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Reconciling *Caperton* and *Citizens United*: When Campaign Spending Should Compel Recusal of Elected Officials

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ABSTRACT

Two recent high-profile U.S. Supreme Court decisions—*Caperton* and *Citizens United*—promise to fundamentally alter the landscape of campaign finance at all levels of government. At first glance, however, their holdings appear to be in considerable tension with one another. This Comment argues that we should overcome this tension by reading the decisions with reference to the form of power exercised by the government official who stood to benefit from the campaign expenditures in question. It argues that, as a reflection of two constitutional values—the Due Process Clause's guarantee of a neutral decisionmaker and the First Amendment's guarantee of decisionmakers responsive to the people—we should be supportive of attempts to influence officials who exercise nonadjudicatory power with campaign expenditures, but wary of similar attempts to influence officials who exercise adjudicatory power. The Comment finishes by contending that the principal consequence of this argument should be to investigate when a nonjudicial government official exercises adjudicatory power and to determine whether or not campaign expenditures made in support of that official require disqualification.

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INTRODUCTION

On June 8, 2009, in a case worthy of a John Grisham novel, the U.S. Supreme Court found that campaign expenditures made in support of West Virginia Supreme Court Justice Brent Benjamin violated the Due Process Clause of the Fourteenth Amendment in *Caperton v. A.T. Massey Coal Co.*[1] After receiving $3 million in support from Massey CEO Don Blankenship during his campaign, Benjamin cast the deciding vote to overturn a $50 million jury verdict against Massey.[2] On appeal, the U.S. Supreme Court found that the $3 million spent on Benjamin's behalf created a risk of actual bias sufficient to violate Caperton's Fourteenth Amendment right to an impartial adjudicator. In doing so, the Court recognized for the first time that campaign expenditures could create a due process violation.[3] Advocates of campaign finance reform greeted the ruling with "something approaching jubilation" and characterized the ruling as a "huge victory for one of the most basic aspects of the rule of law: the right to a fair hearing."[4] Advocates and opponents alike wondered if the decision—which conspicuously failed to draw the traditional distinction between campaign contributions and independent expenditures[5]—signaled that the Court was willing to allow greater regulation of campaign finance.[6]

1. 129 S. Ct. 2252 (2009). In John Grisham's novel, *The Appeal*, the protagonist won a $41 million verdict at trial against a chemical company whose dumping of cancer-causing chemicals into the water was responsible for the death of her husband and son. JOHN GRISHAM, THE APPEAL (2008). The CEO of the chemical company financed the election of a candidate for the state supreme court, who then voted in the company's favor. *See* Terri R. Day, *Buying Justice:* Caperton v. A.T. Massey*: Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. C. L. REV. 359, 359 n.2 (2009).
2. *Caperton*, 129 S. Ct. at 2257–58.
3. *Id.* For a description of the unprecedented nature of the Court's finding, see Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 212 (2010).
4. Adam Liptak, *Justices Issue a Rule of Recusal in Cases of Judges' Big Donors*, N.Y. TIMES, June 9, 2009, at A1 (internal quotation marks omitted).
5. Prior to *Caperton*, this distinction had been crucial in considering the constitutionality of limits on financial support to a candidate. *See* Buckley v. Valeo, 424 U.S. 1, 22–23 (1976) (per curiam). For an overview of the statutory definitions and regulations of the various kinds of campaign support, see *infra* Part I.A. I discuss below the constitutional significance of the distinction between campaign contributions and independent expenditures. *See infra* notes 80–100 and accompanying text.
6. *See* Stephen M. Hoersting & Bradley A. Smith, *The* Caperton *Caper and the Kennedy Conundrum*, 2008–09 CATO SUP. CT. REV. 319, 341; Rick Hasen, *Initial Thoughts on* Caperton v. Massey*: First Meaningful Constitutional Limits on Excesses of Judicial Elections*, ELECTION L. BLOG (June 8, 2009, 7:58 AM), http://electionlawblog.org/archives/013784.html.

Six months later, the Court answered with a resounding "no." In another high-profile decision, *Citizens United v. Federal Election Commission*,[7] the Court struck down a provision of the Bipartisan Campaign Reform Act of 2002 that prohibited corporations and unions from using general treasury funds to make independent expenditures on behalf of a candidate that "expressly advocate the election or defeat of a candidate" or from engaging in "electioneering communication."[8] In doing so, the Court overturned its decisions in *Austin v. Michigan Chamber of Commerce*[9] and *McConnell v. Federal Election Commission*,[10] both of which upheld the constitutionality of similar regulations. The very same campaign finance advocates who celebrated *Caperton* were, to say the least, disheartened. The *New York Times* lamented that the "radical decision" struck "at the heart of democracy,"[11] and denounced the ruling as "disastrous," "terrible," and "reckless."[12] Richard Hasen wrote that a portion of the ruling sounded "more like the rantings of a right-wing talk show host than the rational view of a justice with a sense of political realism."[13]

How can we square these seemingly irreconcilable decisions? Has *Citizens United* completely gutted *Caperton*'s attempt to curb the influence of money in judicial elections, leaving states without "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"?[14] This Comment rejects the notion that these two decisions are irreconcilable. Instead, it argues that the decisions are a product of the tension between two constitutional values—the Due Process Clause's guarantee of a neutral decisionmaker and the First Amendment's guarantee of decisionmakers responsive to the people—brought into stark relief by the timing and publicity of *Caperton* and *Citizens United*. Functionally, these

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7. 130 S. Ct. 876 (2010).
8. *Id.* at 913. "Electioneering communication" is defined as "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election." *Id.* at 887 (quoting 2 U.S.C. § 434(f)(3)(A) (2006)). The prohibition on use of general treasury funds for independent expenditures and electioneering communications can be found at 2 U.S.C. § 441b, *invalidated by Citizens United*, 130 S. Ct. 876.
9. 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876.
10. 540 U.S. 93 (2003), *overruled by Citizens United*, 130 S. Ct. 876.
11. Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30.
12. *See* Floyd Abrams, Citizens United *and Its Critics*, 120 YALE L.J. ONLINE 77, 78 (2010), http://yalelawjournal.org/2010/9/29/abrams.html (internal quotation marks omitted).
13. Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE, Jan. 21, 2010, http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_grubbers.html.
14. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part).

rulings thus draw a line between the form of government action[15] that may and even should be influenced by campaign expenditures[16]—functions I describe, for lack of a better term, as "nonadjudicatory"[17]—and the form of government action for which influence by campaign expenditures offends our basic concept of justice—adjudication.

In making this argument, this Comment does not offer a normative assessment of either decision's underlying assumption about the influencing power of campaign expenditures.[18] Rather, it focuses on each opinion's statement of what the law is: that campaign expenditures risked a litigant's right to a neutral decisionmaker in *Caperton*, and that a ban on independent expenditures is a ban on speech that does not survive strict scrutiny in *Citizens United*. It uses these holdings to support the application of the form-as-distinction thesis—a

15. I use the terms "action" and "exercise of power" interchangeably.

16. As explained below, *see infra* Part I.A, "contributions" and "expenditures" have distinct meanings. However, because the *Caperton* decision summed contributions and expenditures in finding a due process violation, *see infra* notes 69–71 and accompanying text, I use the term "campaign expenditures" in my analysis to mean all financial support made on behalf of a candidate, whether contributions or expenditures.

17. I use this term to broadly encompass activities traditionally associated with those tasks performed by the executive and legislative branches. For example, enforcement of laws—especially criminal laws—is usually identified as one of the most core executive functions, and lawmaking is usually identified as one the most core legislative functions. *See* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 16, 687 (6th ed. 2011). Though this term is no doubt imprecise, it is so because of the genuine difficulty in determining whether a given government action is an adjudication. I have attempted to identify guideposts for understanding when a particular government decision is, or is not, an adjudication in Part III.A, *infra*, though I note here, as I do there, that the five features I identify are by no means dispositive.

18. Samuel Issacharoff sums up this debate:

> Lurking beneath the surface of all debates on campaign finance is a visceral revulsion over future leaders of state groveling for money. The process of fundraising is demeaning to any claim of a higher calling in public service and taints candidates, policies, donors, and anyone in proximity to this bleakest side of the electoral process . . . . [But w]ith these efforts at limitations comes the inevitable result that some speakers will be handicapped in expressing their views and that the total quantity of speech will be curtailed.

Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 118 (2010). For further normative assessments of *Citizens United*, see, for example, Carol Herdman, Citizens United*: Strengthening the First Amendment in American Elections*, 39 CAP. U. L. REV. 723, 749 (2011) ("[T]he Court's decision [in *Citizens United*] was the only possible correct choice. The majority opinion was necessary to preserve core First Amendment principles that American society has long accepted, and no evidence exists to support the belief that the decision will lead to improper political influence."); Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS, May 13, 2010, http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy ("[*Citizens United*] will do a great deal to encourage one particularly dangerous form of [corruption]. It will sharply increase the opportunity of corporations to tempt or intimidate congressmen facing reelection campaigns.").

concept that has been fully developed in a variety of other legal contexts[19]—to campaign finance law, and argues that this application is particularly important because of the considerable number of officials either elected or appointed to nonadjudicatory positions (who might benefit from *Citizens United*) who exercise adjudicatory power (and may therefore be limited by *Caperton*).

I begin by taking a closer look at both *Caperton* and *Citizens United*, highlighting the significant developments each case makes to the Court's due process and campaign finance jurisprudence. I then go on to argue that these two decisions should be viewed along the form-as-distinction paradigm. I draw support for this thesis by first explaining why the guarantee of a neutral decisionmaker is particularly important in the context of adjudications, and then by examining cases in which decisions by elected or appointed political representatives (executive and legislative officials) have been overruled on due process grounds because they exercised adjudicatory power. Next, I turn to what I believe is the principal consequence of drawing this line: that a due process violation can be found when sufficiently large campaign expenditures are made in support of a government official who performs an adjudicatory function, regardless of his or her official position. Finally, based on this conclusion, I suggest a two-step process for determining when *Caperton* recusals will be required: first, a determination of whether a particular governmental action is an adjudication, and second, whether the expenditures made in support of the official create a due process violation as defined in *Caperton*.

I. *CAPERTON* AND *CITIZENS UNITED*: HUH?

A. Campaign Finance Basics

Before diving into the facts of *Caperton* and *Citizens United*, an overview of the structure and rules of campaign finance, at least before *Citizens United*, is required. Financial support of a candidate can usually be placed into one of two categories: contributions or independent expenditures. While the statutory

19. As described below, the form-as-distinction rubric has been applied to cases dealing with separation of powers concerns, the right to an individual trial, and ex parte communications. *See infra* notes 129–146 and accompanying text.

definitions of contributions[20] and expenditures[21] are very similar, the distinction between contributions and *independent* expenditures is of constitutional significance. Unlike contributions, independent expenditures are those "expressly advocating the election or defeat of a clearly identified candidate" that are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."[22] As discussed in Part I.C, *infra*, for purposes of the First Amendment, whether or not an expenditure is made "in concert or cooperation" with a candidate (or party or committee) makes a critical difference.[23]

Within each of these categories, the U.S. Congress set limits, for purposes of federal elections, on how much any one "giving entity"—an individual; a national political party committee; a state, district, or local political party committee; a political action committee (PAC); or an authorized campaign committee—can give to a candidate (or their committee); a national party committee; a state, district, or local party committee; or any other political committee.[24] Thus, for example, during any given calendar year an individual can give a maximum of $2,500 to any candidate (or their committee); $30,800 to a national party committee; $10,000 to a state, district or local committee (combined limit); and $5,000 to "any other political committee per calendar year."[25] The term "Political Action Committee" is reserved for two types of political committees registered with the Federal Election Commission (FEC): separate segregated funds (usually established and administered by corporations, unions, or trade associations) and nonconnected committees (which are free to

20. Campaign contributions are "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office" or "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. § 431(8)(A) (2006).
21. An expenditure includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office" and "a written contract, promise, or agreement to make an expenditure." *Id.* § 431(9)(A).
22. *Id.* § 431(17). "Clearly identified" means that "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." *Id.* § 431(18).
23. *See infra* notes 80–100 and accompanying text; *see also* Buckley v. Valeo, 424 U.S. 1, 22–23 (1976) (per curiam).
24. *See generally* 2 U.S.C. § 441a.
25. *Quick Answers to General Questions*, FEC, http://www.fec.gov/ans/answers_general.shtml (last visited Mar. 26, 2012).

solicit contributions from the general public).[26] Organizations formed under section 527 of the Internal Revenue Code (Section 527 organizations) are those organized to raise money for political activities—and therefore all PACs are Section 527 organizations. However, not all Section 527 organizations are PACs: Those Section 527 organizations that engage in activities expressly advocating the election or defeat of a candidate are PACs, and are thus subject to the contribution and disclosure requirements of the FEC. Non-PAC Section 527 organizations can engage in political activity—such as voter mobilization and issue advocacy—but not for efforts that expressly advocate the election or defeat of particular candidates.[27]

It was against this backdrop of carefully delineated categories that the drama of *Caperton* and *Citizens United* would unfold, forever changing the face of campaign finance regulation.

