

## A NEW THREAT TO THE VIABILITY OF CAMPAIGN CONTRIBUTION LIMITS

*Brent Ferguson\**

In July, the Wisconsin Supreme Court held that it violates the First Amendment to prevent political candidates from coordinating with outside spending groups like Super PACs if the groups' ads do not expressly advocate the election or defeat of a candidate.<sup>1</sup> The decision is erroneous under federal precedent and fundamentally misunderstands the Supreme Court's holdings distinguishing between independent spending and spending coordinated with a candidate. Wisconsin's regulatory scheme will be largely inoperable for the time being: Contribution limits will be fairly meaningless, at least for sophisticated actors who seek to circumvent them. And the logic of the decision leads to the conclusion that candidates have the constitutional right to set up campaign accounts that may accept unlimited contributions, so long as that money is not used for express advocacy.

Because the court's reasoning lacked a coherent basis or a foundation in federal case law, it may not be overly optimistic to think that other state or federal courts will reject its reasoning. Yet there are indications that at least some regulators and courts may share the Wisconsin court's view,<sup>2</sup> and there is little doubt that the issue will arise in other states. This Article will review the law of coordination, as well as recent Supreme Court case law relied upon by

---

\* Counsel, Brennan Center for Justice at NYU School of Law. The views expressed herein are mine, not those of the Brennan Center. Thanks very much to Ian Vandewalker, Dan Weiner, and Larry Norden for their review and suggestions, and to the editors at the *Emory Law Journal*.

<sup>1</sup> State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165 (Wis. 2015). Several Wisconsin district attorneys have stated their intention to file a petition for certiorari with the U.S. Supreme Court, which is due April 29, 2016. *Chisholm v. Eight Unnamed Movants*, Case No. 15A860 (U.S. Feb. 17, 2016) (granting a motion to extend time to file a petition for certiorari). The holding allows for coordination regulations if resulting advertisements contain "express advocacy [or] its functional equivalent." *Id.* at 186. Advertisements containing express advocacy or its functional equivalent are election-related communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *FEC v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 470 (2007).

<sup>2</sup> See, e.g., *O'Keefe v. Schmitz*, 19 F. Supp. 3d 861 (E.D. Wis. 2014), *clarified by* No. 14-C-139, 2014 WL 2446316 (E.D. Wis. May 30, 2014). Even before *Peterson*, Arizona's election enforcement agency indicated a belief similar to that endorsed by the *Peterson* court. *Ariz. Citizens Clean Elections Comm'n, Tr. of Public Meeting 14-16* (Oct. 22, 2010) (explaining belief that "*Wisconsin Right to Life* and other Supreme Court cases" require that there be "no other reasonable meaning" before a communication qualifies as express advocacy, and understanding the express advocacy limitation to apply to coordination rules).

the Wisconsin court, to demonstrate the court's error. It will also address several of the effects the decision will have in Wisconsin and elsewhere if other courts similarly depart from longstanding precedent.

## I. COORDINATION LAW AND THE WISCONSIN SUPREME COURT'S DECISION

### A. *The Development of Coordination Law*

The Federal Election Campaign Act of 1971 (FECA), a reform bill passed after Watergate, limited contributions to candidates as well as political expenditures made without a candidate's involvement. Reviewing the law in *Buckley v. Valeo*,<sup>3</sup> the U.S. Supreme Court held that limiting direct contributions to candidates was permissible, but limiting independent expenditures was not.<sup>4</sup> The Court's theory was that candidates could be corrupted by direct contributions, but independent spending in their favor could be less helpful to a candidate and therefore created a "substantially diminished potential for abuse."<sup>5</sup> The Court in *Citizens United v. FEC* went further, simply concluding that independent spending "[do] not give rise to corruption."<sup>6</sup>

With the advent of the constitutional distinction between the two types of spending, the definition of "contribution" became quite important. As the Court recognized in *Buckley*, spending by an "outside" group that takes directions from the candidate may be treated as a contribution because the candidate will get a similar benefit from that spending (and feel similar gratitude) as she would if the money went straight to her campaign.<sup>7</sup> *Citizens United* took the same view, clearly distinguishing between truly independent spending and spending coordinated with a candidate.<sup>8</sup> Thus, the federal government and most states have long regulated coordination between

---

<sup>3</sup> 424 U.S. 1 (1976) (per curiam).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 47. The *Buckley* Court also addressed vagueness concerns about the definitions of contributions and independent expenditures—the plaintiffs argued that the statute did not clearly limit the scope of permissible regulation. *Buckley* upheld FECA's definition of "contribution," which encompassed all donations "made for the purpose of influencing" an election. *Id.* at 23 & n.24. But with regard to independent expenditures, the Court held that "to preserve the provision against invalidation on vagueness grounds" the law should "apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44.

