

# HOW BIG MONEY RUINED PUBLIC LIFE IN WISCONSIN

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## ABSTRACT

This Article discusses how Wisconsin fell from grace. Once a model good government state that pioneered many democracy-enhancing laws, in a very short time, Wisconsin became a state where special interest money, most of which is undisclosed, dominates politics. This Article identifies several factors as being critical to Wisconsin's descent. These include the state's failure to nurture and build on the campaign finance reforms enacted in the 1970s and both the state's and the United States Supreme Court's failure to adequately regulate sham issue ads. As evidence of Wisconsin's diminished status, this Article describes how several of the state's most progressive laws have been undermined and how each of the three branches of the state's government has been beset by scandal related to the increased importance of special interest money. Finally, this Article suggests that major change will come about only in the long term; such change will require both new campaign finance reforms and a shift in approach by the United States Supreme Court.

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### I. THE CAMPAIGN FINANCE REFORMS ENACTED IN THE 1970S WORKED

From the standpoint of good government, Wisconsin was once a model state, often in the forefront of governmental reform. During the era of Fighting Bob LaFollette, Wisconsin pioneered a range of innovative democracy-enhancing measures, including referendum, recall, direct election of United States senators, and campaign finance reform legislation.<sup>1</sup> In 1905, the Wisconsin legislature banned corporations from

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making financial contributions to political candidates.<sup>2</sup> And in 1911, fourteen years prior to the federal government, the Wisconsin legislature passed a Corrupt Practices Act.<sup>3</sup> The Act was a sweeping reform that barred political candidates from trading favors for contributions and also required candidates to report the sources of their campaign funding.<sup>4</sup>

By the early 1970s, the need for additional campaign finance reform legislation became apparent.<sup>5</sup> A reform movement commenced,<sup>6</sup> fueled principally by the ideas of John Gardner's fledgling national organization, Common Cause.<sup>7</sup> When news of the Watergate scandal<sup>8</sup> broke, the campaign finance reform effort gained traction.<sup>9</sup>

Beginning in 1973, over a period of four years, the Wisconsin legislature enacted comprehensive campaign finance reform legislation.<sup>10</sup> The reforms were based on the following principles: (1) all political spending had to go through committees registered with the newly created bi-partisan Elections Board, which was responsible for administering the law; (2) contributions to candidate committees, political party committees, and political action committees ("PACs") had to be fully disclosed to the public, as did expenditures for political purposes; (3) individuals and committees were subject to contribution limits; and (4) a system of partial public financing of campaigns was created with spending limits for participating candidates.<sup>11</sup>

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<sup>1</sup> SUZANNE NOVAK & SHEEMA SHAH, BRENNAN CTR. FOR JUSTICE, CAMPAIGN FINANCE IN WISCONSIN 2 (2007), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_48578.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48578.pdf).

<sup>2</sup> WIS. LEGIS. REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2001–2002 894 (2001).

<sup>3</sup> Corrupt Practices Act, 1911 Wis. Sess. Laws 883.

<sup>4</sup> CAROLE J. HYNEK, WIS. LEGIS. REFERENCE BUREAU, WISCONSIN BRIEF 01-9, CAMPAIGN FINANCING IN WISCONSIN 1 (2001), <http://lrbdigital.legis.wisconsin.gov/cdm/singleitem/collection/p16831coll2/id/1079/rec/4>.

<sup>5</sup> *See id.* at 1–2.

<sup>6</sup> *See id.*

<sup>7</sup> *See* Rebecca Curry, *Making Law with Lawsuits: Understanding Judicial Review in Campaign Finance Policy*, 46 SUFFOLK U. L. REV. 389, 403–04 (2013).

<sup>8</sup> “In May 1972, as evidence would later show, members of Nixon’s Committee to Re-Elect the President (known derisively as CREEP) broke into the Democratic National Committee’s Watergate headquarters, stole copies of top-secret documents and bugged the office’s phones.” *Watergate Scandal*, HISTORY.COM (2009), <http://www.history.com/topics/watergate>.

<sup>9</sup> *See generally* Gail Shea, *Musings on the Arc of Campaign Finance Reform 2* (n.d.) (unpublished paper) (on file with author).

<sup>10</sup> *See* Act of Oct. 20, 1977, ch. 107, § 44, 1977 Wis. Sess. Law 595, *repealed by* 2011 Wisconsin Act 32, § 13vb, 2011 Wis. Sess. Laws 139; Act of July 6, 1974, ch. 334, § 34, 1973 Wis. Sess. Laws 1057, *repealed and replaced by* 2015 Wisconsin Act 117, § 24, 2015 Wis. Sess. Laws 836.

<sup>11</sup> *See* Act of Oct. 20, 1977, ch. 107, § 44 (creating partial public financing for political campaigns); Act of July 6, 1974, ch. 334, § 34.

The purpose of the legislation was to limit the influence of money in electoral politics. The rationale was that the more candidates had to worry about raising large amounts of money to secure an election, the more likely the decisions they made once in office would be influenced by the sources of their financial support as opposed to the public interest. As the statute's declaration of policy stated: "When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence."<sup>12</sup>

The same concern served as the basis for the statute's public funding provisions. The notion was that if candidates could fund their campaigns through a combination of small contributions and public grants, they would be less likely to be beholden to private interests while in office.<sup>13</sup> The Wisconsin legislature thus recognized that in a democratic society, a systemic tension exists between the interests of the majority and the interests of the rich and powerful. The question was how to create a healthy balance between these interests; on one hand, the power of the majority could be used unfairly against those with substantial financial resources. On the other hand, the wealthy could use their money to dominate governmental decision-making.<sup>14</sup> Therefore, creating strong, democratic institutions was necessary to balance these competing interests. Campaign finance regulation was thought to be one such institution.<sup>15</sup>

The public funding dimension of the reform legislation was designed to conform to the Supreme Court's decision in *Buckley v. Valeo* in which the Court held that a state legislature could impose spending limits on a political campaign only if it made public funding available and the candidate accepted such funding.<sup>16</sup> Thus, the legislature created the Wisconsin Elections Campaign Fund ("WECF") to provide public funding for candidates running for almost all state offices in contested general elections.<sup>17</sup> To be eligible for a public grant, a candidate had to raise a threshold amount in contributions of \$100 or less and receive at least 6% of the vote in the primary election.<sup>18</sup> Like the system used to finance presidential general election campaigns, the WECF funds were generated through a checkoff on income tax returns; individual taxpayers could indicate that \$1 of their tax liability be directed to the WECF.<sup>19</sup>

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<sup>12</sup> WIS. STAT. § 11.001 (2002).

<sup>13</sup> WIS. STAT. § 11.01 (2014); PAUL ONSAGER, WIS. LEGIS. FISCAL BUREAU, INFORMATIONAL PAPER 1, PUBLIC FINANCING OF CAMPAIGNS IN WISCONSIN 2 (2009), [http://legis.wisconsin.gov/lfb/publications/informational-papers/documents/2009/95\\_public%20financing%20of%20campaigns%20in%20wi\\_po.pdf](http://legis.wisconsin.gov/lfb/publications/informational-papers/documents/2009/95_public%20financing%20of%20campaigns%20in%20wi_po.pdf).

<sup>14</sup> *See id.*

<sup>15</sup> Shea, *supra* note 9, at 1.

<sup>16</sup> *Buckley v. Valeo*, 424 U.S. 1, 99 (1976).

<sup>17</sup> 1977 Wis. Sess. Laws at 595.

<sup>18</sup> WIS. STAT. § 11.50 (2010); Kenneth R. Mayer & John M. Wood, *The Impact of Public Financing on Electoral Competitiveness: Evidence from Wisconsin, 1964–1990*, 20 LEGIS. STUD. Q. 69, 72 (1995).

<sup>19</sup> 1977 Wis. Sess. Laws at 599; Mayer & Wood, *supra* note 18, at 83.

Candidates could obtain funds from the WECF equal to 45% of the spending limit for the office they sought.<sup>20</sup> Because the purpose of public funding was to reduce candidate dependence on special interest contributions, the public grant was reduced by a dollar for every dollar of PAC money a candidate accepted.<sup>21</sup> To encourage candidates to accept public funding, a candidate whose opponent declined public funding was not required to abide by the statutory spending limits.<sup>22</sup> Later, for the same reason, the Wisconsin legislature added a provision that authorized a candidate facing a non-participating opponent to receive the non-participating opponent's public grant.<sup>23</sup>

In addition to making it less likely that substantive issues such as education, healthcare, and taxation would not be excessively influenced by moneyed interests, public funding provided other benefits. For example, it helped ensure that citizens with limited means could run for public office. Public funding also enabled elected officials to spend more time focusing on substantive issues.<sup>24</sup> Ultimately, however, the main purpose of providing public funding to candidates was to reduce the nexus between access to wealth and electoral success. As former Arizona governor Janet Napolitano once explained, her executive order creating a discount prescription drug program was directly connected to Arizona's public funding system in that public funding made her less concerned about the financial power of the pharmaceutical industry.<sup>25</sup>

For approximately a dozen years, Wisconsin's campaign finance reform legislation worked well. About 20% of Wisconsin taxpayers participated in the income tax checkoff. As a result, the WECF had enough money to provide all participating candidates with the full public grant of 45% of the spending limit.<sup>26</sup> Further, approximately three-fourths of all candidates participated in the public funding system.<sup>27</sup> This large-scale participation had a significant effect on overall campaign spending.