B. The *Caperton* Decision

The facts of *Caperton* have been well chronicled.[28] In August of 2002, a West Virginia jury found A.T. Massey Coal Company "liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations."[29] It awarded the plaintiff, Hugh Caperton, $50 million in compensatory and punitive damages.[30] The trial court denied Massey's post-trial motion for judgment as a matter of law, finding that Massey "intentionally acted in utter disregard of [Caperton's] rights and ultimately destroyed [Caperton's] businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so."[31] Before the case was appealed, West Virginia held elections for its supreme court.[32] Dan Blankenship, Massey's chairman, "[k]nowing the [West Virginia] Supreme Court [would] consider the appeal in the case, . . . decided to support an attorney," Brent Benjamin,

26. *See Quick Answers to PAC Questions*, FEC, http://www.fec.gov/ans/answers_pac.shtml (last visited Mar. 26, 2012).
27. *See Quick Answers to General Questions*, *supra* note 25.
28. *See, e.g.*, Day, *supra* note 1, at 359–61; Richard M. Esenberg, *If You Speak Up, Must You Stand Down:* Caperton *and Its Limits*, 45 WAKE FOREST L. REV. 1287, 1290–91 (2010).
29. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).
30. *Id.*
31. *Id.* (internal quotation marks omitted).
32. "Thirty-nine states elect at least some of their judges," and elective courts hear the "vast majority of cases in the United States." *State Judicial Elections*, BRENNAN CTR. FOR JUST., http://www.brennancenter.org/content/section/category/state_judicial_elections (last visited Mar. 26, 2012).

who was running against incumbent Justice Warren McGraw.[33] Blankenship contributed $1,000 to Benjamin's campaign committee, the statutory maximum under West Virginia law. He also donated $2.5 million to "And For The Sake Of The Kids," a Section 527 organization. Finally, Blankenship spent $500,000 on independent expenditures—for "direct mailings and letters soliciting donations as well as television and newspaper advertisements"—in support of Benjamin.[34]

Justice Kennedy, author of the *Caperton* opinion, also "provide[d] some perspective."[35] Blankenship's expenditures were more than the total amount spent by all other Benjamin supporters combined, and three times as much spent by Benjamin himself. Blankenship spent $1 million more than the total amount spent by Benjamin's and McGraw's campaigns combined. Benjamin won with 53.3 percent of the vote in November of 2004.[36] In December of 2006, Massey filed its appeal for review. The West Virginia Supreme Court of Appeal granted review, and, after now–Justice Benjamin dismissed Caperton's motion to disqualify him under the Due Process Clause, ruled 3–2 (with Justice Benjamin siding with the majority) to overturn the jury verdict against Massey.[37]

In a 5–4 vote, the U.S. Supreme Court held that Blankenship's campaign expenditures in support of Benjamin's campaign violated the Due Process Clause of the Fourteenth Amendment.[38] Observing that "it is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process,'"[39] the majority recognized, for the first time, that campaign expenditures could impinge on a litigant's right to a neutral decisionmaker.[40]

In reaching its conclusion, the *Caperton* majority relied upon the logic first articulated by the Court eighty years earlier in *Tumey v. Ohio*.[41] There, a Prohibition-era Ohio statute empowered village mayors to sit as judges (with no jury) in criminal prosecutions for possession of alcohol. The ordinance at issue allowed the mayor to retain up to $12 from each fine imposed "in addition to his

33. *Caperton*, 129 S. Ct. at 2257.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 2257–58.
38. *Id.* at 2257.
39. *Id.* at 2259 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).
40. While lower courts had considered claims that *attorneys'* contributions to a judge's campaign could create a due process violation, *Caperton* represented the first case in which the U.S. Supreme Court considered whether a *party's* campaign contributions violated due process. *See* Day, *supra* note 1, at 369.
41. 273 U.S. 510 (1927).

regular salary, as compensation for hearing such cases."[42] Moreover, fines were deposited into the village's general fund for village improvements and repairs.[43] The Court held that both the mayor's "direct pecuniary interest" as well as his "official motive to convict and to graduate the fine to help the financial needs of the village" violated the Due Process Clause.[44] Though conceding that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment," the Court concluded that the due process inquiry was not whether the adjudicator (here, the mayor) was actually biased, but rather whether the "procedure . . . 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."[45] As the Court would later articulate, recusal is required when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[46]

As Justice Kennedy observed in *Caperton*, this standard reaches beyond the common law rule that recusal is required when the judge has a "direct, personal, substantial, pecuniary interest" in a case,[47] to a "more general concept of interests that tempt adjudicators to disregard neutrality."[48] Nonetheless, the *Tumey* rule has usually been applied in situations where the adjudicator has a pecuniary interest in the outcome of the case.[49] The definition of "pecuniary," however, has expanded beyond situations in which an adjudicator receives financial compen-

42. *Id.* at 519.
43. *Id.* at 521.
44. *Id.* at 535.
45. *Id.* at 532.
46. Withrow v. Larkin, 421 U.S. 35, 47 (1975). Note that the standard articulated here is probability of *actual* bias. For an argument that the standard should be appearance of bias, see Jed Handelsman Shugerman, *In Defense of Appearances: What* Caperton v. Massey *Should Have Said*, 59 DEPAUL L. REV. 529, 547–48 (2010).
47. *Tumey*, 273 U.S. at 523.
48. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2260 (2009).
49. *See* Day, *supra* note 1, at 366–68. The Court has recognized one other set of circumstances that create a constitutionally unacceptable risk of actual bias. In *In re Murchison*, the Court held that a state judge who had served as a "one-man grand jury" and authorized charges to be brought against the petitioners could not preside over their subsequent criminal trial. 349 U.S. 133, 136–39 (1955). The Court reasoned that having been a part of the decision to charge the defendants, the judge could not be "wholly disinterested in the conviction or acquittal of those accused" because "[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session." *Id.* at 137–38. The Court has reaffirmed its holding that judges "embroiled in a running, bitter controversy" must recuse themselves. Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); *see* Taylor v. Hayes, 418 U.S. 488 (1974).

sation upon conviction. In *Ward v. Village of Monroeville*,[50] another Ohio statute similar to the one at issue in *Tumey* allowed mayors to sit as judges for certain traffic offenses. The mayor in *Ward* received no compensation for his services; instead, funds collected from fines imposed went into the city's general fund. After observing that funds collected from the traffic fines contributed between a third and a half of all village revenues over a five-year period,[51] the Court concluded that the mayor's role as judge represented a constitutionally unacceptable risk of bias.[52] It reasoned that the mayor's "executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court," thus satisfying the "possible temptation" standard it articulated in *Tumey*.[53] A year later, in *Gibson v. Berryhill*,[54] the Court affirmed a district court's ruling that an administrative board in Alabama composed entirely of "independent" optometrists could not rule on whether or not "corporate" optometrists were practicing their profession unlawfully.[55] Corporate optometrists accounted for about half the practitioners in the state; thus, the Court reasoned that the district court could find that the board had a sufficient interest in excluding corporate optometrists—competition for the same market—to disqualify the board, under the Due Process Clause, from making that determination.[56] Finally, in *Aetna Life Insurance v. Lavoie*,[57] the Court found a due process violation when a justice on the Alabama Supreme Court cast the deciding vote to uphold a verdict against an insurance company for bad-faith refusal to pay a claim, while maintaining his role as lead plaintiff in a nearly identical lawsuit pending in a lower court.[58]

Building on this line of cases, the *Caperton* Court expanded the definition of direct pecuniary interests to include the type of campaign support Blankenship gave Justice Benjamin. The Court found that there was a serious risk of actual bias when a petitioner 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 immi-

50. 409 U.S. 57 (1972).
51. *Id.* at 58–59.
52. *Id.* at 60.
53. *Id.*
54. 411 U.S. 564 (1973).
55. *Id.* at 579.
56. *Id.*
57. 475 U.S. 813 (1986).
58. *Id.* at 823–24.

nent."[59] Not all campaign expenditures require mandatory recusal, according to the Court.[60] Rather, the determination of whether a campaign expenditure created a constitutionally unacceptable risk of bias was a function of the contribution's relative size in comparison to the total amount of money contributed, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.[61] Observing that the total amount spent by Blankenship exceeded Benjamin's own expenditures by 300 percent, that Blankenship spent $1 million more than Benjamin's and McGraw's campaigns combined, and that Benjamin won by 50,000 votes, the Court found that the "risk that Blankenship's influence engendered actual bias is sufficiently substantial that it 'must be forbidden if the guarantee of due process is to be adequately implemented.'"[62]

Two features of the *Caperton* decision stand out. First, despite its limited nature,[63] the fact that campaign expenditures could create a constitutionally unacceptable risk of bias was, in and of itself, extraordinary. The *Caperton* Court repeated its longstanding tradition that "most matters relating to judicial disqualification [do] not rise to a constitutional level."[64] By one observer's account, there have been seven opinions "dealing at any length" with recusal of a judge on due process grounds since *Tumey* was decided in 1927.[65] *Caperton*'s significance is highlighted when considered alongside the Court's ruling seven years earlier in

59. Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts's Concerns in* Caperton *and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. U. L. REV. 1, 23–24 (2009) (quoting Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263–64 (2009)).

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

61. Stempel, *supra* note 59, at 23–24.

62. *Caperton*, 129 S. Ct. at 2264 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). *Caperton*'s focus on the actual amount contributed is a departure from the Court's holding in *Tumey* that the amount received by the subject of recusal did not matter. *See* Tumey v. Ohio, 273 U.S. 510, 532 (1927). This departure may reflect the Court's belief that even the smallest direct financial incentives will create a distortion in the adjudicator's decisionmaking process, but that campaign expenditures will only create a distortion if made in sufficiently large quantities. This would also explain why the *Ward* Court's decision was based, in part, on its observations about the percentages of the total city budget that the fines at issue made up. *See* Ward v. Village of Monroeville, 409 U.S. 57, 58–60 (1972); *supra* notes 50–53 and accompanying text.

63. Justice Kennedy repeatedly emphasized the "extraordinary" nature of *Caperton*, noting that the "facts now before us are extreme by any measure." *Caperton*, 129 S. Ct. at 2265. The consequences of the narrowness of the ruling are discussed below. *See infra* notes 190–195 and accompanying text.

64. *Caperton*, 129 S. Ct. at 2259 (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)) (internal quotation marks omitted).

