*, 129 S. Ct. at 2263 (emphasis added). The court notes that some "pecuniary interests" are "too remote and insubstantial" to amount to a due process violation. *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-26 (1986)).

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

142. *See infra* notes 215-16, 230 and accompanying text.

143. *Id.*

144. *Caperton*, 129 S. Ct. at 2259 (quoting *In re Murchison*, 349 U.S. at 136).

145. *See Caperton*, 129 S. Ct. at 2269.

146. *See id.* at 2262 ("This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.").

experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.<sup>147</sup>

Possibly, as the majority's analysis notes, the Constitution will not be needed to address judicial campaign issues in the future, especially with the reform movement which different state legislatures have recently adopted, or are in the process of attempting to ratify.<sup>148</sup> However, the opinion creates a minimum amount of protection for litigants by attempting, through the Constitution, to provide "a fair trial in a fair tribunal," which individual states may build upon through their own laws and codes of conduct.<sup>149</sup>

A critique stated in the majority's opinion, and often echoed in law schools across the country, is that "hard cases make bad law."<sup>150</sup> While this decision creates new precedent and application for the Fourteenth Amendment's Due Process Clause, the Court addresses this possibly perceived ill with the statement: "It is true that extreme cases often test the bounds of established legal principles, . . . [b]ut it is also true that extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards. This is particularly true when due process is violated."<sup>151</sup>

### 1. Need For An Objective Test

Even the threat of "judicial campaign abuse" will detract from the "public[']s] confidence in the fairness and integrity of the nation's

147. *Caperton*, 129 S. Ct. at 2259 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

148. See *supra* notes 48–55, 59, 61, 73, 78–79 and accompanying text.

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

150. See *id.* at 2272 & 2275 (Scalia, J., dissenting). Scalia notes: "The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious." *Id.* at 2275 (Scalia, J., dissenting).

151. See *id.* at 2265.

elected judges.”<sup>152</sup> For this reason, the Court applied an objective standard to situations which could require recusal of a judge who receives contributions towards his campaign and then is left to judge one of his contributors.<sup>153</sup> The public’s confidence in America’s legal system is already strained, and the Court should protect the law from further disenchantment.<sup>154</sup> Additionally, the review process of a judge’s refusal to recuse himself and the difficulty in discovering actual evidence of bias, makes an objective standard not just preferable, but necessary.<sup>155</sup> The majority opinion realizes that with the application of this standard, some judges who are unbiased and who would try the matter in front of them as fairly as possible will still be disqualified from hearing the case.<sup>156</sup> Nevertheless, an objective assessment still offers much more protection and an easier application than its subjective counterpart.<sup>157</sup>

As discussed above,<sup>158</sup> not every political contribution received by a judge during his candidacy will require him to recuse himself, but only when “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,’” will recusal be required.<sup>159</sup> The Court listed a non-exclusive list of factors for consideration which might show when

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152. *Id.* at 2266. “Judicial integrity is, in consequence, a state interest of the highest order.” (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)). *Id.* at 2267.

153. *Id.*

154. *See id.* at 2266–67 (noting that “[t]he citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity.” (quoting *Republican Party of Minn.*, 536 U.S. at 793 (Kennedy, J., concurring))).

155. *See id.* at 2263 (stating, “[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules . . . The judge’s own inquiry into actual bias, then, is not one that the law can easily superintend or review.”).

156. *Id.* at 2265 (noting that “[o]bjective standards may also require recusal whether or not actual bias exists or can be proved. Due process ‘may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.’” (quoting *In re Murchison*, 349 U.S. at 136)).

157. *See Caperton*, 129 S. Ct at 2265.

158. *See supra* note 140 and accompanying text.

