Session 1: One Symptom of a Serious Problem: *Caperton v. Massey*

Panelists
Bert Brandenburg, Executive Director, Justice at Stake Campaign
Professor Andrew Siegel, Seattle University School of Law
Professor Richard Hasen, William H. Hannon Distinguished Professor of Law, Loyola School of Law, Los Angeles
Kathleen Sullivan, Stanley Morrison Professor of Law and Former Dean, Stanford Law School

Moderator
David Skover, Fredric C. Tausend Professor of Law, Seattle University School of Law

I. INTRODUCTION

DAVID SKOVER: Consider this extraordinary narrative: A resident of a small town brings a tort action against a big corporation and wins a multi-million-dollar jury trial award. While the judgment is pending on appeal to the state supreme court, one of the liberal justices known to often side with tort plaintiffs is up for judicial re-election. To ensure the election of a new justice more sympathetic to corporate defendants, the corporation's CEO pumps in an extraordinary amount of campaign money, both as candidate contributions and as independent political action committee advertising expenditures. Predictably, the newly elected justice casts the tie-breaking vote in favor of the corporation and reverses the jury trial victory.

If this sounds like a narrative from a John Grisham novel, that is because it actually is. I have summarized the plot of *The Appeal*, Grisham's 2008 bestseller. When Grisham was interviewed on NBC's *Today Show* during his promotional tour, the host, Matt Lauer, asked whether such a chain of events could ever realistically occur. "It's already happened," Grisham answered. "It happened a few years ago in West Virginia. A guy who owned a coal company got tired of getting sued, and he elected his own man to the state supreme court."

Reality is, indeed, stranger than fiction. The amazing case to which Grisham referred is, of course, the subject of this panel's discussion—*Caperton v. A.T. Massey Coal*. The case began after A.T. Massey cancelled a long-term coal contract with Hugh Caperton and his small Harmon Mining Company. A West Virginia jury found Massey liable for fraudulent misrepresentation and tortious interference with existing contractual relations. The jury awarded a verdict of $50 million in compensatory and punitive damages. After the verdict, West Virginia held its 2004 judicial elections. Knowing that the state supreme court would likely hear an appeal in the case, Don Blankenship—the Chairman, CEO, and President of Massey Coal—took action to ensure a win for a candidate who would reverse the decision. He spent lavishly in order to help unseat the incumbent, Democrat Justice Warren McGraw, in his reelection campaign against a Republican Charleston lawyer, Brent Benjamin. Not only did Blankenship contribute the $1,000 statutory maximum to Benjamin's campaign committee, but he also spent $500,000 in independent expenditures for direct mailings and letters soliciting donations and for television and newspaper advertising. He further donated almost $2.5 million to a political organization called "And for the Sake of the Kids" that opposed McGraw and supported Benjamin.

To put this financial flood into perspective, Blankenship's $3 million in contributions and expenditures exceeded the total amount spent by all other Benjamin supporters and was three times the amount spent by Benjamin's own campaign committee. Moreover, Caperton claimed that Blankenship spent $1 million more than the total amount disbursed by the campaign committees of both candidates combined. When all was said and done, Brent Benjamin defeated the incumbent, Warren McGraw, by fewer than 50,000 votes.

Before Massey filed its appeal, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause of the Fourteenth Amendment of the federal Constitution and under West Virginia's Code of Judicial Conduct. Despite the conflict caused by Blankenship's campaign involvement, Justice Benjamin refused to recuse himself. He instead found that there was "no objective information to show that this Justice has a bias for or against any litigant, or that this Justice will be anything but fair and impartial."

When the appeal was filed and the West Virginia Supreme Court granted review, the court reversed the $50 million verdict by a vote of three to two, with Justice Benjamin in the majority. During a rehearing process, Benjamin, then-acting chief justice, refused twice more to recuse himself, and the court once again reversed the jury verdict by another three-to-two vote.

When the U.S. Supreme Court reviewed Caperton's Fourteenth Amendment challenge to the West Virginia court's judgment, it was also narrowly divided in its opinion. Justice Kennedy delivered the opinion of the Court and was joined by Justices Stevens, Souter, Ginsburg, and Breyer in finding that, given all of the circumstances of the case, due process required the recusal of Justice Benjamin. The majority declared that the Due Process Clause requires neither proof that Blankenship's contributions were a necessary and sufficient cause of Justice Benjamin's victory nor proof of actual bias calling for Benjamin's recusal. Rather, the appropriate inquiry was whether, under the totality of the facts, there was such a risk of bias or prejudgment that the guarantees of due process were compromised.

The Court found that, in the context of a judicial election decided by fewer than 50,000 votes, Blankenship's campaign contributions had a significant and disproportionate influence on the outcome. The risk that this influence engendered actual bias was sufficiently substantial that, in the words of Justice Kennedy, it "must be forbidden if the guarantee of due process is to be adequately implemented."