65. Stempel, *supra* note 59, at 28 n.117. Though noting that some "readers may have a broader view of what constitutes a 'due process recusal' opinion," Stempel concludes that "a fair observer would have trouble finding more than a dozen or so such opinions since *Tumey*." *Id.*

Republican Party of Minnesota v. White.[66] Challenging a Minnesota statute that barred a candidate from announcing "his or her views on disputed legal or political issues"[67] during a judicial election, the petitioners in *White* alleged that the "announce clause" violated the First Amendment. The Court in *White* agreed, specifically rejecting the argument that a previously announced view on a particular legal dispute would create a "direct, personal, substantial, and pecuniary interest" necessary to create a due process violation.[68] *Caperton*'s holding thus elevates campaign expenditures to the rare orbit of circumstances that can produce a constitutionally unacceptable risk of bias.

The second outstanding feature of *Caperton* is that it did not draw the usual distinction between contributions and independent expenditures. Traditionally, limits on contributions were considered permissible under the First Amendment, while limits on independent expenditures raised significant First Amendment concerns.[69] However, in applying its campaign expenditures test to the facts of *Caperton*, the Court summed Blankenship's $1,000 of direct contributions with his $2.5 million contribution to "And For The Sake Of The Kids" and with his $500,000 in independent expenditures.[70] Long the crux of campaign finance jurisprudence, the failure of Justice Kennedy—one of the Court's strongest First Amendment advocates—to draw this distinction caused observers to wonder whether the Court would abandon it entirely.[71] Six months later, they got their answer.

C. *Citizens United*

In the run-up to the 2008 presidential election, Citizens United, a nonprofit organization organized to "promote the traditional American values of limited government, free enterprise, strong families, and national sovereignty and secu-

66. 536 U.S. 765 (2002).
67. *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)). Minnesota's statute was based on Canon 7(B) of the 1972 American Bar Association MODEL CODE OF JUDICIAL CONDUCT (1976). *White*, 536 U.S. at 768.
68. *Id.* at 782 (quoting *id.* at 814 (Ginsburg, J., dissenting)). *White*, like *Caperton*, was a 5–4 decision, with Justice Scalia's opinion being joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas.
69. The statutory definitions of contributions and independent expenditures are provided *supra* notes 20–22. The constitutional significance of these distinctions is discussed *infra* notes 80–100 and accompanying text.
70. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2264 (2009).
71. *See* Hoersting & Smith, *supra* note 6, at 341–42; Hasen, *supra* note 6.

rity,"[72] released a film entitled *Hillary: The Movie*, a ninety-minute documentary about then–Senator and Democratic presidential hopeful Hillary Clinton.[73] Citizens United had an annual budget of around $12 million, most of which came from individuals, but a small portion of which came from for-profit corporations.[74] In addition to releasing the film in theaters and on DVD, Citizens United wanted to increase distribution by making it available to digital cable subscribers through video on demand. In December of 2007, a cable company offered to make *Hillary* available on demand to its viewers free of charge for $1.2 million from Citizens United. The organization accepted and produced two ten-second ads and one thirty-second ad that it hoped to run on broadcast and cable television to promote the film.[75]

Concerned that airing their video and running their ads would violate federal campaign finance law, Citizens United filed for declaratory and injunctive relief against the Federal Election Commission.[76] Pursuant to 2 U.S.C. § 441b, federal law prohibited corporations and unions from making contributions or expenditures "in connection with any election to any political office."[77] The Bipartisan Campaign Reform Act of 2002 extended this prohibition of corporate and union funding to "electioneering communication," defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election.[78] Corporate and union spending on elections was thus limited to PACs.[79]

Campaign finance regulations have been the subject of intense debate and litigation since the Watergate-inspired amendments to the Federal Election Campaign Act (FECA) in 1974.[80] Those amendments created the Federal

72. Brief for Appellant at 5, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 61467.
73. *Citizens United*, 130 S. Ct. at 887.
74. *Id.*
75. *Id.*
76. *Id.* at 888.
77. 2 U.S.C. § 441b(a) (2006), *invalidated by Citizens United*, 130 S. Ct. 876. For the definitions of contributions and expenditures, see *supra* Part I.A.
78. 2 U.S.C. § 434(f)(3)(A).
79. For an overview of Political Action Committees (PACs) and other campaign finance tools, see *supra* Part I.A.
80. Campaign finance regulations date back to at least 1905, when President Theodore Roosevelt sounded concerns about the influence of corporate funds in elections in his inaugural address. Between 1907 and 1966, the U.S. Congress enacted several statues designed to "[l]imit the dispropor-tionate influence of wealthy individuals and special interest groups on the outcome of federal elections; [r]egulate spending in campaigns for federal office; and [d]eter abuses by

Election Commission (FEC) and gave the new, independent agency significant enforcement powers.[81] They also limited political contributions to candidates for federal office and, separately, limited expenditures "relative to a clearly identified candidate."[82] In response to the new regulations, a diverse group of plaintiffs (including, among others, the Mississippi Republican Party and the New York Civil Liberties Union) sued for declaratory relief in *Buckley v. Valeo*,[83] alleging that the contribution and expenditure limits violated the First Amendment.[84]

One mechanical, though not uncontroversial, detour is required to understand how restrictions on the giving or spending of money might impinge on the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech."[85] This dispute is often characterized as turning on whether money is speech: thus, for opponents of campaign regulation, a ban on contributions and expenditures is a "ban on speech,"[86] while for its advocates, it is not.[87] However, as Eugene Volokh notes, this "is not a helpful framing of the issue, because it rests on metaphor, not reality."[88] Rather, "[a]s Justice Breyer has pointed out, 'a decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech.'"[89] Whether seen as actual speech or enabling speech, contributions and expenditures have consistently been found to be "speechy enough" to trigger First Amendment analysis, over the objections of a vigorous and persistent minority of the Court.[90]

Foreshadowing this debate, the *Buckley* Court elided the question of whether contributions and expenditures were speech,[91] finding it sufficient to

mandating public disclosure of campaign finances." *The FEC and the Federal Campaign Finance Law*, FEC, http://www.fec.gov/pages/brochures/fecfeca.shtml (last updated Feb. 2011). For an overview of the first fifty years of campaign finance regulations and the Court's early campaign finance jurisprudence, see Justice Frankfurter's majority opinion in *United States v. UAW-CIO*, 352 U.S. 567, 570–84 (1957).

81. *See* 2 U.S.C. § 437c.
82. Buckley v. Valeo, 424 U.S. 1, 7 (1976) (per curiam) (internal quotation marks omitted).
83. *Id.*
84. *Id.* at 7–9.
85. U.S. CONST. amend. I.
86. Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).
87. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("Money is property; it is not speech.").
88. EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 445 (4th ed. 2011).
89. *Id.* (quoting *Nixon*, 528 U.S. at 400 (Breyer, J., concurring)).
90. Issacharoff, *supra* note 18, at 119–20.
91. Buckley v. Valeo, 424 U.S. 1, 16–17 (1976) (per curiam).

say that the restrictions operated "in an area of the most fundamental First Amendment activities"—political expression[92]—and were therefore subject to the "closest scrutiny."[93] Though normally such searching review sounds the death knell for the contested government regulation, the Court upheld the *contribution* limits[94] (another example of strict scrutiny being fatal only in theory "and really just strict in fact").[95] The government's interests in preventing both actual quid pro quo corruption and the appearance of such corruption were found to be sufficiently compelling to uphold the contribution limits, especially because the limits left "persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates . . . with financial resources."[96] The independent expenditure limits, however, were found to impose an unconstitutional restraint on free speech.[97] Such expenditures did not generate the same danger of actual or perceived quid pro quo corruption because they were "made totally independently of the candidate and his campaign," and "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[98] Moreover, the limits on independent expenditures "heavily burden[ed] core First Amendment expression," as they infringed upon "the right to speak one's mind [and] engage in vigorous advocacy."[99]

Coordination thus became the touchstone for determining whether or not a campaign finance regulation unduly burdened the exercise of First Amendment rights.[100] Despite the bright line drawn in *Buckley* between independent expenditures and campaign contributions, however, fourteen years later the Court upheld a general ban on corporate and union independent expenditures in *Austin v. Michigan Chamber of Commerce*.[101] There, the Court upheld section 54(1) of the Michigan Campaign Finance Act, which prohibited corporations from using general treasury funds for "independent expenditures in connection with state

92. *Id.* at 14.
93. *Id.* at 16.
94. *Id.* at 29.
95. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798 (2006). The Court would later scrap the application of strict scrutiny to contribution limits in *Nixon*. *Id.* at 846.
96. *Buckley*, 424 U.S. at 26–28.
97. *See id.* at 51.
98. *Id.* at 47.
99. *Id.* at 48 (internal quotation marks omitted).
100. *See* Issacharoff, *supra* note 18, at 123.
101. 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

candidate elections."[102] In doing so, the Court relied on an "antidistortion" rationale, reasoning that the regulations constitutionally guarded against "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[103] Thirteen years after *Austin*, in *McConnell v. Federal Election Commission*,[104] the Court relied on the antidistortion rationale to uphold a federal statute barring corporations and unions from using independent expenditures to engage in electioneering communications in federal elections. The statutory commands upheld in *McConnell* were the same ones challenged in *Citizens United*.

When the Supreme Court granted certiorari for *Citizens United*, few thought that it would overturn *Austin* and *McConnell*. Citizens United itself had abandoned its attempt to overrule *Austin* in the lower court, choosing to argue, instead, that the statutory-provision ban on electioneering communications did not apply to *Hillary*.[105] But, in response to a series of hypothetical questions posed by Justices Alito and Kennedy and Chief Justice Roberts during oral arguments, the Deputy Solicitor General arguing the case stated that, under FECA, the government could ban *books* if they were published with a corporation's general treasury funds.[106] On the last day of its June 2009 term, the Court took the unusual step of asking the parties to reargue the case on the question of whether *Austin* and *McConnell* should be overruled.[107]

In January of 2010, the Court ruled that the restrictions on the use of corporate and union general treasury funds unduly burdened core First Amendment activity.[108] In doing so, it specifically overturned *Austin* and *McConnell*.[109] The

102. *Id.* at 655.
103. *Id.* at 660.
104. 540 U.S. 93, 205, 209 (2003), *overruled by Citizens United*, 130 S. Ct. 876.
105. Jurisdictional Statement at (i), *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2008 WL 3851546, at *i; *see* Richard L. Hasen, *What the Court Did—and Why*, AM. INT., July–Aug. 2010, at 49, *available at* http://www.the-american-interest.com/article-bd.cfm?piece=853.
106. Transcript of Oral Argument at 30, *Citizens United*, 130 S. Ct. 876 (No. 08-205), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf.
107. *See* Hasen, *supra* note 105.
108. *Citizens United*, 130 S. Ct. at 886.
109. *Id.* at 913. Much has been made of the Court's disregard for the principle of stare decisis. *See, e.g.*, *id.* at 938 (Stevens, J., concurring in part and dissenting in part) ("[I]f [the principle of stare decisis] is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine . . . . No such justification exists in this case . . . ."). However, as Samuel Issacharoff notes, a "fairly consistent majority of the Court" has "fastened on the distinction between coordinated and uncoordinated activity in the electoral context as the defining line for what *Buckley* deemed could

Court eviscerated the distinction between corporate and noncorporate speakers that had been the premise for the antidistortion rationale behind *Austin* and *McConnell*, as ultimately that distinction "could not be reconciled with the core analytic structure of *Buckley*."[110] It also specifically rejected the argument that PACs alleviated any First Amendment concerns of § 441b, as "[a] PAC is a separate association from the corporation" that "[does] not allow corporations to speak."[111] Moreover, the Court concluded, "PACs are burdensome alternatives" subject to "onerous restrictions."[112]

Thus, the Court's ruling in *Citizens United* firmly redrew the line between expenditures and contributions that *Caperton* had seemingly called into question. The Court expressly "struck down anything categorized as an expenditure limitation . . . while at the same time upholding virtually all contribution limits . . . ."[113] The ruling was greeted with dismay by a wide range of critics, including President Obama, who lamented that the Court's decision would "open the floodgates for special interests . . . to spend without limit in our elections."[114] Early evidence from the 2010 and 2012 federal election cycles appears to confirm these premonitions;[115] however, it is beyond the scope of

be regulated." Issacharoff, *supra* note 18, at 123. Issacharoff also comments that, prior to *Citizens United*, *Austin* had been "generally disregarded through dozens of Supreme Court opinions on campaign financing." *Id.* at 124.