159. *Caperton*, 129 S. Ct at 2264 (quoting *Tumey*, 273 U.S. at 532).

such “influence” on a judge could rise to violate due process standards.<sup>160</sup> Those factors include: (1) “the contribution’s relative size in comparison to the total amount of money contributed to the campaign”; (2) “the total amount spent in the election”; and (3) “the apparent effect such [a] contribution had on the outcome of the election,” which can include the closeness of the election and the “[t]emporal relationship between the campaign contributions, the justice’s election, and the pendency of the case . . . .”<sup>161</sup>

By weighing these considerations through a “totality of the circumstances”<sup>162</sup> analysis and by applying “a realistic appraisal of *psychological tendencies and human weakness*,” the Court found the “risk of actual bias or prejudgment [was too high, and] must be forbidden if the guarantee of due process [wa]s to be adequately implemented.”<sup>163</sup> Not discounting Justice Benjamin’s subjective analysis into his own actions or possible intentions, the Court reiterates that while Justice Benjamin might be unaffected by the contributions given to his campaign by Massey, the test still must be an objective one.<sup>164</sup> “The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”<sup>165</sup>

Justice Benjamin previously addressed this concern in his concurring opinion with the *Caperton* ruling by the West Virginia

160. *Id.*

161. *Id.*

162. A totality of the circumstances test considers all the circumstances pertaining to the alleged violation, rather than specified elements. BLACK’S LAW DICTIONARY 726 (3d ed. 2006). While some factors may occur more frequently than others, the relative importance of any one factor depends upon the particular facts of the case, and the absence of a factor does not determine the outcome of the test. *Id.* The test is also used to determine whether a defendant consented to a warrantless search (*see Bumper v. N.C.*, 391 U.S. 543 (1968)), and whether probable cause exists for the issuing of a search warrant. *See Illinois v. Gates*, 462 U.S. 213 (1983).

163. *Caperton*, 129 S. Ct. at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))(emphasis added).

164. *Caperton*, 129 S. Ct. at 2263 (stating, “[w]e do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.”).

165. *Id.* at 2262.

Supreme Court.<sup>166</sup> Justice Benjamin argued that “[a]dopting ‘a standard merely of appearances,’ . . . ‘seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day -- a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.’”<sup>167</sup> This warning on the dangers of “opening Pandora’s box” went without heed from Kennedy and the rest of the majority, as they saw an objective standard as the only acceptable option for review.<sup>168</sup> However, the admonition did seem to affect the dissenting judges, especially Chief Justice Roberts, who lists in his dissent forty reasons why the Court should not apply the objective standard.<sup>169</sup> Still, whether it’s for the public’s confidence or judicial convenience, the objective standard was applied and will be used to govern future cases (if needed) involving possible inappropriate campaign contributions to elected adjudicators.<sup>170</sup>

## 2. Application Of The Objective Test

“A judge shall avoid impropriety and the appearance of impropriety.”<sup>171</sup> The Court found “the appearance of impropriety” to be too strong to be permissible in *Caperton*.<sup>172</sup> By applying the factors listed above,<sup>173</sup> even giving Justice Benjamin the benefit of the doubt in his ability to try the case fairly, Justice Kennedy and the

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166. *Id.* at 2259 (citing *Caperton v. A.T. Massey Coal Co.*, 2008 W. Va. LEXIS 123 at \*68 (W. Va Ct. App. Apr. 3, 2008)).

167. *See supra* note 24.

168. *See supra* notes 153–157 and accompanying text.

169. *See infra* note 209–212 and accompanying text.

170. *See Caperton*, 129 S. Ct at 2265–67. “[T]he Court articulated an objective standard to protect the parties’ basic right to a fair trial in a fair tribunal.” *Id.* at 2265–66.

171. *Id.* at 2266 (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004)).

172. MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. (2004) (stating, “the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”).

173. *See supra* note 161 and accompanying text.

rest of the majority concluded the possible public outcry of foul play was too high to be constitutionally permitted.<sup>174</sup>

a) Factor 1: Amount of money donated (\$3 million)

The first factor considered by the court was the size of Blankenship's contribution "in comparison to the total amount of money contributed to the campaign."<sup>175</sup> Blankenship spent three million dollars to help get Justice Benjamin elected,<sup>176</sup> and even though not all of it was directly given to Justice Benjamin's campaign committee, it was still used to help unseat the incumbent Justice and secure a victory for Benjamin.<sup>177</sup> Most of the three million dollars was funneled through the media,<sup>178</sup> newspaper ads, and political organizations that also supported Benjamin.<sup>179</sup> Additionally, Blankenship spent money on "direct mailings" sent to

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174. See *supra* notes 152–154, 164, and accompanying text. See also *Caperton*, 129 S. Ct. at 2263 (stating, "[w]e conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions.").

