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Coordination Is Corruption: An Argument for the Regulation of Coordinated Issue Advocacy Under Campaign Finance Law

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COORDINATION IS CORRUPTION: AN ARGUMENT FOR THE REGULATION OF COORDINATED ISSUE ADVOCACY UNDER CAMPAIGN FINANCE LAW

ABSTRACT

This Comment analyzes the regulability of coordinated issue advocacy. This topic was brought into the spotlight following the Wisconsin Supreme Court's July 2015 decision in State ex rel. Two Unnamed Petitioners v. Peterson, *which held that coordinated issue advocacy could not be regulated under state campaign finance law. The* Peterson *decision is not the end of the debate, but rather the beginning.*

This Comment takes a common-sense approach in arguing for the regulability of coordinated issue advocacy. This approach appeals to the experience of most Americans today, who frequently encounter campaign advertisements during elections. To bolster the common-sense approach, this Comment reviews instances of political scandal related to issue advocacy, such as those involving Senator Alan Cranston and Senator Robert Menendez. It also analyzes the federal courts' limited ventures into defining regulable campaign speech, which reinforce the government's interest in regulating coordination. This Comment further analogizes to other areas of law, such as bribery and anti-gratuity regulations, to better understand the policy concerns underlying regulable conduct by politicians.

Campaign finance law has been a source of controversy for years. Despite significant scholarship concerning campaign finance law in general, very little attention has been paid to the regulability of coordinated speech in conjunction with issue advocacy. This Comment concludes that coordinated issue advocacy should be regulable. Coordination alone is enough to lead to corruptive influence or its appearance, regardless of a communication's content.

INTRODUCTION

A candidate is running for political office. The candidate advertises, but there are limits on advertising spending by the candidate's campaign. In response to these limits, the candidate suggests that campaign donors instead donate to a nonprofit supporting an issue important to the candidate. The nonprofit uses the donations to create advertisements with input from the candidate, but the advertisements do not directly solicit votes for the candidate. Can the candidate continue requesting unlimited, unreported funds for the organization to create advertisements relating to the issues, without directly mentioning the candidate?

Almost this exact scenario was presented to the Wisconsin Supreme Court in Spring 2015, in the case *State ex rel. Two Unnamed Petitioners v. Peterson.*[1] During a recall election, Wisconsin Governor Scott Walker allegedly requested that supporters donate to certain nonprofits supporting the Budget Repair Bill (the Bill), an especially controversial law that he passed.[2] The nonprofits used the funds to create advertisements supporting the Bill and Governor Walker assisted in determining the advertisements' content.[3] When the Milwaukee County District Attorney initiated an investigation into the unreported funds, the nonprofits challenged the investigation on several grounds, including the argument that the state could not regulate advertisements about issues that do not mention a specific candidate. The *Peterson* court sided with the nonprofits, holding that speech that only mentions issues, known as issue advocacy, is unregulable, even when a candidate has input on, or coordinates, the communication.[4]

Federal campaign finance regulation is well established in the United States.[5] Modern regulation is based on the Federal Election Campaign Act of 1971 (FECA),[6] as amended in 1974.[7] Proponents of regulation point to its role in ensuring both the integrity of elected government officials and the public perception of their integrity.[8] A democratic society depends on trust in politicians, because elected officials are supposed to represent the desires of constituents.[9] Prominent politicians becoming embroiled in political corruption scandals, such as Senator Robert Menendez of New Jersey,[10] Senator Alan Cranston of California,[11] and Governor Rod Blagojevich of Illinois,[12] lend credence to the idea that politicians will give quid pro quos in exchange for

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1 866 N.W.2d 165 (Wis. 2015).

2 O'Keefe v. Schmitz, 19 F. Supp. 3d 861, 864 (E.D. Wis. 2014), *aff'd in part, rev'd in part sub nom.* O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014) (predecessor case to *Peterson*).

3 *Id.* at 865, 869.

4 *Peterson*, 866 N.W.2d at 193.

5 Buckley v. Valeo, 424 U.S. 1, 13 (1976) (per curiam).

6 Federal Election Campaign Act, 52 U.S.C. §§ 30101–30126, 30141–30146 (2012).

7 *Buckley*, 424 U.S. at 6.

8 *See* Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 615–16 (2013).

9 *See* Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 AM. J. POL. SCI. 328, 328 (2004) (describing the disconnect "between collective decision making and people's powers to influence collective decisions through speaking and voting, the very link that defines democracy," when there is political corruption).

10 *See infra* Part III.A.2.

11 *See infra* Part III.A.1.

12 *Rod Blagojevich*, CHI. TRIB., http://www.chicagotribune.com/topic/politics-government/government/rod-blagojevich-PEPLT007479-topic.html (last visited Jan. 31, 2016).

monetary donations. For example, regulating campaign funding by requiring disclosure of donors and the amount of campaign funding gives the public information to either reveal improper conduct or have confidence that its politicians are not being improperly influenced.

While the government's interest in preventing both the appearance of corruption and actual corruption is strong, politicians and their donors have strong First Amendment rights to freedom of speech and association.[13] Those interests cannot be taken lightly.[14] Therefore, balancing the interest in protecting First Amendment rights with the interest in preventing corruption and its appearance determines regulable communications in campaign financing.[15]

In *Buckley v. Valeo*,[16] the Supreme Court identified two important distinctions to determine the regulability of communications in campaign finance law. The first is between express advocacy and issue advocacy.[17] Express advocacy involves communications which specifically reference a candidate, or which contain speech that is the "functional equivalent" of a specific reference.[18] This type of advocacy is regulable.[19] Issue advocacy encompasses all other communications, which usually involve communications concerning an issue rather than a specific candidate.[20] This type of advocacy is not regulable.[21]

The second distinction is between contributions and independent expenditures.[22] One form of contributions includes coordination or collaboration between a candidate and an outside organization.[23] The clear connection between contributions and a candidate create a potential for a quid pro quo, making them regulable.[24] In contrast, an isolated independent expenditure involves no collaboration between a candidate and an outside organization, making it unregulable.[25]

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13 Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam).
14 *Id.*
15 *Id.* at 29.
16 *Id.* at 1.
17 *Id.* at 44.
18 *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007).
19 *Buckley*, 424 U.S. at 44.
20 *Id.*
21 *Id.*
22 *Id.* at 45–47; *see also infra* Part I.A.
23 *Id.* at 39, 46.
24 *Id.* at 26–27, 38.
25 *Id.* at 47.

Despite the significant scholarship analyzing campaign finance law, perhaps the most interesting aspect about coordination is that, until recently, it was never seriously addressed by the courts.[26] *Buckley* makes clear that truly independent expenditures, whether containing express or issue advocacy, cannot be regulated.[27] Regarding contributions, such as coordination, the law becomes more complicated.[28] *Buckley* expressly held that combining regulable contributions with regulable express advocacy allows for regulation of contributions for express advocacy, like coordinated express advocacy.[29] However, the law has not clarified whether combining regulable contributions with unregulable issue advocacy results in regulable contributions for issue advocacy, like coordinated issue advocacy.[30]

This Comment argues that coordinated issue advocacy should be regulable. In rejecting regulation of coordinated issue advocacy, the *Peterson* decision was in error. Determining a communication's regulability should depend on a candidate's involvement in an exchange of money to pay for valued political communication; it should not depend on the final communication's content.

Common sense dictates that the risk for corruption or its appearance arises not only when a communication specifically mentions a candidate, but also when

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[26] *See* Smith, *supra* note 8, at 606 (expressing surprise that in the "more than 35 years after *Buckley* was decided, courts and commentators have engaged in remarkably little analysis of the theory of coordination and independent expenditures").

[27] *Buckley*, 424 U.S. at 51.

[28] O'Keefe v. Chisholm, 769 F.3d 936, 942 (7th Cir. 2014) ("[C]onstitutional protection for raising funds to engage in issue advocacy coordinated with a politician's campaign committee has not been established 'beyond debate.'"); Brief Amici Curiae for the Campaign Legal Center & Democracy 21 Supporting Appellants and Urging Reversal at 4, O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014) (No. 14-1822).

[29] *Buckley*, 424 U.S. at 38; *see also Chisholm*, 769 F.3d at 941 (declining to question the regulability of coordinated express advocacy). Although the law itself is clear in this respect, there is a strong sentiment by some, led by Justice Thomas, that there should be no campaign finance regulation. Justice Thomas desires to protect First Amendment rights, emphasizing the importance of allowing "political expression" and association. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 638 (1996) (Thomas, J., concurring in the judgment and dissenting in part). According to Justice Thomas, contribution regulations infringe "as directly and as seriously upon freedom of political expression and association" as independent expenditure regulations. *Id.* at 640. For more on this perspective, see Steven B. Lichtman, *Black Like Me: The Free Speech Jurisprudence of Clarence Thomas*, 114 PENN ST. L. REV. 415, 429–37 (2009).

[30] Scholarly articles even state both sides of the debate as fact. *Compare* Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era*, 42 HASTINGS CONST. L.Q. 471, 484 (2015) ("[C]oordinated expenditures that do not contain express advocacy . . . are not treated as contributions . . . ."), *with* David A. Pepper, *Recasting the Issue Ad: The Failure of the Court's Issue Advocacy Standards*, 100 W. VA. L. REV. 141, 165 (1997) ("[M]ost campaigns either misunderstood or ignored outright the *requirement* that issue advertisements *cannot be coordinated by or with campaign committees or candidates*." (emphasis added)).

a candidate is at all involved in a communication.[31] This notion underlies bribery and anti-gratuity statues that regulate permissible contact between candidates and their supporters.[32] Furthermore, candidates value issue advocacy for policies they support, as demonstrated by political scandals involving Senator Alan Cranston, Senator Robert Menendez, and Governor Walker in *Peterson*.[33]

This Comment proceeds in four Parts. Part I synthesizes the development of campaign finance law, from FECA's statutory foundation through *Buckley* and subsequent developments that have helped shape campaign finance law today. Part II expounds upon the *Peterson* decision in light of current campaign finance regulation, including its background, decision, and dissents. Part III demonstrates that coordination leads to corruption or its appearance by following a common-sense approach, referencing modern examples of political corruption and regulation of bribery and certain gratuities. Part IV validates the importance of coordinated issue advocacy's regulability in the Super PAC era and alleviates potential concerns with regulating coordinated issue advocacy in two scenarios: uncontested or noncompetitive elections and lobbying efforts.

I. THE DEVELOPMENT OF CAMPAIGN FINANCE LAW

Part I of this Comment addresses the development of campaign finance law at the federal level, from FECA and *Buckley* until today. It focuses on regulatory policy and two distinctions: between express and issue advocacy and between independent expenditures and contributions. This framework determines a communication's regulability, making it vital in determining the regulability of coordinated issue advocacy.

A. The Framework and Foundation for Campaign Finance Law

FECA is the statutory foundation for federal campaign finance law and sets forth a number of restrictions on communications concerning elections.[34] In 1974, the statute was significantly amended, strengthening FECA with a focus

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[31] *See infra* Part III.A.

[32] *See infra* Part III.C.2.

[33] *See infra* Part III.A.

[34] Federal Election Campaign Act, 52 U.S.C. §§ 30101–30126 (2012); *see also Buckley*, 424 U.S. at 12–14. Along with the federal campaign finance regulation, states have individual campaign finance regulation laws that are generally modeled after FECA and Federal Election Commission (FEC) regulations, although the extent of regulation varies state-by-state. *See* Ferguson, *supra* note 30, at 485–87 (comparing and contrasting the definition of coordination in Maine, Florida, and Connecticut, concluding that "federal and state laws vary to some degree in their breadth" but nonetheless have commonalities in defining coordination).

on "preventing another Watergate."[35] *Buckley* was the first Supreme Court case interpreting FECA following its 1974 amendments, establishing the foundation for modern campaign finance regulation.[36]

In *Buckley*, the Court articulated the government's key policy concern underlying campaign finance regulation: "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions," specifically, quid pro quo corruption.[37] The "appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime" was of "almost equal concern" with actual quid pro quo arrangements.[38]

Despite this policy concern, campaign financing cannot be regulated unless the policy overcomes a donor or candidate's First Amendment rights to free speech and free association.[39] First Amendment freedoms are of the utmost concern in campaign finance law because the United States political system is predicated on citizens electing their representatives for office.[40] Restrictions on political speech warrant particular scrutiny because "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[41] The Court has gone as far as to suggest that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."[42] Significant regulation of political speech would inhibit citizens' ability to make informed voting decisions,[43] undermining the purpose of a representative government.[44]

The balancing act between First Amendment rights and preventing corruption has led to two distinctions affecting a communication's regulability:

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[35] Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 613–14.