110. Issacharoff, *supra* note 18, at 125.

111. *Citizens United*, 130 S. Ct. at 897. For a definition of PACs, see *supra* notes 24–27 and accompanying text.

112. *Citizens United*, 130 S. Ct. at 897–98.

113. Issacharoff, *supra* note 18, at 125.

114. 156 CONG. REC. S266 (daily ed. Jan. 27, 2010) (statement of Pres. Barack Obama); *see also* Richard L. Hasen, *The Supreme Court Gets Ready to Turn on the Corporate Fundraising Spigot*, SLATE, June 29, 2009, http://www.slate.com/id/2221753.

115. *See, e.g.*, Nicholas Confessore & Michael Luo, *Secrecy Shrouds 'Super PAC' Funds in Latest Filings*, N.Y. TIMES, Feb. 2, 2012, at A1, *available at* http://www.nytimes.com/2012/02/02/us/politics/super-pac-filings-show-power-and-secrecy.html ("Newly disclosed details of the millions of dollars flowing into political groups are highlighting not just the scale of donations from corporation and unions but also the secrecy surrounding 'super PACs' seeking to influence the presidential race. . . . Such donations were made possible by the Supreme Court's Citizens United decision in 2010 and subsequent court rulings, which opened the door to unlimited corporate and union contributions to political committees and made it possible to pool that money with unlimited contributions from wealthy individuals."); T.W. Farnam, *72 Super PACs Spent $83.7 Million on Election, Financial Disclosure Reports Show*, WASH. POST, Dec. 4, 2010, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/03/AR2010120306995.html ("To take advantage of the loosened regulations, political activists created super PACs, which are allowed to accept any kind of contribution as long as they disclose their donors and do not coordinate with candidates.").

this Comment to document the change in campaign expenditures since *Citizens United*, and determine whether or not the Court's ruling caused it.

II. RECONCILING *CAPERTON* AND *CITIZENS UNITED*

A. Form as Distinction

Whatever the long-term impact of *Citizens United*, at a minimum its holding is difficult to reconcile with *Caperton*'s facts in which campaign expenditures—the vast majority of which came in the form of uncoordinated expenditures—created a due process violation. How can uncoordinated expenditures simultaneously create a temptation so "strong and inherent in human nature"[116] as to create a constitutional violation *and* remain "an essential mechanism of democracy"?[117] Dissenting in *Citizens United*, Justice Stevens highlighted this incongruity: "In *Caperton*, then, we accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption." In light of *Citizens United*, Justice Stevens concluded "that the consequences of today's holding will not be limited to the legislative or executive context. . . . At a time when concerns about the conduct of judicial elections have reached a fever pitch [the] Court today unleashes the floodgates of corporate and union general treasury spending in these races."[118]

Rather than viewing these two decisions as irreconcilable campaign finance reform decisions, we should see them as a reflection of the fundamental differences between the two different forms of government action at issue: adjudication in *Caperton* and nonadjudication in *Citizens United*. Both decisions involved attempts to influence the selection of an individual who would ultimately exercise government power. But our perspective regarding whether campaign expenditures are permissible, or even desirable, turns on the form the exercise of power will ultimately take. That is, we should be suspect of attempts to use campaign expenditures to influence the individual who will adjudicate, but tolerant, and even supportive, of attempts to use campaign expenditures to influence the individual who will perform nonadjudicatory functions.

116. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2262 (2009).
117. *Citizens United*, 130 S. Ct. at 898.
118. *Citizens United*, 130 S. Ct. at 967–68 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

The rest of this Part seeks to provide support for this argument. First, in Part II.B, I describe how courts have used this form-as-distinction concept elsewhere to determine whether or not a constitutional or statutory guarantee has been violated. In Part II.C, I argue why this rubric should be applied to determining when campaign expenditures have violated a due process right. Finally, in Part II.D, I examine and respond to other potential ways in which *Caperton* and *Citizens United* might be reconciled.

B. A History of Form as Distinction

The form-as-distinction paradigm has been employed in many contexts outside of campaign finance. In each instance, a constitutional or statutory guarantee was implicated only because the form of government action at issue was determined to be an adjudication.

1. Form as Distinction in the Context of a Neutral Decisionmaker

The most illuminating—and relevant—examples of how courts have engaged in a functional analysis in sustaining a constitutional challenge to a decision made by someone other than a court of law judge come from the impartial-arbiter jurisprudence the Court relied on in reaching its decision in *Caperton*.[119] Recall that in *Tumey v. Ohio*,[120] the mayor of North College Hill was empowered under state and local law to try violators of state law outlawing the manufacture or possession of alcohol.[121] Though his duties were primarily executive,[122] the Due Process Clause disqualified him from making those decisions because he was "acting in a judicial or quasi judicial capacity."[123] Indeed, the mayor's dual role as executive and judge increased his due process conflict: Because some portion of the fines went into the village's general fund, the mayor

119. *See supra* Part I.B.
120. 273 U.S. 510 (1927).
121. *Id.* at 516 ("No person shall, after the passage of this act[,] . . . manufacture . . . [or] possess, . . . any intoxicating liquors . . . ." (quoting OHIO GEN. CODE ANN. § 6212-15 (1926)) (internal quotation marks omitted)). The General Code provided that mayors "shall have final jurisdiction to try such cases," OHIO GEN. CODE ANN. § 6212-18, and the North College Hill village council passed an ordinance declaring that the mayor shall "receive or retain the amount of his costs in each case . . . as compensation for hearing such cases." *Tumey*, 273 U.S. at 517–19.
122. *Id.* at 519.
123. *Id.* at 522.

had an "official motive to convict and to graduate the fine to help the financial needs of the village."[124]

In the next case cited by *Caperton*, *Ward v. Village of Monroeville*,[125] the Court engaged in a similar analysis. Recall that in *Ward*, the mayor of Monroeville had jurisdiction to sit as a judge in cases involving certain traffic violations, and that revenue generated by the traffic fines went into Monroeville's general fund.[126] In finding a due process violation, the Court described the mayor's authority under the state statute as an exercise of "judicial power."[127] In *Ward*, as in *Tumey*, the mayor—an elected official whose primary responsibilities were *not* judicial in nature—was found to have adjudicated a dispute, which made relevant the due process challenge. The conclusion from these two cases—which *Caperton* specifically points to and expands on—is that it is the function, not the office, that matters for purposes of determining whether a neutral decisionmaker challenge is appropriate.[128]

2. Form as Distinction in Other Settings

This distinction surfaces outside of the neutral decisionmaker question as well. Take, for example, the constitutional limits on Congress's ability to impose limits on the president's power to remove executive officials.[129] This struggle between Congress and the president is as contentious today[130] as it was at the time of the Founding,[131] and the U.S. Supreme Court has used the form of

124. *Id.* at 535.
125. 409 U.S. 57 (1972).
126. *Id.* at 58 ("A major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court. Thus, in 1964 this income contributed $23,589.50 of total village revenues of $46,355.38; in 1965 it was $18,508.95 of $46,752.60; in 1966 it was $16,085 of $43,585.13; in 1967 it was $20,060.65 of $53,931.43; and in 1968 it was $23,439.42 of $52,995.95.").
127. *Id.* at 60 (quoting *Tumey*, 273 U.S. at 534) (internal quotation marks omitted).
128. *Tumey* and *Ward* are not the only examples in which the Court has engaged in a functional analysis to determine the applicability of a challenge to a litigant's right to a neutral decisionmaker. *See, e.g.*, Marshall v. Jerrico, 446 U.S. 238, 247–49 (1980).
129. For an overview of these limits, see especially *Morrison v. Olson*, 487 U.S. 654 (1988).
130. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130. S. Ct. 3138 (2010); *Morrison*, 487 U.S. 654.
131. *See* CASS ET AL., *supra* note 17, at 70 ("In the very first Congress, James Madison relied on the sweeping mandate of Article II, § 1, to find inherent authority for the President to remove, unilaterally, officers whom he had appointed with the advice and consent of the Senate. . . . In *Marbury v. Madison*, . . . the Supreme Court adopted a narrower interpretation. Chief Justice John Marshall wrote that although the President generally had the power to remove such officers, Congress could restrict the President's authority.").

power exercised by the official in question to help resolve these disputes when called upon to do so.

For example, in *Myers v. United States*,[132] the Court upheld the president's unilateral power to fire a postmaster, despite the governing statute's requirement that consent of the U.S. Senate was needed before doing so.[133] The Court reasoned: "The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power," such that the requirement of Senate consent was unconstitutional under Article II.[134] The Court did, however, caution that "there may be duties of a quasi-judicial character imposed on executive tribunals whose decisions . . . affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control."[135]

The Court picked up on the theme of quasi-judicial power nine years later in *Humphrey's Executor v. United States*.[136] When President Franklin Delano Roosevelt attempted to dismiss William E. Humphrey, a member of the Federal Trade Commission (FTC), Humphrey sued President Roosevelt on the ground that the Federal Trade Commission Act permitted the president to remove a sitting commissioner only for inefficiency, neglect of duty, or malfeasance of office.[137] In rejecting the president's claim that he had inherent authority under Article II to remove FTC members, the Court explicitly distinguished *Myers*, reasoning that "[a] postmaster is an executive officer restricted to the performance of executive functions,"[138] while the FTC "acts in part quasi-legislatively and in part quasi-judicially."[139] Twenty years later, the Court reiterated its function-as-distinction rationale to invalidate the president's attempt to remove a member of the War Claims Commission in *Wiener v. United States*,[140] explaining that "the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War

132. 272 U.S. 52 (1926), *overruled in part by* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
133. *Id*. at 239; *see also* CASS ET AL., *supra* note 17, at 70.
134. *Myers*, 272 U.S. at 135. Specifically, the limits violated Article II's "Take Care Clause," requiring that the president "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. For an argument of why the Take Care Clause invalidates any limits by Congress on the president's power to remove executive officials, see Justice Scalia's dissenting opinion in *Morrison*, 487 U.S. at 697–734 (Scalia, J., dissenting).
135. *Id.*
136. 295 U.S. 602 (1935).
137. *Id.* at 618–20; *see also* CASS ET AL., *supra* note 17, at 71.
138. *Humphrey's Ex'r*, 295 U.S. at 627.
139. *Id*. at 628.
140. 357 U.S. 349 (1958).

Claims Commission."[141] It reasoned that because the commission was an "adjudicatory body," a for-cause provision was an appropriate limit on the president's removal power.[142] As in *Tumey* and *Ward*, the Court used the ultimate form of power exercised by the official in question to determine the proper scope of Congress's ability to limit the president's removal power.

Other examples of the form-as-distinction paradigm abound. One of the other guarantees of the Due Process Clause—the right to present evidence and cross-examine witnesses—was at issue in both *Londoner v. City and County of Denver*,[143] and *Bi-Metallic Investment Co. v. State Board of Equalization*.[144] Each case involved a challenge to a government agency's decision to raise taxes, but the *Londoner* Court sustained the due process challenge because it affected only a small number of people, while the *Bi-Metallic* Court denied the challenge because the tax at issue applied to "more than a few people."[145] Thus, whether the rights to present evidence and cross-examine witnesses had been infringed by the exercise of power at issue depended on whether the form of that exercise was adjudicatory (applied only to a few people) or not. Moreover, the adjudication/nonadjudication distinction is important in determining whether statutorily imposed limits on ex parte communications apply to specific proceedings.[146]

Each of these examples—the right to a neutral decisionmaker, the president's removal power, the right to present evidence and cross-examine witnesses, and limits on ex parte communications—demonstrates that the form of a government official's exercise of power is highly relevant when determining whether or not those actions encroach upon constitutional or statutory guarantees.