<sup>6</sup> 558 U.S. 310, 357 (2010).

<sup>7</sup> See *Buckley*, 424 U.S. at 78.

<sup>8</sup> *Citizens United*, 558 U.S. at 360 (citing *Buckley*, 424 U.S. at 46) ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.").

candidates and outside groups (or individuals) in order to determine what spending should be treated as an indirect contribution.<sup>9</sup>

Typically such laws prevent candidates from engaging in substantial discussion with outside groups, and also make sure that outside groups do not employ anyone who works for a candidate, among other things. The laws stayed out of the spotlight for the most part until independent spending began to sharply increase after *Citizens United* and the rise of Super PACs beginning in 2010. Yet with the emerging dominance of outside spending, candidates and their supportive groups have often sought to operate more closely than the law would seem to allow. While the phenomenon may be most closely associated with Jeb Bush's pre-candidacy operation<sup>10</sup> and the expanded role of other Super PACs early in the 2016 presidential race,<sup>11</sup> those methods were merely an innovation in a field that had existed for years.

Campaign finance reformers and their opponents have argued extensively about laws defining indirect contributions, and those disputes have centered principally on the types of conduct that should be regulable: for example, if a candidate raises money for a Super PAC that later spends in his favor, should that mean that the group's spending counts as a contribution? But the fight in Wisconsin was different: it centered on the content of the outside groups' advertisements, not the collaboration between candidate and group. Under Wisconsin's (now invalidated) law, and that of many states, if a candidate controlled an outside group's spending, the group's campaign ads counted as contributions as long as they were election-related—the same standard applied to any cash or in-kind contribution.<sup>12</sup> Federal law has a somewhat narrower window: the spending qualifies as a contribution only if the resulting ad (1) mentions the candidate's name and is run within a ninety-

---

<sup>9</sup> For a lengthier discussion of the history of coordination law, see Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era*, 42 HASTINGS CONST. L.Q. 471 (2015).

<sup>10</sup> See, e.g., Eric Lichtblau & Nick Corasaniti, *Jeb Bush, Taking His Time, Tests the Legal Definition of Candidate*, N.Y. TIMES (June 3, 2015), <http://www.nytimes.com/2015/06/04/us/politics/jeb-bush-taking-his-time-tests-the-legal-definition-of-candidate.html>.

<sup>11</sup> See, e.g., Nick Corasaniti, *Carly Fiorina's 'Super PAC' Aids Her Campaign, in Plain Sight*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/us/politics/as-carly-fiorina-surges-so-does-the-work-of-her-super-pac.html>.

<sup>12</sup> WIS. STAT. ANN. §§ 11.01(6), 11.06(7) (West Supp. 2016); Wis. Coal. for Voter Participation, Inc. v. State Elections Bd., 605 N.W.2d 654, 659 (Wis. Ct. App. 1999); see also CAL. GOV'T CODE § 82015(b)(2) (West 2015); 94-270 ME. CODE R. § 6(9) (LexisNexis 2016); Findings and Conclusions 11-12, *In re Complaint by Benjamin Ancona*, No. 2013-140 (Conn. State Elections Enf't Comm'n June 18, 2014), [http://seec.ct.gov/e2casebase/data/fd/FD\\_2013\\_140.pdf](http://seec.ct.gov/e2casebase/data/fd/FD_2013_140.pdf).

day window before the election, or (2) expressly advocates the election or defeat of a candidate.<sup>13</sup> The Wisconsin plaintiffs argued that regardless of whether a candidate controlled an outside group, the group's spending is only regulable as a contribution if it runs an ad expressly advocating the candidate's election.

### *B. The Wisconsin Case and Its Opinions*

In 2012, an Assistant District Attorney in Milwaukee filed a petition to begin an investigation into whether Governor Scott Walker's campaign committee illegally coordinated with several groups that spent money in support of his 2012 recall election.<sup>14</sup> The prosecutors believed that one of Walker's aides may have directed both Walker's campaign committee and Wisconsin Club for Growth, which he allegedly used "as a 'hub' to coordinate fundraising and issue advocacy" for both the campaign and the outside groups.<sup>15</sup>

It is not necessary to explain the full, complex procedural history of the case here, but three written opinions are relevant: (1) the federal district court's May 2014 order calling a halt to the investigation; (2) the Seventh Circuit's order reversing the district court and dismissing the suit so it could be resolved in state court; and (3) the Wisconsin Supreme Court's July 2015 decision terminating the investigation.

In February 2014, a director of the Club for Growth sued in federal court to stop the state's investigation. The court granted a preliminary injunction a few months later, ordering the state to end its inquiry and return or permanently destroy all information obtained through the investigation.<sup>16</sup> Though its substantive reasoning was not fully clear, the court appeared to conclude<sup>17</sup> that

---

<sup>13</sup> 11 C.F.R. § 109.21(c) (2015). For presidential and vice presidential candidates, the window begins 120 days before the primary election. *Id.* § 109.21(c)(4)(ii).