The increase in campaign spending was much smaller in Wisconsin in the post-reform years than it was in other states.<sup>28</sup> Between 1978 and 1990, the average spending by Wisconsin incumbents rose by a little more than 120% in senate races.<sup>29</sup> Comparatively, in roughly the same period, spending in senate races rose in California by 286%, in Oregon by 379%, and in Nebraska by 308%.<sup>30</sup> Also, the gap between incumbent and challenger spending remained relatively narrow, with Wisconsin

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<sup>20</sup> 1977 Wis. Sess. Laws at 598; Mayer & Wood, *supra* note 18, at 73.

<sup>21</sup> WIS. STAT. § 11.509 (2010).

<sup>22</sup> *Id.* § 11.512.

<sup>23</sup> *Id.* § 11.509; 2002 Wis. Sess. Laws 1022.

<sup>24</sup> NOVAK & SHAH, *supra* note 1, at 4.

<sup>25</sup> *Id.* at 6.

<sup>26</sup> Mayer & Wood, *supra* note 18, at 79–80.

<sup>27</sup> NOVAK & SHAH, *supra* note 1, at 14.

<sup>28</sup> Mayer & Wood, *supra* note 18, at 73.

<sup>29</sup> NOVAK & SHAH, *supra* note 1, at 14.

<sup>30</sup> Mayer & Wood, *supra* note 18, at 79–80.

challengers spending 70% to 80% of what incumbents spent, a far better record than in other states.<sup>31</sup>

Additionally, the Wisconsin campaign finance reform legislation effectively limited the role of special interest groups. In 1990, for example, PAC contributions constituted only 13.5% of the total amount raised in legislative campaigns.<sup>32</sup> In contrast, in other states, such as Michigan and Oregon, interest groups accounted for between 60% and 75% of legislative campaign contributions.<sup>33</sup>

The other features of the legislation also worked well. The disclosure provision required candidates to disclose all “contributions in excess of \$20, including the occupation and employer of any contributor whose cumulative contributions for the calendar year exceeded \$100.”<sup>34</sup> And while contribution limits for some elected offices were relatively high, the Wisconsin legislature limited individual and PAC contributions to \$500 for state assembly candidates and \$1000 for senate candidates.<sup>35</sup>

Further, leaders of both the Republican and Democratic parties appointed individuals to the Elections Board who were committed to fair and nonpartisan enforcement of the law.<sup>36</sup> Thus, Wisconsin’s campaign finance reform legislation succeeded in limiting the influence of special interest money in electoral politics. The system created by the reform legislation also developed considerable bipartisan support.<sup>37</sup> Not incidentally, the years in which the system flourished were among the most productive in state history; the Wisconsin legislature enacted important legislation concerning a broad range of subjects.<sup>38</sup>

Therefore, the first lesson learned from Wisconsin’s experience is that campaign finance reform legislation can work and accomplish its intended purposes. As discussed, the law worked well and political actors and the press paid close attention to it. Questionable conduct was brought to the attention of the Elections Board, and the public was kept well-informed about campaign finance issues. Some commentators cynically observe that campaign finance reform legislation must inevitably fail because money will always find a way to influence politics.<sup>39</sup> Yet

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> NOVAK & SHAH, *supra* note 1, at 7; *see* WIS. STAT. § 11.06 (2010).

<sup>35</sup> Novak & Shah, *supra* note 1, at 7.

<sup>36</sup> *See id.* at 15.

<sup>37</sup> Shea, *supra* note 9, at 2.

<sup>38</sup> *See* 1983 Wis. Sess. Laws 725 (automobile lemon law); *id.* at 1153 (a groundbreaking marital property law); 1981 Wis. Sess. Laws 643 (creation of a Citizens Utility Board); *id.* at 901 (protection of gays and lesbians from discrimination in employment, housing and public accommodation); *id.* at 1378 (substantial revisions to the state fair employment law); *id.* at 1387 (an open records law); 1977 Wis. Sess. Laws 412 (creation of the Public Defender’s Office); *id.* at 567 (no fault divorce law); *id.* at 728 (creating a uniform classification system of criminal offenses, including decriminalizing several offenses); *id.* at 1216 (lobbying reform); 1973 Wis. Sess. Laws 186 (laws regarding a code of ethics for public officials).

<sup>39</sup> Steve Gillman, *Why Bother with Campaign Finance Reform?*, HUFFPOST: THE BLOG (Dec. 23, 2012 11:19 AM), [http://www.huffingtonpost.com/steve-gillman/campaign-finance-reform\\_b\\_2001074.html](http://www.huffingtonpost.com/steve-gillman/campaign-finance-reform_b_2001074.html).

Wisconsin's experience, as well as the experiences of many other jurisdictions, such as New York City, demonstrates that a well-constructed system can produce good results.<sup>40</sup>

## II. BUT WISCONSIN FAILED TO NURTURE THE REFORMS

In the late 1980s and thereafter, Wisconsin's positive experience with campaign finance reform began to change. Partisanship intensified, and Elections Board appointees focused more on protecting their party's candidates than the public interest.<sup>41</sup> Even worse, Board members began to collude to thwart enforcement of the law. For example, the Board stopped conducting random audits of campaign finance reports and refused to require campaign committees to reconcile their financial reports with bank statements.<sup>42</sup> Without these checks on the veracity of campaign finance reports, public disclosure essentially became voluntary. The Board also precluded its staff from investigating complaints of law violations. In one instance, the Board squashed a complaint against a committee claiming to be an independent entity making lawful expenditures when that committee was actually a county political party.<sup>43</sup>

The Wisconsin legislature also weakened contribution limits applicable to party committees and PACs by allowing them to set up "conduits" that enabled them to report interest group contributions as if they were from individuals.<sup>44</sup> In addition, the legislature approved the establishment of leadership PACs, known as legislative campaign committees. These committees quickly became vehicles for raising large sums of special interest money.<sup>45</sup>

The legislature's most serious error was its failure to support public funding. It did not promote or increase the \$1 income tax checkoff, and it did not designate another source of public funding.<sup>46</sup> As a result, the money in the WECF diminished, and the

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<sup>40</sup> See ELISABETH GENN ET AL., BRENNAN CTR. FOR JUSTICE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 6, 16 (2012), [http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport\\_WEB.PDF](http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF) (describing the New York City small donor program); SUZANNE NOVAK & PAIGE AMMONS, BRENNAN CTR. FOR JUSTICE, CAMPAIGN FINANCE IN MINNESOTA 4, 7 (2007), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_48578.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48578.pdf) [hereinafter CAMPAIGN FINANCE IN MINNESOTA]; SUZANNE NOVAK & LAUREN JONES, BRENNAN CTR. FOR JUSTICE, CAMPAIGN FINANCE IN MICHIGAN 4, 7 (2007), [http://www.mcfn.org/pdfs/reports/Brennan\\_MI\\_48220.pdf](http://www.mcfn.org/pdfs/reports/Brennan_MI_48220.pdf) [hereinafter CAMPAIGN FINANCE IN MICHIGAN]; SUZANNE NOVAK, MANEESH SHARMA & BETHAN FOSTER, BRENNAN CTR. FOR JUSTICE, CAMPAIGN FINANCE IN OHIO 4 (2007), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_48229.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48229.pdf) [hereinafter CAMPAIGN FINANCE IN OHIO].

<sup>41</sup> See Shea, *supra* note 9, at 2.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See WIS. STAT. § 11.38 (2010); Shea, *supra* note 9, at 2.

<sup>45</sup> Shea, *supra* note 9, at 2.

<sup>46</sup> WIS. LEGIS. FISCAL BUREAU, DEMOCRACY TRUST FUND (GOVERNMENT ACCOUNTABILITY BOARD, GENERAL FUND TAXES, MISCELLANEOUS APPROPRIATIONS, AND STATE TREASURER) 4 (2011),

public grants available to candidates had to be pro-rated.<sup>47</sup> The Wisconsin legislature also declined to increase spending limits to keep pace with inflation.<sup>48</sup>

For public funding to work, spending limits must be high enough for candidates to realistically compete for the office they seek. Otherwise, candidates will not participate in the public funding system. By 2004, the average amount spent by state senate candidates in Wisconsin was \$93,000.<sup>49</sup> This amount was more than two and a half times the spending limit, and few candidates participated in public funding.<sup>50</sup> In contrast, Minnesota enacted a campaign finance system mirroring Wisconsin's, but Minnesota's system increased the income tax checkoff to \$5, gave taxpayers a partisan option, and authorized the use of general fund revenue to supplement checkoff proceeds.<sup>51</sup> Minnesota's ongoing efforts to make its public funding system work succeeded in many respects, and to this day the system enjoys a high rate of candidate participation.<sup>52</sup>

But why did the Democrats, who had enacted the reforms and had been in the majority ever since, let the system atrophy? To some extent, it was a case of state legislators putting what they believed was in their personal interest ahead of any loyalty they may have had to campaign finance reform.<sup>53</sup> One legislator, for example, who was contemplating running for governor, thought that keeping spending limits low would benefit him.<sup>54</sup> Other legislators declined to support public funding because it attracted opponents who otherwise would not have run for public office.<sup>55</sup> And others wanted to present themselves as fiscal conservatives unwilling to spend tax dollars on political campaigns.<sup>56</sup>

Many Democratic legislators, however, just became too comfortable raising money from special interest groups, particularly business interests.<sup>57</sup> They failed to recognize that competing with Republicans for business campaign contributions was a game they were ultimately going to lose. Similarly, they failed to perceive that by

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[https://docs.legis.wisconsin.gov/misc/lfb/budget/2011\\_13\\_biennial\\_budget/102\\_budget\\_paper\\_s/331\\_government\\_accountability\\_board\\_democracy\\_trust\\_fund.pdf](https://docs.legis.wisconsin.gov/misc/lfb/budget/2011_13_biennial_budget/102_budget_paper_s/331_government_accountability_board_democracy_trust_fund.pdf).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> WIS. STAT. § 11.31 (2004); Kenneth R. Mayer, *Wisconsin Campaign Finance Project* (2007), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=hdl:1902.1/10439> (showing that the spending limit in 2004 was \$34,500 for both the primary and general election).