In dissent, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, attacked the majority's probability of bias standard for failing to provide clear, workable guidance for lower federal courts in future cases. Roberts' opinion is remarkable—the first of its kind, to the best of this constitutionalist's knowledge. The Chief Justice posed forty questions, most with sub-questions, that federal trial and appellate courts might now have to confront in enforcing the Due Process Clause to guarantee that justice is not for sale in state court systems.

This is the first national conference to focus on the Supreme Court's decision in *Caperton v. Massey*. This panel will review both the state judicial election trends and the treatment of recusal up to *Caperton*, and it will also provide different perspectives on the Court's analysis in its decision. Subsequently, the following panel will examine possible avenues for judicial reform to be undertaken by legislatures and courts in light of *Caperton*.

II. THE NEW POLITICS OF JUDICIAL ELECTIONS

BERT BRANDENBURG: *Caperton* sounds extreme, but the fact pattern is the logical, predictable result of a new politics in judicial elections that has spiraled forward in the last decade. The issue now is whether judicial elections are undergoing a radical transformation. This transformation could affect how impartial our courts are at the end of the day, as well as whether the public has confidence in the courts' fairness and impartiality. State courts handle 98% of all litigation, and 90% of

America's judges have to stand for election of one kind or another, either in contested races or in unopposed retention races. Until the last decade, these contests have typically differed from other political elections, but over the last ten years, a growing tide of money and special-interest pressure has flooded into judicial elections. There seems to be a growing and systematic effort to make judges of all stripes—whether at the state supreme court level or in lower courts—more accountable to special interests and campaign trail politics, rather than to the law and the Constitution.

This transformation is most evident in light of the sheer amount of money spent on recent campaigns. Of the twenty-one states that elect judges in contested races, nineteen of those states have seen their fundraising records smashed during this past decade. Sixty-six supreme court candidates have raised $1 million or more—nearly triple the number of candidates who raised that amount in previous decades. Since 1999, supreme court candidates have raised more than $200 million for supreme court elections. This dwarfs the amount raised in the previous decade. Locally, in Washington State, supreme court candidates have raised almost $5.3 million in the last decade.

The last decade also ushered in the rise of the super-spenders. In the states with the five most expensive elections, 58% of the total election campaign was financed by twenty-five organizations in support of their candidates. The remaining 42% was financed by 9,000 other contributors. The differential between 9,000 and twenty-five contributors is huge, and the money primarily comes from the national tort wars that have been raging around the country in various guises. Because of this, much of the financing on the business side comes from groups, while the financing on the trial attorneys' side comes from individual checks.

The rise in television advertising has been another striking phenomenon in this new politics of judicial elections. Although television advertisements used to be fairly unusual, they are now the norm. In the year 2000, about 20% of states used television advertising for their high court contested elections, but by 2006, 91% of states used television advertising. The use of television advertising functions as the canary in the coal mine: if these advertisements show up, they are typically signs that the rest of the election is going to be nasty and noisy. The advertisements typically portray courts as dark fantasy worlds populated by abused children, fearsome rapists, malevolent corporations, greedy lawyers, and judges who apparently spend all their time trying to hurt ordinary Americans. Frightening horror-movie music was playing behind the narrator in a Wisconsin ad:

> Michael Gableman has committed his life to locking up criminals to keep families safe, putting child molesters behind bars for over 100 years. Louis Butler worked to put criminals on the street, like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?

Justice Butler lost. He was the first incumbent to lose in Wisconsin in quite a while. Unfortunately, Justice Butler is not the only casualty of smear campaigns. Other justices have also been unseated through lies propagated by television advertising.

The rise in hot-button questionnaires is another ancillary item that has followed from this new politics. As the elections have grown hotter, more interest groups have sent forward pushy questionnaires that demand judicial candidates to take positions in advance in order to lock them in before they hear a case. Additionally, the fact that judicial elections typically have low turnouts makes them especially tempting for an interest group to try to dominate. For example, in 2006, twenty-six experienced Republican judges were swept out in Dallas County, Texas, entirely because of party election trends and not because of their qualifications.

When ordinary citizens see these trends, it affects what they think and fear about the courts. Seventy-six percent of Americans believe that these campaign contributions influence judges' decisions in the courtroom. Seventy-nine percent of business leaders agree with this statement. The most chilling may be a poll from the National Center for State Courts, which was the largest poll ever conducted of state court judges in America. Almost half agreed that campaign dollars affect judges' decisions. When a group self-identifies that half of its own members are engaging in money-inspired justice, it is very indicative of how the politics of judicial elections are changing.

In terms of what *Caperton* might mean, the majority's approach was limited on its face, and many commentators have suggested that those limitations will define how the case is interpreted in the future. *Caperton* was an extreme case, and as Justice Kennedy wrote, "Our decision today addresses an extraordinary situation where the Constitution requires recusal. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires recusal, but this is an exceptional case."

However, other clues foreshadow the potential expandability of *Caperton*, even if a similar case were to come before the federal courts in a less-extreme form. For example, some of the criteria laid out by *Ca-*

perton are not necessarily hard to reach. The Court enumerated a six-point test: a person with a personal stake in a particular case and a significant and disproportionate influence placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. Some of these criteria are not so far-fetched as to be met by only the fact pattern in West Virginia. Instances of this type of behavior are becoming more common with this new politics of judicial elections.