<sup>14</sup> See Patrick Marley, Daniel Bice & Lee Bergquist, *Walker Wanted Funds Funneled to Wisconsin Club for Growth*, MILWAUKEE J. SENTINEL, (Aug. 22, 2014), <http://www.jsonline.com/news/statepolitics/walker-wanted-funds-sent-to-wisconsin-club-for-growth-b99336519z1-272364371.html>.

<sup>15</sup> O'Keefe v. Schmitz, 19 F. Supp. 3d 861, 867 (E.D. Wis. 2014), *clarified* by No. 14-C-139, 2014 WL 2446316 (E.D. Wis. May 30, 2014); see also Niraj Chokshi, *Prosecutors Allege Gov. Scott Walker Schemed to Bypass Campaign Laws*, WASH. POST (June 19, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/06/19/prosecutors-allege-gov-scott-walker-schemed-to-bypass-election-laws/>.

<sup>16</sup> *Schmitz*, 19 F. Supp. 3d at 875.

<sup>17</sup> As described by the Seventh Circuit, the lower court decision held that the First Amendment "forbids . . . penalties for coordination between political committees and groups that engage in issue

neither Wisconsin law nor the U.S. Constitution permitted the state to regulate coordination between a candidate and an outside group if the group's election ads did not contain express advocacy: "A candidate's coordination with and approval of issue advocacy speech . . . does not rise to the level of 'favors for cash.' Logic instructs that there is no room for a *quid pro quo* arrangement when the views of the candidate and the issue advocacy organization coincide."<sup>18</sup>

The Seventh Circuit immediately stayed the district court's order that the investigators destroy or return all documents and, several months later, reversed the decision granting the injunction.<sup>19</sup> While its decision was principally based on the need to defer to ongoing litigation in state court, the court demonstrated a solid understanding of coordination law. It correctly explained that the Supreme Court has held that "the government is entitled to regulate coordination between candidates' campaigns and purportedly independent groups," but has yet to fully define the scope of permissible coordination regulation.<sup>20</sup> The court acknowledged that coordination rules are necessary to prevent circumvention of contribution limits, and while "[t]he district court thought that the Supreme Court will overrule what remains of *Buckley*," its approval of contribution limits still stands for now.<sup>21</sup>

The Seventh Circuit's decision brought no certainty, of course, and the case was heard by the Wisconsin Supreme Court, which issued a decision halting the investigation in July 2015. The case was controversial in several respects, in part due to charges of politicization of the case on both sides, as well as years of acrimony between justices on the Wisconsin court.<sup>22</sup>

The Wisconsin Supreme Court held that because state law treated coordinated expenditures as contributions any time they were made for

---

advocacy," as well as any investigation to learn what type of coordination occurred. *O'Keefe v. Chisholm*, 769 F.3d 936, 938 (7th Cir. 2014).

<sup>18</sup> *Schmitz*, 19 F. Supp. 3d at 872. It is unclear why the court believed that such corruption is impossible when a group aligned with a candidate does not expressly advocate for a candidate, but it presumably is possible if the ad contains express advocacy.

<sup>19</sup> *Chisholm*, 769 F.3d at 937, 939.

<sup>20</sup> *Id.* at 941.

<sup>21</sup> *Id.* (citing *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 635–40 (1996) (Thomas, J., concurring in the judgment and dissenting in part)).

<sup>22</sup> The Wisconsin Supreme Court is sharply divided along ideological lines, and the case took place during a dispute over which justice had the legal right to the title of chief justice. See Mitch Smith, *Wisconsin Chief Justice Files a Lawsuit to Avoid Demotion*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/2015/04/09/us/wisconsin-chief-justice-files-a-lawsuit-to-avoid-demotion.html>.

political purposes, the law was overbroad and vague; to save the statute, it held that coordinated expenditures could only be treated as contributions if the resulting communications contained express advocacy.<sup>23</sup> The majority opinion was long on discussion of broad First Amendment principles, and it included expansive language predicting dire consequences that would occur if Wisconsin law were interpreted to allow the state to regulate coordination as it had since at least 1999.<sup>24</sup> The court did not examine any Supreme Court holdings on the issue of coordination, or explain the basis of its belief that an election-related “issue ad,” aired by an advocacy group just before an election but controlled by a candidate, could not lead to regulable corruption.<sup>25</sup>