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

176. See *id.*

177. See *supra* note 10 and accompanying text.

178. During the West Virginia 2004 judicial election, both parties spent much of their money on TV ads that included lines like, "McGraw agreed to let this convicted child rapist work as a janitor in a West Virginia school. Letting a child rapist free to go work in our schools?" William Kistner, Justice for Sale?, American Radio Works, <http://americanradioworks.publicradio.org/features/judges/> (last visited Feb. 11, 2009). Another ad which supported McGraw read:

Who is Brent Benjamin? The man a Daily Mail column says "doesn't mind destroying a life to get what he wants." Who really is Brent Benjamin? Someone who goes too far to get elected, who is funded by out of state corporate interests who expect him to rule for them on the supreme court and against working people.

*Id.*

179. *Caperton*, 129 S. Ct. at 2257 (noting that, "Blankenship donated almost \$2.5 million to 'And For The Sake Of The Kids,' a political organization formed under 26 U.S.C. § 527. The § 527 organization opposed McGraw and supported Benjamin.").

West Virginia voters soliciting them for both their support of Benjamin and to give money to his campaign.<sup>180</sup>

You might be thinking “so what, most political campaigns cost a lot of money,” but to give some context to just how imbalanced Blankenship’s contributions were, the Court included in the first factor that the amount given be weighed as a ratio to the overall contributions given.<sup>181</sup> There was over a three to one ratio between the amount of donations given by Blankenship, and the amount of money spent by Benjamin’s campaign committee.<sup>182</sup> Even with all the funds raised through the direct mailings and the television and newspaper advertisements (paid for by Blankenship), he still gave one million dollars more to the Benjamin campaign than all the other contributors combined.<sup>183</sup>

#### b) Factor 2: The Big Picture

Similar to the first factor discussed above, the second factor also considers the amount of money spent in the election.<sup>184</sup> The difference between the two factors is the second one considers “the total amount spent in the election,” from both parties.<sup>185</sup> Through the second factor the Court looks at more than just Justice Benjamin’s campaign spending, it also considers the amount of spending by incumbent Justice McGraw.<sup>186</sup> The combined amount spent between Justice McGraw’s committee and Justice Benjamin’s was around five million dollars, of which three million came from Blankenship.<sup>187</sup> Even though Justice McGraw raised roughly one million dollars, primarily through trial lawyers and unions,<sup>188</sup> the amount paled in comparison to the quantity given to Justice Benjamin by just one contributor, Blankenship. In fact, in Caperton’s brief to the Court, he

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180. *Id.*

181. *See supra* note 175.

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

183. *Id.*

184. *See supra* notes 175–182, and accompanying text.

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

186. *Id.*

187. *See Kistner, supra* note 178.

188. *Id.*



claimed “Blankenship spent one million dollars more than the total amount spent by the campaign committees of both candidates combined.”<sup>189</sup>

### c) Factor 3: Did it Matter?

The last factor which the Court considered was the apparent effect the contribution had on the outcome of the election.<sup>190</sup> In a race which was decided by less than fifty thousand votes, and a margin smaller than four percent, the majority refused to believe that Blankenship’s contribution was nominal in its influence on result of the election.<sup>191</sup> Furthermore, the “temporal connection” between Blankenship’s contributions, the actual election, and the pendency of Massey’s appeal before the West Virginia Supreme Court were too close to call coincidence or serendipity.<sup>192</sup> Blankenship knew the case would come before the state supreme court and, even though he had given political contributions in the past, none had been to the extent which was given to Benjamin’s campaign.<sup>193</sup>

## 3. The Outcome, Putting It All Together

Just as “no man can be a judge in his own case[,] . . . no man is permitted to try cases where he has an interest in the outcome.”<sup>194</sup> This concern was too much for the majority, as they noted by stating:

Justice Benjamin would review a judgment that cost his biggest donor’s company \$50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship’s extraordinary contributions were made at a time when he had a

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

190. *Id.*

191. *Id.* (“The vote differential was 382,036 to 334,301.”).

192. *See id.*

193. *Id.* at 2274 (Roberts, C.J., Dissenting) (stating that “Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was ‘intended to influence the outcome’ of particular pending litigation.”).