In *Caperton*, the majority held that the inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent on the election, and the apparent effect such contribution had on the outcome of the election. The inquiry centers only on these factors, but this is not an exclusive list. These criteria are not confined in a straightjacket, and the *Caperton* decision is not as narrow as it has been portrayed.

As new problems have emerged that were not discussed at common law, the Court has identified additional instances that would require recusal as an objective matter. Although the money Blankenship paid was not a bribe or a criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. Finally, the majority notes that due process requires an objective inquiry into whether the contributor's influence on the election or all the circumstances "would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear, and true."

These are examples that could recur. Since *Caperton*, three different trends have already emerged that could influence the federal courts as they look at other possible recusal decisions.

First, the initial predictions were that this decision will lead to a flood of recusal motions. That has not happened, but if the states were to impose their own recusal mechanisms, the states would preemptively screen most of the potential recusals before those cases make it to court. Second, the fact that judicial elections are changing is a fact that the Court will continue to note. Finally, the *Citizens United* case could lead to a huge increase in corporate and union money flooding into elections. Judicial elections are supposed to be different, and the court system is supposed to be different from other branches. The courts cannot help but notice this influx of money, but the more money that comes in, the greater the chance that federal courts will require recusal further down the road. In the end, the future of *Caperton* will be a question of culture shift. The circumstances of judicial elections are changing; therefore, the way we look at them and the way we regulate them needs to be different as well.

III. *CAPERTON*: AN ORDINARY AND PREDICTABLE DECISION

ANDREW SIEGEL: I want to take a somewhat paradoxical perspective today. Notwithstanding the judicial reform advocates' excitement over the *Caperton* decision and the possibilities that it opens, and certainly notwithstanding the hyperbolic language of the dissents, I want to stress the ordinariness of the *Caperton* decision. Given the historical values of the Due Process Clause and the traditional methods of doctrinal development in this area, *Caperton* was an ordinary and predictable decision, if not inevitable.

In my remarks, I want to do three things. First, I will provide some historical background on the development of the Due Process Clause, in particular, focusing on the way the due process guarantees were interpreted before the adoption of the modern distinction between procedural and substantive due process. Second, I will explain how the issues in *Caperton* fit into the larger picture of due process values and doctrinal development. Finally, I will briefly discuss and evaluate the various opinions in *Caperton* more specifically.

To begin, the due process guarantees in this country evolved out of English law: the colonists and the early National Americans borrowed England's constitutional provision that prevented the government from depriving individuals of liberty or property without due process of law, which was more commonly referred to as the requirement that the government not deprive them except according to the law of the land. The early Americans put some variation of one of these phrases into almost every early state constitution and charter and into the Fifth Amendment.

However, many early American judges, lawyers, and citizens quickly realized that a system of natural law imposed inherent limits on the powers of government, and they explored different theories as to how and why those limits might or might not be enforceable. Increasingly, though sporadically, they settled on state due process and law of the land clauses as the primary vehicle for "constitutionalizing" these natural law constraints. As evidenced by constitutional cases, treatises, and Supreme Court arguments, these clauses were reframed over time. The due process guarantees migrated from the criminal procedure section of state constitutions to the sections dealing with general rights and the structure of government. Because of this migration, we can see that the early American lawmakers understood the importance of this right.

By the time the Fourteenth Amendment was passed, "due process of law" was arguably a term of art. In this early era, we saw a very different due process superstructure and a different set of doctrines than the ones we see today. There was no distinction between substantive and procedural due process. Instead of being separate categories, due process

requirements were stated as a series of free-standing prohibitions on government conduct, a series of postulates, or in the words of one scholar, paradigms. Some of these were very general: the guarantee of notice and an opportunity to be heard, the guarantee of an impartial arbiter, or the requirement that government treat individuals equally and not adopt special class legislation. Some were framed more specifically: the requirement that government not take property from *A* just to transfer it to *B*, or the rule—very relevant in this case—that no one should be a judge in one's own case.

What is intriguing is that these prohibitions were meant to be illustrative rather than exhaustive. Both the universe of due process postulates and the application of these postulates to particular facts were meant to follow common law methods of interpretation. The normative content of these postulates is also interesting. The focus was on policing the boundaries of governmental power, and there are two related, but distinct, strands here. The first focuses on the legitimacy of government action: in a formal sense, does government have the authority to act in these circumstances or in this particular way? The second focuses on fairness: do the government's particular actions violate fundamental notions of fairness?