## II. ERROR OF LAW

The argument made by the Wisconsin plaintiffs is not new, and it was flatly rejected by the U.S. Supreme Court twelve years ago in *McConnell v. FEC*.<sup>26</sup> One challenge to the 2002 McCain–Feingold campaign finance law was that “the First Amendment limits the coordination concept to express advocacy.”<sup>27</sup> The Court explained that the statute clearly applied coordination rules even “for communications that avoid express advocacy,” and affirmed the district court’s decision to uphold the coordination section of the law, concluding that “there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures.”<sup>28</sup>

The rejection of the plaintiffs’ argument was not limited to the five-justice majority opinion; Justice Kennedy, joined by Chief Justice Rehnquist, reached the same result. Justice Kennedy’s opinion explained that he would “uphold [the law] as to its candidate coordination regulation” because the law satisfied *Buckley*’s anticorruption interest by “treat[ing] electioneering communications expenditures made by a person in coordination with a candidate as hard-money

---

<sup>23</sup> State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 193 (Wis. 2015).

<sup>24</sup> See, e.g., Wis. Coal. for Voter Participation, 605 N.W.2d 654, 659 (1999). For example, the majority predicted that if the “prosecutor’s theories” were adopted, it “would assure that such political speech will be investigated with paramilitary-style home invasions conducted in the pre-dawn hours.” *Peterson*, 866 N.W.2d at 194.

<sup>25</sup> A new coordination law that adheres to the *Peterson* holding was signed into law by Governor Scott Walker in December 2015. See 2015–2016 Wis. Legis. Serv. Act 117 (West).

<sup>26</sup> 540 U.S. 93 (2003).

<sup>27</sup> *McConnell v. FEC*, 251 F. Supp. 2d 176, 249 (D.D.C. 2003).

<sup>28</sup> *McConnell*, 540 U.S. at 202–03; see also *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 88 (D.D.C. 1999).

contributions to that candidate.”<sup>29</sup> This discussion by Justice Kennedy was included in the same opinion in which he voted (with the dissent) to strike down the ban on corporate spending, which he would do successfully seven years later in *Citizens United*.

It is true that the Wisconsin law operated somewhat more broadly than the federal law at issue in *McConnell*—the federal coordinated expenditure provision applies only to electioneering communications, not all expenditures made for political purposes. Thus, one could argue that because *McConnell* does not opine on whether coordinated expenditures that are made for political purposes (but would not fall in the federal electioneering communications window) may be treated as contributions, the *Peterson* Court’s decision does not violate Supreme Court precedent. Setting *Buckley* aside, the argument would be plausible if *Peterson*’s language did not foreclose that interpretation: the Wisconsin court made quite clear that it would strike down any coordinated expenditure provision that regulated communications that do not contain express advocacy or its functional equivalent.<sup>30</sup>

As explained by Justice Kennedy, the seven-Justice *McConnell* holding on this point flows directly from the logic of *Buckley*. Simply put, *Buckley* held both that (1) coordinated expenditures could be treated as contributions,<sup>31</sup> and that (2) the definition of “contributions” need not be limited to payments made for express advocacy, but could extend to payments “made for the purpose of influencing” an election.<sup>32</sup>

Even before *McConnell* was decided, the most influential case to directly address this subject, *FEC v. Christian Coalition*, reached the same conclusion as the Supreme Court and noted the absurdity of the express advocacy argument.<sup>33</sup> The court cogently explained that “importing the ‘express advocacy’ standard into [the] contribution prohibition would misread *Buckley*

---

<sup>29</sup> *McConnell*, 540 U.S. at 319 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy would have struck down the provision as applied to spending coordinated with political parties. *Id.*

<sup>30</sup> *See, e.g., Peterson*, 866 N.W.2d at 193 (“[W]ithout a limiting construction [the law] could just as easily include issue advocacy aired during the closing days of an election cycle.”); *id.* (relying on *Buckley* and *WRTL* to hold that “[i]n order to cure this overbreadth and vagueness,” Wisconsin law could only be applied to groups engaging in express advocacy or its functional equivalent).

<sup>31</sup> *Buckley v. Valeo*, 424 U.S. 1, 46–47 (1976) (per curiam).

<sup>32</sup> *Id.* at 23–30, 78–79 (citing 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV)); *see also* Orloski v. FEC, 795 F.2d 156, 167 (D.C. Cir. 1986) (explaining that under *Buckley*, the express advocacy limitation “is not constitutionally required for those statutory provisions limiting contributions” (citing *Buckley*, 424 U.S. at 78–80)).