194. *Id.* at 2261 (quoting *In re Murchison*, 349 U.S. at 136).

vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties – a man chooses the judge in his own cause.<sup>195</sup>

Viewing the “totality of the circumstances,” and how they would be perceived by the average person, the majority penned its decision by writing: “We find that Blankenship’s significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—‘offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”<sup>196</sup>

### *B. Dissenting Opinions*

#### 1. Chief Justice Roberts’ Concerns and Questions

“Sometimes the cure is worse than the disease.”<sup>197</sup> Chief Justice Roberts used this old adage to recognize that, while appearances of bias do indeed constitute a problem, it is not one that the Constitution’s Due Process Clause should remedy.<sup>198</sup> While there are no concurring opinions to the *Caperton* decision, Chief Justice Roberts dissented to the holding and was joined by Justices Scalia, Thomas, and Alito.<sup>199</sup> The Chief Justice expressed the fear, throughout his dissent, that the ruling could create an “unworkable standard” which will have many more negative effects on the judicial system than the positive ones.<sup>200</sup> He articulated these concerns, even

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195. *Id.* at 2265.

196. *Id.* at 2265 (quoting *Tumey*, 273 U.S. at 532).

197. *Caperton*, 129 S. Ct. at 2274 (Roberts, C.J., Dissenting).

198. *See id.* at 2267–74.

199. *Id.* at 2267.

200. *Id.*

The Court’s new “rule” provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end

though the majority claimed the decision would be limited to cases substantially similar to the claim at hand, which they predicted would make them “exceedingly rare.”<sup>201</sup> Not persuaded by the majority’s logic, Chief Justice Roberts criticized the majority’s disclaimer of the law being limited to the exceedingly rare facts of the case by emphasizing that “[c]laims that have little chance of success are nonetheless frequently filed.”<sup>202</sup> Furthermore, using rulings like the ones given in *United States v. Halper*,<sup>203</sup> and *Hudson v. United States*,<sup>204</sup> the Chief Justice showed examples of how what the Court at one time had considered to be only “rules for the rare case,”<sup>205</sup> became rules commonly used by crafty lawyers to retard the legal system.<sup>206</sup>

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result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

*Id.* The court noted: “[P]robability of bias’—fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.” *Id.* at 2269.

201. *Id.* at 2272 (“[T]he Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority’s only answer is that the present case is an “extreme” one, so there is no need to worry about other cases.”).

202. *Id.*

The success rate for certiorari petitions before this Court is approximately 1.1%, and yet the previous Term some 8,241 were filed. Every one of the “Caperton motions” or appeals or § 1983 actions will claim that the judge is biased, or probably biased, bringing the judge and the judicial system into disrepute. And all future litigants will assert that their case is really the most extreme thus far.

*Id.*

203. *United States v. Halper*, 490 U.S. 435 (1989).

204. *Hudson v. United States*, 522 U.S. 93 (1997).

205. *See Halper*, 490 U.S. at 449.

206. *Caperton*, 129 S. Ct. at 2273 (Roberts, C.J., dissenting).

In addition, Chief Justice Roberts listed out forty different questions (just off the top of his head)<sup>207</sup> which plague the majority's rulings with uncertainties and make the decision unworkable for future application.<sup>208</sup> Some of these concerns include: (1) whether the amount in controversy of the actual case matter as opposed to the campaign contribution;<sup>209</sup> (2) whether the level of the court or affirmation by a higher court matter;<sup>210</sup> (3) whether the amount of time that has passed from the contribution being given to the time of litigation change the consideration;<sup>211</sup> (4) if payments were made by an organization to the campaign, whether the judge must recuse himself whenever a member of that organization comes before him; and (5) whether a judge must recuse himself whenever a party comes before him who has contributed to an opponent's campaign?<sup>212</sup> Chief Justice Roberts predicts that all of these unanswered questions, plus the ones which future parties will be making through, or responding to, "Caperton claims" will make the rule's application impossible and leave courts with no guidance.<sup>213</sup> Furthermore, Chief Justice Roberts criticizes the holding in that it seems to neglect the legal presumption of judges being "impartial and fair," and instead relies upon perception to govern recusal instead of a judge's honor.<sup>214</sup>

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207. *Id.* at 2269-72. "These are only a few uncertainties that quickly come to mind. Judges and litigants will surely encounter others when they are forced to, or wish to, apply the majority's decision in different circumstances." *Id.* at 2273.