This kind of due process analysis did not die out when we developed the modern distinction between substantive and procedural due process. Instead, it coexists in a complicated, layered sort of way in the due process superstructure. Many free-standing, residual due process claims still remain—claims that the government has violated some separate and specific due process rule. These most often come up in criminal cases—for example, the rules against entrapment, coerced confessions, or fabricated evidence, or the rule against unexpected and unprecedented judicial reinterpretation of penal statutes. But these claims can also come up in civil cases—for example, the constitutional limitation on retroactive litigation. One frequently cited example is the two million *Ward v. Monroeville* cases—the very cases that the Supreme Court relied on in *Caperton* regarding judicial bias. Sometimes the Court evaluates these under a fundamental fairness or "shocks the conscience" test, but at other times, it evaluates them through issue-specific rules and doctrines that are always evolving.

The problem presented in *Caperton* and the broad approach that the Court took in this case fits neatly with the story of doctrinal evolution. The concern in *Caperton* is one that has always been at the heart of the due process analysis. At a broad level, *Caperton* is about fundamental fairness and the basic legitimacy of governmental action. More specifically, *Caperton* is about the requirement of an impartial arbiter, and even

more specifically, about the long-standing prohibition on being a judge in one's own case. The latter rule dates back to Dr. Bonham's case in 1610, which was one of the most famous original cases in due process. One scholar on the subject argued that this case was the paradigmatic due process case—that the prohibition against being a judge in your own case was the paradigm through which we interpreted due process.

These concerns have led the Supreme Court to take special interest in judicial bias. The Court downplays the number of situations in which it has previously found due process violations for judicial bias, but there are five modern cases that have pricked out the line that determines when judges are too self-interested, and another few cases that determine when judges might be too wrapped up in the case because of the contempt context that is arising. The Court carefully polices those lines. The Court's approach in *Caperton* was also broadly consistent with this due process evolution.

The Due Process Clause is clearly being used as a backstop with minimal standards. The Court is not here to enforce minimal requirements; instead, its decisions mark out the boundaries of legitimacy and the minimum standards of fairness. As in most of the common law due process decisions, the Court is identifying broad areas where courts must remain vigilant (framed in terms of rules or postulates), and it is also marking out the boundaries of legitimate state conduct on a case-by-case basis. This kind of cautious, evolutionary, incrementalist approach is very characteristic of due process evolution.

Also, this history is a history of a doctrine that is explicitly evolutionary. The concerns of the Due Process Clause—legitimacy and fairness—are timeless. Throughout American history, we have recognized that any application of those concerns is going to be partial, nominal, and time-bound. New circumstances raise new concerns that challenge old values in new ways, or to put it another way, pose new threats to timeless values. Protecting against those new threats has been at the heart of the Due Process Clause. Situations that combine popular judicial elections, modern mass media, and rising levels of expenses can be seen as posing the kind of new threats that the Due Process Clause might respond to.

Finally, the opinions in *Caperton* itself deserve both accolades and condemnation. To begin, I want to give two cheers to the majority opinion. It is workmanlike. It is not flashy; it is consistent with most prior opinions in related areas. It reads like a commonsense, common law opinion. It takes a clear position. It explains why the result in the case is compelled by, or fits with the operative principles in the earlier cases. It does not reach out to decide other harder cases or to state rigid rules that might burden the Court in future cases. And, it uses an extreme case to

mark out the boundaries of legitimate government action in the same way that we have been doing for centuries. On the other hand, the majority's reliance on such an extreme case deserves only two cheers, not three. It has no sense of history. It makes no effort to explain just how deeply embedded the decision is in due process law and in due process values. And, it makes no real response to the dissent's allegation that the opinion is overturning a long-standing, stable constitutional law of judicial recusal. It makes one meager attempt to link to the due process traditional prohibition against being a judge in your own case. Justice Kennedy says, "Just as no man is allowed to be a judge in his own case, similar fears of bias can arise when, without the consent of the other parties, a man chooses the judge in his own case." But this statement is never explained and is never developed. It is never linked to the history or the sources that could have been used to support it or to explain why that is a logical extension. The dissent takes advantage of this weakness. When isolated from the rest of the historical story, it is not a restatement or a reformation of a fundamental due process postulate. It appears to be yet another self-indulgent, rhetorical farce by Justice Kennedy. The majority opinion—workmanlike in the due process tradition—could have done more.

On the flip side, the dissents deserve harsh criticism. The dissents are hyperbolic, over-the-top, and in places, disingenuous. The dissents have two great flaws: first, although we happen to be in a nominal resting place as part of the evolution of the due process doctrine, the dissent treats this as establishing a fixed rule as to when recusal is constitutionally required. But we are at just one point in a long evolutionary process. It is incorrect to interpret our temporary deviation from that process as a deep violation of something that has been clearly established.

This notion also reflects a second flaw: the Court has an excessive, almost pathological fear of common law judging. There is a profound skepticism in this Court about the ability of litigation to resolve disputes and collectively administer justice. The Roberts opinion reads almost like a caricature or parody of these two sets of concerns.

I find Chief Justice Roberts' list of forty questions particularly troubling and sophomoric. A list such as this could be compiled for any general common law or constitutional rule. You can always disaggregate a complex web of factors that lead to a common law or a constitutional ruling, tweak one of those factors, and ask if the result changes. That is what future cases are for—they are intended to test the law under different circumstances. Chief Justice Roberts uses the example of one relatively obscure situation in which the Court applied a long-standing constitutional guarantee in a new context and then backtracked because of its

inability to administer, but he ignored the fact that there are dozens of counter-examples that exist. The Court routinely announces the application of old principles to new contexts in fairly vague terms in a fairly easy case, thus leaving the details to later Courts.