[36] 424 U.S. 1, 6 (1976) (per curiam).

[37] *Id.* at 25. The concern with the appearance of corruption exists even when there are full disclosure requirements for contributions. *Id.* at 28. The singular policy concern in quid pro quo corruption was reiterated in *Citizens United v. FEC*, 558 U.S. 310, 452 (2010).

[38] *Buckley*, 424 U.S. at 27.

[39] *Id.* at 29.

[40] *Id.* at 14–15 (first citing Mills v. Alabama, 384 U.S. 214, 218 (1966); then citing Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

[41] *Id.* at 14 (quoting *Mills*, 384 U.S. at 218).

[42] *Id.* at 15 (quoting *Monitor Patriot Co.*, 401 U.S. at 272).

[43] By limiting the amount of money that can be spent on political communications, the number of communications, and therefore the amount of information reaching the public, decreases. *Id.* at 11.

[44] *See id.* at 14–15.

first, between issue and express advocacy, and second, between contributions and independent expenditures.

The first distinction is between communications utilizing issue versus express advocacy.[45] Communications utilizing issue advocacy "propagate one's views on issues without expressly calling for a candidate's election or defeat."[46] On the other hand, communications expressly advocating for a candidate contain "explicit words of advocacy of election or defeat of a . . . 'clearly identified'" candidate for political office.[47] The Court permitted regulation of express advocacy, but not issue advocacy, to avoid an unconstitutionally vague interpretation of FECA's language allowing regulation of speech "relative to" a candidate.[48]

To clarify the line between express and issue advocacy,[49] the Court initially identified what have been called the "magic words of express advocacy"[50] to determine language constituting regulable express advocacy.[51] However, in the 2000s, the Court expanded the definition of express advocacy beyond the *Buckley* "magic words"[52] to include language that is "functional[ly] identical."[53]

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[45] *Id.* at 43–44.

[46] *Id.* at 44.

[47] *Id.* at 43–44. A "clearly identified" candidate requires an "unambiguous reference to his identity" within the communication. *Id.* at 43 n.51.

[48] *Id.* at 41, 44.

[49] The Court cited *Thomas v. Collins*, 323 U.S. 516, 535 (1945) for its concern that without a clear standard, there is "no security for free discussion," the First Amendment concern that the Court sought to avoid. *Buckley*, 424 U.S. at 43.

[50] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 495 (2007) (Scalia, J., concurring in part and concurring in judgment). These "magic words" include: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' defeat,' [and] 'reject.'" *Buckley*, 424 U.S. at 44 n.52.

[51] *Buckley*, 424 U.S. at 44. The text of footnote 52 states that regulation only applies to "communications containing express words of advocacy of election or defeat, *such as* 'vote for,'" *id.* at 44 n.52 (emphasis added), meaning this may not have been intended as a "magic words" test. *See* James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers"*, 51 CATH. U. L. REV. 785, 790 n.27 (2002) ("The express advocacy test is not a 'magic words' test . . . ."). Nonetheless, courts and academics alike have shown that the "magic words" have been relevant in identifying express advocacy. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 126 (2003) ("[T]he use or omission of 'magic words' . . . marked a bright statutory line separating 'express advocacy' from 'issue advocacy.'"), *overruled on other grounds by* Citizens United v. FEC, 558 U.S. 310 (2010); Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine?*, 10 STAN. L. & POL'Y REV. 33, 35 (1998) (noting courts' concerns about FECA loopholes due to a "magic words" test).

[52] *McConnell*, 540 U.S. at 206.

[53] 11 C.F.R. § 109.21(c) (2017); *McConnell*, 540 U.S. at 126, 193. Although *McConnell* only addressed defining express advocacy in the context of electioneering communications, as defined in Federal Election Campaign Act, 52 U.S.C. § 30104(f)(3) (2012), this language has since been codified in the Bipartisan Campaign

Speech is defined as functionally identical when it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[54] Only "genuine issue ads," which "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter" without mentioning elections, candidates, or political parties, were excluded from regulation.[55] By excluding only genuine issue ads from regulation, these developments permit regulation of a broader range of coordinated communications than *Buckley*.[56]

After narrowing the scope of possible regulation to express advocacy, the *Buckley* Court addressed the second distinction that determines the regulability of communications, contributions versus independent expenditures.[57] Contributions include "controlled or *coordinated* expenditures" with a candidate, campaign, or political party in connection with an election campaign.[58] The Court determined that campaign contributions are "the narrow aspect of political association where the actuality and potential for corruption [has] been identified" and gave little attention to burdens to First Amendment association rights implicated by regulating contributions.[59] The potential for contributions to be "given to secure a political *quid pro quo*" undermines "the integrity of our system of representative democracy."[60] Therefore, the Court accepted contribution limits as a "corollary" restraint on the freedom of association.[61]

Reform Act of 2002 to define a coordinated communication and applies beyond electioneering communications. 11 C.F.R. § 109.21(c) (2016); *see also infra* footnotes 74–77 and accompanying text.

54 *Wis. Right to Life*, 551 U.S. at 469–70.

55 *Id.* at 456–58, 470.

56 The advertisements in *Wisconsin Right to Life* met the criteria for genuine issue advertisements, *id*. at 476, including the advertisement "Wedding" which urged the public to contact their senators to oppose filibuster delays blocking federal judicial nominees, *id.* at 458–59. The Fourth Circuit held that the advertisement, "Change" to be the functional equivalent of express advocacy. Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 554–55 (4th Cir. 2012). The advertisement did not ask individuals to vote for or against Obama, but instead purported to tell "the real truth about Obama's position on abortion," with examples of policy changes that it believed would be enacted should Obama be elected. *Id*. at 546.

57 By limiting the scope of potentially regulable communications to express advocacy prior to analyzing the distinction between independent expenditures and contributions, the Court did not address the combination of contributions, like coordination, and issue advocacy. *See* Buckley v. Valeo, 424 U.S. 1, 44 (1975).

58 *Id.* at 39, 46 (emphasis added).

59 *Id.* at 26–28; Smith, *supra* note 8, at 611 ("[T]he *Buckley* Court saw the major issue with contribution limitations not as their infringement on speech, but on association.").

60 *Buckley*, 424 U.S. at 26–27.

61 *Id.* at 38; Smith, *supra* note 8, at 618.

An independent expenditure, in contrast to a contribution, lacks a candidate's control or input.[62] The Court determined that large independent expenditures did not "pose dangers of real or apparent corruption comparable to those identified with large campaign contributions"[63] because without "prearrangement and coordination," there is no "danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[64] Further, regulation could impose significant potential burdens on the First Amendment freedoms of speech and association.[65] Balancing the lower governmental interest with the severe burden placed on First Amendment freedoms, the Court held that independent expenditures could not be regulated.[66]

B. Coordinated Communications as a Subset of Contributions

Coordinated communications are considered a form of "disguised contributions" that could serve as a quid pro quo for political favors from the candidate.[67] Coordinated speech is "as useful to the candidate as cash," because candidates can guarantee that those expenditures benefit their campaigns.[68] This aligns with the rationale to regulate contributions and contrasts with independent expenditures, which are not as useful because candidates cannot control the content to their advantage.[69]

Today, the primary federal definition of coordination as a subset of contributions is statutory and regulatory.[70] The Bipartisan Campaign Reform Act of 2002 (BCRA)[71] overhauled the old FEC regulations defining coordinated

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[62] *Buckley*, 424 U.S. at 47.

[63] *Id.* at 46.

[64] *Id.* at 47.

[65] *Id.* at 44.

[66] *Id.* at 51. This reasoning also applies to independent expenditures by corporations. Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[67] FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 446 (2001). This was true even if the party itself coordinated expenditures with a candidate. *Id.* at 464.

[68] *Id.* at 446.

[69] *See id.*

[70] Regulable contributions include "indirect contributions that take the form of coordinated expenditures, defined as 'expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.'" Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 611 (1996) (quoting 2 U.S.C. § 441a(a)(7)(B)(i), currently Federal Election Campaign Act, 52 U.S.C. § 30116(a)(7)(B)(i) (2012)).

[71] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 36 U.S.C., and 47 U.S.C.).

communications in favor of three criteria to determine a coordinated communication.[72]

First, the communication must be "paid for, in whole or in part, by a person other than that candidate, authorized committee, or political party committee."[73]

Second, the communication must meet at least one of the five content standards in the regulation.[74] Content standards include: (1) electioneering communications, (2) public communications revealing campaign materials prepared by a candidate or authorized representative (3) public communications that expressly advocate for a candidate, (4) public communications that reference clearly identified federal office candidates or political parties within either 90[75] or 120[76] days of an election, or (5) public communications that are the functional equivalent of express advocacy.[77]

Third, the communication must meet at least one of the five conduct standards in the regulation.[78] Three standards relevant for this analysis are: (1) request or suggestion of a candidate[79] or assent by a candidate to suggestions for the communication, (2) material involvement by the candidate in decisions, and (3) substantial discussion with a candidate prior to creating the communication.[80] The regulation made clear that conduct standards do not require "[a]greement or formal collaboration," defined as a mutual

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[72] 11 C.F.R. § 109.21(a) (2017); Coordinated Communications, 75 Fed. Reg. 55,947, 55,949 (Sept. 15, 2010). The FEC struggled to develop a constitutional definition of coordination, with regulations being struck down as "arbitrary and capricious" in 2004 in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) and again in 2007 in *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007), *aff'd*, 528 F.3d 914 (D.C. Cir. 2008). Smith, *supra* note 8, at 621.

[73] 11 C.F.R. § 109.21(a)(1).

[74] 11 C.F.R. § 109.21(a)(2). The content portion of a coordinated expenditure had been a source of confusion under the old regulations. *See* Thomas & Bowman, *supra* note 51, at 33 (expressing concern with the implications if an express advocacy requirement were applied to the definition of coordinated expenditures).

[75] The ninety-day limit applies to U.S. House of Representatives and U.S. Senate candidates. 11 C.F.R. § 109.21(c)(4)(i).

[76] The 120-day limit applies to Presidential candidates. 11 C.F.R. § 109.21(c)(4)(ii).

[77] 11 C.F.R. § 109.21(c). The FEC added the "functional equivalent of express advocacy" standard in 2011, following the language in *McConnell* and *Wisconsin Right to Life*. 11 C.F.R. § 109.21(c)(5); Coordinated Communications, 75 Fed. Reg. at 55,952; *see supra* notes 52–56 and accompanying text.

[78] 11 C.F.R. § 109.21(a)(3).

[79] For the purposes of explaining the conduct standards of BCRA, the word "candidate" refers to the candidate, the candidate's authorized committee, or a political party committee.

[80] 11 C.F.R. §§ 109.21(d)(1–3). The other two standards include: (1) if a common commercial vendor that created the communication also provided certain services to a candidate, or the candidate's opponent, within the last 120 days, and (2) the communication is paid for by a former employee or independent contractor of the candidate, and that person served the candidate within the previous 120 days. 11 C.F.R. §§ 109.21(d)(4–5).

understanding or planned work on the communication, respectively, with the candidate clearly identified in the communication.[81] If a communication meets the payment requirements and at least one of the content and conduct standards outlined above, then it will be regulable.[82]

Based on the foregoing analysis, the regulability of three categories of speech is clear: (1) independent expenditures are not subject to regulation under federal campaign finance law, regardless of whether they contain issue or express advocacy, (2) express advocacy, and its functional equivalent, can be regulated when coordinated with a candidate, and (3) issue advocacy is not subject to regulation under federal campaign finance law. Interestingly, despite the substantial body of case law involving campaign finance regulation which has developed at the Supreme Court level,[83] the Court has not answered a significant question left open by *Buckley*: if issue advocacy cannot be regulated, and contributions, including coordination, can be regulated, can issue advocacy be regulated when coordinated with a candidate?[84] The remainder of this Comment provides an analysis of campaign finance law and principles to answer this longstanding question.