<sup>50</sup> Mayer, *supra* note 49.

<sup>51</sup> CAMPAIGN FINANCE IN MINNESOTA, *supra* note 40, at 14.

<sup>52</sup> *Id.* at 17.

<sup>53</sup> Doug Mell, *Around the Limit? Governor's Spending May Test Election Law*, WIS. ST. J., May, 20, 1990, 1990 WLMR 3085100.

<sup>54</sup> *Id.*

<sup>55</sup> HERBERT ALEXANDER, REFORM AND REALITY: THE FINANCING OF STATE AND LOCAL CAMPAIGNS 46 (1991).

<sup>56</sup> *Pocan and Risser Tout Public Funding Plan*, WIS. ST. J., Mar. 21, 2001, 2001 WLNR 8783934.

<sup>57</sup> Shea, *supra* note 9, at 3.

making special interest money less important, campaign finance reform was in their party's long-term interest.

Traditionally, the Democratic Party's main strength has been its connection to large numbers of people, primarily low- and middle-income wage earners. In the late 1980s, however, Wisconsin Democrats did little to draw on this strength.<sup>58</sup> Instead, they relied heavily on money provided by business interests<sup>59</sup> and failed to nurture the campaign finance reforms of the 1970s. Their success at playing the money game was short-lived, and a few years later, the Republicans won big majorities in both houses of the Wisconsin legislature.<sup>60</sup>

Some of the Democrats' natural allies, such as the Wisconsin Education Association ("WEAC"), the state's wealthiest union, similarly miscalculated. Instead of mobilizing its members and others with an interest in education, such as parents, WEAC based its election strategy on independent expenditures.<sup>61</sup> WEAC focused on narrow teacher pocketbook issues, came into campaigns in the last several weeks, and spent large sums of money on negative television advertisements.<sup>62</sup> Further, WEAC repeatedly used the threat of this kind of spending in its lobbying efforts.<sup>63</sup> One effect of this approach was that Republicans became fearful of WEAC's last minute spending and less supportive of statutory spending limits.<sup>64</sup> Republicans concluded, not without justification, that they needed more money to defend themselves.<sup>65</sup> Thus, WEAC's strategy accelerated an independent spending war.<sup>66</sup> Business interests quickly adopted WEAC's approach, and in a very short time, far exceeded WEAC in campaign spending.<sup>67</sup>

Thus, the second important lesson from Wisconsin's experience with campaign finance reform is that a system of campaign finance regulation will only thrive if it is continually nurtured. Such systems are inherently fragile and subject to pressures from a variety of sources, including elected officials who find campaign finance reform inconvenient and interest groups that seek political influence. Supporters of campaign finance reform must work unceasingly to strengthen the regulatory systems they create. Constant vigilance is necessary, and Wisconsin Democrats did not provide it.

### III. AND WISCONSIN ALSO FAILED TO REGULATE SHAM ISSUE ADS

The second major reason for the demise of campaign finance reform in Wisconsin was the proliferation of sham issue ads. These are the now ubiquitous television

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<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> WIS. LEGIS. REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2013–2014 258 (2013).

<sup>61</sup> Shea, *supra* note 9, at 3.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> Doug Mell, *Thompson Lifts Election Spending Lid*, WIS. ST. J., Aug. 24, 1990, 1990 WLNR 3077984.

<sup>67</sup> Shea, *supra* note 9, at 3.

advertisements that generally say something negative about a candidate, but, instead of telling viewers how to vote, advise viewers to call the candidate and express their opinion. Prior to the advent of sham issue ads, candidates running for public office in Wisconsin controlled their own campaigns.<sup>68</sup> Les Aspin, former Wisconsin Congressman and United States Secretary of Defense, once said that Wisconsin was a wonderful state for someone who wanted to run for office; the state was politically competitive, political parties were relatively weak, and there were no power-brokers whose blessing a candidate had to receive.<sup>69</sup> As Aspin put it, if someone wanted to run for office in Wisconsin, the candidate only had to recruit some volunteers, find somebody to help raise money, and start ringing doorbells.<sup>70</sup>

This political climate began to change in the late 1980s and early 1990s. Special interest groups with substantial resources began to make independent expenditures and, because of the large sums of money that these groups had, candidates had to be prepared to deal with them.<sup>71</sup> Further, in 1996, another spending pipeline opened. This one involved a particularly insidious kind of independent expenditure, sham issue ads.<sup>72</sup> The state's largest business association, Wisconsin Manufacturers and Commerce ("WMC"), spent substantial amounts of money on such ads, most of which involved political attacks on Democratic candidates.<sup>73</sup> WMC believed that because these ads did not direct viewers how to vote, they were not "express advocacy"<sup>74</sup> under *Buckley* and thus were not subject to campaign finance regulations.<sup>75</sup> The possibility of being able to engage in unregulated political spending was attractive to WMC.<sup>76</sup> If spending were unregulated, WMC could pay for its ads with corporate money which, under Wisconsin law, was money WMC could not otherwise spend for political purposes.<sup>77</sup> Further, WMC would not have to identify its contributors.<sup>78</sup>

I was in the Wisconsin State Senate when WMC began spending money on sham issue ads and had the unpleasant experience of being one of the ads' first targets. I was initially elected in 1976 when Les Aspin's description of running for office in Wisconsin remained accurate. I recruited a few volunteers, started running, got a few good breaks (shortly before the election, my opponent was convicted of a felony), and was ultimately elected. I was fortunate enough to be re-elected to five four-year terms.

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<sup>68</sup> WIS. DEMOCRACY CAMPAIGN, *From Sunlight to Darkness: The Demise of Campaign Finance Disclosure in Wisconsin* (Apr. 7, 2004), <http://www.wisdc.org/suntodark.php>.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> HYNEK, *supra* note 4, at 7.

<sup>74</sup> Express advocacy refers to political advertisements that clearly support or oppose a particular electoral outcome. *See Buckley v. Valeo*, 424 U.S. 1, 43–44 (1976).

<sup>75</sup> *See Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 726 (Wis. 1999).

<sup>76</sup> HYNEK, *supra* note 4, at 7.

<sup>77</sup> *See id.*

<sup>78</sup> *See* WIS. DEMOCRACY CAMPAIGN, *supra* note 68.

In all of my campaigns, I participated in public funding, and in the first three, my opponent did as well. Not until 1992 did candidate spending even approach \$100,000 apiece. Further, in my first five campaigns, no independent group participated.<sup>79</sup> In 1996, however, WMC budgeted \$250,000 to broadcast a sham issue ad on Milwaukee television in the last two weeks of the campaign. The ad stated:

State Senator Lynn Adelman is standing in the way of reform. Voting against curbs on frivolous lawsuits that cost Milwaukee jobs. What's worse, Adelman's made a career of putting the rights of criminals ahead of the rights of victims: Voting to deny employers the right to keep convicted felons out of the workplace. That's wrong. That's liberal. But that's Lynn Adelman. Call Lynn Adelman. Tell him honest working people have rights too.<sup>80</sup>

As indicated, sham issue ads were new in Wisconsin, and I was unsure of how to handle the situation. Independent campaigns subject to campaign finance rules, such as full public disclosure, contribution limits, and prohibitions on corporate contributions, were lawful, but WMC was not engaging in that kind of independent campaign.<sup>81</sup> WMC argued that its sham issue ad was not a campaign ad at all because it did not contain express advocacy.<sup>82</sup>

I thought the ad was a campaign ad because its purpose was to elect my opponent. To me, no other reasonable interpretation of the ad was possible because the ad identified me by name, criticized me, ran just before the election, and appeared only on stations watched by voters in my district.<sup>83</sup> The notion that the purpose of the ad was to educate voters about issues seemed preposterous. Thus, as I saw it, WMC violated the law by using corporate money to pay for the ad (which I did not know for sure but thought highly likely) and by not disclosing the identity of its contributors. I also worried that if I could not get the ad off the air, I might lose the election because I was a Democrat representing a heavily Republican district and had won by only 1% of the vote in the last election four years earlier.<sup>84</sup>

I concluded that I had no alternative but to file a lawsuit against WMC and the television stations broadcasting the ad. I brought an action in Milwaukee County Circuit Court seeking to enjoin further broadcast of the ad (which had started to run) on the ground that it violated Wisconsin's campaign finance law. I simultaneously filed a complaint with the Elections Board. Judge Patricia McMahon rejected WMC's argument that the ad was not express advocacy and enjoined further broadcast of it.<sup>85</sup>

After I filed suit, other Democratic candidates who were the targets of similar WMC ads elsewhere in the state filed complaints. Courts subsequently enjoined all of

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<sup>79</sup> *See id.*

<sup>80</sup> *Elections Bd.*, 597 N.W.2d at 724 n.3, 724–25.