<sup>33</sup> 52 F. Supp. 2d at 88.

and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions.<sup>34</sup>

The Wisconsin plaintiffs and the judges who provided their victory might argue that the law has changed since *McConnell*. They are correct in broad terms: *FEC v. Wisconsin Right to Life, Inc. (WRTL)*<sup>35</sup> eroded *McConnell* and *Citizens United* partially overruled it, such that bans on independent spending by corporations and unions are now impermissible.<sup>36</sup> And in 2014, *McCutcheon v. FEC* held that the federal aggregate contribution limits were unconstitutional.<sup>37</sup>

None of these decisions overruled *McConnell's* holding that coordinated expenditures may be limited even when the resulting communication did not contain express advocacy, and none contained dicta that would indicate willingness to do so.<sup>38</sup> *Citizens United* and *WRTL*,<sup>39</sup> in fact, focused solely on independent spending and repeatedly emphasized the difference between independent expenditures and contributions for constitutional purposes.<sup>40</sup>

---

<sup>34</sup> *Id.*

<sup>35</sup> 551 U.S. 449 (2007).

<sup>36</sup> *Id.*

<sup>37</sup> 134 S. Ct. 1434, 1462 (2014).

<sup>38</sup> As noted above, Justice Kennedy in *McConnell* already would have struck down the corporate spending ban as he did in *Citizens United*, but he voted to uphold the relevant coordination provisions. See *supra* note 30.

<sup>39</sup> *WRTL* held that corporate spending could not be banned unless the resulting advertisement was "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469–70. That holding was rendered obsolete by *Citizens United*, which held that domestic corporate spending may never be banned. The *WRTL* test survived for less than three years and has no bearing on which coordinated expenditures should be treated as contributions. *WRTL* left unchanged the fact that contributions may be limited if given for political purposes, regardless of whether the resulting advertisements contain express advocacy.

<sup>40</sup> *Citizens United*, 558 U.S. at 357–58; *WRTL*, 551 U.S. at 478–79 (holding that truly independent issue ads were not equivalent to contributions in terms of risk of corruption).

In determining whether a case like *Citizens United* repudiated *McConnell*, a lower court must closely examine each case's logical underpinnings. See, e.g., *United States v. Danielczyk*, 683 F.3d 611, 615–19 (4th Cir. 2012) (upholding federal corporate contribution ban and concluding that "*Citizens United*, a case that addresses corporate independent expenditures, does not undermine *Beaumont's* reasoning on this point"); see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (explaining that future courts must "adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law" (quoting *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part))).



Neither the Wisconsin Supreme Court decision nor the federal district court opinion articulated exactly why or how recent Supreme Court cases have altered the law to mean that *McConnell*'s holding should be ignored. In fact, neither acknowledged *McConnell*'s holding on the issue.<sup>41</sup> Each holding was rife with references to more recent decisions but mainly cited general quotations that provide little in the way of analysis of the particular issue at hand.

In *Peterson*, the majority opinion began by drawing a sharp distinction between issue advocacy and election advocacy, implying all the while that anything less than express advocacy qualifies as issue advocacy, which cannot be regulated.<sup>42</sup> It drew heavily on Supreme Court cases but generally used either broad phrasing or quotations taken out of context as a justification for its conclusion, and it did not address *Buckley*'s decision to allow limits on contributions made for purposes broader than express advocacy.

For example, the *Peterson* majority relied on *WRTL* for the proposition that “[t]he compelling governmental interest that justifies the regulation of express advocacy (the prevention of *quid pro quo* corruption) ‘might not apply to’ the regulation of issue advocacy.”<sup>43</sup> Yet that phrase in *WRTL* was drawn from *McConnell*, which, as shown above, mandates a conclusion different than the one the court reached in *Peterson*. More generally, the *WRTL* Court reviewed a ban on corporate *independent* spending that contained issue advocacy, meaning that its language is unhelpful if applied to coordinated expenditures, which have been consistently treated as contributions before and after *WRTL*.

Similarly, the Court cited *McCutcheon* for its statement that “[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to such *quid pro quo* corruption.”<sup>44</sup> While the *Peterson* Court’s reference implies that that money spent “in connection with elections” means issue advocacy, *McCutcheon* had nothing to do with issue advocacy; by discussing spending “in connection with elections,” the *McCutcheon* Court sought to distinguish between contributions made directly to a candidate (which might cause corruption) and contributions made to a group of other

---

<sup>41</sup> The *Peterson* dissent discussed *McConnell*'s holding, so the majority was presumably aware of its existence. *Peterson*, 866 N.W.2d at 390.

<sup>42</sup> *Id.* at 188.

<sup>43</sup> *Id.* (footnote omitted).

<sup>44</sup> *Id.* at 188 (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014)).

candidates (which the Court held would not lead to corruption of the original candidate).<sup>45</sup>

While there are various other references to federal precedent in *Peterson* that provide little support for its conclusion, the fundamental flaw in the decision is its refusal to acknowledge that the law still treats coordinated expenditures as contributions. The majority did not address, and could not deny, the fact that limits on contributions to candidates have long been applied to all payments made for the purpose of influencing elections, and that has not changed despite *WRTL*, *Citizens United*, *McCutcheon*, or any other case.