II. WISCONSIN: COORDINATED ISSUE ADVOCACY CANNOT BE REGULATED

Although the United States Supreme Court has not made clear whether coordinated issue advocacy can be regulated, the Wisconsin Supreme Court in *State ex rel. Two Unnamed Petitioners v. Peterson* definitively answered this question in the negative.[85] In the first judicial test of the question, the Wisconsin Supreme Court held that Governor Walker's coordination of issue advocacy could not be regulated.

Beginning in 2011, Wisconsin's political scene became contentious following Republican Governor Scott Walker's proposal and subsequent

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[81] 11 C.F.R. § 109.21(e).

[82] Coordinated Communications, 75 Fed. Reg. at 55,949.

[83] *See* James Bopp, Jr., Randy Elf & Anita Y. Milanovich, *Contribution Limits After* McCutcheon v. FEC, 49 VAL. U. L. REV. 361 (2015) (discussing many Supreme Court decisions that have influenced modern campaign finance law).

[84] O'Keefe v. Chisholm, 769 F.3d 936, 941 (7th Cir. 2014) (presenting the question, "[C]an government also regulate coordination of contributions and speech about political issues, when the speakers do not expressly advocate any person's election?").

[85] State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 186 (Wis. 2015).

passage of the Budget Repair Bill[86] restricting collective bargaining rights of public sector unions.[87] The Bill was so controversial that it prompted a recall election for Governor Walker.[88] During that election, Governor Walker allegedly solicited donors to give money to conservative issue advocacy groups, such as the nonprofit Wisconsin Club for Growth (WCFG).[89] The donations were used by WCFG to create communications in support of the Bill,[90] and WCFG directed funds to other organizations that would support the Bill's policy goals.[91] Governor Walker subsequently won the recall election on June 6, 2012.[92]

The issue advocacy came under investigation a couple months after the recall election.[93] The Milwaukee Attorney General initiated a John Doe proceeding[94] targeting alleged "illegal campaign coordination" between the campaign

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[86] This bill is more commonly known as Act 10. Dave Umhoefer, *For Unions in Wisconsin, a Fast and Hard Fall Since Act 10*, MILWAUKEE J. SENTINEL (Nov. 27, 2016), https://projects.jsonline.com/news/2016/11/27/for-unions-in-wisconsin-fast-and-hard-fall-since-act-10.html.

[87] O'Keefe v. Schmitz, 19 F. Supp. 3d 861, 864 (E.D. Wis. 2014), *aff'd in part, rev'd in part sub nom.* O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014).

[88] Brian Montopoli, *Scott Walker Wins Wisconsin Recall Election*, CBSNEWS (June 6, 2012, 12:20 AM), http://www.cbsnews.com/news/scott-walker-wins-wisconsin-recall-election/. There were six recall elections in total, including for Governor, Lieutenant Governor, and four state senators. *2012 Recall Election for Governor, Lt. Governor, and State Senator*, WIS. ELECTIONS COMM'N (June 5, 2012), http://elections.wi.gov/elections-voting/results/2012/recall-election.

[89] Ed Pilkington et al., *Because Scott Walker Asked*, THE GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2016/sep/14/john-doe-files-scott-walker-corporate-cash-american-politics (last visited Feb. 16, 2017).

[90] *Schmitz*, 19 F. Supp. 3d at 864. WCFG director Eric O'Keefe stated that the advertisements' purpose was to advance WCFG's "pro-liberty, fiscal responsibility, pro-[Budget Repair Bill] beliefs. None of the advertisements expressly urged voters to vote for or against any candidate." Pilkington et al., *supra* note 89. These advertisements were treated as genuine issue advertisements. *See supra* note 55 and accompanying text.

[91] *Schmitz*, 19 F. Supp. 3d at 864.

[92] Montopoli, *supra* note 88.

[93] *Schmitz*, 19 F. Supp. 3d at 865.

[94] At the time, a John Doe proceeding, pursuant to Wisconsin Statute § 968.26, WIS. STAT. § 968.26 (2015), allowed a judge to supervise an investigation into criminal activity in a jurisdiction even without an initial named target, O'Keefe v. Chisholm, 769 F.3d 936, 937 (7th Cir. 2014), as long as the investigation's scope was "limited to the subject matter of the complaint upon which the John Doe [was] commenced," State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 199 (Wis. 2015) (quoting State v. Washington, 266 N.W.2d 597, 604 (Wis. 1978)). Upon belief that there is criminal activity, the judge could convene proceedings, potentially in secret, and issue subpoenas to relevant parties. WIS. STAT. § 968.26. Following the *Peterson* decision, this statute has been modified to limit the use of the John Doe investigative powers, such as eliminating secrecy orders during investigations. *Wis. Gov. Scott Walker Signs Bill Ending Secret 'John Doe' Investigations into Political Misconduct*, CHI. TRIB. (Oct. 23, 2015, 5:51 PM) [hereinafter *John Doe*], http://www.chicagotribune.com/news/nationworld/midwest/ct-scott-walker-john-doe-investigation-bill-20151023-story.html.

committee and certain nonprofit interest groups.[95] Specifically, the investigators[96] alleged that during the recall election, Governor Walker or his campaign committee coordinated with nonprofits,[97] including a "wide-ranging scheme" in which Governor Walker requested that donors contribute funds to WCFG rather than to his campaign.[98] His campaign then controlled the content and airtime of the advertisements created by WCFG.[99] The investigators alleged a "blatant attempt to avoid the regulations governing contributions to candidates and their campaign committees" when the campaign did not report the funds as contributions.[100]

In state court, Judge Gregory Peterson granted a motion to quash the John Doe subpoenas and search warrants, which he stayed, along with halting the investigation, pending appeal.[101] In response, WCFG sought a federal injunction against the state case being heard by the Wisconsin Supreme Court from the District Court for the Eastern District of Wisconsin on the grounds that, regardless of whether there was coordination, issue advocacy was unregulable.[102] The investigators argued that "issue advocacy does not create a free-speech 'safe harbor' when expenditures are coordinated between a candidate and a third-party organization."[103] Judge Randa disagreed.[104] Coordination would not add a threat of quid pro quo corruption to issue advocacy,[105] because "[l]ogic instructs that there is no room for a *quid pro quo*

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95 *Schmitz*, 19 F. Supp. 3d at 865.

96 District Attorneys in five counties launched John Doe investigations. *Id.* at 866. To avoid allegations of impropriety due to all of the District Attorneys being affiliated with the Democratic Party, a nonpartisan special prosecutor, Deputy United States Attorney Francis Schmitz, was assigned to lead the investigations. *Id.*

97 Although *Schmitz* states that WCFG did not run advertisements related to the recall petition, *id.*, the investigators accused WCFG of a scheme involving other nonprofits related to the recall election, *id.* at 867.

98 *Id.*; *Peterson*, 866 N.W.2d at 260–61 (Abrahamson, J., concurring in part, dissenting in part). Although the court does not identify the nonprofit accused of coordination in *Peterson*, it appears to be WCFG. *See Schmitz*, 19 F. Supp. 3d at 866 (identifying WCFG advisors R.J. Johnson and Deborah Jordahl as individuals whose homes were raided by the police); *Peterson*, 866 N.W.2d at 182–83 (search warrants were authorized on the homes of Unnamed Movants Nos. 6 and 7).

99 *See Schmitz*, 19 F. Supp. 3d at 867; *Peterson*, 866 N.W.2d at 261 (Abrahamson, J., concurring in part, dissenting in part). Under federal regulations, this conduct would meet the conduct standard for regulable coordinated communications. *See supra* notes 79–80 and accompanying text. Although this is a state law case, most states closely model their statutes after FECA, making federal regulations instructive for states' interpretations of their campaign finance statutes. *See supra* note 34 and accompanying text.

100 *Peterson*, 866 N.W.2d at 261 (Abrahamson, J., concurring in part, dissenting in part); *see Schmitz*, 19 F. Supp. 3d at 867.

101 *Schmitz*, 19 F. Supp. 3d at 867; *Peterson*, 866 N.W.2d at 177.

102 Schmitz, 19 F. Supp. 3d at 868, 871.

103 *Id.* at 871–72.

104 *Id.* at 872.

105 Quid pro quo corruption specifically is required following *Citizens United*. *See supra* note 37.

arrangement when the views of the candidate and the issue advocacy organization coincide."[106] Thus, Judge Randa ordered an injunction on the John Doe investigation.[107]

On appeal to the Seventh Circuit, Judge Easterbrook made quick work of reversing the injunction because the federal court did not have jurisdiction to interpret the state law statute.[108] Nonetheless, Judge Easterbrook felt that Judge Randa "broke new ground," as "[n]o opinion issued by the Supreme Court, or by any court of appeals, establishes ('clearly' or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups—let alone that the First Amendment forbids even an *inquiry* into that topic."[109]

With the federal injunction removed, the Wisconsin Supreme Court, in *Peterson*, was able to address the issues related to campaign finance.[110] Justice Gableman's decision turned on interpreting Wisconsin Statute section 11.01,[111] specifically the state's definition of "political purposes," because the statute only permits regulation of contributions "made for political purposes."[112] The statute defined "political purposes," in relevant part, as acts "done for the purpose of influencing the election or nomination for election of any individual to state or local office, [or] for the purpose of influencing the *recall* from or retention in office of an individual holding a state or local office."[113] Acts for political purposes included, but were not limited to, "[t]he making of a communication which *expressly advocates* the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum."[114]

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106 *Schmitz*, 19 F. Supp. 3d at 872. The language "logic instructs" highlights that there was no precedent cited in the opinion for the language quoted above. *See* Brief Amici Curiae for the Campaign Legal Center & Democracy 21 Supporting Appellants and Urging Reversal at 25, O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014) (No. 14-1822). This decision was based on an analysis of Wisconsin Statute section 11.01, as discussed in *Peterson*. *See infra* text accompanying notes 111–14.

107 *Schmitz*, 19 F. Supp. 3d at 875.

108 *Chisholm*, 769 F.3d at 937. The Anti-Injunction Act, 28 U.S.C. § 2283 (2012), provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments," none of which were true in the district court case. *Chisholm*, 769 F.3d at 937. Judge Easterbrook considered the Supreme Court's uncertainty in defining "coordination" a significant reason to remand the case to state court to decide the issue "as a matter of state law without any need to resolve these constitutional questions." *Id.* at 941.

109 *Id.* at 942.

110 State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165 (Wis. 2015).

111 WIS. STAT. § 11.01 (2015).

112 § 11.01(6)(a)(1); *Peterson*, 866 N.W.2d at 178.

113 WIS. STAT. § 11.01(16) (emphasis added).

114 § 11.01(16)(a)(1) (emphasis added).

Justice Gableman focused on the Supreme Court's distinction between issue and express advocacy, rather than between coordinated and independent expenditures, to support holding that the definition of "political purposes" was overbroad if applied to issue advocacy.[115] Even if a "compelling governmental interest" in preventing quid pro quo corruption justifies regulation of express advocacy, the Court had suggested that this distinction "'might not apply to' the regulation of issue advocacy."[116] Justice Gableman cited the Seventh Circuit decision in *Wisconsin Right to Life v. Barland* (*Barland II*)[117] for the proposition that, to protect First Amendment rights, the government can extend regulation "*only* to money raised and spent for speech that is clearly [express advocacy]; ordinary political speech about issues, policy, and public officials," that is, issue advocacy, "*must remain unencumbered*."[118] By limiting the definition of "political purposes" to express advocacy and its functional equivalent, issue advocacy could not be regulated.[119] Thus, the court did not examine the role of coordination in determining the regulability of speech and ended the John Doe investigation.[120]

Unsurprisingly, this decision had multiple dissents. Justice Abrahamson's vigorous dissent argued that the majority's "[a]nything [g]oes" attitude regarding regulation of issue advocacy "adopt[ed] an unprecedented and faulty interpretation of Wisconsin's campaign finance law and of the First Amendment."[121] Justice Abrahamson defended her perspective by analyzing the policy behind Wisconsin's campaign finance statute:[122] to prevent a "potential corrupting influence" when "the true source of support or extent of support [for a candidate] is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors."[123] Finding this potential corrupting

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115 *Peterson*, 866 N.W.2d at 188–89.