<sup>81</sup> *Id.* at 724.

<sup>82</sup> *Id.* at 726.

<sup>83</sup> *Id.*

<sup>84</sup> WIS. LEGIS. REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1993–1994 919 (1993).

<sup>85</sup> *Elections Bd.*, 597 N.W.2d at 738.

WMC's ads from further broadcast.<sup>86</sup> An intermediate appellate court affirmed the injunctions.<sup>87</sup> And in 1999, the matter went to the Wisconsin Supreme Court.<sup>88</sup> By that time, however, I no longer controlled the case because the Elections Board had brought its own suit, and its suit became the case that the Wisconsin Supreme Court considered.

The Wisconsin Supreme Court ducked the question of whether WMC's sham issue ads constituted express advocacy under *Buckley*, but encouraged the Elections Board to adopt new rules that better defined the forms of advocacy that were subject to campaign finance regulation. Justice Ann Walsh Bradley wrote a dissenting opinion, joined by Chief Justice Shirley Abrahamson. The Justices dissented from the court's refusal to address the express advocacy question and set forth a test for determining whether an ad constituted express advocacy.<sup>89</sup> In their view, the court needed to consider the ad's essential nature:

Is it one that merely discusses issues, and in the process discusses candidates inextricably linked to those issues, or is it one that advocates some action for or against a candidate but does so under the guise of discussing issues? . . . Under such a standard, there can be no doubt that . . . [t]he essential nature of these advertisements is candidate advocacy, not issue advocacy. These advertisements mention issues only as a vehicle of propping up or tearing down a particular candidate. Take away references to the candidates and precious little, if anything, would remain of the advertisement.<sup>90</sup>

After the Wisconsin Supreme Court failed to resolve the sham issue ad problem, the Wisconsin legislature and the Elections Board similarly failed. The collective result of these failures was that spending on such ads increased astronomically, and sham issue ads became the most important form of political advertising in Wisconsin.<sup>91</sup> In 1998, an explosion of sham issue ad spending contributed to producing Wisconsin's first million dollar state senate race.<sup>92</sup> In 2000, special interest groups spent \$2.3 million, and candidates spent an additional \$700,000 in a senate race in rural Wisconsin.<sup>93</sup> In 2002, the amount of money spent on sham issue ads far exceeded independent expenditures by committees subject to public disclosure requirements and contribution limits.<sup>94</sup> In 2006, special interest groups spent approximately \$15 million

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 725.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.* at 742.

<sup>90</sup> *Id.*

<sup>91</sup> NOVAK & SHAH, *supra* note 1, at 8.

<sup>92</sup> Mike McCabe, *Campaign Finance Reform in Wisconsin: Where We've Been, Where Things Stand Today and Where We Go from Here*, WISCONSIN DEMOCRACY CAMPAIGN (Oct. 17, 2001), [https://web.archive.org/web/20051119131723/www.wisdc.org/campfinreform\\_progrpt.php](https://web.archive.org/web/20051119131723/www.wisdc.org/campfinreform_progrpt.php).

<sup>93</sup> *Id.*

<sup>94</sup> NOVAK & SHAH, *supra* note 1, at 8.

on sham issue ads, more than triple the amount spent in 2002.<sup>95</sup> Since then, spending on sham issue ads has only continued to increase.<sup>96</sup>

Currently, special interest groups and wealthy contributors (including individuals and corporations) favor sham issue ads because they are unregulated, and the public can be kept in the dark about who is paying for them.<sup>97</sup> Thus, dark money dominates almost every high spending election in Wisconsin.<sup>98</sup> Candidate committees, which are subject to contribution limits and public disclosure requirements, are rarely able to match the amount of money raised for unregulated expenditures. Therefore, the third important lesson from Wisconsin's experience with campaign finance reform is that to be effective, campaign finance legislation must regulate sham issue ads.

#### IV. THE CORRUPTING EFFECT OF WISCONSIN'S REGULATORY FAILURE

By the early 2000s, the campaign finance reform legislation that Wisconsin pioneered in the 1970s had, for the most part, been rendered irrelevant, and the halcyon days of Wisconsin politics that Les Aspin described were long gone.<sup>99</sup> The breakdown of the reform legislation resulted in an explosion of special interest spending and an enormous increase in the importance of political money.<sup>100</sup> And the result of Wisconsin's regulatory failure has been grave damage to the public life of the state. For example, voters in Wisconsin now have fewer electoral choices than they once had because fewer people run for public office.<sup>101</sup> In 1970, not a single legislative race was uncontested, whereas by 2002, 50% of the candidates for legislative office ran unopposed.<sup>102</sup>

Furthermore, the increased importance of money in state elections has adversely affected the functioning of the Wisconsin legislature. Wisconsin was once known for its independent legislators.<sup>103</sup> It was a place where mavericks thrived. Former U.S. Senator Bill Proxmire, for example, who was re-elected to the Senate in 1982 after spending less than \$150 on his campaign, got his start in the Wisconsin Assembly.<sup>104</sup> However, as money became more important in the electoral process, legislative power

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Mary Bottari, *Undisclosed Dark Money Reigns Supreme in Wisconsin*, PRWATCH (Oct. 5, 2016), <http://www.prwatch.org/news/2016/10/13154/dark-money-reigns-supreme-in-wisconsin>.

<sup>99</sup> Wisconsin's public funding system limped along until 2010 when Republican Scott Walker was elected governor. In his first budget bill, Walker eliminated the public funding mechanism for all state political and judicial campaigns. *See* 2011 Wis. Sess. Laws 139.

<sup>100</sup> MIKE McCABE, *BLUE JEANS IN HIGH PLACES: THE COMING MAKEOVER OF AMERICAN POLITICS* 46 (2014).

<sup>101</sup> *Id.* at 45.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 43.

became increasingly centralized.<sup>105</sup> Legislative leaders now control most legislative fundraising as well as the allocation of funds to candidates.<sup>106</sup> And few, if any, mavericks remain.

The demise of campaign finance reform also led to the diminution of Wisconsin's status as a model good government state. Increased campaign spending was one of several factors that contributed to the Republican Party's takeover of the state legislature.<sup>107</sup> Regrettably, the GOP's stewardship of Wisconsin's good government tradition has been less than exemplary. In 2015, the non-partisan Center for Public Integrity gave Wisconsin an overall grade of "D" on its national report card on government transparency and accountability.<sup>108</sup> Further, it gave Wisconsin grades of "F" in public access to information, political financing, and legislative accountability.<sup>109</sup>

Some examples of the legislature's recent work demonstrate why Wisconsin received these grades. In 2010, the legislature enacted one of the worst partisan gerrymanders in modern American history.<sup>110</sup> More recently, working with the Governor, legislative leaders attempted to undo Wisconsin's long-standing commitment to transparency in government by inserting a last minute amendment into the state budget that gutted the state's open records law.<sup>111</sup> The legislature withdrew the amendment only because of a public outcry led by the media.<sup>112</sup>

The legislature also eliminated Wisconsin's watchdog agency, the Government Accountability Board ("GAB"), a non-partisan body consisting of six retired judges that was created to take over the duties of the Elections and Ethics Boards.<sup>113</sup> A well-known election law expert referred to the GAB as "a model for the nation."<sup>114</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 45.

<sup>107</sup> Jason Stein & Annysa Johnson, *Republicans Take over State Senate, Assembly*, MILWAUKEE J. SENTINEL (Nov. 2, 2010), <http://archive.jsonline.com/news/statepolitics/106582898.html/>.

<sup>108</sup> Patricia Simms, *Wisconsin Gets D Grade in 2015 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2017), <https://www.publicintegrity.org/2015/11/09/18562/wisconsin-gets-d-grade-2015-state-integrity-investigation>.

<sup>109</sup> Ernst-Ulrich Franzen, *Another Bad Grade for the State*, MILWAUKEE J. SENTINEL, Nov. 23, 2015, at A9.

<sup>110</sup> Complaint at 1–2, *Whitford v. Nichol*, No. 3:15-CV-00421 (W.D. Wis. July 8, 2015).

<sup>111</sup> Brendan Fischer, *As Walker Announces, Wisconsin GOP Moves to Gut Open Records Law*, PRWATCH (July 2, 2015), <http://www.prwatch.org/news/2015/07/12872/Scott-Walker-WI-GOP-Gut-Open-Records>.

<sup>112</sup> Dennis Punzel, *Scott Walker, Legislative Leaders Drop Open Records Changes*, WIS. STATE J. (July 6, 2015), [http://host.madison.com/wsj/news/local/govt-and-politics/scott-walker-records-changes/article\\_0b1fb6da-39d2-5229-b54e-491aa98901db.html](http://host.madison.com/wsj/news/local/govt-and-politics/scott-walker-records-changes/article_0b1fb6da-39d2-5229-b54e-491aa98901db.html).

<sup>113</sup> Patrick Marley, *GOP Bills Would Hike Contribution Limits, Split GAB into Two Agencies*, MILWAUKEE J. SENTINEL (Oct. 7, 2015), <http://www.jsonline.com/news/statepolitics/assembly-republicans-want-to-splitgab-into-two-agencies-b99592139z1-331067811.html>.