Think of all the situations where this has happened: *New York Times v. Sullivan*, *Baker v. Carr*, *Frontiero v. Richardson*, *Craig v. Boren*, and the other early gender discrimination cases. More recently, *District of Columbia v. Heller* followed that same track, as did some of the takings cases like *Lucas v. South Carolina Coastal Commission*. In each of these cases, the dissenters could have compiled a list of questions like the Chief Justice did in this case.

The flaw in the dissents is in the Justices' distrust of common law judges' ability to answer those questions. If the Supreme Court needs to decide six or eight or ten *Caperton* cases in the next decade to mark out the boundaries of this new rule, that is a small price to pay in judicial resources to insure impartial justice in the state courts.

IV. BEYOND RECUSAL: *CAPERTON*'S FIRST AMENDMENT CONSIDERATIONS IN JUDICIAL ELECTIONS

RICHARD HASEN: Citing the First Amendment, the 2002 case of *Republican Party of Minnesota v. White* struck down a Minnesota judicial speech regulation that prevented judicial candidates from "announcing" their position on certain subjects. In her dissent, Justice Ginsburg lamented the majority's approach to the First Amendment and judicial elections. She said, "I do not agree with this unilocular 'an-election-is-an-election' approach. Instead, I would differentiate elections for political offices in which the First Amendment holds full sway from elections designed to select those whose office it is to administer justice without respect to purses."

Justice Ginsburg lost that battle, but in the new *Caperton* case, she may have won the war. Justice Kennedy, writing for the majority, seemed to acknowledge that different First Amendment standards may apply to judicial elections than to other elections. I will argue that this recognition makes *Caperton* an important case about regulating judicial elections, even more so than a specific case about judicial recusal standards.

In my brief comments, I plan to make two points. First, although *Caperton* deals with due process issues in the judicial context, and not with the First Amendment per se, its reasoning cannot be cabined to due process and recusal issues. Instead, Justice Kennedy's recognition that judicial elections are different could affect how courts adjudicate judicial candidate speech cases and any other cases related to the conduct of elec-

tions. Second, although the opinion itself stresses the narrow, exceptional nature of the facts supporting a constitutional recusal requirement, Justice Kennedy's opinion in *Caperton* is likely to have a broader effect than the narrow holding first suggests. I will address both of these points in turn.

To begin, *Caperton* appears to jettison the "an-election-is-an-election" mantra in favor of the recognition that judicial elections are different. This recognition comes in an indirect way and requires a bit of background on campaign finance jurisprudence, which is not directly the topic of *Caperton*.

In the 1976 case of *Buckley v. Valeo*, the Supreme Court considered the constitutionality of a number of provisions of the 1974 Federal Election Campaign Act, which was challenged as violating the First Amendment. Roughly speaking, the Court held that limits on campaign contributions were permissible because the most important First Amendment aspect of contributing was not the amount of the contribution, but rather the symbolic act of making the contribution. Also, contributions could be limited because of the potential for corruption and the appearance of corruption when money is given to a candidate. Elected officials and candidates could feel that they owe political debts to large contributors.

In contrast to contributions *to* candidates, the Court also considered the constitutionality of limits on spending, independent of candidates. In *Buckley*, the Court held that limits on spending, unlike contribution limits, went to the core of the First Amendment. It reasoned that such limits would bar anyone besides candidates, the parties, PACs, and the institutional media from being able to influence the outcome of a campaign. Notably, the Court also said that the interest in preventing corruption could not justify limits on independent expenditures because such spending, being truly independent, might not lead to corruption. For example, the spending might be counter-productive.

Throughout the years, apart from the question of corporate and union spending in the *Citizen's United* case, the Court has stuck to the line it drew regarding spending contribution. Justice Kennedy is one of the Justices who has expressed a strong belief that independent spending, even by corporations and unions, cannot be limited by the First Amendment. This history is what makes Justice Kennedy's decision in *Caperton* so interesting.

In *Caperton*, as you will recall, Mr. Blankenship gave then-candidate Benjamin only $1,000, the statutory maximum. Mr. Blankenship then gave $2.5 million to an independent group (a 527 organization) supporting candidate Benjamin, and he spent another $500,000 on his own, independently supporting the candidate.

In the majority opinion in *Caperton*, Justice Kennedy elides over the distinction between contributions and expenditures and this history of campaign finance jurisprudence. Thus, Justice Kennedy refers to the very large contributions "received by Justice Benjamin." Of course, aside from the $1,000, the contributions were not received by Justice Benjamin, even though he benefited from the independent spending. Justice Kennedy refers to the "debt of gratitude" that Justice Benjamin must have felt from these independent expenditures, an observation that would make perfect sense if we were writing on a clean slate—but, of course, we are not. We are writing in the shadow of *Buckley*, which said that independent spending has no potential for corruption.