116 *Id.* at 188 (quoting FEC v. Wis. Right to Life, 551 U.S. 449, 471 (2007)).

117 751 F.3d 804 (7th Cir. 2014).

118 *Peterson*, 866 N.W.2d at 188 (quoting *Barland II*, 751 F.3d at 810).

119 *Id.* at 193. The special prosecutor's theory relied on violations of Wis. Stat § 11.10(4) and the Wisconsin Government Accountability Board's regulation GAB 1.20(1)(e). *Id.* at 194–95. By limiting the definition of "political purposes" to include only express advocacy and its functional equivalent, the actions in this case were not subject to regulation under either theory. *Id.* at 194.

120 *Id.* at 179.

121 *Id.* at 253 (Abrahamson, J., concurring in part, dissenting in part).

122 *Id.* at 254.

123 *Id.*

influence in coordination, Justice Abrahamson concluded that "coordinated disbursements for issue advocacy" must be reported as contributions.[124]

Like the majority, Justice Abrahamson looked to Supreme Court precedent but focused on precedent concerning coordination.[125] Justice Abrahamson noted that the Court "has not differentiated between coordinated expenditures made for issue advocacy purposes and coordinated expenditures made for express advocacy purposes."[126] Justice Abrahamson looked to *Buckley*'s rationale for leaving issue advocacy unregulated because it may be duplicative or counterproductive to a candidate.[127] However, when a candidate coordinates, these concerns are absent.[128] The Court's treatment of coordinated expenditures as "disguised contributions" does not appear to implicate the type of advocacy.[129] It implicates the nature of coordination itself.[130]

Justice Crooks's dissent followed the same vein. Justice Crooks believed there was no overbreadth problem in defining "political purpose" with the language "for the purpose of influencing" an election.[131] The *Buckley* Court had already deemed the language "for the purpose of influencing" an election overbroad only in the context of independent expenditures; the language was appropriate to regulate contributions.[132] *Buckley* indicated that a "general understanding"[133] or "common sense" would inform people as to "what is and is not a campaign contribution,"[134] such as coordination. This common sense would inform people that the purpose of coordination is to influence an election and therefore should be regulable.[135]

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124 *Id.* at 256. Coordinating a disbursement in Wisconsin requires the disbursement be from third parties "with the authorization, direction or control of or otherwise by prearrangement" with a benefitted candidate. *Id.* at 259 (quoting WIS. STAT. § 11.06(4)(d) (2015)).

125 *Id.* at 269.

126 *Id.* at 264, 274. Justice Abrahamson uses the word "expenditure" to refer to both issue and express advocacy. *See id.*

127 *Id.* at 264; *see also infra* note 290 and accompanying text.

128 *Peterson*, 866 N.W.2d at 264.

129 *Id.* at 269.

130 *Id.*

131 *Id.* at 377 (Crooks, J., concurring in part, dissenting in part).

132 *Id.* at 383.

133 *Id.* at 377 (quoting Buckley v. Valeo, 424 U.S. 1, 23 n.24 (1976) (per curiam)).

134 *Id.*

135 *See id.* at 388.

III. COORDINATION ALONE LEADS TO QUID PRO QUO CORRUPTION OR ITS APPEARANCE

The courts have attempted to reach an agreeable balance between First Amendment rights and the government's right to prevent corruption and its appearance.[136] This Part demonstrates that coordinated issue advocacy reaches a point of regulable contributions. Empirical evidence demonstrates political corruption involving issue advocacy.[137] A common-sense approach to understanding the empirical evidence, an approach encouraged by Justice Crooks in his *Peterson* dissent,[138] demonstrates issue advocacy's value to candidates and its potential to lead to quid pro quo corruption or its appearance. The policy behind bribery and illegal gratuity laws, with its concern with political quid pro quos, validates the empirical and common-sense principles indicating coordinated issue advocacy's potential for corruption.

A. Issue Advocacy Has Value to Candidates

Despite the *Peterson* majority's finding to the contrary, there is substantial empirical evidence of issue advocacy's value to politicians both in state and federal government.[139] As demonstrated by the political favors accepted by Senator Cranston in the Keating Five scandal, the alleged bribes given to Senator Menendez for issue advocacy, and the alleged conduct of Governor Walker leading to the litigation in *Peterson*, issue advocacy can cause quid pro quo corruption or its appearance. Politicians value issue advocacy, and history demonstrates their willingness to trade favors for money to fund political campaigns.

1. Senator Cranston in the Keating Five Scandal

The events leading to the Keating Five scandal arose in 1984, when the Federal Home Loan Bank Board, led by Chairman Ed Gray, sought to impose regulations on the savings and loan bank industry.[140] The industry had been only lightly regulated, and the threat of greater government oversight did not please

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136 *See, e.g.*, FEC v. Wis. Right to Life, 551 U.S. 449, 476 (2007); *Peterson*, 866 N.W.2d at 179, 187–88; *supra* notes 133–35 and accompanying text.

137 *See infra* Part III.A.

138 *See supra* notes 133–35 and accompanying text.

139 *See Peterson*, 866 N.W.2d at 260 (Abrahamson, J., concurring in part, dissenting in part).

140 *The Banking Crisis: Lincoln, Keating, and Gray*, KEATINGFIVE.ORG [hereinafter *Banking Crisis*], http://keatingfive.org/about (last visited Jan. 9, 2016).

industry leaders like Charles Keating.[141] After Keating attempted to oust Gray as Chairman, Gray investigated Keating's savings and loan bank and claimed to uncover ethics violations.[142]

As the investigation continued, Keating reached out to five U.S. Senate members, including Senator Alan Cranston.[143] Keating contributed almost $1 million to organizations either run by or affiliated with Senator Cranston, including voter registration groups run by Senator Cranston and his son.[144] Senator Cranston subsequently attended meetings with Gray on Keating's behalf.[145] The Senate eventually caught onto the potentially unethical conduct in protecting a campaign contributor and investigated these five senators, the so-called Keating Five.[146] The Ethics Committee formally reprimanded Senator Cranston, and he left the Senate following the completion of his term.[147]

Senator Cranston's conduct during the Keating Five scandal shows issue advocacy's value to candidates. Rather than Senator Cranston accepting only direct campaign donations, Keating persuaded the senator to support him by donating to issue advocacy groups promoting voter registration, an important cause to Senator Cranston.[148] Senator Cranston risked harsh consequences if this unethical behavior was discovered; even so, he valued the contribution toward the issue enough to make the reward worth the risk.[149] This indicates that candidates value contributions to organizations supporting issues the candidate also supports comparably to direct campaign contributions. Therefore, issue advocacy should be regulable in certain situations, like when combined with something valuable to candidates like coordination.

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141 *Id.*

142 *Id.*

143 *Id.* The other senators investigated include Donald Riegle of Michigan, Dennis DeConcini of Arizona, John Glenn of Ohio, and John McCain of Arizona. *Id.*

144 *Alan Cranston*, KEATINGFIVE.ORG, http://keatingfive.org/actors/senators/Alan-Cranston (last visited Jan. 9, 2016). For comparison, Keating contributed only $132,000 to actual campaigning for the senator. Richard L. Berke, *Cranston Inquiry Widens to Include Signups of Voters*, N.Y. TIMES (Dec. 6, 1989), http://www.nytimes.com/1989/12/06/us/cranston-inquiry-widens-to-include-signups-of-voters.html?pagewanted=all.

145 *Banking Crisis*, *supra* note 140.

146 *Id.*

147 Alyssa Fetini, *A Brief History of the Keating Five*, TIME (Oct. 8, 2008), http://content.time.com/time/business/article/0,8599,1848150,00.html; *Banking Crisis*, *supra* note 140.

148 *Banking Crisis*, *supra* note 140.

149 Berke, *supra* note 144. Senator Cranston described voter registration as a "'driving force' in his political career." *Id*.

2. The Alleged Bribery of Senator Menendez

In 2014, Senator Robert Menendez of New Jersey was accused of accepting bribes during his 2012 campaign for reelection to the U.S. Senate.[150] Dr. Salomon E. Melgen is the alleged source of the bribes.[151] Through his company, Dr. Melgen gave $700,000 in corporate contributions to the Senate Majority Super PAC,[152] which, among other candidate-specific initiatives, advocates on issues important to Democratic candidates in general.[153] Dr. Melgen also donated nearly $1 million to Senator Menendez's campaign and party groups.[154] With the support of this funding, New Jersey reelected Senator Menendez.[155]

These campaign donations, according to prosecutors, were not without strings.[156] After reelection, Senator Menendez allegedly pressured federal officials to intervene in a Medicare reimbursement policy dispute for Dr. Melgen's financial benefit, and Senator Menendez supported a port security deal involving Dr. Melgen.[157] Senator Menendez's actions have led to bribery charges that could result in up to fifteen years in prison,[158] with trial pending.[159]

This scenario demonstrates the importance of issue advocacy to candidates in two ways. First, Dr. Melgen allegedly provided significant funding to Super PACs and party groups to bribe Senator Menendez.[160] These groups advocate for issues important to the party, rather than just for specific candidates.[161] Second, Senator Menendez allegedly accepted bribes in exchange for

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150 Alexander Burns, *Some Counts Dismissed in Indictment of Robert Menendez*, N.Y. TIMES (Sept. 28, 2015), https://www.nytimes.com/2015/09/29/nyregion/some-counts-dismissed-in-indictment-of-robert-menendez.html.

151 Matt Apuzzo, *Senator Robert Menendez Indicted on Corruption Charges*, N.Y. TIMES (Apr. 1, 2015), https://www.nytimes.com/2015/04/02/nyregion/senator-robert-menendez-indicted-on-corruption-charges.html.

152 *Id.*

153 SENATE MAJORITY PAC, http://www.senatemajority.com/about/ (last visited Oct. 9, 2015).

154 Steven Nelson, *Judge: Constitution Can't Cloak Senator from Bribery Charges*, U.S. NEWS & WORLD REP. (Sept. 29, 2015, 12:11 PM), http://www.usnews.com/news/articles/2015/09/29/judge-sen-menendez-cant-use-constitution-to-avoid-bribery-charges.

155 Apuzzo, *supra* note 151.

156 Nicholas Confessore & Matt Apuzzo, *Robert Menendez Indictment Points to Corrupting Potential of Super PACs*, N.Y. TIMES (Apr. 2, 2015), https://www.nytimes.com/2015/04/03/us/politics/robert-menendez-indictment-points-to-corrupting-potential-of-super-pacs.html.

157 Apuzzo, *supra* note 151.

158 *Id.*

159 David Voreacos, *Senator Menendez Campaign Bribery Trial Postponed to 2016*, BLOOMBERG (Sept. 17, 2015, 6:55 PM), http://www.bloomberg.com/news/articles/2015-09-17/senator-menendez-bribery-trial-date-postponed-to-at-least-2016.

160 Apuzzo, *supra* note 151.

161 SENATE MAJORITY PAC, *supra* note 153.

advocating on particular issues once in office.[162] Senator Menendez likely put Dr. Melgen's campaign contributions toward advocating for these issues, as opposed to using them only for his own reelection. Moreover, after the senator's reelection, Dr. Melgen allegedly provided him with additional, nonmonetary bribes as incentives to support issues important to the doctor.[163] The issue advocacy could be "bought" using nonmonetary gifts, indicating that Senator Menendez valued the advocacy.[164] The potential to accept bribes, including bribes given in exchange for issue advocacy, supports the value of issue advocacy both during elections and while in office.