208. *Id.* ("The novel claim that we had recognized in *Halper* turned out not to be so 'rare' after all, and the test we adopted in that case—'overwhelmingly disproportionate'—had 'proved unworkable[]' . . . . The *deja vu* is enough to make one swoon.").

209. *Id.* at 2269.

210. *Id.* at 2269-70.

211. *Id.*

212. *Id.* at 2270.

213. *Id.* at 2273 ("I believe we will come to regret this decision [], when courts are forced to deal with a wide variety of *Caperton* motions, each claiming the title of 'most extreme' or 'most disproportionate.'").

214. *Id.* at 2268 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("presumption of honesty and integrity in those serving as adjudicators.")). "All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise." *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (KENNEDY, J., concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor'" (quoting *Bridges v. California*, 314 U.S. 252, 273 (1941))).

In his dissent, although the Chief Justice questions the ruling applicability, he does not claim nothing should be done, or that bias, favor, or prejudice should be without remedy, but instead states its cure should not be found in the Due Process Clause.<sup>215</sup> To support this assertion, Chief Justice Roberts points out that prior to this decision, the Court found only two instances where the Due Process Clause called for judicial recusal.<sup>216</sup> Those two fact patterns included when the judge had a pecuniary interest in the outcome of the case, as in *Tumey*,<sup>217</sup> or in certain criminal contempt hearings when a judge charges a person with contempt and then later is the same adjudicator to try the contempt, as in *In re Murchison*.<sup>218</sup> Chief Justice Roberts distinguished the clarity of the law with regard to financial interest in the outcome of the case, and contempt hearings from all the different considerations which would need to be taken into account for finding when a campaign contribution requires judicial recusal on Due Process grounds.<sup>219</sup> Additionally, the Chief Justice states several examples of when the Due Process Clause does not require judicial recusal, which include: kinship, personal bias, friendship, state policy, and remoteness of interest.<sup>220</sup> These issues dealing with recusal are governed by legislation, state statutes, common law, state ethical codes, and cannon law.<sup>221</sup> The Chief Justice urged the Court

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215. *See id.* at 2267 (“Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.”).

216. *See Caperton*, 129 S. Ct. at 2268 (Roberts, C.J., dissenting).

217. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *see also supra* note 96 and accompanying text.

218. *Caperton*, 129 S. Ct. at 2268 (Roberts, C.J., dissenting) (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)).

219. *See Caperton*, 129 S. Ct. at 2268 (Roberts, C.J., dissenting).

220. *Id.* at 2268 (“All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.” (citing *Tumey*, 273 U.S. at 523; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986))). Chief Justice Roberts also stated that Due Process has never before required recusal based off “friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations.” *Caperton*, 129 S. Ct. at 2268 (Roberts, C.J., dissenting).

221. *Caperton*, 129 S. Ct. at 2268 (Roberts, C.J., dissenting) (“Subject to the two well-established exceptions described above, questions of judicial recusal are

to let judicial campaign contributions also be governed by these standards.<sup>222</sup> “Hard cases mak[ing] bad law,” with the ruling creating an impossible-to-apply precedent, was the Chief Justice’s primary concern.<sup>223</sup> This concern was echoed by Justice Scalia in his dissent.<sup>224</sup>

## 2. Justice Scalia’s Argument of Judicial Uncertainty and Non-Justiciability

Justice Scalia stressed that one of the Court’s main purposes is to create judicial certainty so lower courts are able to apply precedent with confidence.<sup>225</sup> Expanding on Chief Justice Robert’s dissent, Justice Scalia warned of the likely possibility that “Caperton Claims” will become just another weapon in a lawyer’s arsenal in their schemes to win legal battles on procedural grounds, instead of on the merits.<sup>226</sup> Justice Scalia also attacked the majority’s reasoning in that it would “preserve the public’s confidence in the judicial system,” by claiming the decision would have the “opposite effect” by showing litigation to be nothing more than style with no substance.<sup>227</sup>

Justice Scalia, always the textualist,<sup>228</sup> ended his dissatisfaction with the majority’s ruling by comparing religious writings with the Constitution, and by stating the two styles should not be interpreted similarly.<sup>229</sup> While the Constitution gives guidance and addresses many ills of American society, it does not answer all wrongs, unlike

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regulated by ‘common law, statute, or the professional standards of the bench and bar.’” (citing *Bracy v. Gramley*, 520 U.S. 899, 904, (1997))).