### III. CONSEQUENCES

*Peterson* cannot be squared with the Supreme Court's holdings, and it directly contravenes *McConnell*. But perhaps more importantly, even without *McConnell*'s direct holding, the decision cannot survive in a campaign finance world ruled by *Buckley*'s contribution–expenditure distinction. As this section will show, the Wisconsin court's logical premise—that electioneering is not regulable if it does not contain express advocacy or its equivalent—creates a loophole so large that contribution limits will be meaningless, at least for those willing to circumvent them.

#### A. Unlimited Coordination Between Candidates and Outside Groups

The prosecutor in Wisconsin alleged that Governor Scott Walker's campaign directed spending by “independent” groups, essentially making the

---

<sup>45</sup> The majority also relied on a recent Seventh Circuit decision, *Wisconsin Right to Life, Inc. v. Barland* (*Barland II*), which included broad language stating that “the government’s authority to regulate in this area extends only to money raised and spent for speech that is clearly *election related*; ordinary political speech about issues, policy, and public officials must remain unencumbered.” 751 F.3d 804, 810–11 (7th Cir. 2014). The clearest indication that *Barland II* did not control the result of *Peterson* is that the Seventh Circuit did not rely on it when addressing the very same issue in *O’Keefe*. The dissenting opinion in *Peterson* contains a thorough discussion of why *Barland II*'s holding is inapplicable to the realm of coordinated expenditures. *Peterson*, 866 N.W.2d at 267.

The *Barland II* court was referring specifically to *Buckley* and its holdings concerning disclosure of independent expenditures, but the *Peterson* Court applied it to coordinated expenditures without acknowledging the distinction. Of course, if *Barland II*'s language were indeed taken to mean that *no regulation* could extend to anything other than express advocacy, that would mean that standard contribution limits would be unconstitutional as applied to non-express advocacy. The *Barland II* court did not address that issue, and clearly did not intend to go so far, given its direct reliance on *Buckley*.

groups little more than puppets for the campaign.<sup>46</sup> A long line of federal precedent would hold that this collaboration triggers contribution limits (or bans, in the case of corporations) on the groups' spending because Governor Walker would be likely to view the money given to those groups as contributions to his campaign. Common sense leads to the same conclusion: if the candidate decides how the money is spent (or provides any strong indication of its value to him),<sup>47</sup> he is just as likely to provide an impermissible reward to those who gave him the money to spend.

The *Christian Coalition* court, which has performed the most extensive analysis of coordination law to date, recognized the likely results if coordination rules were limited to express advocacy: "Were this standard adopted, it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat."<sup>48</sup>

The *Christian Coalition* court's prediction now applies to Wisconsin: under *Peterson*, the state may not limit contributions to the affiliated groups, as long as they run ads that do not contain express advocacy or its equivalent. And under *Citizens United* and later cases, all such groups may accept unlimited corporate contributions. Conveniently, candidates often do not use express advocacy anyway.<sup>49</sup> Thus, a candidate's campaign manager may start a Super PAC, the candidate may write the ad, star in it, tout his record, criticize his opponent, and the Super PAC may run the ad the day before the election, and all is legal if the candidate does not say "vote for me" or something similar at the end. Considering this potential, it is difficult to say that there are now effective contribution limits in Wisconsin.<sup>50</sup>

---

<sup>46</sup> Candidates regularly used multiple "independent" campaign committees to circumvent campaign finance restrictions until the practice was outlawed by the Federal Election Campaign Act in 1971. See DAVID C.W. PARKER, *THE POWER OF MONEY IN CONGRESSIONAL CAMPAIGNS, 1880–2006*, at 110 (2008).

<sup>47</sup> See Ferguson, *supra* note 9.

<sup>48</sup> *FEC v. Christian Coal.*, 52 F. Supp. 2d 25, 88 (D.C. Cir. 1999).

<sup>49</sup> *McConnell v. FEC*, 540 U.S. 93, 127 (2003) ("[C]ampaign professionals testified that the most effective campaign ads . . . should, and did, avoid the use of [express advocacy]."); see also *id.* at 127 n.18 (finding use of express advocacy in 5% or less of candidate advertisements in the 1998 and 2000 elections); see also Michael M. Franz, Joel Rivlin & Kenneth Goldstein, *Much More of the Same: Television Advertising Pre and Post-BCRA*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 141, 144* (Michael J. Malbin ed., 2006) (concluding that candidates only used express advocacy in 11.4% of their advertisements in the 2000 election).

