CAPERTON AFTER *CITIZENS UNITED*

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They were decided just seven months apart and are in some ways hard to reconcile. But there is a message in the combined holdings of *Caperton v. A.T. Massey Coal Co.*[1] and *Citizens United v. Federal Election Commission*.[2] It is that the Supreme Court views the justice system as specially vulnerable to the influence of money.

The *Caperton* decision, now thrown into sharp relief by *Citizens United*, has started a vigorous conversation about the meaning of fairness in adjudication, one to which this special issue of the *Arizona Law Review* on "Funding Justice" makes an important contribution.

The conversation reflected in these pages is necessary in part because it is not easy to divine a broad principle from *Caperton*, which said little about when the requirements of due process require judges to recuse themselves beyond holding that three million dollars in campaign spending is just too much money.

"[T]his is," Justice Anthony M. Kennedy wrote for the five-justice majority, in words faintly echoing the suggestion in *Bush v. Gore*[3] that some decisions are tickets good for one ride only, "an exceptional case."[4]

Justice Kennedy four times called the sum—spent to help elect a new justice to the West Virginia Supreme Court—"extraordinary."[5] The only solution where that much money was at issue, Justice Kennedy said, was to require the justice to step aside from a case involving the supporter.[6] The due process rights of the litigants required it—at least when the pile of money in question reached some unspecified height.[7]

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* Supreme Court correspondent, *The New York Times*.

1. 129 S. Ct. 2252 (2009).
2. 130 S. Ct. 876 (2010).
3. *See generally* 531 U.S. 98 (2000).
4. *Caperton*, 129 S. Ct. at 2263.
5. *Id.* at 2256, 2262, 2265.
6. *Id.* at 2263–65.
7. *See id.* at 2265.

But there is no bright-line limiting principle in *Caperton*; Chief Justice John G. Roberts Jr., in his caustic dissent, calls the new rule established in the decision, if it can be called a rule at all, "inherently boundless."[8]

"[T]he standard the majority articulates—'probability of bias'—fails to provide clear, workable guidance for future cases," Chief Justice Roberts wrote.[9]

Just seven months later, Justice Kennedy found himself having to distinguish *Caperton* when the court's *Citizens United* bombshell landed. Justice Kennedy was again the author of the majority opinion, and the vote was again 5-to-4. But now every single one of his allies in *Caperton* were on the other side, while every one of the *Caperton* dissenters now joined him.[10]

Citizens United held that Congress was powerless under the First Amendment to forbid corporations and unions from spending money on independent expenditures supporting or opposing political candidates.[11]

Justice Kennedy used every litigator's stock phrase in introducing his discussion of a case most helpful to the other side. *Caperton*, he wrote in *Citizens United*, "is not to the contrary."[12]

Why?

First, he said, *Caperton* focused on the *remedy* for the risk of bias. He was right about this: *Caperton* did not directly concern campaign speech. It required only that the beneficiaries of the speech recuse themselves from cases involving their benefactors if the speech reached a certain level.[13] There was no suggestion in *Caperton*, Justice Kennedy wrote, "that the litigant's political speech could be banned."[14]

So far so good. But there is no analogy to compelled recusal in the political branches, and so the right to the perception of fair treatment identified in *Caperton* appears to be one without a remedy in the political realm.

In *Caperton*, Justice Kennedy credited the idea that judges will feel a "debt of gratitude" to those who spent large sums getting them elected.[15] For politicians, he said in *Citizens United*, "there is only scant evidence that independent expenditures even ingratiate."[16]

Those two ideas read together generate a surprising conclusion. Judges, Justice Kennedy seems to be saying, are more corruptible than politicians.

Justice Kennedy did allow that it would be a bad thing for elected officials of any kind to give unwarranted special treatment to their supporters.

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8. *Id.* at 2272 (Roberts, C.J., dissenting).
9. *Id.* at 2269.
10. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); *Caperton*, 129 S. Ct. 2252.
11. *Citizens United*, 130 S. Ct. at 900–02.
12. *Id.* at 910.
13. *See Caperton*, 129 S. Ct. 2252.
14. *Citizens United*, 130 S. Ct. at 910.
15. *See Caperton*, 129 S. Ct. at 2262.
16. *Citizens United*, 130 S. Ct. at 910.

"If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern," he wrote.[17]

Outside the judicial realm, though, there appear to be few ways to address this "cause for concern." Suppressing the speech in question, he said, will not do.[18]

Much has and will be written about the impact *Citizens United* will have in elections for executive and legislative offices. Justice John Paul Stevens, in his dissent in the case, paused to observe in a mixed metaphor that the court "today unleashes the floodgates of corporate and union general treasury spending in" judicial elections.[19]

"Perhaps '*Caperton* motions' will catch some of the worst abuses," Justice Stevens added, referring to recusal motions. "This will be small comfort to those states that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems."[20]

The four provocative articles that follow explore the questions raised and suggested by *Caperton* and *Citizens United*, the Supreme Court's most recent attempt to reconcile the integrity of democratic government and the justice system that ensures it with a distinctively American commitment to unfettered political speech. It is not always easy to make sense of the doctrinal crosscurrents in this area, but the authors here do a commendable job in navigating them. The journey could hardly be more important.

17. *Id.* at 911.
18. *Id.*
19. *Id.* at 968 (Stevens, J., concurring in part and dissenting in part).
20. *Id.*