<sup>114</sup> *Id.* (quoting Professor Daniel Tokaji); see also Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 572 (2013).

Wisconsin's largest newspaper opined that the GAB was eliminated to create "a watchdog with no teeth."<sup>115</sup> In addition, the legislature made investigating political corruption more difficult for prosecutors,<sup>116</sup> weakened the public disclosure requirement and other provisions of the state's campaign finance law,<sup>117</sup> and diminished long-standing civil service protections for state employees.<sup>118</sup>

Further, the demise of campaign finance reform legislation, along with the increased importance of political money, harmed public life in Wisconsin in yet another way. It led to the emergence of a phenomenon, once rare in the state, the major political scandal.<sup>119</sup> In the last fifteen years, Wisconsin has been beset by three such scandals, one involving legislative campaigns, one involving a gubernatorial campaign, and one involving campaigns for the Wisconsin Supreme Court and their aftermath.<sup>120</sup> Wisconsin's lapse as a good government state and these scandals have contributed to increased disrespect for the Wisconsin state government.<sup>121</sup> The scandals also teach another important lesson: even a model state can be corrupted in a very short time.

#### A. The Legislature's Caucus Scandal

The first scandal, widely known as the caucus scandal, grew directly out of the increased centralization of legislative power and the expansive use of such power to raise money for political campaigns.<sup>122</sup> Partisan caucus organizations, staffed by state employees, were created in the late 1960s to perform public policy research for what were generally part-time legislators who had minimal staff support.<sup>123</sup> Each party in the state assembly and senate had a caucus staff.<sup>124</sup> With the ever increasing importance of money in politics, however, legislative leaders began to use caucus employees to assist in fundraising and related political activity rather than for research.<sup>125</sup>

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<sup>115</sup> Editorial, *Let Watchdog Do Its Job*, MILWAUKEE J. SENTINEL, Aug. 9, 2015, at A9.

<sup>116</sup> Ernst-Ulrich Franzen, *Closing Government's Curtains*, MILWAUKEE J. SENTINEL, Nov. 2, 2015, at A11.

<sup>117</sup> *Id.*

<sup>118</sup> Chris Taylor, *Republicans Ransack Civil Service System*, URBAN MILWAUKEE (Oct. 30, 2015), <http://urbanmilwaukee.com/2015/10/30/op-ed-republicans-ransack-civil-service-system/>.

<sup>119</sup> MCCABE, *supra* note 100, at 50.

<sup>120</sup> Louis Fortis & Lisa Kaiser, *Has Wisconsin Become a Corrupt State?*, SHEPHERD EXPRESS (Aug. 18, 2015), <http://shepherdexpress.com/article-26307-has-wisconsin-become-a-corrupt-state-news-shepherd-express.html>.

<sup>121</sup> MCCABE, *supra* note 100, at 47.

<sup>122</sup> *Id.* at 43–44.

<sup>123</sup> WIS. LEGIS. REFERENCE BUREAU, WISCONSIN LEGISLATORS CHARGED WITH CRIMES AND VIOLATIONS OF ETHICS AND CAMPAIGN FINANCE LAWS, 1939–2010, INFORMATIONAL MEMORANDUM 09-2, at 1 (2010).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

Although the unlawful activity of caucus employees was an open secret, neither the Elections Board nor the Ethics Board took any action. The full picture did not emerge until a part-time political reporter and a local district attorney got involved.<sup>126</sup> After a lengthy investigation, legislative leaders of both parties and several legislative staffers were charged with numerous felonies and lesser offenses.<sup>127</sup>

The criminal complaints indicate the centrality of fundraising to the caucus scandal. For example, the complaint against Republican Assembly Speaker Scott Jensen alleged that Jensen met with the “four horsemen” (the lobbyists from WMC, the Farm Bureau, the Builders, and the Realtors)<sup>128</sup> and directed them where to send their clients’ money and whether they should give it “directly to campaigns or as independent expenditures.”<sup>129</sup> And, the complaint against Democratic Senate Majority Leader Chuck Chvala alleged that he “designed a scheme” to conceal his control of a PAC so that his aide, who was presumably running the PAC, would not know of his control “and could not be a witness against him.”<sup>130</sup>

The caucus probe ended in the criminal convictions of six legislators and several legislative staffers.<sup>131</sup> The scandal destroyed the political careers of the convicted legislators, and the legislature enacted legislation abolishing the caucuses.<sup>132</sup> The caucus scandal was a watershed in Wisconsin political history. The intense emphasis on money had changed the state’s political culture, and it was difficult to imagine how the genie that had been released could be stuffed back into the bottle.<sup>133</sup>

#### *B. The Governor’s Campaign Coordination Scandal*

A few years after the resolution of the final case in the caucus scandal, another campaign finance scandal emerged. This scandal involved the activities of Governor Scott Walker’s campaign in the 2012 gubernatorial recall election and several supposedly independent entities, including WMC and the Wisconsin Club for Growth (“WiCFG”).<sup>134</sup> This scandal concerned sums of money many orders of magnitude larger than the amounts involved in the caucus scandal.<sup>135</sup> The scandal began to unfold when a bipartisan group of district attorneys and the GAB began an investigation into the potentially unlawful campaign coordination between Walker’s campaign

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<sup>126</sup> Shea, *supra* note 9, at 3.

<sup>127</sup> WIS. LEGIS. REFERENCE BUREAU, *supra* note 123, at 2–8.

<sup>128</sup> George Hesselberg, *Charges in Caucus Scandal Long Overdue*, WIS. ST. J., Oct. 22, 2002, 2002 WLNR 10451343, at D1.

<sup>129</sup> *Id.* (quoting Scott Jensen).

<sup>130</sup> *Id.* (quoting Douglas Burnett (Chvala staff member)).

<sup>131</sup> *Caucus Scandal: A Look Back*, NBC15.COM (Mar. 11, 2016), <http://www.nbc15.com/home/headlines/2448367.html>.

<sup>132</sup> 2001 Wis. Sess. Laws 876; WIS. LEGIS. REFERENCE BUREAU, *supra* note 123, at 2.

<sup>133</sup> MCCABE, *supra* note 100, at 46–47.

<sup>134</sup> Monica Davey & Nicolas Confessore, *Wisconsin Governor at Center of a Vast Fund-Raising Case*, N.Y. TIMES (June 19, 2014), [http://www.nytimes.com/2014/06/20/us/scott-walker-wisconsin-governor.html?\\_r=0](http://www.nytimes.com/2014/06/20/us/scott-walker-wisconsin-governor.html?_r=0).

<sup>135</sup> *Id.*

committee and supposed independents.<sup>136</sup> Coordinated campaign expenditures are generally regarded as in-kind campaign contributions, subject to the same public disclosure requirements and contribution limits applicable to a candidate's campaign contributions.<sup>137</sup>

The reason for anti-coordination rules is that if a candidate can coordinate with an independent group that, under the United States Supreme Court's decision in *Citizens United v. FEC*,<sup>138</sup> can accept secret, unlimited contributions, then contribution and disclosure rules that apply to political candidates are meaningless.<sup>139</sup> A large contribution to a supposedly independent group that coordinated with a candidate would have the same effect as a direct contribution to the candidate.<sup>140</sup> Furthermore, because the contribution remained secret, the public would never know whether the contributors later received special treatment from the political candidates they

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<sup>136</sup> Brendan Fischer, *Evidence Mounting that Walker Campaign is at Center of Criminal Probe*, PRWATCH (Feb. 7, 2014), <http://www.prwatch.org/news/2014/02/12377/walker-campaign-finance-probe-court-docs-show>.

<sup>137</sup> In 1999, the state court of appeals held in *Wis. Coal. for Voter Participation Inc. v. State Elections Bd.*, that, as is the case under federal law, Wisconsin law can count issue ad "expenditures that are 'coordinated' with, or made 'in cooperation with or with the consent of a candidate . . . or an authorized committee' as campaign contributions." 605 N.W.2d 654, 660 (Wis. Ct. App. 1999) (quoting *Buckley v. Valeo*, 424 U.S. 1, 46–47 (1976)). As a result of that decision, the Elections Board pursued an investigation into illegal coordination between a campaign led by Mark Block and an "independent" group that sent issue ad postcards. Brendan Fischer, *Top Six Facts in the Walker Dark Money Criminal Probe*, PRWATCH (May 13, 2014), <http://www.prwatch.org/news/2014/05/12475/scottwalker-john-doe-darkmoney-sixthings>. That probe resulted in a settlement pursuant to which Block was fined and barred from politics for three years. *Id.* In addition, in 2002 the Elections Board issued an opinion citing both state and federal cases to advise that coordinated electoral issue ads are contributions under Wisconsin law. *Id.* In 2008, the GAB re-affirmed that opinion. GOV. ACCOUNTABILITY BD., EL. Bd. 00-2 (2008), [http://www.gab.wi.gov/sites/default/files/opinions/29/00\\_02opelbd\\_pdf\\_17587.pdf](http://www.gab.wi.gov/sites/default/files/opinions/29/00_02opelbd_pdf_17587.pdf).

<sup>138</sup> *Citizens United v. FEC*, 558 U.S. 310 (2009).

<sup>139</sup> Brendan Fischer, *Scott Walker John Doe Ruling and the Well-Funded Assault on WI Campaign Finance Law*, PRWATCH (July 1, 2015), <http://www.prwatch.org/news/2015/07/12884/scott-walker-john-doe-assault-campaign-finance-law>.