<sup>50</sup> Florida has operated under the *Peterson* rule for years, providing some preview of how things may change in Wisconsin. See FLA. STAT. ANN. § 106.011(8)(c) (West 2015) ("For purposes of this chapter, an expenditure made for, or in furtherance of, an electioneering communication is not considered a contribution to or on behalf of any candidate."). As of September 2014, outside groups and political parties were responsible

Individuals and outside groups will certainly use the rule to get closer to candidates, but the decision will also have widespread effects on corporate giving and disclosure rules. Corporations are still banned from making direct contributions to candidates under federal law, and are banned or subjected to low limits under many state laws, including Wisconsin.<sup>51</sup> Yet under *Citizens United* and later cases, they may make unlimited independent expenditures themselves or give unlimited funds to other groups that engage in such spending. After *Peterson*, corporations or groups supported by them, just like individuals, will in essence be permitted to give unlimited money to a candidate, as long as the resulting advertisements do not contain express advocacy.

Further, it will be difficult to know the extent to which this is happening and who is funding the spending. All or most states have reasonably good rules requiring disclosure of contributions directly to candidates. Those disclosure rules are simplified because candidates have one campaign account and are responsible for reporting. But mandating useful disclosure from outside groups has proven much more difficult: some states barely try, and the federal government and other states have mediocre laws that can be easily circumvented by those willing to move their money through multiple entities.<sup>52</sup> Under *Peterson*, this will still occur, but candidates will have greater control over the spending, and in all likelihood will be fully aware of its original source.<sup>53</sup>

### B. Unlimited Campaign Contributions

If candidates may engage in unlimited coordination with “outside” groups, there is no clear logical basis for Wisconsin to prevent candidates themselves from raising unlimited contributions to their campaign accounts, as long as

---

for over 96% of election advertising in the Florida Governor’s race. See Rachel Baye, ‘Outside’ Groups Swamp Florida’s Airwaves in Race for Governor, CTR. FOR PUB. INTEGRITY (Sept. 24, 2014), <http://www.publicintegrity.org/2014/09/24/15553/outside-groups-swamp-floridas-airwaves-race-governor>.

<sup>51</sup> WIS. STAT. ANN. § 11.1112 (West Supp. 2016).

<sup>52</sup> See, e.g., IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED 2* (2015) (noting that almost half of the \$1 billion in independent spending over last three election cycles came from undisclosed original sources); see also, Daniel I. Weiner & Brent Ferguson, *Wisconsin Legislature Should Reject Secrecy Bill*, J. SENTINEL (Oct. 31, 2015), <http://m.jsonline.com/news/wisconsin-legislature-should-reject-secrecy-bill-b99605680z1-339024381.html> (explaining recent weakening of Wisconsin disclosure laws).

<sup>53</sup> See *Christian Coal.*, 52 F. Supp. 2d at 88 (“Coordinated expenditures for such communications would be substantially more valuable than dollar-equivalent contributions because they come with an ‘anonymity premium’ of great value to a candidate running a positive campaign.”).

they do not spend on express advocacy.<sup>54</sup> The court in *Peterson* held that the state may not even examine how a group and a candidate work together on ads that do not contain express advocacy, meaning the candidate may do all the fundraising, write the advertisements, and even take checks directly from donors.<sup>55</sup>

Is there any constitutional distinction between (1) allowing a candidate to perform activities like solicitation and receipt of money, ad writing, and strategy planning under the aegis of a nominally separate group and (2) allowing candidates to do all of the same things for his or her own campaign committee? The answer should be no, unless a court were to give substantial weight to the superficial question of who is the group's nominal leader. It is true that in some circumstances, bestowing official candidate-sanctioned status on an entity will change how it is viewed, or how it should be permitted to function. Yet with the prospect of candidates controlling outside groups and raising money for them, as they may under *Peterson*, there is no substantive distinction between such groups.

One could argue that if a candidate solicits money or creates an ad for her own campaign committee (rather than a nominally independent group), that activity is more solidly a part of the campaign itself, at least as far as voters and potential donors could tell; perhaps the risk of such appearances could mean that contributions to campaign committees could be limited under an honest reading of *Peterson*.<sup>56</sup> In some circumstances, this could be plausible, yet in cases of extensive candidate control of an outside group, it would be quite difficult to believe that many voters or donors would be aware of such a distinction based solely on a committee's official affiliation.<sup>57</sup> The formalism

---

<sup>54</sup> Campaign committee funds could be separated into two accounts, one of which may accept unlimited funds, like a hybrid PAC. *See, e.g.,* *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). There is a separate question of whether the campaign account accepting unlimited funds could receive certain benefits of typical campaign accounts, such as preferential advertising rates, that will not be addressed here.

<sup>55</sup> *Peterson*, 866 N.W.2d 165. The district court in *O'Keefe* hinted at an understanding that its ruling would mean that direct contributions to candidates could not be limited if the money was to be used for anything other than express advocacy. *O'Keefe v. Schmitz*, 19 F. Supp. 3d 861, 870–71 (E.D. Wis. 2014) (concluding that “regulation setting contribution limits on express advocacy . . . is permitted,” but “‘issue advocacy money[.]’ is not subject to these limitations”).