3. Governor Walker's Alleged Conduct in Peterson

Circling back to *Peterson*, the alleged conduct of Governor Walker is a particularly good example of issue advocacy's importance to candidates. State laws vary in the extent of their campaign finance regulation,[165] and the structure and interpretation of Wisconsin's campaign finance statute had bound candidates "by minimal contribution limits and tight spending limits."[166] This "compel[led] candidates to depend increasingly upon expenditures by [nonprofit] committees that engage in issue advocacy" rather than to rely on their independent campaign fundraising and spending.[167] The nonprofits are required by tax laws to "focus primarily on social-welfare issues;" notwithstanding this mandate, the advertisements containing issue advocacy have been called "thinly veiled political ads."[168]

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[162] Apuzzo, *supra* note 151.

[163] The senator allegedly received personal favors such as "luxury vacations, golf outings, . . . and expensive flights," along with campaign contributions. Apuzzo, *supra* note 151; Burns, *supra* note 150.

[164] *See* Burns, *supra* note 150.

[165] Ferguson, *supra* note 30, at 485–87.

[166] State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 239 n.15 (Wis. 2015) (Prosser, J., concurring). The Wisconsin statute limited funding donated directly to a candidate's fund to $43,000 and required full disclosure of the donor and donation amount. Pilkington et al., *supra* note 89. Corporations could also not make direct political donations to candidates, but had to donate to independent third-party groups or spend their own money on direct advertising, with disclosure requirements. *Id.*

[167] *Peterson*, 866 N.W.2d at 239 (Prosser, J., concurring).

[168] Justin Miller, *Scott Walker Leaks Could Force Supreme Court to Confront Dark Money*, THE AM. PROSPECT (Sept. 16, 2016), http://prospect.org/article/scott-walker-leaks-could-force-supreme-court-confront-dark-money. Robert Maguire, a political nonprofit researcher for the Center for Responsive Politics, went a step further, stating that the nonprofits are "pretty clearly political entities meant to do things that are not social welfare. Saving Governor Walker's governorship is not a social welfare function." *Id.*

The value of issue advocacy to Governor Walker is bolstered by statements and conduct by his own campaign during the recall election campaigns.[169] An e-mail sent by Governor Walker's fundraiser stated that the campaign aimed to raise $9 million in "issue advocacy efforts" to support conservative candidates in the senatorial recall races, which accompanied Governor Walker's recall.[170] The campaign coordinated its efforts through WCFG "to ensure correct messaging," because that group could "accept Corporate and Personal donations without limitations and no donors disclosure."[171] Governor Walker participated in at least 114 meetings or calls with potential donors during the recall elections,[172] touting the advantages of limitless, unidentified donations as talking points.[173] Their efforts ended up raising $12 million.[174] Governor Walker's former campaign consultant indicated this money resulted in advertising and mailings which "moved independent swing voters to the GOP candidate," helping the GOP maintain its majority status in the state senate.[175] Recently, Governor Walker stated that, when planning to fundraise, the campaign "thought it was appropriate to get the message out about the facts, not talking about advocating for or against, expressly advocating for or against candidates, but getting the message out that the [Budget Repair Bill] reforms would work" to help the GOP candidates survive their recall elections.[176]

Another unique factor affecting *Peterson* is that it involved a recall election.[177] In a recall election, the candidate is trying to retain an office position

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169 These statements came from documents collected during the John Doe investigation. Although these documents were ordered to be suppressed or destroyed in *Peterson*, the *Guardian* received and leaked many of the documents in September 2016. Pilkington et al., *supra* note 89. The Wisconsin Supreme Court later ordered many of redacted documents related to the case to be released. *Wisconsin Supreme Court Orders John Doe Documents in Gov. Walker Case Released*, CHI. TRIB. (Jan. 20, 2017, 11:07 PM), http://www.chicagotribune.com/news/nationworld/midwest/ct-wisconsin-john-doe-documents-walker-20170120-story.html.

170 *Id.*

171 *Id.*

172 Matthew DeFour, *Leaked Records Provide Glimpse Inside Scott Walker's Political Operation*, MADISON.COM (Sept. 19, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/leaked-records-provide-glimpse-inside-scott-walker-s-political-operation/article_324fa354-acee-5342-a82f-ef4f683f3dbc.html.

173 Pilkington et al., *supra* note 89.

174 This included donations to WCFG personally solicited by Governor Walker from conservative donors nationwide, including $1 million from hedge-fund manager Stephen Cohen, $1 million from John Menard, founder of Wisconsin-based home improvement chain Menard's, and $15,000 following a meeting with Donald Trump. *Id.*

175 *Id.*

176 DeFour, *supra* note 172.

177 Montopoli, *supra* note 88.

rather than be elected to one.[178] The voters already know the candidate, which would make advocating for the candidate's issues especially important. In Wisconsin, the election essentially hinged on the issue of collective bargaining rights for public sector unions,[179] making communications advocating for that issue directly impact Governor Walker's success in the election.

The combination of the stringent Wisconsin campaign finance laws with a recall election made issue advocacy imperative to Governor Walker. He needed to generate support for his cause to win the election, and Wisconsin's regulations made individual spending difficult.[180] However, issue advocacy nonprofits, such as WCFG, could create communications supporting the Bill and avoid Wisconsin's strict restrictions on express advocacy and campaign spending.[181] Furthermore, the alleged coordinated issue advocacy led to a long, intense investigation of WCFG, other nonprofits, and Governor Walker,[182] another indication that the communications had value to the Walker campaign and influenced the recall election. Overall, the intense scrutiny surrounding this case, the importance of issues in elections, especially recall elections, and that issue advocacy could help political candidates evade stringent campaign finance laws demonstrate the importance of issue advocacy to political candidates.[183]

B. Common Sense: Appropriate Campaign Finance Regulation Decreases the Public Perception of Corruption

Political campaigning is a routine part of American lives.[184] Most people have seen television advertisements, newspaper articles, and even bumper stickers supporting political parties and politicians.[185] Even if laypeople are not familiar with campaign finance law, they are familiar with the communications leading to the laws. These facts appeal to common sense, which is the

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178 *Recall Election*, ENCYCLOPEDIA BRITANNICA, www.britannica.com/topic/recall-election (last visited Apr. 9, 2017).

179 *See* O'Keefe v. Schmitz, 19 F. Supp. 3d 861, 864 (E.D. Wis. 2014), *aff'd in part, rev'd in part sub nom.* O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014).

180 *See* State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 179 (Wis. 2015).

181 *See Schmitz*, 19 F. Supp. 3d at 864. Richard Briffault has noted that a principal benefit of nonprofits is that they can "be a very good device for hiding the participation of wealthy individuals" in campaign financing because there are no disclosure requirements for the identify of donors. Pilkington et al., *supra* note 89.

182 *Schmitz*, 19 F. Supp. 3d at 866.

183 *See* Peterson, 866 N.W.2d at 239 (Prosser, J., concurring).

184 *See* Shaun Bowler & Todd Donovan, *Campaign Money, Congress, and Perceptions of Corruption*, 44 AM. POL. RES. 272, 276–77 (2016) (describing the importance of the media in campaigning).

185 *See id.* at 276.

appropriate place to begin analyzing the regulability of coordinated issue advocacy.

Consider the *Peterson* scenario in a modified, federal context. There are two advertisements for a democratic senatorial candidate. The candidate controlled the advertisements' content and timing, which an activist group in favor of stricter gun control laws created. The first advertisement states: "A vote for Candidate is a vote for stricter gun control laws." The second advertisement states: "This State must support stricter gun control laws." Each advertisement functionally gives the same message: vote for the candidate favoring stricter gun control laws.

Despite the congruent messages, because one advertisement explicitly mentions the candidate while the other only mentions the issue, the law may have different regulatory authority over the advertisements. This raises two questions. First, does the advertisement's language determine the public perception of quid pro quo corruption? Second, does whether a candidate is involved make a difference in the potential for quid pro quo corruption or its appearance? The law leaves the door open to answer yes; common sense suggests no. This Comment follows the common-sense approach: candidate involvement in political communications is what leads to the potential for or perception of corruption.

In a representative political system, the "integrity of appearances" is particularly important to maintain citizens' trust in their politicians.[186] Americans already perceive significant political corruption.[187] Only 1% of Americans rated the ethics and responsibility of the average member of Congress as "excellent;" 68% rated the average congressperson's ethics and responsibility as either "not so good" or "poor."[188] Even more telling, when asked how often politicians vote to please contributors, 29% responded "all the time," and 41% responded "often."[189] Only 1% responded "never."[190] Americans considered campaign contributors as the greatest influence on a congressperson's vote, even above lobbyists and well above individual voters.[191]

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186 *Id.* at 274.

187 *Id.* at 273 (citing other studies which have found that "large proportions of Americans think their Congress is corrupt").

188 Abby Blass, Brian Roberts & Daron Shaw, *Corruption, Political Participation, and Appetite for Reform: Americans' Assessment of the Role of Money in Politics*, 11 ELECTION L.J. 380, 385 (2012).

189 *Id.*

190 *Id.*

191 *Id.* at 386.

Campaign finance regulation has the power to significantly reduce this public perception of corruption in three ways. Each way appeals to the citizens' common sense based on their experience with campaigning, reflecting Justice Crooks's *Peterson* dissent.[192] First, an actual awareness of the law can make political funding appear less corrupt.[193] To that point, at least one study has shown that knowledge of campaign finance regulation significantly decreased citizens' perceptions of political corruption.[194] Second, the extent of regulation determines the amount of money that can reach a politician.[195] The less money that reaches a politician, the lower the influence the donor may appear to have on the candidate.[196] Third, campaign finance regulations restrict permissible contact between candidates and outside organizations,[197] decreasing the public's perception of corruption.[198] Surveys by Bowler and Donovan showed that the public perceives significantly less corruption when organizations run independent advertisements than when organizations contribute to particular political committees.[199]

Although this Comment does not go so far as to suggest reforming the entire campaign finance regulatory system, at the least, it urges construing existing finance laws to avoid increasing the perception of corruption. Disallowing regulation of coordinated issue advocacy fails in that respect.

To be sure, regulating coordinated issue advocacy burdens free speech, as does any campaign finance regulation.[200] But regulating express advocacy, and not issue advocacy, when a candidate is equally involved in creating the communication is not a principled distinction. Although Judge Randa contended that "logic instructs" that citizens will not perceive corruption in issue advocacy, even if coordinated, that "logic" is not compatible with United States political realities and its citizens' common sense.[201] The remainder of this Part analyzes

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192 *See supra* notes 133–35 and accompanying text.

193 Necmi K. Avkiran, Direnç K. Kanol & Barry Oliver, *Knowledge of Campaign Finance Regulation Reduces Perceptions of Corruption*, 56 ACCT. & FIN. 961, 962 (2016).

194 *Id.* at 963.

195 *See* Blass, Roberts & Shaw, *supra* note 188, at 384.

196 Bowler & Donovan, *supra* note 184, at 279, 284–85.

197 *See supra* note 43 and accompanying text.

198 Bowler & Donovan, *supra* note 184, at 283–84.

199 *Id.*

200 Smith, *supra* note 8, at 609.

201 *Supra* note 106 and accompanying text.

the political and legal realities to affirm this common-sense approach to determining that coordinated issue advocacy should be regulable.[202]

C. Legal Support for Regulation: Case Law Precedent and Bribery and Anti-Gratuity Laws

This section provides the legal backbone to support the common-sense notion that coordinated issue advocacy should be regulable. Even with the empirical evidence of issue advocacy's value to candidates, candidate coordination ultimately creates the government interest in preventing corruption or its appearance.[203] The existing legal framework to regulate bribery and certain gratuities is based on a concern with quid pro quo corruption, indicating that some regulation of coordinated issue advocacy should likewise be permissible.[204] Further, campaign finance case law itself has suggested that coordinated communications should be regulable, regardless of their language, because they lead to corruption or its appearance.[205]

1. The Law and Policy Behind Regulating Bribery and Certain Gratuities

The law against political bribery and certain gratuities is well entrenched in federal and state statutory provisions.[206] Bribery and illegal gratuities are similar, but distinct, prohibited actions by political officials.[207] The same federal statute defines the two actions,[208] as explained by the Court in *United States v. Sun-Diamond Growers*.[209] Both bribery and illegal gratuities involve anything of value being "*corruptly* given, offered, or promised to a public official (as to the giver) or *corruptly* demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient)."[210] The difference between bribery and gratuities comes in the intended purpose for the gift or

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202 *See* Brief Amici Curiae for the Campaign Legal Center & Democracy 21 Supporting Appellants and Urging Reversal at 25–26, O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014) (No. 14-1822).