<sup>140</sup> *Id.*; see also *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 (2001) ("Colorado II") ("There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, . . . ."); *Buckley*, 424 U.S. at 78 (construing federal law to treat "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," i.e., coordinated expenditures, as contributions); *In re Cao*, 619 F.3d 410, 416–17 (5th Cir. 2010) (noting that "for purposes of First Amendment scrutiny, 'prearranged or coordinated expenditures' are constitutionally equivalent to contributions" and that "it followed that coordinated expenditures are subject to the same limitations and scrutiny that apply to contributions.") (quoting *Buckley*, 424 U.S. at 46, 47).

supported.<sup>141</sup> Thus, anti-coordination rules are one of the few remaining bulwarks against a completely lawless campaign finance landscape.<sup>142</sup>

As a result of the unveiling of information regarding possible unlawful coordination between Walker's campaign committee and supposed independent groups, an experienced federal prosecutor with a Republican background was appointed to investigate the matter.<sup>143</sup> The special prosecutor concluded that Walker's campaign and groups such as WiCFG had, in fact, coordinated their political activities and violated Wisconsin's campaign finance laws.<sup>144</sup> Specifically, the special prosecutor determined that Walker secretly raised millions of dollars for WiCFG and evaded campaign finance disclosure requirements.<sup>145</sup> He concluded that Walker's staff had advised Walker to "stress that donations to WiCFG are not disclosed" and that "corporate contributions" could be accepted and are "not reported" when soliciting campaign funds.<sup>146</sup> In addition, the prosecutor discovered evidence that caused him to suspect that the Walker campaign coordinated with groups engaged in express advocacy.<sup>147</sup>

One effect of the alleged Walker/WiCFG coordination scheme was that voters were left in the dark about who was influencing elections in Wisconsin and whether they might be getting something in return. For example, no campaign finance reports disclosed to Wisconsin citizens that a Florida-based mining company, which lobbied for a massive open pit mine in Wisconsin, contributed \$700,000 to WiCFG to spend in support of Walker's agenda.<sup>148</sup> Nor did any reports reveal that John Menard, owner of a chain of hardware stores, gave \$1.5 million to WiCFG for similar purposes.<sup>149</sup>

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<sup>141</sup> Fischer, *supra* note 139; *see also* O'Keefe v. Chisholm, 769 F.3d 936, 941 (7th Cir. 2014) ("Buckley held that the Constitution allows limits on how much one person can contribute to a politician's campaign. If campaigns tell potential contributors to divert money to nominally independent groups that have agreed to do the campaigns' bidding, these contribution limits become porous, and the requirement that politicians' campaign committees disclose the donors and amounts becomes useless.").

<sup>142</sup> Fischer, *supra* note 139.

<sup>143</sup> John McCormick, *Why is John Doe Chasing Scott Walker in Wisconsin?*, BLOOMBERG POL. (May 18, 2015), <http://www.bloomberg.com/politics/articles/2015-05-18/why-is-john-doe-chasing-scott-walker-in-wisconsin->.

<sup>144</sup> Mary Bottari, *The Disappearance of John Doe*, PRWATCH (July 15, 2015), <http://www.prwatch.org/news/2015/07/12885/disappearance-john-doe>.

<sup>145</sup> *Id.*

<sup>146</sup> Mary Bottari, *Walker's Dark Money Allies Orchestrate Coup of the Courts*, PRWATCH (Apr. 19, 2015), <http://www.prwatch.org/news/2015/04/12796/walkers-dark-money-allies-orchestrate-coup-courts> [hereinafter Bottari, *Walker's Dark Money*].

<sup>147</sup> Patrick Marley et al., *New Doe Documents Link Walker Campaign, Two National Groups*, MILWAUKEE J. SENTINEL (Aug. 25, 2014), <http://www.jsonline.com/news/statepolitics/secret-probe-targets-try-to-head-off-more-court-disclosures-b99337497z1-272569051.html>; *see also* State *ex rel.* Three Unnamed Petitioners v. Peterson, 875 N.W.2d 49, 58 n.9 (Wis. 2015).

<sup>148</sup> Bottari, *Walker's Dark Money*, *supra* note 146.

<sup>149</sup> Michael Isikoff, *Secret \$1.5 Million Donation from Wisconsin Billionaire Uncovered in Scott Walker Dark-Money Probe*, YAHOO NEWS (Mar. 23, 2015),

Voters, therefore, were unable to assess whether Menard's donation had anything to do with his receipt of at least \$1.8 million in tax credits from Walker's job development agency.<sup>150</sup>

The evidence appeared to lead the special prosecutor to conclude that through unlawful coordination, WiCFG and other big money groups bankrolled Walker's 2012 recall victory.<sup>151</sup> WiCFG alone spent at least \$9.1 million on Wisconsin's 2011 and 2012 recall elections and funneled almost \$9.6 million more to other groups, including WMC, that supported the re-election efforts.<sup>152</sup>

WiCFG and other groups whose activity the special prosecutor was investigating launched an aggressive legal and public relations campaign to discredit the investigation.<sup>153</sup> Their legal contention was that Wisconsin could not apply its anti-coordination rules to them because the money they spent in coordination with Walker's campaign was spent on issue ads that the State could not regulate consistent with the First Amendment.<sup>154</sup> They brought this argument to the federal courts and lost.<sup>155</sup>

Federal appellate court judge Frank Easterbrook, a Ronald Reagan presidential appointee, indicated that no federal or state court had ever held that the First Amendment barred regulation of coordination between campaign committees and issue advocacy groups.<sup>156</sup> Nor had any federal or state court held that the First Amendment forbid an inquiry into that topic.<sup>157</sup> Ultimately, the targets of the investigation shifted to the Wisconsin Supreme Court. This brings us to Wisconsin's third major money in politics scandal, the Wisconsin Supreme Court scandal.

### C. The Wisconsin Supreme Court Scandal

The Wisconsin Supreme Court scandal does not refer to a single event, but rather involved the elections of a number of the court's justices and the conduct of those justices. The story begins in 2007 when an open seat on the court led to a campaign unprecedented in the amount of money spent, particularly the amount of dark money.<sup>158</sup> The interest groups and the candidates spent nearly \$6 million on the campaign.<sup>159</sup> This amount was over four times more than had ever been spent on a

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<https://www.yahoo.com/politics/wisconsin-gov-scott-walker-photo-charlie-114429739886.html>.

<sup>150</sup> Bottari, *Walker's Dark Money*, *supra* note 146.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Brendan Fischer, *Partisan Witchhunt Claims from Club for Growth Upended by New Court Filings*, PRWATCH (Apr. 22, 2014), <http://www.prwatch.org/news/2014/04/12455/john-doe-court-filings-blow-partisan-witchhunt-allegations>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> O'Keefe v. Chisholm, 769 F.3d 936, 942 (7th Cir. 2014).

<sup>157</sup> *Id.*

<sup>158</sup> MCCABE, *supra* note 100, at 125.

<sup>159</sup> *Id.*

state supreme court campaign, and the special interest groups far outspent the candidates.<sup>160</sup> For example, WMC spent an estimated \$2.2 million, and WiCFG spent an estimated \$400,000.<sup>161</sup> Most of the special interest money was spent on sham issue ads.<sup>162</sup>

Elected to the court was trial court judge Annette Ziegler.<sup>163</sup> After the election, the Judicial Commission, which is responsible for monitoring judicial conduct, charged Ziegler with misconduct for ruling on cases in which her husband had a financial interest.<sup>164</sup> The Wisconsin Supreme Court reprimanded Ziegler and fined her \$10,000, making her the first justice in history to be so punished.<sup>165</sup>

The 2008 Wisconsin Supreme Court election was worse.<sup>166</sup> Several years prior, Governor Jim Doyle appointed Wisconsin's first African-American supreme court justice, Louis Butler.<sup>167</sup> After Butler's appointment, the court would occasionally split 4–3 in favor of plaintiffs on civil liability issues, as it did in a case involving medical malpractice<sup>168</sup> and another involving the liability of manufacturers of lead paint.<sup>169</sup> As a result, WMC and other business groups made defeating Butler a priority.<sup>170</sup> Naturally, WMC was unconcerned about the problems created by high-spending judicial campaigns funded primarily by dark money.<sup>171</sup> Rather, its focus was on ensuring that a majority of the court's members shared its position on civil liability issues and others that it regarded as important.<sup>172</sup> Thus, an obscure trial court judge and former prosecutor, Michael Gableman, was recruited to run against Butler.<sup>173</sup> In

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<sup>160</sup> *Id.*

<sup>161</sup> *Hijacking Justice 2007: Issue Ads in the 2007 Supreme Court Campaign*, WIS. DEMOCRACY CAMPAIGN (Oct. 13, 2014), <http://www.wisdc.org/ind07issueads.php#wmc>.

<sup>162</sup> *Id.*

<sup>163</sup> MCCABE, *supra* note 100, at 125.

<sup>164</sup> *Id.* at 125–126.

<sup>165</sup> *Id.* at 126.

<sup>166</sup> *Id.*

<sup>167</sup> *Former Justices: Louis J. Butler, Jr.*, WIS. CT. SYS. (Mar. 7, 2012), <http://www.wicourts.gov/courts/supreme/justices/retired/butler.htm>.

<sup>168</sup> *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).