141. *Id.* at 353.
142. *Id.* at 355–56. The Court lessened, but did not completely erase, the importance of the underlying form of an executive official's action in ascertaining when limits on the president's removal power violated Article II in *Morrison v. Olson*, 487 U.S. 654, 691 (1988) ("We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.").
143. 210 U.S. 373 (1908).
144. 239 U.S. 441 (1915).
145. *Id.* at 445–46 (distinguishing *Londoner*, 210 U.S. 373).
146. *Compare* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1540 (9th Cir. 1993) (finding the ex parte communications ban of the Administrative Procedure Act applicable to the statutorily created Endangered Species Committee because the Committee's determinations were "quasi-judicial"), *with* Sierra Club v. Costle, 657 F.2d 298, 406–07 (D.C. Cir. 1981) (noting that ex parte communications between an agency and the president or his staff might be prohibited "where such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings," and holding that the ex parte communications between the Environmental Protection Agency and the president's staff during the promulgation of a rule posed no such threat).

C. Form as Distinction in Campaign Finance

While the form-as-distinction paradigm is not often (if ever) discussed in the campaign finance context, the holdings of *Caperton* and *Citizens United* give us plenty of reason to believe that we should apply it to determining when campaign expenditures are permissible and when they are suspect. Why should we apply the paradigm to this context? Because campaign expenditures simultaneously enable speech[147] (per *Citizens United*) *and* influence government decisionmakers (per *Caperton*). This unique feature of campaign expenditures puts them at the intersection of two constitutional values—the Due Process Clause's guarantee of a neutral decisionmaker,[148] and the First Amendment's guarantee of decisionmakers responsive to the people[149]—that can sometimes be in tension with one another. As James Madison wrote in *The Federalist No. 10*:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. . . . [Y]et what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?[150]

147. As noted previously, though the Court has consistently found campaign expenditures to be "speech" or "enabling speech," this characterization has been vigorously disputed. *See supra* notes 85–90 and accompanying text.

148. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259–62 (2009) (examining 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").

149. *See* Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identifies of those who are elected will inevitably shape the course that we follow as a nation."); *see also* Martin Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900, 907 (1971) ("[In the context of campaign finance laws], both the first amendment and the law with which it is in potential conflict are designed to accomplish the same broad purpose, namely to advance the interests of democratic self-government."). *See generally supra* Part I.C. The Due Process Clause's guarantee of a neutral decisionmaker and the First Amendment's guarantee of government decisionmakers responsive to the people are not, of course, not the only values embedded in each constitutional provision.

150. THE FEDERALIST NO. 10, at 131–32 (James Madison) (Benjamin Fletcher Wright ed., 1961); *see also* Bridges v. California, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting) ("In the cases before us, the claims on behalf of freedom of speech and of press [to publish statements aimed at

When this tension manifests itself because of campaign expenditures—as the holdings of *Caperton* and *Citizens United* suggest—I argue that we should subordinate one value to the other depending on the ultimate form of power exercised. Next, I turn to why we should value a neutral decisionmaker when government performs adjudicatory functions.[151]

1. The Demand of a Neutral Decisionmaker

Government exercises power in many different ways—making laws, terminating benefits, imprisoning violators—but there is something inherent about the exercise of power in the form of adjudication that makes the guarantee of a neutral decisionmaker particularly important. What is it?

First, adjudications involve a determination of individual rights, a process that requires protection from majoritarian pressures. As Justice Stevens noted in his dissent in *Republican Party of Minnesota v. White*,[152] "[t]here is a critical difference between the work of the judge and the work of other public officials."[153] "[J]udges 'are not representatives in the same sense as are legislators or the executive' because '[t]heir function is to administer the law, not to espouse the cause of a particular constituency.'"[154] While "it is the business of legislators and executives to be popular[,] . . . it is the business of judges to be indifferent to unpopularity."[155] "[I]n litigation, issues of law or fact should not be determined by popular vote . . . ."[156] Many of the hallmarks of the American legal system are designed to protect individual rights from popular determination, including the Sixth Amendment guarantee of a right to counsel,[157] the Seventh Amendment

influencing pending cases] encounter claims on behalf of liberties no less precious [the administration of justice by an impartial judiciary].").

151. Though the inverse proposition—that we prioritize the value of representative decisionmakers when government exercises nonadjudicatory power—is equally true, I do not explore the reasons for it in this Comment because my focus here is on understanding when the value of a neutral decisionmaker limits campaign expenditures.
152. 536 U.S. 765 (2002).
153. *Id.* at 798 (Stevens, J., dissenting).
154. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 83 (2009) (quoting Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd without opinion*, 409 U.S. 1095 (1973)).
155. *White*, 536 U.S. at 798 (Stevens, J., dissenting).
156. *Id.*
157. U.S. CONST. amend. VI.

right to a jury trial,[158] and, as implicated in *Caperton*, the due process rights embedded in the Fifth and Fourteenth Amendments.[159]

Second, separation of powers concerns come into play when discussing why certain decisions should be made via neutral adjudication. Concurring in *INS v. Chadha*,[160] Justice Powell reasoned that "[w]hen Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers."[161] Justice Powell expanded on the specific dangers that such a determination engendered:

> Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country. . . . Nor is it subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights.[162]

Without a neutral decisionmaker, separation of powers becomes an empty guarantor of liberty.

Finally, a bit more broadly, a neutral decisionmaker is needed to give effect to reasoned arguments. Adjudication is, as Lon Fuller posits, one of three forms of social ordering, of "reaching decisions, of settling disputes, of defining men's relations to one another."[163] In contrast to the other basic forms (contract and elections), adjudications, Fuller claims, are the proper form of resolving problems best settled by the "presentation of proofs and reasoned arguments."[164] Fuller provides an elegant example:

158. *Id.* amend. VII.
159. *Id.* amends. V, XIV.
160. 462 U.S. 919 (1983). *Chadha* involved the deportation of an East Indian born in Kenya lawfully admitted to the United States on a nonimmigrant student visa. After an initial hearing, Chadha submitted an application for suspension of his deportation, which the attorney general was statutorily empowered to grant upon approval by Congress (the legislative veto). *Id*. at 923–25. When Congress overturned the attorney general's suspension of deportation, Chadha appealed the congressional action. *Id.* at 927–28. The *Chadha* majority invalidated the provision giving Congress veto authority as a violation of the constitutional requirements of bicameralism and presentment. *See id.* at 946–51. Justice Powell, concerned with the breadth of the holding (as legislative vetoes had been included in "literally hundreds of statutes"), believed that the case rested on narrower grounds of the particular separation of powers concerns *Chadha* implicated (thereby preserving the legislative veto in other circumstances). *Id.* at 959–67 (Powell, J., concurring).
161. *Id.* at 960 (Powell, J., concurring).
162. *Id.* at 966 (internal footnotes omitted).
163. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978).
164. *Id.* In contrast, contracts are the proper form of resolving problems best settled via negotiation, and elections are the proper form of resolving problems best settled by voting. *See id.*

> If one boy says to another, "Give me that catcher's mitt," and answers the question, "Why?" by saying, "Because I am the best catcher on the team," he asserts a principle by which the equipment of the team ought to be apportioned in accordance with the ability to use it.[165]

The use of reason—"I am the best catcher on the team"—proves to be the best way of solving this problem (rather than an election, in which the most popular player might be elected catcher, or contract, through which a person who wants to be catcher but is not the best at the position might negotiate by offering to allow the catcher to hit twice).[166]

This mode of decisionmaking is only legitimate, however, if the decision is made by a neutral decisionmaker. Thus, to continue with Fuller's catcher example, the rationale that one boy should be catcher because he is the best catcher on the team means little if the decisionmaker—let us say the coach—has a "strong emotional attachment [to] one of the interests involved."[167] If the coach has such an attachment and makes his decision on that basis, the principle of apportioning equipment "in accordance with the ability to use it" has been violated. An impartial arbiter is required to give meaning to decisions made via articulation of a principle. Without an unbiased adjudicator, this mode of decisionmaking is useless.

Thus, the norm of a neutral decisionmaker is a product of theory (to ensure that decisions best made on the basis of reason are resolved on that principle), structure (to ensure that separation of powers remains robust) and of a desire for basic fairness (to ensure that the majority does not trample over certain individual rights).

2. Reconciling *Caperton* and *Citizens United* as a Distinction Between Forms

Because adjudications require neutral decisionmakers, it makes sense to read *Caperton* and *Citizens United*—two decisions that otherwise appear to be in considerable tension with one another[168]—along the same form-as-distinction paradigm that drove the Court's rulings in the examples described in Part II.B. In each of the cases discussed there—*Tumey*, *Ward*, *Myers*, *Humphrey's Executor*, *Wiener*, *Londoner*, and *Bi-Metallic*—the officials were either elected to or served

165. *Id.* at 368.
166. *Id.*
167. *Id.* at 391.
168. *See supra* Part II.A.

as members of the executive or legislative departments. Nonetheless, the alleged constitutional violation was premised on the determination that the form of government action ultimately taken was an adjudication. As *Caperton* extended the reach of situations in which the right to a neutral decisionmaker can be violated to include campaign expenditures, it makes sense to expand *Caperton*'s reach to all adjudicatory decisions regardless of which government official makes them, especially in light of *Citizens United*'s holding that campaign finance is "an essential mechanism of democracy."[169] Doing so allows us to ensure that a government action is made by a neutral decisionmaker when we most need a decisionmaker to be neutral (adjudication), and ensure that a government action is made by a partial decisionmaker when we most want a decisionmaker to be partial (nonadjudication).

Two recent Supreme Court decisions—each dealing with an influence on a government decisionmaker other than campaign expenditures—give further support to the thesis that the form of the government action at issue should be used to determine when the influence of government officials by campaign expenditures is permissible. In *Nevada Ethics Commission v. Carrigan*,[170] the Court considered whether a provision of the Nevada Ethics in Government Law violated a legislator's First Amendment right to vote on any given matter.[171] Section 281A.420 of the Nevada code prohibited "public officer[s]" from voting or advocating the passage or failure of a matter "'with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by,' inter alia, '[h]is commitment in a private capacity to the interest of others.'"[172] Michael Carrigan had been elected to the City Council of Sparks, Nevada, and voted to approve an application for a hotel/casino project, the "Lazy 8."[173] The Nevada Ethics Commission found that Carrigan had a disqualifying conflict of interest under Section 281A.420 because his long-time friend and campaign manager, Carlos Vasquez, worked as a paid consultant for the Red Hawk Land Company, which had proposed the project "and would benefit from its approval."[174] Carrigan filed suit in Nevada state court, alleging that

169. Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).
170. 131 S. Ct. 2343 (2011).
171. *Id.* at 2346.
172. *Id.* (quoting NEV. REV. STAT. § 281A.420(2) (2007)).
173. *Id.* at 2346–47.
174. *Id.* at 2347. The Ethics Commission

> censured Carrigan for failing to abstain from voting on the Lazy 8 matter, but did not impose a civil penalty because . . . [b]efore the hearing, Carrigan had consulted with the Sparks city attorney, who advised him that disclosing his relationship with Vasquez before voting on the Lazy 8 project, which he did, would satisfy his obligations under the Ethics in Government Law.

Id.