222. *See id.*

223. *Id.* at 2272.

224. *Id.* at 2268.

225. *Id.* at 2274 (Scalia, J., dissenting). In interpreting Rule 10 of the United States Supreme Court, Scalia noted, “The principal purpose of this Court’s exercise of its certiorari jurisdiction is to clarify the law.” *Id.*

226. *Id.* (stating, “our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice. The Court’s opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim.”).

227. *Id.*

228. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI L. REV. 1175 (1989).

229. *Caperton*, 129 S. Ct. at 2275 (Scalia, J., dissenting).

religious readings, and to try and make it do so can only cause grief.<sup>230</sup> Justice Scalia expresses this lesson with the statement:

Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfection through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfection have been called nonjusticiable . . . . The relevant question, however, is whether we do more good than harm by seeking to correct this imperfection through expansion of our constitutional mandate in a manner ungoverned by any discernable rule. The answer is obvious.<sup>231</sup>

#### IV. THE EFFECT

##### *A. Citizens United v. FEC, 130 S. Ct. 876 (2010)*

Until January 21st of this year, it seemed the effect which the *Caperton* ruling would have on the future of due process's applicability towards elections would be minimal.<sup>232</sup> However, with the Supreme Court's recent decision in *Citizens United v. FEC*, the safeguard which *Caperton* offers seems much more relevant and applicable.<sup>233</sup> In *Citizens United*, the Court determined that the First

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230. *See id.*

231. *Id.*

232. *Id.* at 2265 (stating, "[o]ur decision today addresses an extraordinary situation where the Constitution requires recusal . . . . The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.").

233. *Citizens United v. FEC, 130 S. Ct. 876 (2010).*

In January 2008, *Citizens United* released a film entitled *Hillary: The Movie* . . . . It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political

Amendment's guarantees of free speech prohibit the government from interfering with businesses' or corporations' ability to buy or sponsor advertisements for or against a candidate for election.<sup>234</sup> Until the decision, the government had prohibited "corporations and unions from using their general treasury funds to make independent expenditures for speech . . . expressly advocating [for] the election or defeat of a candidate."<sup>235</sup>

While the majority in *Caperton* repeatedly stressed the importance of the public's perception of impartiality and the need to preserve confidence against corruption,<sup>236</sup> the Court in *Citizens United*, which was predominately the same as the one in *Caperton*, stated: "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."<sup>237</sup> The Court further concluded: "[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."<sup>238</sup> Suddenly, the "appearance of corruption" seems to be viewed differently than it was in *Caperton*.<sup>239</sup> The *Citizens United* Court explained the rule

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commentators and other persons, most of them quite critical of Senator Clinton.

*Id.* at 887.

234. *Id.* at 913 ("We return to the principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."). The Court did note that "[a]t least since the latter part of the 19th century, the laws of some States and of the United States [has] imposed a ban on corporate direct contributions to candidates." *Id.* at 900.

235. 2 U.S.C. § 441b (2006). This restriction had ties that go back to 1907, when President Theodore Roosevelt got congress to exclude corporations, railroads and banks from using their money in federal election campaigns. David G. Savage, *Supreme Court overturns ban on direct corporate spending on elections*, L.A. Times, Jan. 21, 2010, at A1. Later this restriction was also extended to labor unions. *Id.*

236. *See supra* notes 152–69 and accompanying text.

237. *Citizens United*, 130 S. Ct. at 911.

238. *Id.* at 884.