Justice Kennedy must have been aware of the tension between what he wrote in *Caperton* and his usual views on campaign finance. In his dissent, Chief Justice Roberts pointed out the majority's repeated use of the term "contributions," and, in one of his forty questions, he asked whether the recusal rules apply equally to contributions and non-coordinated expenditures. This shows that Justice Kennedy was aware of what he was doing. Justice Roberts also noted that independent spending in a campaign, far from creating a debt of gratitude, could be counter-productive from the candidate's viewpoint. Again, this echoes the language from *Buckley*.

The difference in Justice Kennedy's views on the campaign finance issues is explained by the fact that this was a judicial election. Justice Kennedy's ordinary view—that the rough-and-tumble of politics should just play itself out with little or no financial limits—does not apply in judicial elections. This is quite significant. It is true that the immediate impact of this case will be on judicial recusal cases, but the broader implication is that it is appropriate to treat judicial elections differently for First Amendment purposes. If it were not this way, the independent nature of the pro-Benjamin spending should have been dispositive. In other words, an election is not always just an election, at least when it is a judicial election.

Justice Kennedy makes clear the reasons for the different treatment. Even though judges are elected, they are not supposed to be accountable in the way that elected officials are. Judges are to engage in introspection by looking at text, purpose, and history, and they are to probe for a potential bias before deciding a case. Justice Kennedy recognizes the goal of judicial objectivity and neutrality that does not apply to candidates for regular office. Therefore, if a judicial candidate feels a debt of gratitude to someone who engages in a large, independent expenditure campaign in her favor or against her opponent, the very nature of the judge's job as a neutral arbiter is at stake. In contrast, in normal elec-

tions for office, elected officials can feel beholden to many different supporters. This is a system that promotes accountability to the people. This type of system makes sense for ordinary elections, but Justice Kennedy's idea raises danger signs when applied to the neutral and objective judiciary.

The other special aspect of judicial elections is the low salience nature of judicial campaigns. Because most people do not pay as much attention to the work of judges as to the work of ordinary elected officials, voters at the ballot box are less likely to punish those who have benefited from large, one-sided spending.

The first big lesson from *Caperton* is therefore the Court's mostly implicit recognition that judicial elections are a different creature. If that is so, then it is possible that the issues from *Republican Party v. White* could be reopened and other special judicial election rules could also withstand further constitutional challenges.

Let me turn to the second issue: the likely effect of the *Caperton* recusal standard on judicial elections. In a list of unanswered questions in his *Caperton* dissent, Chief Justice Roberts includes a note about Justice Kennedy's opinion in a 2004 case called *Vieth v. Jubelirer*. In that case, the Court held that partisan gerrymandering cases are nonjusticiable. More specifically, the Court ruled that there are not yet any judicially manageable standards for separating partisan gerrymandering from an acceptable use of party information in redistricting. The Court in that case actually split 4–1–4, with Justice Kennedy in the middle. This left the question open for another day as to whether a judicially manageable standard for partisan gerrymandering could ever be created.

Because Justice Kennedy was concerned about the unmanageability of the standard, his opinion left the plaintiffs without a remedy. In his *Caperton* dissent, Chief Justice Roberts saw a similar question of unmanageability. He worried about a flood of follow-up cases asking for recusal and the many issues that would need to be sorted out by the lower courts. Justice Kennedy does not make an extended argument for the manageability of the standard he sets forth in *Caperton*, although he did make the empirical prediction that *Caperton* motions will be rare because the facts will never be this extreme. Beneath the surface, Justice Kennedy seems to have made two determinations relevant on this point. First, Justice Kennedy seems to have decided that the uncertainties that will accompany the resolution of *Caperton* motions are worth dealing with. Justice Kennedy thinks that the price of some unmanageability is worth paying in the context of judicial elections—a price that he was not willing to pay in the context of disputes over partisan gerrymandering. Second, Justice Kennedy likely calculated that the vagueness of his opi-

nion will likely have an *in terrorem* effect on the worst kinds of abuses in judicial elections. An unclear boundary, as Rick Pildes has pointed out, can sometimes effectively police bad behavior. In this case, confusion about what would trigger a *Caperton* recusal order could curb the most egregious campaign spending practices. It will also encourage other institutional actors, such as state supreme courts enacting their own judicial codes, to fill in the gaps of *Caperton* with more detailed rules and procedures.

It was particularly interesting that the Chief Justice, in his *Caperton* dissent, pointed out that a 527 organization allied with the plaintiff's bar spent almost $2 million in support of Justice Benjamin's opponent in the West Virginia judicial race. Will such groups continue to mount major campaigns for and against judicial candidates where their groups have regular business before the courts? Or might this cause those who have been seen to have "significant and disproportionate influence on electoral outcomes" to scale back some of their major spending? Spenders' fear is that they might not benefit from the very people they help to elect. In the end, the vagueness of the *Caperton* standard could be its greatest benefit.