Section 281A.420 was unconstitutional under the First Amendment. The Nevada Supreme Court held that Carrigan's right to vote was protected by the First Amendment.[175]

The U.S. Supreme Court reversed.[176] Justice Scalia's majority opinion rested largely on evidence that conflict-of-interest laws had been in place since the Founding, and that a "universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional."[177] However, Justice Kennedy—author of both *Caperton* and *Citizens United*, as well as the only member of the Court who voted in the majority of both opinions—filed a concurrence on separate grounds. He expressed concern that Section 281A.420 imposed a significant burden on activities protected by the First Amendment as "citizens voice their support and lend their aid because they wish to confer the powers of public office on those whose positions correspond with their own."[178] Nonetheless, Justice Kennedy voted with the majority because, in his opinion, the recusal statute as applied to this set of facts did not burden such First Amendment freedoms. In support of his conclusion, Justice Kennedy cited *Caperton*'s holding that "due process may require recusal in the context of certain judicial determinations," and reasoned that such recusal was appropriate in this situation because the decision being made was adjudicatory:

> The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.[179]

Justice Kennedy's concurrence is thus an endorsement of form as distinction: that the recusal rules required by Section 281A.420 are constitutionally permissible when applied to an adjudicative decision, but would pose "constitutional concerns of the first magnitude"[180] if applied to an exercise of executive or legislative decision.

The majority opinion in *Republican Party of Minnesota v. White*—another First Amendment ruling—lends further support for the argument that a neutral

175. *Id.*
176. *Id.*
177. *Id.* at 2347–48 (internal quotation marks omitted). *See generally id.* at 2347–52.
178. *Id.* at 2353 (Kennedy, J., concurring).
179. *Id.*
180. *Id.* at 2354.

decisionmaker is critical when government action takes the form of an adjudication. Here, again, the Court considered an influence other than campaign expenditures that might improperly distort a government official's decision—the influence of entrenchment.[181] The *White* Court sustained a First Amendment challenge to a provision of a Minnesota statute—the announce clause—that barred judicial candidates from expressing "his or her views on disputed legal or political issues."[182] Minnesota contended that its ban served the state's interest in assuring the fact or appearance of judicial impartiality.[183] Justice Scalia, writing for the majority, identified three ways in which impartiality might be threatened. The relevant interpretation for the form-as-distinction paradigm described here was the first: Justice Scalia indicated that impartiality might require that a judge should be impartial "as between specific parties, i.e., each *litigant* should expect that a judge will apply the law to him the same way as she applies it to every other party,"[184] but concluded that the announce clause was not narrowly tailored to serve impartiality as understood in this manner as the restriction did not "restrict speech for or against particular *parties*, but rather speech for or against particular *issues*."[185] The negative implication of Justice Scalia's argument is that if a judicial candidate were to announce his or her views on a particular party, the risk of bias might create a constitutional violation. As Richard Esenberg observes, "even after *White* it may be permissible to prohibit candidates from promising to decide a particular case in a particular way," and that it would be "[c]onsistent with Justice Scalia's recognition of a compelling interest in preventing bias in *White*'s first sense" to "adopt rules or practices that protect against bias toward particular litigants or classes of litigants."[186] This analysis of *White* suggests that the norm of a neutral decisionmaker embedded in the Due Process Clause can serve as a limit on the free speech guarantees of the First Amendment.

181. Entrenchment occurs when an adjudicator makes statements or engages in conduct "which give the appearance that the case has been prejudged." Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 590 (D.C. Cir. 1970). Such entrenchment can improperly influence adjudicators: It "may have the effect of entrenching a[n adjudicator] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id.*

182. Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002). Minnesota's statute was based on Canon 7(b) of the 1972 American Bar Association MODEL CODE OF JUDICIAL CONDUCT (1976). *White*, 536 U.S. at 768.

183. *See White*, 536 U.S. at 777.

184. Esenberg, *supra* note 28, at 1304 (emphasis added).

185. *White*, 536 U.S. at 765–66.

186. Esenberg, *supra* note 28, at 1318–19.

Carrigan and *White* provide two more data points to help us understand the Court's ongoing effort to wrestle with the tension, first identified by James Madison in *The Federalist No. 10*, between the limits of the Due Process Clause and the First Amendment. And they help to illustrate the argument made here that in order to rank these two constitutional values when they conflict, it makes sense to look to the ultimate form that the government's exercise of power will take, as doing so allows us to prioritize the value we think more important in the situation presented.

D. Exploring Alternative Explanations

Form as distinction may not be the only way to reconcile *Caperton* and *Citizens United*. One potential explanation is that the judicial recusal required by *Caperton* does not in fact impact a litigant's free speech rights. Justice Kennedy—author of both the *Caperton* and *Citizens United* decisions—appeared to adopt this line of reasoning in *Citizens United*. "*Caperton* is not to the contrary," he wrote. Rather, its "holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."[187] This argument seems unpersuasive, as evidenced by the fact that he alone split the difference. Surely the recusal right recognized in *Caperton* will suppress at least some of a litigant's speech, as a litigant who knows that he is going to be in front of a judge will be hesitant to spend too heavily in favor of a particular candidate. Observing that Justice Kennedy wrote the majority opinions in *Caperton* and *Citizens United* and joined the majority in *White*, Richard Esenberg concludes that "it seems unlikely that [Justice Kennedy] believes that aggressive recusal requirements do not restrict speech."[188] Similarly, Stephen Hoersting and Bradley Smith, writing after *Caperton* but before *Citizens United*, argued that "if independent expenditures [can] create the greater, more direct, personal, substantial, pecuniary benefit necessary to a finding of 'bias,' then independent expenditures must always create the lesser potential benefit necessary to a finding [sic] an 'appearance of corruption,' leading inexorably—if taken seriously—to the overruling of *Buckley*."[189]

187. Citizens United v. FEC, 130 S. Ct. 876, 910 (2010).
188. Esenberg, *supra* note 28, at 1323–24.
189. Hoersting & Smith, *supra* note 6, at 341; *see also* J. Robert Abraham, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1107 (2010) ("If independent expenditures can create the probability of bias, one would think they could similarly raise the specter of corruption in candidate elections."); Marie McManus Degnan, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 TEMP. L. REV. 225, 242 (2010)

Another response might be that *Caperton* is sui generis. Indeed, Justice Kennedy repeatedly emphasized the "extraordinary" circumstances presented by the Court in *Caperton*.[190] Thus, as two commentators argue, it follows that any recusal motions granted would only come in the most extreme scenarios and therefore have only minimal limits on speech: Narrowly construed, *Caperton* "has little significance to judicial campaign canons . . . [that] regulate the conduct of judges and judicial candidates, not those who participate in their campaigns."[191] Similarly, another commentator argues:

> It is difficult to understand Justice Kennedy's vote with the majority in *Caperton* in light of his staunch First Amendment protection for campaign speech and campaign contributions. . . .
>
> With little analysis and no attempt to reconcile *Caperton* from his previous opinions that have championed states' rights to employ judicial elections and the First Amendment rights associated with those elections, Justice Kennedy's opinion rests solely on the "extreme facts" of the case.[192]

However, the dramatic increase in judicial spending undermines the argument that *Caperton* is a one-time affair. Once famously described as "exciting as a game of checkers [p]layed by mail,"[193] judicial elections have become, in the words of retired Justice O'Connor, "political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the constitution."[194] Nationally, state supreme court candidates spent over $200.4 million in judicial elections between 1999 and 2008, more than double

("Commentators have also argued that the judicial election aspect of *Caperton* creates free speech problems.").

190. *See* James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The* Sui Generis *Recusal Test of* Caperton v. Massey, 60 SYRACUSE L. REV. 305, 329 (2010).

191. *Id.* at 331–32.

192. Day, *supra* note 1, at 375–76.

193. Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1231 (2008) (quoting William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice Into Justice Race*, COM. APPEAL, Oct. 29, 2000, at DS1).

194. Day, *supra* note 1, at 365 (quoting Press Release, Justice at Stake, National Report Shows Independent Expenditures Defined 2006 Washington Supreme Court Races (May 17, 2007), http://www.justiceatstake.org/newsroom/press-releases-16824/?national_report_shows_independent_expenditures_defined_2006_washington_supreme_court_races&show=news&newsID=5747); *see also* Bert Brandenburg, *Inevitable, Flexible, Expandable* Caperton*?*, 33 SEATTLE U. L. REV. 617, 622 (2010) ("Especially in the wake of *Citizens United v. Federal Election Commission*, which bars states from keeping a lid on outside corporate and union spending campaigns, more extreme *Caperton*-like fact patterns could be just around the corner." (footnotes omitted)).

the $85.4 million spent for the same purpose between 1989 and 1998.[195] Given the financial arms race that judicial elections have become, it is unlikely that *Caperton* can be reconciled with *Citizens United* by arguing that the former will be sui generis.

III. THE IMPLICATIONS OF *CAPERTON* AND *CITIZENS UNITED*: A TWO-STEP PROCESS

What are the implications of reading *Caperton* and *Citizens United* as drawing a line between forms of government action in which campaign expenditures are permissible (nonadjudicatory functions) and those in which they are not (adjudications)? *Caperton*'s significance lies in its holding that campaign expenditures can violate a party's right to a neutral decisionmaker.[196] But, as we saw in *Tumey*, *Ward*, and elsewhere, "court of law"[197] judges—those that consider "suit at the common law, or in equity, or admiralty"[198]—such as Justice Benjamin in *Caperton*, are not the only government officials who exercise adjudicatory power. A wide range of federal administrative agencies exercise judicial power, even though they are officials of the executive department.[199] Similarly, many state agencies not within the judicial department exercise adjudicatory functions.[200] Because so many adjudications are carried out by government officials who are not members of the judicial department (either state or federal), we can—and should—import *Caperton*'s holding into decisions made by other government actors who exercise adjudicatory power.

195. Brief of Justice at Stake et al. as Amici Curiae Supporting Appellee, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2365225, at *5–6.
196. *See supra* notes 63–68 and accompanying text.
197. The term "courts of law" is borrowed from U.S. CONST. art II, § 2, cl. 2. In the federal system, the term courts of law generally refers to Article III courts—judges who are protected by the guarantees of life tenure and nondiminution of salaries. *See id.* art III, § 1. I use the term here to include both federal Article III judges and state judges (officers of the judicial, as opposed to executive or legislative, branch), even though the latter do not always enjoy the same protections.
198. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).
199. For a comprehensive delineation of how matters have been split between federal courts of law and non–Article III federal tribunals within the executive branch, see RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 324–83 (6th ed. 2009).
200. *Compare* CAL. CONST. art. VI, § 1 ("The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record."), *with* Marine Forests Soc'y v. Cal. Coastal Comm'n, 113 P.3d 1062, 1074 (Cal. 2005) (describing some of the functions of the California Coastal Commission, whose members were appointed by the governor and the legislature, as "quasi-judicial").

Thus, for decisions made by government actors who benefit from campaign expenditures, a two-step process emerges in determining whether or not those campaign expenditures pose a constitutionally unacceptable risk of bias on behalf of the decisionmaker. The first is to determine whether the government action at issue is, in fact, an adjudication. The second is to determine whether or not the campaign expenditure at issue was big enough to create a constitutionally unacceptable risk of bias in the decisionmaker. The rest of this Part seeks to provide a framework for how each determination can be made.

A. Step One: Defining Adjudications

Because the precise scope of the adjudicatory form of action has been thoroughly examined by others,[201] I provide only a brief overview of the defining features of an adjudication. From this literature, five features stand out as the hallmarks of adjudication. None of these features is dispositive, and many of them are absent even from decisions made by courts of law. However, together, they give a rough sense of when a decision made by a government actor is an adjudication. experimental

The first is the number of parties affected. Some have suggested that in order for a form of action to be an adjudication, it must involve no more than two parties;[202] however, the number of individuals affected can be greater. I will not venture to provide an absolute number—the point rather is that when the government action affects fewer parties, then it is more likely to be seen as an adjudication, and when more parties are affected, then the action is more likely to be seen as legislative or executive.