<sup>169</sup> *Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

<sup>170</sup> Jim Pugh, *WMC: Big Stakes for Supreme Court Election*, WIS. MANUFACTURERS & COM. (Jan. 7, 2013), <https://www.wmc.org/issues/wmc-taking-on-personal-injury-lawyers/>.

<sup>171</sup> Patrick L. Willis, *Money Shouldn't Tip the Scales of Justice*, MANITOWOC HERALD TIMES REP. (Apr. 7, 2017), <http://www.htrnews.com/story/opinion/2017/04/07/wisconsin-courts-judicial-recusal-petition-dark-money-special-interests-patrick-willis/100125716/>.

<sup>172</sup> *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court Campaign*, WIS. DEMOCRACY CAMPAIGN (Oct. 13, 2014), <http://www.wisdc.org/hijackjustice08issueads.php> [hereinafter *Hijacking Justice 2008*].

<sup>173</sup> MCCABE, *supra* note 100, at 126.

the Butler/Gableman election, WMC spent an estimated \$1.7 million on sham issue ads, and WiCFG spent an estimated \$507,000.<sup>174</sup>

The special interest group ads mostly accused Butler of being soft on crime.<sup>175</sup> This, of course, was not WMC's real concern,<sup>176</sup> but crime made for more compelling television ads than civil liability issues. Gableman's ads likewise charged Butler with being soft on crime.<sup>177</sup>

One of Gableman's ads was so misleading that the Judicial Commission charged him with misconduct based on the ad's "reckless disregard for the truth."<sup>178</sup> Specifically, the ad attacked work that Butler did during his pre-judicial career as a criminal defense attorney.<sup>179</sup> It told viewers that Louis Butler worked "to put criminals back on the street"<sup>180</sup> and misleadingly implied that Butler had been responsible *as a judge* for the release of a repeat child molester.<sup>181</sup> Notwithstanding the dishonesty of Gableman's commercial, the attack ads run by his campaign, WMC, and WiCFG succeeded, and Butler became the first incumbent justice since 1967 to lose at the polls.<sup>182</sup> As for the misconduct charge against Gableman, the court deadlocked 3–3. Justices David Prosser, Patience Roggensack, and Annette Ziegler supported Gableman and enabled him to avoid sanction for misconduct.<sup>183</sup> And the service of Wisconsin's first African-American supreme court justice was short-lived.

It was later discovered that Gableman received two years of free legal counsel on his defense of the Judicial Commission's misconduct charge from a law firm that regularly appeared before the Wisconsin Supreme Court.<sup>184</sup> In ten cases in which the firm appeared during that period, Gableman recused himself just once.<sup>185</sup> In addition, Gableman did not disclose his receipt of free legal services.<sup>186</sup> Rather, a lawyer appearing in a case before the Supreme Court discovered the potential conflict.<sup>187</sup> The arrangement between Gableman and the law firm arguably created the appearance of

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<sup>174</sup> *Hijacking Justice 2008*, *supra* note 172.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> MCCABE, *supra* note 100, at 126.

<sup>178</sup> Lincoln Caplan, *Justice for Sale*, THE AMERICAN SCHOLAR (June 1, 2012), <https://theamericanscholar.org/justice-for-sale/> [Caplan, *Justice for Sale*].

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Wis. Judicial Comm'n v. Gableman, 784 N.W.2d 605, 606, 631 (Wis. 2010).

<sup>184</sup> Caplan, *Justice for Sale*, *supra* note 178.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

a quid pro quo, and it is well-established that a judge must disqualify himself if his impartiality can reasonably be questioned.<sup>188</sup>

In 2009, however, the Wisconsin Supreme Court jettisoned the recusal rule.<sup>189</sup> In a 4–3 vote, Justices Prosser, Roggensack, Ziegler, and Gableman weakened the basis for recusal by adopting word for word a proposal submitted by WMC and the Wisconsin Realtors Association.<sup>190</sup> The adopted proposal provided that campaign contributions to a justice or independent expenditures on a justice’s behalf do not require recusal.<sup>191</sup> The dissenting opinion emphasized that the court’s integrity was at stake and that “judges must be perceived as beyond price.”<sup>192</sup> Justice Roggensack defended the court’s action, arguing that because the judiciary is elected, requiring a justice to recuse herself because of a conflict of interest would diminish the significance of her supporters’ votes.<sup>193</sup> Soon after, in another 4–3 vote, the same four justices ruled that a justice’s decision not to recuse was final and could not be reviewed by the rest of the court.<sup>194</sup>

In 2011, Justice Prosser ran for re-election and was opposed by an assistant attorney general.<sup>195</sup> Again, the campaign involved enormous spending by outside groups, including \$1.1 million on sham issue ads by WMC and \$520,000 by WiCFG.<sup>196</sup> Prosser was re-elected, but he was soon back in the headlines.<sup>197</sup> In March 2012, the Judicial Commission filed ethics violations charges against him based on an incident that occurred in June 2011.<sup>198</sup> He allegedly placed his hands on the neck of another justice, Ann Walsh Bradley, and subjected her to a chokehold.<sup>199</sup> The

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

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*; *In re Amendment of the Code of Judicial Conduct’s Rules on Recusal*, 2010 WI 73 (July 7, 2010), <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874>.

<sup>192</sup> Caplan, *Justice for Sale*, *supra* note 178.

<sup>193</sup> Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, THE NEW YORKER (May 25, 2015), <http://www.newyorker.com/news/news-desk/the-destruction-of-the-wisconsin-supreme-court> [hereinafter, Caplan, *Destruction of the Wisconsin Supreme Court*].

<sup>194</sup> *Id.*

<sup>195</sup> Monica Davey, *Wisconsin’s Election Is Referendum on Governor*, N.Y. TIMES (Apr. 4, 2011), <http://www.nytimes.com/2011/04/05/us/politics/05wisconsin.html>.

<sup>196</sup> *Hijacking Justice 2011: Wisconsin Manufacturers & Commerce*, WIS. DEMOCRACY CAMPAIGN, <http://wisdc.org/wmc2011supreme.php> (last updated Oct. 13, 2014); *Hijacking Justice 2011: Club for Growth Wisconsin*, WIS. DEMOCRACY CAMPAIGN, <http://wisdc.org/cfg2011.php> (last updated Jan. 16, 2014).

<sup>197</sup> Patrick Marley, *Ethics Violations Filed Against Prosser*, MILWAUKEE J. SENTINEL (Mar. 16, 2012), <http://archive.jsonline.com/news/statepolitics/ethics-violations-filed-against-prosser-4c4k50c-142975425.html/> [hereinafter Marley, *Ethics Violations Filed Against Prosser*].

<sup>198</sup> *Id.*

<sup>199</sup> Caplan, *Destruction of the Wisconsin Supreme Court*, *supra* note 193.

Commission appointed a special prosecutor to pursue the charges.<sup>200</sup> The charges also included an allegation that Prosser had “‘demonstrated a tendency toward lack of proper decorum and civility’ because he had called Chief Justice Shirley Abrahamson a ‘total bitch’ . . . .”<sup>201</sup> The Commission asked the Wisconsin Supreme Court to send the case to a panel of appeals court judges to determine whether Prosser had violated three ethics rules.<sup>202</sup> The court, however, did nothing. Like Gableman, Prosser avoided sanctions.<sup>203</sup>

Although the Wisconsin Supreme Court declined to take action on the Judicial Commission’s complaints against Gableman and Prosser, it did take action against the chairman of the Commission. In May 2012, the four justice majority voted to block the reappointment of retired Milwaukee lawyer, John Dawson, as chairman.<sup>204</sup> This decision represented a departure from the court’s long-standing practice of retaining appointees who were eligible for reappointment and whose service was satisfactory.<sup>205</sup> The committee in charge of nominating members of the Judicial Commission had previously urged the court to reappoint Dawson and praised his “leadership skills.”<sup>206</sup>

Finally, in 2013, Justice Roggensack was re-elected with the assistance of \$850,000 in expenditures on sham issue ads by WMC and \$350,000 by WiCFG.<sup>207</sup> Even though Roggensack’s victory ensured that the ideological make-up of the court would remain unchanged, Roggensack and her allies were not satisfied.<sup>208</sup> They hatched a scheme to remove eighty-one-year-old Shirley Abrahamson as the court’s chief justice.<sup>209</sup> On the surface, the scheme made little sense because the position of

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<sup>200</sup> *Id.*

<sup>201</sup> Marley, *Ethics Violations Filed Against Prosser*, *supra* note 197.

<sup>202</sup> *Id.*

<sup>203</sup> L.L. Braiser, *Troubling Trend: When Judges Need Discipline*, USA TODAY, (Dec. 7, 2014), <https://www.usatoday.com/story/news/nation/2014/12/07/when-judges-need-disciplining/20053455/>.

<sup>204</sup> Don Walker & Patrick Marley, *Three Justices Miffed Over Rejected Judicial Commission Appointment*, MILWAUKEE J. SENTINEL (May 11, 2012), [www.jsonline.com/news/statepolitics/three-justices-miffed-over-judicial-commission-appointment-ud5crdt-151182085.html](http://www.jsonline.com/news/statepolitics/three-justices-miffed-over-judicial-commission-appointment-ud5crdt-151182085.html).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Hijacking Justice 2013: Wisconsin Manufacturers & Commerce*, WIS. DEMOCRACY CAMPAIGN, <http://wisdc.org/wmc2013.php> (last updated Apr. 24, 2014); *Hijacking Justice 2013: Club for Growth Wisconsin*, WIS. DEMOCRACY CAMPAIGN, <http://wisdc.org/index.php?module=cms&page=3622> (last updated Jan. 17, 2014).