<sup>56</sup> *Peterson's* holding did not appear to hinge on any requirement that a group make clear that its activities were nominally separate from a campaign's.

<sup>57</sup> Because under *Peterson* a regulator may not examine the extent of candidate control over an outside group if it does not engage in express advocacy, there could be no attempt to determine whether candidate control reached a point such that the distinction between candidate committee and outside group was meaningless for voters or donors.

that would be required to allow a candidate to perform such activities for a nominally independent group, yet prevent a candidate from performing those activities for his own committee, would be difficult for any court to bear.

### C. A Broader Look

Considering the dominance of Super PACs in the coming 2016 presidential election, FEC inaction, and dim prospects for reform in Congress, it is tempting to conclude that a nationwide adoption of the Wisconsin rule would be relatively inconsequential. That conclusion would be mistaken.

On the federal level, it is true that candidates and Super PACs are already operating fairly closely with ostensible immunity. But candidates at least profess to maintain distance from supportive groups after campaign announcements, and that flimsy wall may do a bit to keep the candidate from rewarding donors, especially if the Super PAC's spending proves to be less helpful than the candidate would have preferred. For example, Governor Walker exited the Presidential race in September 2015 despite the fact that his Super PAC had plenty of money, because the PAC could not pay "phone bills, salaries, airfares or ballot access fees. They are not entitled to the preferential rates on advertising that federal law grants candidates, forcing them to pay far more money than candidates must for the same television and radio time."<sup>58</sup> Application of the Wisconsin rule on the federal level could allow candidates with support from only a few wealthy donors to survive.

And in some states, coordination rules are robust and well-enforced. California, Connecticut, and Minnesota, for example, have fairly strong rules that are enforced by agencies willing to clarify the law and issue penalties for illegal activity.<sup>59</sup> While Super PACs and other big-spending groups can still

---

<sup>58</sup> Nicholas Confessore, *Demise of Scott Walker's 2016 Bid Shows Limits of 'Super PACs,'* N.Y. TIMES (Sept. 22, 2015), <http://www.nytimes.com/2015/09/23/us/politics/scott-walkers-demise-shows-limits-of-super-pac-money-model.html>; David Karol, *If You Think Super PACs Have Changed Everything About the Presidential Primary, Think Again,* WASH. POST: MONKEY CAGE (Sept. 21, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/09/21/if-you-think-super-pacs-have-changed-everything-about-the-presidential-primary-think-again/> ("Perry's withdrawal from the race despite having several millions left in his super PAC coffers is a reminder that candidates still need 'hard money' to provide for campaign expenses. A candidate who is doing very badly will have a hard time raising such funds.")

<sup>59</sup> See CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, *AFTER CITIZENS UNITED: THE STORY IN THE STATES* 18 (2014), <https://www.brennancenter.org/publication/after-citizens-united-story-states>. For example, California's regulator recently fined a candidate when two of his campaign employees left the campaign to work for an outside group that spent on his behalf. Ramona Giwargis, *Former Assemblyman Joe Coto Charged with Hefty FPPC Fine,* SANTA CRUZ SENTINEL (Aug. 10, 2015),

dominate elections in those states, there is a real divide between those groups and candidates. Aside from the Supreme Court, only a naïve observer would conclude that the separation means that top donors to Super PACs do not have excessive influence over elected officials. Nevertheless, candidates cannot fully direct Super PAC spending, and are likely at least somewhat less inclined to follow the bidding of those donors.

Aside from the direct effect on near-term elections, rejection of *Peterson* is important for the legitimacy of the Supreme Court and the strength of our election laws. No close observer maintains that the Court has stayed consistent in campaign finance cases in recent years, or that our judge-made patchwork of rules is healthy for American democracy. But the answer is not ignoring precedent or predicting the Court's next watershed holding. Deregulation by lack of enforcement has already destabilized campaign rules, forcing candidates to decide whether to play by the rules and risk severe disadvantage or to bend the law and stay even with the pack. If the final obstacle preventing direct unlimited contributions is to be removed, it should be done legislatively or by the Supreme Court. Doing otherwise will simply create confusion amongst candidates and other political actors and decrease their confidence in our election system.

\* \* \*

While *Buckley*'s days may be numbered, the case has shown an unlikely staying power over the recent decades, and its demise is not guaranteed to come anytime soon. And regardless of its chances for survival, it is governing law. *Peterson* is unsustainable under *Buckley*—if its reasoning is adopted broadly, contribution limits will have little meaning, at least for those who are willing to push the limits of the law. The consequences of a piecemeal and ambiguous elimination of contribution limits will be detrimental to upcoming elections and our democracy more broadly.