This feature was precisely the rubric used to determine whether or not a government action was an adjudication in both *Londoner v. City & County of*

201. Lon Fuller's *The Forms and Limits of Adjudication*, *see supra* note 163, and Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), are two landmark articles that provide an in-depth analysis of the defining characteristics of adjudication. Chris Miller, *The Adaptive American Judiciary: From Classical Adjudication to Class Action Litigation*, 72 ALB. L. REV. 117 (2009), provides an excellent overview of what the author describes as the "six prominent models" of the American legal system: (1) Fuller's, (2) Chayes's, (3) the managerial model, developed by Judith Resnik and Donald Horowitz (which Miller concludes overlaps significantly with Chayes's model except perhaps that whereas "Chayes' model describes a 'judge . . . acting as legislator,' the managerial model represents a 'judge . . . acting primarily as an executive official 'managing' cases'"), (4) the consultative process model, as articulated by Melvin Eisenberg, (5) the transactional model, as developed by William Rubenstein and Linda Mullenix, and (6) the experimental model, as explained by Charles Sabel and William Simon. *Id.* at 120–30. The five features identified in this Part draw upon each of these models.

202. *See* Chayes, *supra* note 201, at 1282.

Denver[203] and *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*,[204] discussed in Part II.B. In *Londoner*, the Denver Board of Public Works authorized the paving of a street.[205] To pay for the paving, the Board assessed taxes "in an amount commensurate with the benefit conferred on each property."[206] Though landowners were "allowed to formulate and file complaints and objections, [they] were not afforded an opportunity to be heard upon them."[207] The Court found the process constitutionally deficient, holding that the Due Process Clause required a hearing for the taxpayer.[208] Just a few years later, however, in *Bi-Metallic*, the Court dismissed a due process challenge to a Colorado Board of Equalization decision to increase the value of all taxable property in Denver by 40 percent, in which no opportunity to be heard was given to individual property owners.[209] The Court reasoned that:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of whole. [Individuals'] rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.[210]

The Court distinguished *Londoner* on the grounds that it involved a relatively small number of people who were "exceptionally affected, in each case upon individual grounds," while *Bi-Metallic* involved "general determinations dealing only with the principle upon which all the assessments" had been made.[211] Thus, the smaller the number of people a government decision affects, the more likely it will functionally be an adjudication.

The second feature of distinguishing adjudications from other forms of government action is whether the decision being made is prospective or retrospective in "focus and effect."[212] That is, to what end are we undertaking this government action? The answer to this question often depends on what facts we are attempting

203. 210 U.S. 373 (1908).
204. 239 U.S. 441 (1915).
205. 210 U.S. at 377–78.
206. CASS ET AL., *supra* note 17, at 381.
207. *Londoner*, 210 U.S. at 385.
208. *Id.*
209. *Bi-Metallic*, 239 U.S. at 446.
210. *Id.* at 445.
211. *Id.* at 446.
212. Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 950 (1995).

to find. Kenneth Davis's articulation of the difference between "legislative" and "adjudicative" facts provides a useful illustration:

> Adjudicative facts are the facts about parties and their activities, businesses, and properties. Adjudicative facts usually answer the question of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.[213]

Governmental actions that focus on events that happened in the past, that can be limited to what was done by whom, or can reach a specific determination are adjudicatory in nature.[214] Legislative facts are those that are more far reaching and less well defined.

A concrete example of the retrospective/prospective distinction was considered in *Marathon Oil Co. v. EPA*.[215] There, oil companies challenged the pollution limits imposed on them through an EPA permitting process. In concluding that the process followed by the EPA had to adhere to the adjudicatory procedures prescribed by the Administrative Procedure Act (APA), the Court observed:

> These "quasi-judicial" proceedings determine the specific rights of particular individuals or entities. And, like judicial proceedings, the ultimate decision often turns, in large part, on sharply-disputed factual issues. . . . [Conversely], "[r]ule making . . . is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations . . . . Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts . . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities . . . ."[216]

The court applied this logic to the specific issue in front of it: "Unlike [other] proceedings which lead to the promulgation of industry-wide effluent limitation guidelines and which are in large measure policymaking, [these] proceedings focus

213. CASS ET AL., *supra* note 17, at 382 (quoting KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958)).
214. *See* Cass, *supra* note 212, at 952 ("Retrospective decisions act upon the basis of past circumstances or conduct.").
215. 564 F.2d 1253 (9th Cir. 1977).
216. *Id.* at 1261–62 (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14–15 (1947)).

on whether particular effluent limitations are currently practicable for individual point sources." The government action at issue—permitting—was found to be an adjudication because the facts required to make the decision were needed for the purpose of determining whether the specific pollution limits for specific oil platforms were feasible, rather than setting an industry-wide standard: That is, the purpose as well as the nature of the facts found fell along the retrospective/prospective line.

The third feature of adjudicatory functions is the source of the record. Some have asserted that an adjudication must be limited to the grounds advanced by the parties;[217] however, it may also be extended to a limited set of facts and findings as prescribed by the procedures laid out for coming to a decision.

Thus, for example, the court in *Portland Audubon Society v. Endangered Species Committee*[218] found a government committee's grant of a requested exception to the Endangered Species Act was an adjudication because, among other things, the Act required the committee to makes its decision "on the report of the Secretary, the hearing held under (g)(4) of this section and on such other testimony or evidence as it may receive."[219] When the process limits the source from which evidence can be derived, the decision is more like an adjudication—as opposed to a broad gathering of sources of information from any source whatsoever.

The fourth feature of adjudication is the requirement that the decision be accompanied by some reasoned explanation. Without a reasoned explanation, the adjudicatory process, meant to allow for the "presentation of proofs via reasoned arguments,"[220] is "frustrated, and the whole proceeding becomes a farce, should the decision that emerges make no pretense whatever to rationality."[221] If a decision is required by statute or by some other process to be accompanied by some reasoned explanation, this pushes a decision to be more like an adjudication—if no such requirement exists, then the decision is more like an executive or legislative determination.

217. *See* Fuller, *supra* note 163, at 388 ("[I]f this congruence is utterly absent—if the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant—then the adjudicative process has become a sham . . . .").

218. 984 F.2d 1534 (9th Cir. 1993).

219. *Id.* at 1541 (quoting 16 U.S.C. § 1536(h)(1)(A) (2006)) (emphasis omitted).

220. Fuller, *supra* note 163, at 363.

221. *Id.* at 367. Conversely, "[t]he same cannot be said of the mode of participation called voting. We may assume that the preferences of voters are ultimately emotional, inarticulate, and not subject to rational defense." *Id.*

The fifth and final feature of adjudications as opposed to executive and legislative actions is whether action is confined or open ended.[222] Though this factor overlaps with some of the others listed here (for example, a larger number of people is likely to make the problem more open ended), it more broadly encompasses the notion that there are certain problems beyond the institutional competency of courts because solving them requires the weighing of too many variables for an adjudicator to decide. Lon Fuller identified these more managerial tasks as those that are "polycentric," explaining that:

> We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered"—each crossing of strands is a distinct center for distributing tensions.[223]

Fuller illustrates his position by pointing out that a decision to assign players on a football team to their positions by the process of adjudication would be unwise:

> It is not merely a matter of eleven different men being possibly affected; each shift of any one player might have a different set of repercussions on the remaining players: putting Jones in as quarterback would have one set of carryover effects, putting him in as left end, another. Here, again, we are dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of adjudication.[224]

Thus, for example, the Court felt that the exercise of power requested in *Norton v. Southern Utah Wilderness Alliance*[225] was beyond the ability of courts to handle because of the multiple competing priorities at issue. Asking the courts to manage a "classic land use dilemma of sharply inconsistent uses"[226] between wilderness protection and the use of off-road vehicles in the disputed area was deemed to be beyond judicial competence: "The principal purpose of the [APA]

222. *See* Cass, *supra* note 212, at 950.
223. Fuller, *supra* note 163, at 395.
224. *Id.*; *see also* James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act*, 75 NEB. L. REV. 27, 74–76 (1996).
225. 542 U.S. 55 (2004).
226. *Id.* at 60.

limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve."[227] Managing these competing uses required a high level of discretion and intuition, and thus was beyond the reach of the Court.

These five features provide a general framework of understanding when a particular government action is an adjudication or not. If a particular governmental action is deemed to be an adjudication, then it is possible that campaign expenditures to an official who ultimately votes on the adjudication could create a constitutionally unacceptable risk of bias. In the next Part, I briefly discuss what a *Caperton* recusal system might look like in practice.

B. Step Two: Requiring Recusals

Justice Kennedy's majority opinion in *Caperton* provides a multifactor test for when campaign expenditures create a constitutionally unacceptable risk of bias: "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."[228]

Jeffrey Stempel provides some direction. In addressing the amount of money spent, he suggests a twofold assessment: first, a proportional limit, and second, some measure of absolute dollar limit.[229] He suggests that when a particular person, entity, or group provides more than 5 to 10 percent of campaign spending, "reasonable people get concerned," and further reasons that "[a] standard[] tenet of law firm economics and that of other businesses is that it is dangerous to have more than ten percent of the firm billings come from a single client or client family."[230] Stempel goes on to suggest:

> (1) That recusal motions will be required regardless of the amount or type of remedy at issue;[231]

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227. *Id.* at 66.

228. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2264 (2009). Chief Justice Roberts's dissent maintained that this standard was unworkable, posing forty questions he believed the majority left unresolved as evidence of impracticability of the standard. *Id.* at 2267–74 (Roberts, C.J., dissenting). As others have undertaken a more systematic response to the Chief Justice's concerns, I do not endeavor to do so here. *See* Stempel, *supra* note 59.

229. Stempel, *supra* note 59, at 28–29.

230. *Id.* at 28 & n.120.

231. *Id.* at 32–33.

(2) That the probability of bias lasts "at least through a winning judicial candidate's term of office;"[232]
(3) That recusal is required if the case "implicates a regulatory issue that is of great importance to the party making expenditures, even though he has no direct financial interest in the outcome;"[233]
(4) That the affected judge's vote need not be outcome determinative;[234] and
(5) That actual causation (that is, that the campaign expenditures were the reason the decisionmaker at issue voted with the contributing party) is irrelevant, and instead what matters is "whether a reasonable lay observer could objectively raise sufficient questions regarding the judge's ability to be impartial toward a sufficiently supportive litigant."[235]

These six suggestions, taken from Stempel's much longer exposition on how to operationalize *Caperton*, provide some of the highlights of what a *Caperton* recusal system might look like.[236]

However, it is in all likelihood too early to tell exactly what *Caperton* recusals will look like because there has not been enough time for lower courts to develop a sufficiently large body of jurisprudence around the recusal standard. In response to Chief Justice Roberts's contention that the recusal standard articulated by the majority would prove to be unworkable, Justice Kennedy noted that the Court's earlier impartial-adjudicator jurisprudence "raised questions similar to those that might be asked after our decision today," but that "[c]ourts proved quite capable of applying standards to less extreme situations."[237] Thus, step two suggested here will be in large part shaped by how courts in the future treat *Caperton* motions.

232. *Id.* at 34.
233. *Id.* at 38–39.
234. *Id.* at 39.
235. *Id.* at 51.
236. Nancy Welsh also provides some insight on how to apply *Caperton* in her discussion of whether or not privatized alternative dispute resolution arbiters are at risk of actual bias. Nancy A. Welsh, *What Is "(Im)partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395 (2010). In reaching her conclusion that they are, she examines three "related, but distinct, administrative settings": (1) an individual administrator-judge's bias (like the mayor-judges in *Tumey* and *Ward*); (2) an "entire administrative adjudicative entity['s]" bias (like the Board at issue in *Gibson v. Berryhill*, 411 U.S. 564 (1973), *see supra* notes 54–56 and accompanying text); and (3) the bias of an administrative entity when it has allocated benefits and "delegated decision-making and the adjudication of resulting disputes to private contractors" (such as the situations of the private dispute resolution contractors that are the focus of Welsh's essay). Welsh, *supra*, at 442. These three categories might be layered on top of Stempel's analysis to deal with the variety of adjudicative settings in which *Caperton* challenges should, according to the argument put forward here, arise.
237. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2266 (2009).