239. It would seem that the amount of money which corporations are able to spend to advocate for a candidate would create a significant or disproportionate effect, which is why the amount of money spent in a campaign for election is one



established by *Caperton* means a judge must recuse himself when a contributor has a “significant or disproportionate” effect on the outcome of the election, and that contributor has a matter which is imminent to come before the court or is already pending.<sup>240</sup> Justice Kennedy, who also wrote the opinion in *Citizens United*, distinguished the *Caperton* ruling by stating: “The remedy of recusal was based on a litigant’s due process right to a fair trial before an unbiased judge . . . *Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.”<sup>241</sup>

As emphasized by Larry Flynt, speech, even when it is unpopular and controversial, must be protected.<sup>242</sup> In fact, that is when speech needs the most protection.<sup>243</sup> However, as President Theodore Roosevelt expressed throughout his time in office,<sup>244</sup> and as many people still feel, corporations are not people, they should not be given the same rights as individuals, and protections should be put in place

of the factors for consideration discussed in *Caperton*. See *supra* note 175 and accompanying text.

240. *Citizens United*, 130 S. Ct. at 911 (noting that “*Caperton* held that a judge was required to recuse himself ‘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.’”) (quoting *Caperton*, 129 S. Ct. at 2263-64).

241. *Id.* The Court found that once corporations were found to have free speech rights, the Government may not completely suppress those rights, but instead may only regulate them through “disclaimer and disclosure requirements.” *Id.* at 769.

242. See *Hustler Magazine, v. Falwell*, 485 U.S. 46 (1988). In *Falwell*, Jerry Falwell sued *Hustler Magazine* and its owner Larry Flynt for publishing an advertisement in the magazine that parodied Falwell as being an alcoholic whose first sexual experience came with his mother in an outhouse. *Id.* at 47.

243. See *Cuffley v. Mickes*, 208 F.3d 702, 711 (8th Cir. 2000). The Supreme Court ruled that even the Ku Klux Klan has free speech rights, because “the First Amendment protects everyone, even those with viewpoints as thoroughly obnoxious as those of the Klan, from viewpoint-based discrimination by the State.” *Id.* The significance of the *Cuffley* decision is that it further emphasizes the point that the government cannot exclude certain groups because their religious or political views are objectionable. See generally *id.* The protection of “thoroughly obnoxious groups” helps protect the ability for everyone to express their views and associate with others freely without the fear of government interruption or censorship. *Id.* at 712.

244. See *Savage*, *supra* note 235 and accompanying text.

to ward off their power to “drown out” the voices of individuals with the corporation’s seemingly endless resources.<sup>245</sup> Corporations, unlike individuals, cannot vote, go to jail, or be drafted to serve in the military.<sup>246</sup> As shown in *Caperton*, money used for campaign advertisements to support or advocate against a candidate can have a significant impact on the outcome of an election.<sup>247</sup> It is rare for an individual’s voice to have the same financial backing as a corporation’s.

While the Court in *Citizens United* focuses on protecting free speech, the effect the decision could have on elections—including judicial campaigns—is readily apparent.<sup>248</sup> The Court ruled that corporate contributions to a candidate’s campaign, or the use of corporate funds to advocate for that candidate through advertisements is “[p]olitical speech, [which] must be protected from the ‘chilling effect’ of government regulation.”<sup>249</sup> However, a for-profit corporation is exactly that (for profit), which could cause its campaign efforts to be seen as a business decision which can be interpreted as “commercial speech.” Commercial speech is not given the same protections by the First Amendment as the ones afforded to political speech.<sup>250</sup> Nevertheless, that discussion is for an entirely different legal article.

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245. Jim Sleeper, *Corporate free speech? Since when?*, The Boston Globe, Sept. 5, 2009, at A1.

246. *Id.*

247. *Caperton*, 129 S. Ct. at 2263–64.

248. *See generally id.*; *see also Citizens United v. FEC*, 130 S. Ct. at 910 (stating that “a judge [is] required to recuse himself ‘when a person with a personal stake in a particular case ha[s] a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign . . . .’”) (quoting *Caperton*, 129 S. Ct. at 2263–64).

249. *Id.* at 894 (“Any other course of decision would prolong the substantial, nation-wide chilling effect caused by § 441b’s prohibitions on corporate expenditures.”). *Id.*

250. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942) (In *Valentine* the Supreme Court ruled that commercial speech is not protected under the First Amendment).