203 Buckley v. Valeo, 424 U.S. 1, 46–47 (1976) (per curiam).

204 *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000).

205 *Id.*

206 *See* Joseph F. Savage Jr. & Brian Kelly, *Courts Divide on Corruption Statute as 1st Circuit Limits 18 U.S.C. § 666 to Bribes*, 28 WESTLAW J. WHITE-COLLAR CRIME, Jan. 2014, at 1 (noting that Congress enacted 18 U.S.C. § 201, criminalizing bribery and certain gratuities, in 1962, and it has been used to enforce those crimes ever since).

207 United States v. Sun-Diamond Growers, 526 U.S. 398, 404–05 (1999).

208 18 U.S.C. § 201 (2012). Within the statute, § 201(b) regulates bribery, and § 201(c) regulates gratuities.

209 *Sun-Diamond*, 526 U.S. at 404.

210 *Id.* at 404 (emphasis added).

receipt.[211] Bribery requires a quid pro quo, being a specific exchange for an official act, because it requires *intent* to influence an official act.[212] On the other hand, gratuities require that something of value be given or accepted for or because of any past or future official act, rather than requiring specific intent to influence politicians.[213] Bribery and illegal gratuities carry severe penalties, including jail time and fines, indicating the importance of discouraging these acts.[214]

The government's interest in preventing corruption and its appearance lies behind prohibiting bribery and certain gratuities, just as that policy lies behind regulating political contributions.[215] The Court in *Nixon v. Shrink Missouri Government PAC*[216] acknowledged that the analogy is not perfect, because "neither law nor morals equate all political contributions, without more, with bribes."[217] Nonetheless, it reinforced that the same interest underlies these areas of law,[218] making bribery and illegal gratuity regulations an appropriate analogy to the regulation of coordination.

The bribery and illegal gratuity statute focuses on the resulting quid pro quo or influence on a candidate.[219] It does not focus on the content of the bribe or gratuity.[220] Because the same government interest underlies those statutes and contribution limits,[221] the coordinated communication's content likewise should not affect its regulability. Analogizing to bribery, if coordination results in a quid pro quo, the government has a strong interest in preventing that conduct and should be able to regulate it.[222] Analogizing to gratuities, when a candidate coordinates a communication, that conduct is enough to lead to, at the least, the appearance of corruption.[223] To protect the government's interest in preventing

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211 *Id.* at 404–05.
212 *Id.*
213 *Id.* at 405.
214 *Id.*
215 Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000); Buckley v. Valeo, 424 U.S. 1, 29 (1976) (per curiam).
216 528 U.S. 377.
217 *Id.* at 390.
218 *Id.*
219 *See* 18 U.S.C. § 201 (2012).
220 *See id.*
221 *See supra* note 8 and accompanying text.
222 *Buckley*, 424 U.S. at 26–28.
223 *Id.*

actual or perceived corruption,[224] it needs to be able to regulate coordinated communications containing issue advocacy.

2. Case Law Precedent

No federal case has provided specific guidance on whether the regulability of coordinated communications depends on a communication's content.[225] Nonetheless, the policy developed through case law to allow regulating contributions supports the proposition that all coordinated communications are regulable.[226]

First, the *Buckley* Court's policy for regulating coordinated communications indicates the Court's intention to disregard a communication's content in determining its regulability.[227] The Court focused on the risk for "real or apparent corruption" and "attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions."[228] Experience and common sense suggest that the risk of corruption or circumventing FECA arises when a candidate is involved in any aspect of a communication's content or dissemination. This is true in spite of the Court stating this policy interest in light of coordinated express advocacy.[229]

McConnell v. Federal Election Commission later addressed the *Buckley* policy concerns, where multiple opinions indicated that coordination should be used to determine the regulability of communications.[230] The plurality opinion succinctly noted that the distinction between express and issue advocacy "has not aided the legislative effort to combat real or apparent corruption."[231] In effect, that gives the distinction no place in determining the regulability of communications.[232] Justice Kennedy was even more explicit in implicating the corruption potential of contributions themselves.[233] He interpreted *Buckley* to mean that all contributions have a "*quid pro quo* nature . . . pos[ing] *inherent*

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224 *Id.* at 29.

225 O'Keefe v. Chisholm, 769 F. 3d 936, 942 (7th Cir. 2014).

226 Brief Amici Curiae for the Campaign Legal Center & Democracy 21 Supporting Appellants and Urging Reversal, O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014) (No. 14-1822).

227 *See Buckley*, 424 U.S. at 26–28.

228 *Id.* at 46–47.

229 *See supra* notes 57–61 and accompanying text.

230 540 U.S. 93 (2003), *overruled on other grounds by* Citizens United v. FEC, 558 U.S. 310 (2010).

231 *Id.* at 193–94.

232 *Id.*; *see* Brief Amici Curiae for the Campaign Legal Center & Democracy 21 Supporting Appellants and Urging Reversal at 21–23, O'Keefe v. Chisholm, 769 F.3d 936 (7th Cir. 2014) (No. 14-1822).

233 *See McConnell*, 540 U.S. at 298 (Kennedy, J., concurring in the judgment in part and dissenting in part).

corruption potential."[234] Even though Justice Kennedy specifically referenced the corruption potential of large financial contributions,[235] his logic easily extends to the corruption potential of other forms of contributions, like coordinated communications.

A third case, *Citizens United*, condemns the distinction between express and issue advocacy in assessing a communication's regulability.[236] In determining disclosure requirements for electioneering communications under BCRA, the Court refused to draw a line between express advocacy, along with its functional equivalent, and issue advocacy.[237] This refusal was consistent with *Buckley* and *McConnell*'s precedent, which had allowed for disclosure requirements in spite of an impediment on First Amendment rights.[238]

A couple of factors stemming from *Citizens United* suggest that the distinction between express and issue advocacy should be likewise rejected for coordination. First, disclosure requirements are based on an interest in preventing corruption, the same interest as in regulating contributions, like coordination.[239] In addition, one content standard for determining regulable coordinated communications is electioneering communications.[240] Following *Citizens United*, a court could not examine the language of an electioneering communication to determine disclosure requirements, but under BCRA, the other content standards would involve examining the communication's language. There is no sense in the differing treatment of the content standards.

Finally, *Peterson* references two lower court cases worth noting. First, as the dissent points out in *Peterson*, the Seventh Circuit's decision in *Barland II* is not dispositive on the regulability of coordinated issue advocacy, contrary to the majority's contention in *Peterson*.[241] The Wisconsin Supreme Court relied heavily on *Barland II* in contending that issue advocacy "must remain

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234 *Id.* (second emphasis added). This statement reinforces the common-sense notion that coordination's policy concerns are not just related to coordinated express advocacy.

235 *Id.*

236 Citizens United v. FEC, 558 U.S. 310, 369 (2010).

237 *Id.*

238 *See id.*; *McConnell*, 540 U.S. at 193 (refusing to apply the distinction to electioneering communication regulation); Buckley v. Valeo, 424 U.S. 1, 38 (1976) (per curiam) (allowing regulation of contributions).

239 *Buckley*, 424 U.S. at 36, 38.

240 11 C.F.R. § 109.21(c)(1) (2017).

241 State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 273 (Wis. 2015) (Abrahamson, J., concurring in part, dissenting in part).

unencumbered."[242] However, in *Barland II*, the court did not examine *coordinated* speech, but examined the regulability of *independent expenditures*.[243] The distinction is important because after *Buckley*, regulations on independent expenditures are generally not permitted.[244] When independent expenditures were regulated, the court closely considered First Amendment principles to limit the scope of regulable speech.[245] However, with coordinated speech, the government has a stronger, legitimate interest in preventing corruption and its appearance.[246] Therefore, the rationale in *Barland II* of limiting the scope of regulable *independent expenditures* should not be applied to *coordinated* speech.[247] The *Peterson* court's reliance on that case as precedent was inappropriate.

Second, Justice Abrahamson's dissent relied on *FEC v. Christian Coalition*,[248] a D.C. Circuit case, for its interpretation of *Buckley*.[249] The *Christian Coalition* court stated that "[i]mporting the 'express advocacy' standard into [the contribution regulation at issue] would misread *Buckley* and collapse the distinction between contributions and independent expenditures."[250] This would allow the real and perceived corruption that the government has a compelling interest to prevent.[251] The clear connection between contributions, like coordination, and the potential for corruption indicates that coordinated issue advocacy can be, and should be, regulated.[252]

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242 *Id.* at 188 (quoting Wisconsin Right to Life, Inc. v. Barland (Barland II), 751 F.3d 804, 810 (7th Cir. 2014)) (emphasis omitted).

243 *Barland II*, 751 F.3d at 807 ("[T]he complaint alleges that the challenged laws . . . unjustifiably burden the free-speech rights of *independent* political speakers." (emphasis added)).

244 *Buckley*, 424 U.S. at 51.

245 *Barland II*, 751 F.3d at 842.

246 *Buckley*, 424 U.S. at 29.

247 *Peterson*, 866 N.W.2d at 273 (Abrahamson, J., concurring in part, dissenting in part).

248 52 F. Supp. 2d 45 (D.D.C. 1999). Although this case was decided prior to the passage of BCRA and the new regulations defining coordination, very few federal cases have closely examined the definition of coordination, making this case a valuable analytical tool. *See* Smith, *supra* note 8, at 624 (noting that "only one federal district court decision," *Christian Coalition*, "has examined coordination in depth").

249 *Peterson*, 866 N.W.2d at 270–72.

250 *Id.* at 270–71 (quoting *Christian Coalition*, 52 F. Supp. 2d at 88) (modification in original). *Christian Coalition* analyzed multiple factors to determine coordination's regulability, which did not include the type of speech. *See* Smith, *supra* note 8, at 624–25.

251 *Peterson*, 866 N.W.2d at 270–71.

252 *Id.* at 271–72.

IV. PRACTICAL CONCERNS

This final Part explores the importance of regulating coordinated issue advocacy in the Super PAC era and potential fallout if coordinated issue advocacy were regulated. The purpose of regulation is to prevent corruption or its appearance;[253] therefore, it is critical that the regulation serves this intended purpose, and that it does not overstep its bounds. A potential impediment to preventing corruption arises with Super PACs, because legal candidate involvement in unlimited corporate fundraising may limit issue advocacy's importance. Regulation may also be inappropriate in uncontested or noncompetitive elections, or in regulating communication between lobbyists and candidates. This Part alleviates these concerns by demonstrating that regulating coordinated issue advocacy would effectively prevent corruption and the appearance of corruption in appropriate situations.

A. Coordinated Issue Advocacy Has Continued Value in the Super PAC Era

Likely the most significant development in campaign financing post-*Citizens United* is the rise of the Super PAC.[254] *Citizens United* limited the government's interest to only quid pro quo corruption or its appearance.[255] By doing so, it eliminated the government's corruption interest in independent expenditures by corporations because when corporations make independent expenditures, it does "not give rise to . . . the appearance of corruption."[256] The result was the rise of a new form of campaign financing: the Super PAC.[257]

In the most basic sense, Super PACs are entities that cannot coordinate directly with candidates, and as such can spend and accept unlimited funds.[258] Their ability to raise funds in excess of campaign finance limits makes Super PACs valuable to political campaigns.[259] Although Super PACs cannot contribute directly to candidates, they have become more candidate-specific.[260]

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253 Citizens United v. FEC, 558 U.S. 310, 359–60 (2010).