The decision's vagueness might lead to minor corrections so that these issues do not come back to the courts. In addition to the extent that the issues come to the lower courts, these courts will try various approaches to the question of recusal in line with *Caperton*. These varied experiences can then provide valuable information to the Supreme Court, should it need to craft subsidiary rules to put the *Caperton* opinion into action. Lower courts serve as scouts, providing advance information for the Supreme Court on what does and does not work.

In the end, Justice Kennedy's opinion in *Caperton* leaves open many questions about the regulation of judicial elections, but that may be precisely the point. Its vagueness may leave room for finally jettisoning the unilocular "an-election-is-an-election" approach in the judicial context.

V. *CAPERTON* AS A SECOND-BEST SOLUTION

KATHLEEN SULLIVAN: I would like to begin by disagreeing with Rick on his last point and agreeing with him on his first point.

On his last point, how vague and uncertain is the *Caperton* decision? The most important sentence in the decision is the one in which Justice Kennedy summarizes the ruling:

> There is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in plac-

> ing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.[1]

Note that he says "on the case," not "on the court." He has given us a risk of bias, but he focused on a crucial distinction between biasing the judge with respect to issues (an interest that the Court found insufficient to justify limitations on judicial campaign speech in *Republican Party v. White*), and on the other hand, biasing a judge with respect to parties, which is certainly at the core of the broad due process concepts.

Stated that way, the outcome in the *Caperton* case is clear. Given all the particular facts and optics in the case, Justice Benjamin should have recused himself under either the West Virginia standard or the ABA standard. In other words, it should have been an easy matter that did not have to go to a due process ruling. In the future, it may be possible that we will not see a lot more *Caperton*-style due process cases. Rather than forcing the issue into a due process case, state judicial recusal requirements may be tightened or enforced in such a way as to handle this at the state common law level or at the judicial procedural level.

The *Caperton* decision is really a second-best solution to the problem of the influx of money designed to influence judges on both issues and cases. It is an *ex-post* solution that tries to control the damage after the fact, rather than an *ex-ante* solution, which would try to prevent the problem from occurring in the first place. To the extent possible, the law prefers *ex-ante* approaches that align incentives in advance to *ex-post* solutions—it is always harder to catch the horse when it is out of the barn or to put the toothpaste back in the tube. Any sort of retroactive effort at damage control is always flawed, and the *Caperton* decision is no different. The relevant question is this: what latitude exists for trying to impose more *ex-ante* limits on the kind of judge-buying that led to the *Caperton* recusal ruling?

Of course, our initial instinct is to say that we cannot impose these types of limits because we have a structure of campaign finance law already established. The existing structure stems from *Buckley v. Valeo*, which limits the supply of political money while leaving the demand untouched. We can have contribution limitations consistent with the First Amendment, but we cannot have expenditure limitations consistent with the First Amendment, including limitations on independent expenditures made in support of or in opposition to a candidate. Although I strongly support First Amendment limits on expenditure limitations in the political campaign context, there is no reason to think that such limits apply exactly the same way in the judicial election context. There are objec-

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

tions to this argument, but the Court held in *Republican Party v. White* that the First Amendment prevents any effort to limit campaign speech in judicial election campaigns.

I would like to suggest that *Republican Party v. White* is a very narrow decision. It imposes very narrow, common law-like limits on particular outlier restrictions that limit judicial campaign speech, and it absolutely does not impose First Amendment barriers to an *ex-ante* solution to the problem.

There are specific things that *White* did and did not do. *White* struck down a rule that barred a judicial candidate from announcing views on disputed political or legal topics in a campaign, a rule embraced by only a handful of outlier states at the time. The First Amendment issues in the case made the rule easy to strike down, but *White* pointedly did not do a number of things. First of all, in the majority opinion, Justice Scalia wrote, "We explicitly are not requiring judicial campaigns to sound the same way as legislative campaigns." He specifically noted also that a justification for preventing bias toward parties was not implicated here. *White* espoused the "no announce" rule, but the concern that led to this rule was that judges would talk about issues. Because Justice Scalia wrote that this is not about bias toward a party, it does not seem to pertain to the issues presented in *Caperton*.

Second, *White* does not imply any limits on incumbent judges' speech. It applies to candidate speech in a campaign, but not to an incumbent judge who is already bound by rules of judicial conduct.

Third, *White* does not speak to limitations on contributions to or expenditures by supporters or opponents of judicial candidates. Although this leaves intact the default world of the *Buckley* system, as stated earlier, judicial elections might be different from the political elections at issue in *Buckley*.

Fourth, *White* does not cover restrictions on judges' conduct, as it does their speech. A host of regulations governing judicial candidates' conduct during campaigns is unaffected by any First Amendment limitation on what the judges themselves may say. Because there are so many regulations that *White* does not address, the lower courts that have interpreted *White* broadly have gotten *White* wrong.