*B. More States Moving Towards Judicial Nominations?*

*Caperton*, and the controversy it provided, furthers the argument for judicial nominations as opposed to elections.<sup>251</sup> This option seems to be strengthened with the *Citizens United* decision and the influence which corporations may now impose on judicial elections.<sup>252</sup> While *Caperton* offers protection against such influence and the possibility of corruption, the “tracking” of such information as to who made what contributions and how much, will still permit many contributors to go unnoticed or remain unaffected by the analysis explained in *Caperton*.<sup>253</sup> Furthermore, the recusal reform steps which are being taken by many state legislators dealing with judges and campaign contributions will vary greatly and could deter corporations from incorporating in certain states where it may not be as easy to influence elections.<sup>254</sup> This type of “forum shopping” for a state of incorporation could be another heavy blow to the economies of those states which are not chosen, many of which are already feeling the strong effects of the current recession.

When the Institute on Money in State Politics did a study comparing the lists of “actual contributors to the lists of people who show up in [state] Supreme Court cases,” they found that seventy five percent of the cases involved at least one contributor.<sup>255</sup> Additionally, in the 2004 judicial elections, more than forty-five million dollars was spent, which surpassed the record set in 2000.<sup>256</sup> The money was spent to elect forty-three judges in just twenty states.<sup>257</sup> “The campaign money mainly came from business interests and their trial lawyer and union opponents.”<sup>258</sup> These studies show that parties involved in litigation are more than ever in need of protection to guarantee them their “fair trial in a fair tribunal.”<sup>259</sup>

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251. See *supra* note 64 and accompanying text.

252. See *supra* note 239 and accompanying text.

253. See *supra* notes 160–161 and accompanying text.

254. See *supra* note 56 and accompanying text.

255. See Kistner, *supra* note 178.

256. *Id.*

257. *Id.*

258. *Id.*

259. See *supra* note 170 and accompanying text.

## V. CONCLUSION

Hopefully, the decision in *Caperton* balances out the one provided in *Citizens United*, at least when the matter concerns judicial campaigns and the money given by contributors. The effect, for now, can only be speculated (as shown above), but whether it be by state legislation or the case's due process extension, parties that find themselves in American courts will at least have a defense against the possibility of bias by an adjudicator who finds himself judging one of his contributors. Even with large campaign contributions, many judges will do their best to uphold their oaths of being impartial and blindly serving justice, as the majority in *Caperton* emphasizes, but there is a comfort in having the added protection the decision gives; especially because for many litigants, appearances do matter.<sup>260</sup>

In most Grisham books, the story line is all cleaned up at the end. The frantic scrambling to resolve the issue is settled, and balanced is restored. In *The Last Juror*, the killer is discovered and the small town news writer goes back to having lunch with his good friend.<sup>261</sup> In *The Appeal*, the head of the Krane Chemical, Carl Trudeau, finishes the story by sailing down the Hudson on his mega yacht surrounded by New York's elite, as he sips champagne and laughs at those who had doubted him after the trial court's decision; well he had got it all back, all back and more.<sup>262</sup> So, too, here were things cleaned up, only this time with a different ending than that given in

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260. See *supra* notes 53, 152 and accompanying text.

261. JOHN GRISHAM, *THE LAST JUROR* (2004).

262. See GRISHAM, *supra* note 1, at 355.

The great Carl Trudeau had outfoxed them again. He'd cleaned up the Bowmore mess and saved his company. He'd driven its stock into the ground, bought it cheap at a fire sale, and now owned virtually all of it. It was making him even richer. He was destined to move up the Forbes 400 list, and as Carl sailed along the Hudson at the very top of his extraordinary ship, and gazed with smug satisfaction at the gleaming towers packed around Wall Street, he admitted to himself that nothing else mattered. Now that he had three billion, he really wanted six.

*Id.*

*The Appeal.* The Supreme Court remanded the case to West Virginia to be tried without Justice Benjamin's involvement.<sup>263</sup> The ruling does not promise the trial court's decision will be upheld, but it at least gives some assurance to both Caperton and Americans that due process is still guaranteed, a "fair trial in a fair tribunal" cannot be so easily bypassed, and that justices are not able to be bought as easily as a New York Times "best seller."

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263. *Caperton*, 129 S. Ct. at 2267.