254 Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1481–82 (2015) [hereinafter *Working Together*].

255 *See supra* note 37.

256 *Citizens United*, 558 U.S. at 357; *Working Together*, *supra* note 254, at 1481–82.

257 *Working Together*, *supra* note 254, at 1482.

258 *Id.* Corporations and labor unions are two of the largest contributors to Super PACs, but individuals can independently pool resources to contribute as well. *Id.* at 1485.

259 *Id.* at 1485.

260 *Id.* at 1483–84. As of November 2015, 90% of funding from outside groups like Super PACs to campaigns has come from single candidate financing. Paul Blumenthal, *How Super PACs and Campaigns Are*

Candidates have found methods to legally support their affiliated Super PACs, including soliciting contributions for a Super PAC up to federal limits or providing a Super PAC with donor lists.[261] Although the extensive collaboration between candidates and Super PACs has led to allegations of excessive, illegal coordination,[262] candidates have continued to rely heavily on Super PAC financing into the 2016 presidential campaign.[263]

Super PACs have a significant role in financing campaigns, and candidates have legal avenues to support specific Super PACs.[264] Where does that leave the real-world value of coordinated issue advocacy? Why should the government concern itself with regulating coordinated issue advocacy if Super PACs provide an avenue around campaign finance regulations anyways? The answer to these questions comes from the movement to restrict Super PAC funding for elections and communication with candidates.[265]

Due to concerns with the extent of legal candidate involvement with Super PACs, there have been calls to reform campaign finance law.[266] Proponents of change seek to increase the scope of regulable candidate coordination.[267] Many states regulate coordination more extensively than the federal government, thus restricting the legal communication between a Super PAC and a candidate.[268] Federally, House Bill 5641[269] purports to expand the definition of coordinated expenditures to include payments "not made entirely independently of the candidate."[270] This would include payments "made pursuant to any general or particular understanding, or more than incidental communication."[271] Thus, even tacit approval by a candidate would be enough to trigger regulable coordination.[272] The bill would likely apply to spending by candidate-specific Super PACs due to their explicit connection with a candidate.[273] In addition, the

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Coordinating in 2016, HUFFINGTON POST (Nov. 14, 2015, 9:01 AM), http://www.huffingtonpost.com/entry/super-pac-coordination_56463f85e4b045bf3def0273.

261 Blumenthal, *supra* note 260.

262 *Working Together*, *supra* note 254, at 1486–87.

263 For a discussion on the role of Super PACs in the pre-election period for the 2016 presidential election, see Blumenthal, *supra* note 260.

264 *Working Together*, *supra* note 254, at 1485–86.

265 Ferguson, *supra* note 30, at 488.

266 *Id.* at 492.

267 *Id.*

268 *Id.* at 485–86.

269 H.R. 5641, 113th Cong. (2014).

270 H.R. 5641 § 324(b)(1).

271 *Id.*

272 *See id.*; H.R. 5641 § 324(c)(2)(A).

273 *See Working Together*, *supra* note 254, at 1485–86.

American Anti-Corruption Act is a proposed model legislation for state and federal law that would impose campaign finance regulations on Super PACs, restricting coordination with candidates.[274]

Scholarly commentators have also supported limiting candidate involvement in Super PAC funding.[275] Campaign finance law scholars both traditionally for and against expanding campaign finance regulation have expressed some measure of support for increasing regulation of coordinated fundraising with specific Super PACs.[276] The *Harvard Law Review* proposed a new framework for regulating coordination in the Super PAC era.[277] It consists of a four part regulatory scheme, where candidates may not: (1) attend Super PAC fundraising events, (2) solicit any contributions on behalf of Super PACs, (3) share outside fundraising consultants with Super PACs, or (4) provide supporter lists directly to Super PACs.[278] The scheme would supposedly limit quid pro quo corruption or its appearance, reflecting the rationale for regulating coordination in general.[279]

The crux of these proposed changes to Super PAC regulation is that although Super PACs are an influential cog in the campaign finance machine today, their influence may not last forever. If Super PAC influence were diminished, candidates would look to other forms of financing to avoid regulation and generate comparable financing. Unregulable, coordinated speech such as, potentially, issue advocacy, would become highly attractive to candidates. Candidates engaging in unfettered coordinated issue advocacy would result in the very corruption or appearance of corruption that regulating Super PACs is supposed to prevent. In light of this risk, determining issue advocacy's regulability is an important issue to address now.

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274 Ferguson, *supra* note 30, at 492–93; *It's Time to End Corruption*, AM. ANTI-CORRUPTION ACT, http://anticorruptionact.org (last visited Feb. 22, 2017); *Fight Corruption in America: Stop Political Bribery, End Secret Money, and Fix Our Broken Elections*, AM. ANTI-CORRUPTION ACT, http://anticorruptionact.org/whats-in-the-act/ (last visited Feb. 22, 2017).

275 *See, e.g.*, *Working Together*, *supra* note 254, at 1494.

276 Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 92 (2013); Smith, *supra* note 8, at 635.

277 *Working Together*, *supra* note 254, at 1494.

278 *Id.* at 1495.

279 *Id.* at 1496–97.

B. Regulation of Coordinated Issue Advocacy Is Appropriate in Uncontested or Noncompetitive Elections

Uncontested and noncompetitive elections are becoming a societal norm, caused primarily by intense partisanship divides and the power of incumbency.[280] These elections are especially prevalent in state legislative elections.[281] In 2014, 32.8% of voters in state senate elections and 40.4% of voters in state house elections faced ballots featuring a single candidate, while in contested elections, only 4.9% of Americans lived in districts where a state legislative candidate won by less than 5% of the vote.[282] To an extent, federal elections also follow this trend.[283] The Republican Party did not challenge thirty-seven Democratic house seats, and the Democratic Party left uncontested thirty-two Republican house seats.[284] In 2014, very few contested federal elections were decided by less than 5% of the vote: around 6% of elections for the U.S. House of Representatives and 13% of elections for the U.S. Senate.[285]

Despite running in unopposed or relatively noncompetitive elections, candidates still have an incentive to campaign.[286] The main purpose of all campaign advertisements falls into two categories: increase votes and increase campaign funding.[287] Although the number of votes may not be as important to these candidates, receiving campaign and party funding motivates candidates to create political communications.[288] In a presidential campaign, candidates can increase funding by advertising in noncompetitive states.[289] Similarly, outside organizations like interest groups have a motive to fundraise for candidates supporting their cause, potentially by creating issue advocacy. A candidate would prefer to coordinate these communications with the organization to

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280 Carl Klarner, *Competitiveness in State Legislative Elections: 1972–2014*, BALLOTPEDIA.ORG (May 6, 2015), https://ballotpedia.org/Competitiveness_in_State_Legislative_Elections:_1972-2014.

281 *Id.*

282 *Id.*

283 *Id.*

284 *How to Win 99.6% of the Vote*, THE ECONOMIST (Oct. 25, 2014) [hereinafter *How to Win*], http://www.economist.com/news/united-states/21627661-too-many-members-congress-are-running-unopposed-how-win-996-vote.

285 Klarner, *supra* note 280.

286 Carly Urban & Sarah Niebler, *Dollars on the Sidewalk: Should U.S. Presidential Candidates Advertise in Uncontested States?*, 58 AM. J. POL. SCI. 322, 322 (2014).

287 *Id.*

288 *How to Win*, *supra* note 284. Representative Mike Capuano, running unopposed for a Congressional seat that he has held since 1998, raised $628,000 for his campaign. He used the money to fund other Democratic campaigns and held onto enough money "to dissuade potential opponents." *Id.*

289 Urban & Niebler, *supra* note 286, at 334.

ensure that the communications reflect positively on the candidate's policies and potentially increase the candidate's campaign donations.[290]

On its face, regulating coordinated issue advocacy in uncontested or noncompetitive elections may appear unnecessary. A candidate gains no significant advantage in votes over a nonexistent or nonthreatening opponent by coordinating public communications.[291] Also, candidate security in her representative status may indicate public satisfaction with the candidate's work. Therefore, the public may be less concerned with corruption of its politician, decreasing the government's interest in the appearance of corruption.

That being said, even when a candidate is guaranteed to win, the government's interest in preventing corruption or its appearance overcomes First Amendment rights to permit regulating coordinated issue advocacy. Regardless of an election's competitiveness, issue advocacy has value to candidates,[292] and coordination creates a connection to the organization. In a sense, coordination in these elections may raise an even greater specter of corruption. Knowing a candidate is guaranteed to hold office creates an incentive for organizations to assist the candidate through advertising because the candidate will have power to implement favorable policies for the organization. Therefore, the same corruption risk that arises in any other election with coordinated communications arises in uncontested or noncompetitive elections.

Even if the government's interest in preventing corruption were not as strong in uncontested or noncompetitive elections, permitting regulation of coordinated issue advocacy would not significantly burden the First Amendment rights of candidates or outside organizations.[293] Regarding candidates in these elections, many, if not all, would not take advantage of potential issue advocacy in advertising.[294] Ever since the George W. Bush presidential campaign in 2000, presidential candidates have not been advertising in noncompetitive states,

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290 *See* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 464 (2001); Buckley v. Valeo, 424 U.S. 1, 47 (1976) (per curiam) (acknowledging the risks inherent in independent spending by outside organizations by stating that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove *counterproductive*," because an "absence of prearrangement and coordination . . . undermines the value of the expenditure to the candidate" (emphasis added)).

291 *See How to Win*, *supra* note 284 (noting that a candidate secure in his position in Congress did not spend the majority of the campaign's funding on advertising).

292 *See supra* Part III.B.

293 *Cf.* Urban & Niebler, *supra* note 286, at 334 (noting that presidential candidates have not spent in noncompetitive states in recent years).

294 *Id.*

despite the power of advertising in fundraising.[295] Regarding outside organizations, regulating coordinated issue advocacy would not significantly alter advertising decisions. Even if a candidate would not or could not coordinate in creating an advertisement, outside organizations have independent interests, beyond specific candidates, motivating them to advertise.[296] For example, although political candidates have not spent money to advertise in noncompetitive states,[297] interest groups have continued to advertise independently of the candidates.[298] Therefore, even if the government's interest in preventing corruption is not as strong, regulating coordinated issue advocacy in uncontested or noncompetitive elections is unlikely to have a significant effect on exercising First Amendment rights, further supporting regulation in these elections.

C. Lobbying Efforts Would Survive Regulation of Coordinated Issue Advocacy

Lobbying has become an influential aspect of the American political system.[299] Lobbyists serve three essential functions: (1) fundraising through campaign donations, (2) mobilizing voters, and (3) increasing the quality of information available to politicians when making official decisions.[300] Individuals and groups with expertise in a field requiring legislation can provide information to politicians, who cannot be experts in all fields.[301]

However, due to the close communication between politicians and lobbyists, there is a concern with politicians being corrupted by lobbyists.[302] The corruption concern arises when lobbyists contribute to candidates without disclosing the contributions.[303] The Honest Leadership and Open Government Act of 2007[304] (HLOGA) banned "gifts," such as gratuities and favors, from

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295 *Id.*

296 *Cf. id.* at 334 n.45 (noting that interest groups spend money to advertise in non-competitive states).

297 *See id.* at 334.

298 *Id.* at 334 n.45.

299 Angela Lynne Davis, *Genuine Reform or Just Another Meager Attempt to Regulate Lobbyists: A Critique of the Honest Leadership and Open Government Act of 2007*, 18 KAN. J.L. & PUB. POL'Y 340, 343 (2009).

300 G. RICHARD SHELL, MAKE THE RULES OR YOUR RIVALS WILL 37–42 (2004); *see also* Gajan Retnasaba, *Do Campaign Contributions and Lobbying Corrupt? Evidence from Public Finance*, 2 J.L. ECON. & POL'Y 145, 164 (2006). Many politicians consider the most important function of these three to be increasing information. SHELL, *supra*, at 40–41 (quoting former Senator Ned Pattison as saying that the most helpful lobbyists "brought technical information . . . that would enable [him] to understand the issues" behind a bill).