C. Where and How *Caperton* Motions Will Occur

There are two final issues that remain to be addressed. First is the question of where a constitutionally unacceptable risk of bias from campaign expenditures will surface outside of judicial elections. Second is the question of how such motions will occur.

1. *Caperton* Motions for Adjudications Conducted Outside a Court of Law

Perhaps the most common application of the two-step process proposed here will occur at the state and local level. We have already seen three examples of when a constitutionally unacceptable risk of bias invalidated an action taken by a local official—the mayors in *Tumey v. Ohio*[238] and *Ward v. Village of Monroeville*,[239] and the city councilmember in *Nevada Commission on Ethics v. Carrigan*.[240] And there are many more examples of adjudications made by officials other than court-of-law judges. Take, for example, the Railroad Commission of Texas, a state agency created by the legislature that has jurisdiction over common carrier pipelines, oil and gas wells, and persons owning or operating pipelines or engaged in drilling oil or gas wells in Texas.[241] Railroad commissioners are empowered to "hear and determine complaints"[242] in the discharge of their duties, and thus "[o]bviously . . . possess[] . . . adjudicatory powers."[243] Commissioners are also elected to six-year terms,[244] and thus are susceptible to the influences described in *Caperton* in the instances in which they exercise adjudicatory power. Although commissioners are subject to financial-disclosure, standards-of-conduct, and conflict-of-interest requirements[245] applicable to all Texas officials,[246] they can,

238. 273 U.S. 510 (1927).
239. 409 U.S. 57 (1972).
240. 131 S. Ct. 2343 (2011).
241. TEX. NAT. RES. CODE ANN. § 81.051 (West 2011).
242. *Id.* § 81.053.
243. R.R. Comm'n v. Lone Star Gas Co., 844 S.W.2d 679, 688–89 (Tex. 1992). These decisions are subject to judicial review. *See* TEX. NAT. RES. CODE ANN. § 81.0533.
244. *Railroad Commissioners Home Page*, R.R. COMM'N TEX., http://www.rrc.state.tx.us/commissioners/index.php (last visited Mar. 26, 2012).
245. *See* TEX. NAT. RES. CODE ANN. § 81.01004 ("A commissioner is subject to the provisions of Chapter 572, Government Code, that apply to elected officers, including the requirements governing personal financial statements, standards of conduct, and conflicts of interest.").
246. *See* TEX. GOV'T CODE ANN. § 572.001(a) (West 2004) ("It is the policy of this state that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any

under Texas election law and consistent with *Citizens United*, benefit from unlimited independent expenditures.[247] But if a commissioner were elected with the support of a large enough independent expenditure[248] and then presided over a hearing in which the party who made the independent expenditure was a litigant, this commissioner would either need to recuse herself or risk a due process violation being made subsequently in a court of law.

A very similar analysis applies when considering adjudicatory actions taken by executive officers who, as a matter of state constitutional law, are elected. Unlike the federal constitution, which has only one elected executive official (the president) who appoints other executive officials,[249] many states divide executive power among several elective positions. For example, the California Constitution provides for the statewide election of "not only the Governor (and the Lieutenant Governor), but also of the Attorney General, the State Treasurer, the Secretary of State, the Controller, and the Superintendent of Public Instruction."[250] California's Lieutenant Governor and the Controller rotate as a nonvoting member of the California Coastal Commission,[251] which performs quasi-judicial functions by, for example, voting on coastal development permits.[252] As in the hypothetical posed in the context of the Railroad Commission of Texas, presuming that either one of these constitutional executive officials was the beneficiary of a large enough independent expenditure they could be required to recuse themselves or risk a due process challenge in court.

Finally, another dimension is added when considering decisions made by executive officers within a single executive—the most obvious example being cabinet officials within a presidential administration. As with the Railroad Commission of Texas and the Lieutenant Governor of California, many of these officials are specifically empowered to exercise adjudicatory power. For example, the Attorney General of the United States reviews all decisions of the Executive Office for Immigration Review,[253] whose "primary mission . . . is to adjudicate

nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest.").

247. *See* TEX. ELEC. CODE ANN. § 253.169 (West 2010).
248. *See supra* Part III.B.
249. *See* U.S. CONST. art. II, § 1, cl. 1; *see also* Morrison v. Olson, 487 U.S. 654, 698–99 (1988) (Scalia, J., dissenting).
250. Marine Forests Soc'y v. Cal. Coastal Comm'n, 113 P.3d 1062, 1077 (Cal. 2005).
251. *See id.* at 1070 n.4.
252. *See id.* at 1074.
253. 8 U.S.C. § 1103(g)(1) (2006).

immigration cases."[254] While "principal" officers such as the Attorney General are not elected,[255] they are (and can only be) appointed by the president, who is.[256]

The question of whether adjudications by such officials should be subject to a *Caperton* type analysis, then, depends on how much control the elected official—here, the president—in fact exerts over principal officers. For those who believe that the structure of the federal executive branch is, or should be, unitary—that the "President must have the authority to control all government officials who implement the laws"[257]—the threat that campaign expenditures pose to adjudications decided by an elected official can be directly transmitted to principal officers. However, for those who believe that there is some measure of insulation between the president and principal officials, presumably there should be less concern.

The influence of campaign expenditures is further lessened when an adjudicatory decision is made by a group of executive officials, even if each of those officials is directly accountable to the elected official. For example, the Committee on Foreign Investment in the United States—comprised of top-ranking officials from various executive departments[258]—is a body authorized by Congress to screen and investigate foreign-investment proposals "to determine the effects of the transaction on the national security of the United States,"[259] negotiate mitigation agreements with foreign investors to minimize national security concerns,[260] and, should mitigation efforts fail, recommend to the president that she block the

254. *Executive Office for Immigration Review*, U.S. DEP'T JUSTICE, http://www.justice.gov/eoir (last visited Mar. 26, 2012).
255. U.S. CONST. art. II, § 2, cl. 2 ("[The President] . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").
256. *See* Morrison v. Olson, 487 U.S. 654, 670–77 (1988) (describing the difference between principal and inferior officers, and noting that the Attorney General is a principal officer and that principal officers can only be appointed by the president).
257. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994). Justice Scalia is one of the most strident advocates of the unitary executive model. *See, e.g.*, *Morrison*, 487 U.S. at 727–34 (Scalia, J., dissenting).
258. 50 U.S.C. § 2170(k)(2) (2006) (naming the Secretaries of Treasury, Homeland Security, Commerce, Defense, State, and Energy, and the Attorney General or their designees as the members of the Committee). The Secretary of Labor and the Director of National Intelligence (or their designees) are also nonvoting, ex officio members, and the president may appoint "the heads of any other executive department, agency, or office" as she "determines appropriate." *Id.*
259. *Id.* § 2170(b)(1)(A)(i).
260. *Id.* § 2170(l).

deal,[261] powers that are "like individual adjudications (or quasi-adjudications)."[262] Yet the very fact that a committee, rather than a single officer, exercises this adjudicatory power insulates its decisions from presidential control: "With a single agency, the President could credibly threaten to remove or otherwise pressure or discipline that agency's Secretary or Administrator. But there is strength in numbers."[263] Thus, even within a unitary executive, such a structure would likely temper the influence that campaign expenditures would have on the outcome of an adjudication.

2. How *Caperton* Motions Will Occur

The final issue that remains to be addressed is how such recusals would work. There are (at least) two possibilities: one is ex ante, the other ex post. The ex ante option would require legislatures to adopt mandatory recusal standards for themselves and other nonjudicial actors when they are engaged in adjudications. John Nagle suggested this option in a more general manner long before the rulings in *Caperton* and *Citizens United*, proposing that "contributors [be allowed] to give whatever they want to political candidates, but require successful candidates to recuse themselves from voting on or participating in any legislation or other matters that directly affect those contributors."[264] Justin Levitt picked up on Nagle's suggestion after *Citizens United*, suggesting that the rule from *Caperton* could be applied to legislative scenarios.[265] Nagle recognized that his proposal had the potential to "deny the successful candidate's constituents representation

261. *Id.* § 2170(d).
262. Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 875 (2011).
263. *Id.* at 866. As Jon Michaels notes, this insulation appears to be by design. The initial statute passed by Congress "vested all of the administrative and decisionmaking power directly in the President." *Id.* at 823. However, "[r]ather than embracing his newly acquired authority or, as is customary, delegating it either to a single department or to presidential aides, President Reagan tapped [the Committee] to handle all but the final decision to cancel deals." *Id.* Moreover, presidents have continued to embrace the Committee, in lieu of increasing their own authority. Doing so has allowed President Reagan and his successors to avoid the problems that political accountability create in the context of foreign investments, including an unreasonably distrustful public and the tension between sometimes adversarial investigations and negotiations and the president's broader foreign policy agenda. *See id.* at 831–32.
264. John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 71 (2000).
265. Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 231 (2010) (suggesting that a recusal requirement for "particularly sizable expenditures" might be "productive to consider such a solution in the legislative arena as well").

in Congress."[266] Moreover, if Nagle's proposal were to be enacted, he suggests that "[c]ontributors are likely to vanish,"[267] a conclusion that is in direct tension with *Citizens United*'s holding that campaign expenditures are "an essential mechanism of democracy."[268] By mandating recusals only for adjudicatory actions, campaign expenditures would continue to play their essential role in ensuring constituent representation while preventing certain decisions from being tainted by a constitutionally unacceptable risk of actual bias in matters that require independence from majoritarian pressures.

Moreover, the template for such recusal motions already exists in state statutes passed after *Caperton* mandating judicial recusal on account of campaign expenditures. For example, California has required that judges receiving more that $1500 from a "party or lawyer in the proceeding," recuse themselves if the contribution was "received in support of the judge's last election, if the last election was within the last six years" or "the contribution was received in anticipation of an upcoming election."[269] Several other states have enacted or are considering similar legislation.[270]

The ex post option would be for parties suing to enjoin a particular governmental decision from taking effect to raise a *Caperton* motion in the lawsuit. Of course, this option would exist without legislative authorization—per *Caperton*'s holding, it is a right embedded in the Due Process Clauses of the Fifth and Fourteenth Amendments.

CONCLUSION

For better or for worse, *Caperton* and *Citizens United* have changed the face of campaign finance. While these two decisions at first seem at odds, they can be reconciled by recognizing that the campaign expenditures sought to influence different forms of government exercises of power. The implication of this reconciliation, then, is that government adjudications performed by nonjudicial actors will be subject to *Caperton* recusals. Moreover, as *Caperton* recognized for the first time that campaign expenditures could create a constitutionally unacceptable risk of bias, and *Citizens United* reaffirmed the principle that such

266. Nagle, *supra* note 264, at 97.
267. *Id.*
268. Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).
269. CAL. CIV. PROC. CODE § 170.1(a)(9)(A) (West 2011).
270. For an overview, see William E. Raftery, *"The Legislature Must Save the Court From Itself"?: Recusal, Separation of Powers, and the Post-*Caperton *World*, 58 DRAKE L. REV. 765, 775–77 (2010).

expenditures are an "essential mechanism of democracy," this functional separation allows legislators to properly perform their roles, and adjudicators to properly perform theirs. As Justice Stevens wrote, "[I]t is the business of legislators and executives to be popular. . . . [I]t is the business of judges to be indifferent to unpopularity."[271]

271. Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting).