

ROBERTS, C. J., dissenting

**SUPREME COURT OF THE UNITED STATES**

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No. 08–22

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HUGH M. CAPERTON, ET AL., PETITIONERS *v.*  
A. T. MASSEY COAL COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
APPEALS OF WEST VIRGINIA

[June 8, 2009]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA,  
JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

I, of course, share the majority’s sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such. But I fear that the Court’s decision will undermine rather than promote these values.

Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. 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.

Today, however, the Court enlists the Due Process Clause to overturn a judge’s failure to recuse because of a “probability of bias.” Unlike the established grounds for disqualification, a “probability of bias” cannot be defined in any limited way. 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 result will do

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

## I

There is a “presumption of honesty and integrity in those serving as adjudicators.” *Withrow v. Larkin*, 421 U. S. 35, 47 (1975). 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. See *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))). We have thus identified only *two* situations in which the Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is presiding over certain types of criminal contempt proceedings.

It is well established that a judge may not preside over a case in which he has a “direct, personal, substantial pecuniary interest.” *Tumey v. Ohio*, 273 U. S. 510, 523 (1927). This principle is relatively straightforward, and largely tracks the longstanding common-law rule regarding judicial recusal. See Frank, *Disqualification of Judges*, 56 *Yale L. J.* 605, 609 (1947) (“The common law of disqualification . . . was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else”). For example, a defendant’s due process rights are violated when he is tried before a judge who is “paid for his service only when he convicts the defendant.” *Tumey, supra*, at 531; see also *Aetna Life Ins. Co. v. Lavoie*, 475 U. S. 813, 824 (1986) (recusal required when the judge’s decision in a related case “had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case”); *Connally v. Georgia*, 429 U. S. 245, 250 (1977) (*per curiam*).

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It may also violate due process when a judge presides over a criminal contempt case that resulted from the defendant's hostility towards the judge. In *Mayberry v. Pennsylvania*, 400 U. S. 455 (1971), the defendant directed a steady stream of expletives and *ad hominem* attacks at the judge throughout the trial. When that defendant was subsequently charged with criminal contempt, we concluded that he "should be given a public trial before a judge other than the one reviled by the contemnor." *Id.*, at 466; see also *Taylor v. Hayes*, 418 U. S. 488, 501 (1974) (a judge who had "become embroiled in a running controversy" with the defendant could not subsequently preside over that defendant's criminal contempt trial).

Our decisions in this area have also emphasized when the Due Process Clause does *not* require recusal:

"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." *Tumey, supra*, at 523; see also *Lavoie, supra*, at 820.

Subject to the two well-established exceptions described above, questions of judicial recusal are regulated by "common law, statute, or the professional standards of the bench and bar." *Bracy v. Gramley*, 520 U. S. 899, 904 (1997).

In any given case, there are a number of factors that could give rise to a "probability" or "appearance" of bias: friendship with a party or lawyer, prior employment experience, membership in clubs or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a "probability of bias." Many state *statutes* require recusal based

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on a probability or appearance of bias, but “that alone would not be sufficient basis for imposing a *constitutional* requirement under the Due Process Clause.” *Lavoie, supra*, at 820 (emphasis added). States are, of course, free to adopt broader recusal rules than the Constitution requires—and every State has—but these developments are not continuously incorporated into the Due Process Clause.

## II

In departing from this clear line between when recusal is constitutionally required and when it is not, the majority repeatedly emphasizes the need for an “objective” standard. *Ante*, at 1, 6, 9, 11–18. The majority’s analysis is “objective” in that it does not inquire into Justice Benjamin’s motives or decisionmaking process. But the standard the majority articulates—“probability 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.

But there are other fundamental questions as well. With little help from the majority, courts will now have to determine:

1. How much money is too much money? What level of contribution or expenditure gives rise to a “probability of bias”?
2. How do we determine whether a given expenditure is “disproportionate”? Disproportionate *to what*?
3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate’s campaign? What about contributions to independent out-

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side groups supporting a candidate?

4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?
5. Does the amount at issue in the case matter? What if this case were an employment dispute with only \$10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?
6. Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?
7. How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?
8. What if the “disproportionately” large expenditure is made by an industry association, trade union, physicians’ group, or the plaintiffs’ bar? Must the judge recuse in all cases that affect the association’s interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?
9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received “disproportionate” support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are “tough on

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crime,” must the judge recuse in all criminal cases?

10. What if the candidate draws “disproportionate” support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?
11. What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court’s analysis apply if the supporter “chooses the judge” not in *his* case, but in someone else’s?
12. What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome (*e.g.*, a facial challenge to an agency rulemaking or a suit seeking to limit an agency’s jurisdiction)?
13. Must the judge’s vote be outcome determinative in order for his non-recusal to constitute a due process violation?
14. Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law?
15. What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no “debt of gratitude” to the supporter? Does that “moot” the due process claim?
16. What if the judge voted against the supporter in many other cases?

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17. What if the judge disagrees with the supporter's message or tactics? What if the judge expressly *disclaims* the support of this person?
18. Should we assume that elected judges feel a "debt of hostility" towards major *opponents* of their candidates? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?
19. If there is independent review of a judge's recusal decision, *e.g.*, by a panel of other judges, does this completely foreclose a due process claim?
20. Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate?
21. Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?
22. Does it matter whether the campaign expenditures come from a party or the party's attorney? If from a lawyer, must the judge recuse in every case involving that attorney?
23. Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections?
24. Under the majority's "objective" test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?

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25. What role does causation play in this analysis? The Court sends conflicting signals on this point. The majority asserts that “[w]hether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry.” *Ante*, at 15. But elsewhere in the opinion, the majority considers “the apparent effect such contribution had on the outcome of the election,” *ante*, at 14, and whether the litigant has been able to “choos[e] the judge in his own cause,” *ante*, at 16. If causation is a pertinent factor, how do we know whether the contribution or expenditure had any effect on the outcome of the election? What if the judge won in a landslide? What if the judge won primarily because of his opponent’s missteps?
26. Is the due process analysis less probing for incumbent judges—who typically have a great advantage in elections—than for challengers?
27. How final must the pending case be with respect to the contributor’s interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability?
28. Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election?
29. When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members?

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30. What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent?
31. What type of support is disqualifying? What if the supporter's expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?
32. Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude?
33. What procedures must be followed to challenge a state judge's failure to recuse? May *Caperton* claims only be raised on direct review? Or may such claims also be brought in federal district court under 42 U. S. C. §1983, which allows a person deprived of a federal right by a state official to sue for damages? If §1983 claims are available, who are the proper defendants? The judge? The whole court? The clerk of court?
34. What about state-court cases that are already closed? Can the losing parties in those cases now seek collateral relief in federal district court under §1983? What statutes of limitation should be applied to such suits?
35. What is the proper remedy? After a successful *Caperton* motion, must the parties start from scratch before the lower courts? Is any part of the lower court judgment retained?
36. Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only

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be ripe after decision, when the judge's actions or vote suggest a probability of bias?

37. Are the parties entitled to discovery with respect to the judge's recusal decision?
38. If a judge erroneously fails to recuse, do we apply harmless-error review?
39. Does the *judge* get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?
40. What if the parties settle a *Caperton* claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation?

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. Today's opinion requires state and federal judges simultaneously to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).

The Court's inability to formulate a "judicially discernible and manageable standard" strongly counsels against the recognition of a novel constitutional right. See *Vieth v. Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (holding political gerrymandering claims nonjusticiable based on the lack of workable standards); *id.*, at 317 (KENNEDY, J., concurring in judgment) ("The failings of the many proposed standards for measuring the burden a gerrymander imposes . . . make our intervention improper"). The need to consider these and countless other

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questions helps explain why the common law and this Court's constitutional jurisprudence have never required disqualification on such vague grounds as "probability" or "appearance" of bias.

## III

## A

To its credit, the 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. *Ante*, at 17. The Court repeats this point over and over. See *ante*, at 13 ("this is an exceptional case"); *ante*, at 16 ("On these extreme facts"); *ibid.* ("Our decision today addresses an extraordinary situation"); *ante*, at 17 ("The facts now before us are extreme by any measure"); *ante*, at 20 (Court's rule will "be confined to rare instances").

But this is just so much whistling past the graveyard. Claims that have little chance of success are nonetheless frequently filed. 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 "*Carperton* 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.

Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: "Hard cases make bad law."

Consider the cautionary tale of our decisions in *United States v. Halper*, 490 U. S. 435 (1989), and *Hudson v.*

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*United States*, 522 U. S. 93 (1997). Historically, we have held that the Double Jeopardy Clause only applies to criminal penalties, not civil ones. See, e.g., *Helvering v. Mitchell*, 303 U. S. 391, 398–400 (1938). But in *Halper*, the Court held that a civil penalty could violate the Clause if it were “overwhelmingly disproportionate to the damages [the defendant] has caused” and resulted in a “clear injustice.” 490 U. S., at 446, 449. We acknowledged that this inquiry would not be an “exact pursuit,” but the Court assured litigants that it was only announcing “a rule for the rare case, the case such as the one before us.” *Id.*, at 449; see also *id.*, at 453 (KENNEDY, J., concurring) (“Today’s holding, I would stress, constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case”).

Just eight years later, we granted certiorari in *Hudson* “because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*.” 522 U. S., at 98; see also *ibid.*, n. 4. 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.” *Id.*, at 101–102 (internal quotation marks omitted). We thus abandoned the *Halper* rule, ruing our “ill considered” “deviation from longstanding double jeopardy principles.” *Id.*, at 101.

The déjà vu is enough to make one swoon. Today, the majority again departs from a clear, longstanding constitutional rule to accommodate an “extreme” case involving “grossly disproportionate” amounts of money. I believe we will come to regret this decision as well, when courts are forced to deal with a wide variety of *Caperton* motions, each claiming the title of “most extreme” or “most disproportionate.”

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## B

And why is the Court so convinced that this is an extreme case? It is true that Don Blankenship spent a large amount of money in connection with this election. But this point cannot be emphasized strongly enough: Other than a \$1,000 direct contribution from Blankenship, *Justice Benjamin and his campaign had no control over how this money was spent*. Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party might distort the campaign’s message or cause a backlash against the candidate, even though the candidate was not responsible for the ads. See *Buckley v. Valeo*, 424 U. S. 1, 47 (1976) (*per curiam*) (“Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive”); see also Brief for Conference of Chief Justices as Amicus Curiae 27, n. 50 (citing examples of judicial elections in which independent expenditures backfired and hurt the candidate’s campaign). The majority repeatedly characterizes Blankenship’s spending as “contributions” or “campaign contributions,” *ante*, at 1, 3, 14–17, 19, but it is more accurate to refer to them as “independent expenditures.” Blankenship only “contributed” \$1,000 to the Benjamin campaign.

Moreover, Blankenship’s independent expenditures do not appear “grossly disproportionate” compared to other such expenditures in this very election. “And for the Sake of the Kids”—an independent group that received approximately two-thirds of its funding from Blankenship—spent \$3,623,500 in connection with the election. App. 684a. But large independent expenditures were also made in support of Justice Benjamin’s opponent. “Consumers for Justice”—an independent group that received large contributions from the plaintiffs’ bar—spent approximately \$2 million in this race. *Id.*, at 682a–683a, n. 41.

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And 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. Brief for Petitioners 29.

It is also far from clear that Blankenship’s expenditures affected the outcome of this election. Justice Benjamin won by a comfortable 7-point margin (53.3% to 46.7%). Many observers believed that Justice Benjamin’s opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as “deeply disturbing” and worse. App. 679a, n. 38. Justice Benjamin’s opponent also refused to give interviews or participate in debates. All but one of the major West Virginia newspapers endorsed Justice Benjamin. Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent. Unlike the majority, I cannot say with any degree of certainty that Blankenship “cho[se] the judge in his own cause.” *Ante*, at 16. I would give the voters of West Virginia more credit than that.

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It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias,” will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

I respectfully dissent.