301 SHELL, *supra* note 300, at 40–41; Retnasaba, *supra* note 300, at 164.

302 *See* Davis, *supra* note 299, at 350; Retnasaba, *supra* note 300, at 164.

303 *See* Davis, *supra* note 299, at 350.

304 Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735.

lobbyists to politicians,[305] but lobbyists can still contribute and donate to interest groups supporting politicians.[306]

Lobbying regulation is based on a concern with perceived or actual corruption,[307] as is coordination of issue advocacy.[308] Thus, regulating coordinated issue advocacy may also affect lobbying efforts. For example, assume an organization engaged in lobbying is working with a senator to encourage a bill's passage. The lobbyist wants to run an advertisement supporting the issue behind the bill, but the lobbyist has discussed the issue with the politician. Would this communication be subject to the campaign finance regulation of coordinated issue advocacy?

Even though this scenario presents the same potential for corruption that HLOGA, other lobbying reform acts,[309] and FECA have attempted to curtail, imposing regulation of issue advocacy would not necessarily imperil lobbying activities. The important distinction between coordinated issue advocacy under FECA and in lobbying is that lobbying occurs when a politician is already in office, not during the campaign process.[310] FECA regulations would only apply during an election campaign.[311] Therefore, even if a lobbyist cannot coordinate with a candidate to run advertisements containing issue advocacy while the candidate is running for office, once elected, the lobbyist should be able to coordinate issue advocacy up to the limits mandated by lobbying regulations.

Regulating coordinated issue advocacy would impact certain lobbyist communications while an incumbent campaigns for reelection, because at that point, the communications would be regulated by FECA.[312] However, regulation would not mean that the lobbyist could not create a coordinated communication; the communication would simply be subject to FECA's disclosure requirements and spending limits. Due to the potential for quid pro quo corruption or its appearance present in both lobbying and coordination,[313] there is a very strong government interest in regulating lobbyist interactions with politicians during

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305 Davis, *supra* note 299, at 359.
306 *Id.* at 361.
307 *See id.* at 350; Retnasaba, *supra* note 300, at 164.
308 Buckley v. Valeo, 424 U.S. 1, 26–28 (1976) (per curiam).
309 For a discussion of various lobbying reform acts, see Davis, *supra* note 299, at 344–48.
310 *See supra* text accompanying note 34.
311 *See supra* text accompanying note 34.
312 *See supra* text accompanying note 34.
313 *Buckley*, 424 U.S. at 26–28; Retnasaba, *supra* note 300, at 164.

elections.[314] This government interest should justify any impediment on the First Amendment rights of a lobbyist and candidate during an election.[315] Therefore, regulating coordinated issue advocacy would not normally affect politician–lobbyist interactions, and when it does, the government interest in preventing corruption and its appearance justifies regulation.

CONCLUSION

Campaign finance regulation continues to be a contentious area of law. Balancing the constitutionally protected rights of freedom of speech and association with the government's interest in preventing actual or perceived corruption is a struggle unlikely to end anytime soon. Coordination between candidates and outside organizations raises an important consideration, because preventing communication with candidates inhibits First Amendment rights. However, the blatant appearance of corruption, if not actual corruptive influence, should be sufficient to justify regulating coordinated issue advocacy.

Although it is arguable that the bifurcation between express and issue advocacy should determine a communication's regulability, this contention is without merit. Whether a communication expressly mentions a candidate or simply mentions the issues that the candidate supports, it nonetheless becomes associated with the candidate. Common sense suggests that if a candidate is involved at all, the candidate values the communication. In the eyes of a skeptical public, that is enough to raise, at the least, the appearance of corruption.

An artificial divide in regulability based on a communication's language is inconsistent with other areas of law. Bribery and anti-gratuity laws are based on the same policy interest in preventing corruption as regulation of contributions. Yet the former do not have standards to invoke regulation that specify the content of a bribe or purpose of a contribution—giving or receiving anything of value is enough. Following these laws is the appropriate path.

Underlying the understanding of campaign finance law is an intense partisanship split.[316] *Peterson* was a 4–2 decision split along party lines.[317]

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[314] *See supra* note 305 and accompanying text (discussing lobbying regulation regarding gifts or favors to politicians).

[315] *See supra* Part IV.B.

[316] Smith, *supra* note 8, at 619 ("[*Buckley*] has been criticized from the political right and from the political left.").

[317] *See* Monica Davey, *Scott Walker 2012 Campaign Inquiry Ended by Wisconsin Court*, N.Y. TIMES (July 16, 2015), https://www.nytimes.com/2015/07/17/us/wisconsin-court-to-rule-on-inquiry-involving-scott-

Justice Gableman's majority opinion focused on First Amendment rights to deny regulation, a traditionally conservative focus.[318] Meanwhile, Justice Abrahamson's dissent reflects a more liberal attitude, going so far as to claim that the conservative majority had determined "to reach its desired result by whatever means necessary."[319] Justice Abrahamson was concerned with a loss of integrity in campaign finance regulations from this decision.[320] If "[u]ntold millions of dollars in undisclosed contributions could be funneled into a 501(c) nonprofit entity that purchases issue ads written or approved by a candidate or the candidate's campaign manager," contribution limits would be "porous" and disclosure requirements would be "useless."[321]

The ultimate effect of Wisconsin Supreme Court's holding in *Peterson*, and whether any other jurisdictions will follow its lead, remains to be seen. The political scene in the state remains contentious, with those lauding the decision's emphasis on protecting free speech[322] contrasted with those fundamentally concerned about this decision ending all campaign finance regulation.[323] In response to the case, Governor Walker signed legislation prohibiting use of a John Doe investigation to look into misconduct in office and bribery of public officials, among other matters.[324] These and other actions by the state

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walkers-2012-campaign.html. Interestingly, *Peterson* became especially politically charged because the investigation focused on conservative groups. *See John Doe*, *supra* note 94. As a result of this conduct, the John Doe investigation became framed as an attack on the free speech rights of conservatives. *Id.* (describing how Wisconsin's "Republicans have denounced the second John Doe investigation into Walker and his allies as a political witch hunt"). WCFG president Eric O'Keefe characterized the John Doe investigation as "a politically motivated attack and a criminal investigation in search of a theory." *The Latest: Walker Applauds Those Who Fought Investigation*, WASH. TIMES (Oct. 3, 2016), http://www.washingtontimes.com/news/2016/oct/3/the-latest-walker-silent-on-supreme-court-victory/. Therefore, along with the expected partisanship influence, the desire to protect Republican ideals from perceived attack by Democrats may have affected the *Peterson* decision.

318 *See* State *ex rel.* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165, 178 (Wis. 2015).

319 *Id.* at 254 (Abrahamson, J., concurring in part, dissenting in part).

320 *Id.* at 261 (quoting O'Keefe v. Chisholm, 769 F.3d 936, 941 (7th Cir. 2014)).

321 *Id.*

322 *See, e.g.*, Deborah Jordahl, *Free Speech Is on the Line in Wisconsin*, WISCONSINJOHNDOE.COM (Oct. 21, 2015), http://wisconsinjohndoe.com/2015/10/21/free-speech-is-on-the-line-in-wisconsin/; John Stossel, *Wisconsin's Shame: How Free Is Free Speech in America?*, FOX NEWS (Oct. 21, 2015), http://www.foxnews.com/opinion/2015/10/21/wisconsins-shame-how-free-is-free-speech.html.

323 *See, e.g.*, Matthew DeFour, *Federal Judge's Ruling on Evidence Could Fuel John Doe Appeal to U.S. Supreme Court*, WIS. ST. J. (Dec. 29, 2015), http://host.madison.com/wsj/news/local/govt-and-politics/federal-judge-s-ruling-on-evidence-could-fuel-john-doe/article_7c60ccf2-18fa-5fdc-ac62-b1bad9075075.html (describing critics' responses to the *Peterson* decision); Brendan Fischer, *Five Things to Know About the Scott Walker John Doe Ruling*, CTR. FOR MEDIA & DEMOCRACY (July 16, 2015, 5:57 PM), http://www.prwatch.org/news/2015/07/12887/five-things-know-about-scott-walker-john-doe-ruling (stating that the supreme court's ruling "guts Wisconsin campaign finance law").

324 Patrick Marley, *Scott Walker Signs Bill Limiting Doe Probes as Records Are Released*, MILWAUKEE WIS. J. SENTINEL (Oct. 23, 2015), http://archive.jsonline.com/news/statepolitics/scott-walker-signs-bill-

legislature[325] and government had led to strong calls for the Supreme Court to grant certiorari on the case,[326] which was denied on October 3, 2016.[327]

The partisanship split, along with a lack of Supreme Court guidance, make the future of this area of law unclear. The difference in perspectives may mean that other states with conservative leaning governments may be open to construing their state statutes similarly to Wisconsin.[328] This Comment expresses hope that state legislators and judges look to both the letter and policy of the law, and not just ideologies, before making such influential decisions. Candidates for political office must be accountable to the voters, and they cannot use issue advocacy to avoid this critical obligation.

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limiting-john-doe-b99602429z1-336367161.html. Interestingly, in the Wisconsin Senate and Assembly, all Republicans voted to support the bill and all Democrats opposed it. *John Doe*, *supra* note 94.

325 The Wisconsin Legislature had also proposed a bill that would have, in essence, codified the *Peterson* decision. *See* A.B. 605, 2015 Assemb., 102d Sess. (Wis. 2015). The bill would have amended the text of Wisconsin's campaign finance regulation statute to read that acts made for "a political purpose" include "[t]he making of a communication *in reference to a clearly identified candidate* that expressly advocates the election, defeat, recall, or retention of *that* candidate *and that clearly relates to that candidate's campaign*." *Id.* (amended portions in italics). The bill failed to pass pursuant to Senate Joint Resolution 1 on April 13, 2016. State of Wisconsin Assembly Journal, 2016 Assemb., 102d (Wis. 2016). The definition of "political purposes" has since been removed from the Wisconsin Statute. *See* WIS. STAT. § 11.0101 (2017).

326 DeFour, *supra* note 323. Furthermore, there were allegations that "two conservative justices refused to recuse themselves despite having received outside support from the Wisconsin Club for Growth during their own previous judicial elections," which may have led to an unfair trial. Miller, *supra* note 168; *see also* Pilkington et al., *supra* note 89. One commentator had hypothesized that, following the death of Justice Scalia, the recusal issue may have been a more likely reason for the Court to grant certiorari than whether issue advocacy is regulable, as the campaign finance issue may have resulted in a 4–4 split. Rick Hasen, *WI John Doe Cert. Petition Raises Substantial Questions, but #SCOTUS May Not Bite*, ELECTION L. BLOG (Apr. 29, 2016, 8:08 AM), http://electionlawblog.org/?p=82420.

327 Scott Bauer, *Supreme Court Rejects Bid to Reopen Walker Campaign Probe*, U.S. NEWS & WORLD REP. (Oct. 3, 2016, 3:11 PM), http://www.usnews.com/news/politics/articles/2016-10-03/supreme-court-rejects-to-reopen-gov-walker-investigation.

328 For a further discussion of partisanship in decisions of state supreme court justices today, see generally Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship Between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. S161 (2015).

* Articles Editor, *Emory Law Journal*; J.D., Emory University School of Law (2017); A.B., Ripon College (2014). I owe immense gratitude to Professor Michael Kang for teaching me election law from the ground up when I came to him with a case and an idea. Thank you to Nathan North, Molly Haren, and the rest of the *Emory Law Journal* editors and staff for their diligent work in shaping this Comment for publication. I especially thank my father, Paul, who represented the Wisconsin Government Accountability Board in filing an amicus brief in *Chisholm*. He told me even before I started law school that this case was going to make a great Comment topic; I am glad I listened to you, Dad. I also want to thank my mom, Cheryl, and my sister, Kimmy, for always inspiring me to be more creative.