The deeper reason that lower courts have misinterpreted *White* is that they ignore the countervailing constitutional interests that are implicated by limiting the expenditure or contribution of funds and the use of those funds in judicial campaigns. There are three major countervailing constitutional interests. The first is the rule of law. Beyond an individual litigant's interest in impartiality, there is a general systemic interest in having an impartial judiciary that is deeply rooted in our system. The

second is the separation of powers. The impartiality of judges is partly an idea that one branch should not overbear the others. The final countervailing interest is the individual litigant's interest in due process. Nothing in *White* ruled out the possibility that these countervailing constitutional interests could trump the free speech interests in any particular case.

There are other cases in other contexts in which the Court has held that countervailing constitutional interests are sufficiently compelling to outbalance First Amendment interests. Take, for example, the Hatch Act Cases. The Hatch Act Cases involved First Amendment challenges to rules at both the federal and the state levels. Essentially, the Hatch Act said that if an individual is working as a public servant or an officer of the government, then that person's electioneering activity must be limited within the workplace. The Act governed everything down to buttons and bumper stickers in order to keep government workers from pressuring their colleagues into contributing to a political campaign. This is an obvious limitation on political speech, and the Act would be overbroad by normal First Amendment rules. Yet the Court unceremoniously upheld it in 1947 and again in 1973 on the grounds that the interest in the impartial execution of the law overwhelmed the First Amendment interest. The Court reasoned that no one working in the executive branch of government should be overborne by political pressure from his fellow employees. Here, the notion that impartial administration in the judicial branch can overwhelm any speech interest is at least parallel to the Hatch Act Cases.

In a second example, the Court in *Burson v. Freeman* upheld a restriction on political signs wielded in the immediate vicinity of a polling place. This would have been obviously invalid as subject-matter-based restriction on speech if we were in any context other than an election, but Justice Kennedy joined an opinion that upheld the restriction. According to Justice Kennedy, there is a compelling interest in protecting the fairness and integrity of the political process by prohibiting signage outside of the polling place.

These cases remind us that, when it comes to elections generally, we have tolerated limitations on freedom of speech to ensure the fairness of the election process. Judicial elections in particular have a special due process component of a compelling state interest. Thus, because the countervailing interests in judicial elections are of a constitutional weight themselves, some limitation on speech is justified.

Overall, nothing in *Republican Party v. White* necessarily imposes the *Buckley* framework on *ex-ante* regulation of judicial campaign speech outside the narrow context in which *White* held that "no an-

nounce" rules were invalid. Nothing in *White* limits us to *Buckley*. Nothing in *White* imposes broad First Amendment limitations.

Since this means that there is no absolute First Amendment bar at the threshold, why might we prefer *ex-ante* regulation of independent expenditures of Mr. Blankenship's kind to *ex-post* regulation of the kind imposed in *Caperton*? Apart from a general preference for preventive measures rather than damage control, I will offer three reasons why *ex ante* is better than *ex post* as a way to regulate expenditures in judicial elections.

First, *ex-ante* regulation eliminates the burden on judges to do the line drawing that is imposed by *Caperton*. The line for when recusal is required, although easy to spot in the *Caperton* fact pattern, becomes more difficult to discern when we move away from the epicenter of this case. Retroactive regulation is also is harmful to courts because it disrupts the cohesiveness of the court itself. For example, in reference to Justice Sotomayor's arrival to the Supreme Court, Justice Thomas said, "We're a family, and when a new family member comes, it changes the dynamic." By multiplying recusals and constantly bringing up substitute judges from the lower appellate courts to sit in, the very notion of the sitting court's "repeat player" quality is damaged. The *ex-ante* approach therefore eliminates the burden on judges to determine where the line for recusal is drawn and minimizes the disruption of the ongoing nature of the court *en banc*.

Second, an *ex-ante* approach is best if we were to try to limit the use of independent expenditures to elect judicial candidates. Independent expenditures often come from organization with names like "Fair" or "And for the Sake of the Children," but it is never clear who heads the organization or how the organization is tied to a judicial candidate. Instead of directing the money into these unaccountable, tertiary organizations, money should be redirected into the candidate's campaign. This way, the candidate would be accountable to the voters, which benefits the democratic impulse that leads us to elect judges in the first place. If the judicial candidate is held accountable for his or her campaign, the nature of the campaign and the campaign's ads may change for the better. *Ex-ante* regulation would move campaign money from unaccountable, tertiary organizations to the accountable candidate's campaign.

Finally, an *ex-ante* method of regulation is preferable to an *ex-post* method because the *ex-ante* approach would influence the conduct of judicial campaigns even when the money is spent on behalf of losers. In other words, recusal operates only on the judge who wins the election, but the money flowing into the campaigns (even for an unsuccessful candidate) is going to change the election: it creates an arms race in

which the other side has to ratchet up its contributions from independent organizations, and it alters the character of the election and the focus on the issues at stake.

Overall, it seems as though the Court preserved the distinction between judicial and legislative elections in both *White* and *Caperton*. In the wake of *Caperton*, I hope that future reform efforts will focus on trying to prevent the problem that led to the recusal, rather than counting on the recusal to close the barn door after the horse has left.