<sup>208</sup> Bruce Murphy, *Wisconsin Supreme Court Justice Pat Roggensack Wins Second Term as Big Liberal Money Sits Out Race*, ISTHMUS (Apr. 3, 2013), <https://isthmus.com/news/news/wisconsin-supreme-court-justice-pat-roggensack-wins-second-term-as-big-liberal-money-sits-out-race/>.

<sup>209</sup> Scott Bauer, *Patience Roggensack Elected Chief Justice; Shirley Abrahamson Says She Still Holds Post*, WIS. ST. J. (Apr. 29, 2015), [http://host.madison.com/wsj/news/local/govt-and-politics/patience-roggensack-elected-chief-justice-shirley-abrahamson-says-she-still/article\\_76ebef79-7e77-54de-823b-f4fb74f0895d.html](http://host.madison.com/wsj/news/local/govt-and-politics/patience-roggensack-elected-chief-justice-shirley-abrahamson-says-she-still/article_76ebef79-7e77-54de-823b-f4fb74f0895d.html).

chief justice confers only modest administrative powers.<sup>210</sup> However, proponents of the change could not abide the liberal Abrahamson and sought to amend the state constitution to enable the justices to elect the chief justice.<sup>211</sup> For 126 years, the longest serving member of the Wisconsin Supreme Court automatically became the chief justice, but Roggensack and her allies were certain that with their 4–3 majority, they could remove Abrahamson through an election.<sup>212</sup>

Accordingly, Roggensack lobbied legislators and urged them to support the amendment.<sup>213</sup> Her behavior inspired one observer to refer to her as the “Lady MacBeth” of the court because the likelihood that she would replace Abrahamson as chief justice in an election among the justices made her lobbying look Shakespearean: the younger justice trying to kill the queen.<sup>214</sup> In contrast, Abrahamson desisted from lobbying and tried to avoid politicizing the court.<sup>215</sup> Once the amendment passed the legislature and needed voter approval, WMC sprang into action. WMC launched a \$600,000 advertising blitz in support of the amendment.<sup>216</sup> WMC’s money was critical because no grassroots support for the amendment existed.<sup>217</sup> Registrants for the amendment included WMC and former justice Jon Wilcox, whose own campaign was fined \$10,000 for the same type of illegal campaign coordination that was at issue in the investigation pending before the Wisconsin Supreme Court.<sup>218</sup> In fact, Wilcox’s case established the Wisconsin precedent that coordination with outside groups was illegal.<sup>219</sup>

Given WMC’s financial support, voters unsurprisingly supported the amendment, although they did so narrowly.<sup>220</sup> When Abrahamson challenged the retroactive aspect of the amendment in federal court<sup>221</sup>—proponents of the amendment were unwilling to wait until the end of her term for it to take effect—the *Milwaukee Journal Sentinel* ran a story with the droll headline, “Will the Real Chief Justice Please Stand.”<sup>222</sup> While Abrahamson made no statements to the press, Roggensack, who had been elected chief

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<sup>210</sup> *Id.*

<sup>211</sup> Caplan, *Destruction of the Wisconsin Supreme Court*, *supra* note 193.

<sup>212</sup> Mary Bottari, *WMC Spends \$600,000 to Demote Chief Justice as Criminal Probe of Walker Campaign Looms*, PRWATCH (Mar. 31, 2015), <http://www.prwatch.org/news/2015/03/12784/wisconsin-manufacturers-and-commerce-spends-600000-demote-chief-justice> [hereinafter Bottari, *WMC Spends \$600,000*].

<sup>213</sup> Bruce Murphy, *Lady MacBeth of the Supreme Court*, URB. MILWAUKEE, (May 7, 2015), <http://urbanmilwaukee.com/2015/05/07/murphys-law-lady-macbeth-of-the-supreme-court/> [hereinafter Murphy, *Lady MacBeth*].

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Bottari, *WMC Spends \$600,000*, *supra* note 212.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Bauer, *supra* note 209.

<sup>221</sup> Caplan, *Destruction of the Wisconsin Supreme Court*, *supra* note 193.

<sup>222</sup> Murphy, *Lady MacBeth*, *supra* note 213.

justice, called into a talk radio show and criticized both Abrahamson and the newspaper.<sup>223</sup>

As chief justice, two of Roggensack's first actions were to close the procedure for appointing members to the Judicial Commission to the public and to fill a vacancy on the Commission with Joe Olson, a Republican operative who was sanctioned and excoriated by a three-judge federal court in a suit challenging the legislature's gerrymandering of electoral districts to favor Republicans.<sup>224</sup>

Thus, like the caucus scandal and the campaign coordination scandal, the Wisconsin Supreme Court scandal has harmed the reputation of one of the three branches of Wisconsin's government. Lincoln Caplan, a writer who has closely followed the court, observed that a decade-long saga of money-fueled elections has transformed it from "one of the nation's most respected state tribunals into a disgraceful mess."<sup>225</sup> He pointed out that the absence of effective campaign finance regulation has turned Wisconsin judicial campaigns into a grubby embarrassment to good government.<sup>226</sup> He also noted that the integrity of the justices that made up the majority on the court was "compromised, as plainly as if they had personally solicited every dollar that helped elect them."<sup>227</sup>

#### *D. The Campaign Coordination and the Wisconsin Supreme Court Scandals Intersect*

As previously mentioned, WiCFG, WMC, and other targets of the campaign coordination investigation involving the Governor's recall election wanted to shut the investigation down.<sup>228</sup> After failing to succeed in this effort in federal court, they brought the matter to the Wisconsin Supreme Court.<sup>229</sup> Thus, two of Wisconsin's campaign finance scandals, the campaign coordination scandal and the Wisconsin Supreme Court scandal, intersected in a kind of perfect storm.

Initially, the Wisconsin Supreme Court declined to hear any oral arguments in the case, either in public or in a closed courtroom.<sup>230</sup> Justice Abrahamson dissented from this decision, stating that she found it both "highly unusual" and "alarming."<sup>231</sup>

Thus, the campaign coordination case went behind closed doors for consideration by four justices elected with the assistance of massive ad buys by WiCFG and

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<sup>223</sup> *Id.*

<sup>224</sup> Bruce Thompson, *Roggensack Weakens Judicial Watchdog*, URB. MILWAUKEE (Jan. 4, 2016), <http://urbanmilwaukee.com/2016/01/04/will-roggensack-make-judicial-commission-toothless/>.

<sup>225</sup> Caplan, *Destruction of the Wisconsin Supreme Court*, *supra* note 193.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Patrick Marley & Mary Spicuzza, *Wisconsin Supreme Court Ends John Doe Probe into Scott Walker's Campaign*, MILWAUKEE J. SENTINEL (July 16, 2015), <http://archive.jsonline.com/news/statepolitics/wisconsin-supreme-court-ends-john-doe-probe-into-scott-walkers-campaign-b99535414z1-315784501.html/>.

<sup>229</sup> *Id.*

<sup>230</sup> Bottari, *Walker's Dark Money*, *supra* note 146.

<sup>231</sup> Bottari, *WMC Spends \$600,000*, *supra* note 212.

WMC,<sup>232</sup> both of which were parties to the case.<sup>233</sup> The prosecutors in charge of the investigation asked Justices Prosser and Gableman to recuse themselves, arguing that the justices' ability to fairly rule on a case that involved parties largely responsible for their own elections could reasonably be questioned.<sup>234</sup> In addition, a number of distinguished legal ethicists as well as prominent public interest organizations, such as the James Madison Center for Free Speech, The Ethics and Public Policy Center, and The Brennan Center for Justice, argued that the United States Constitution required the justices to recuse themselves.<sup>235</sup>

The argument in support of recusal was roughly as follows: WiCFG, WMC, and their offshoots spent millions of dollars in support of Prosser's election, approximately five times as much as the Prosser campaign itself spent in an election that was decided by about seven thousand votes.<sup>236</sup> In support of Gableman's election, WMC spent some five and a half times the amount that Gableman's own campaign spent, and WiCFG also surpassed the Gableman campaign's spending.<sup>237</sup> Gableman prevailed in his election by about twenty thousand votes.<sup>238</sup> The closeness of these elections indicated that in the absence of WMC's and WiCFG's heavy political spending, Justices Prosser and Gableman would not have prevailed. In addition, the justices had a personal stake in the outcome of the case since a decision closing the investigation into campaign coordination would make it easier for WiCFG and WMC to support the justices in future campaigns. Nevertheless, relying on the recusal rule that the court had previously adopted, the justices declined to recuse themselves.<sup>239</sup>

Then, on July 16, 2015, in a 4–2 decision—Justice Ann Walsh Bradley recused herself because her son was a member of a law firm participating in the case<sup>240</sup>—the court closed the investigation into unlawful campaign coordination and declared that any coordination that occurred did not violate the law since it only involved issue ads.<sup>241</sup> The court did not address the fact that the prosecutor was also looking into the

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Caplan, *Destruction of the Wisconsin Supreme Court*, *supra* note 193.

<sup>235</sup> See *Three Unnamed Petitioners v. Peterson*, No. 2013AP2504-2508-W (Wis. July 16, 2015) (Order granting motions to file non-party amicus briefs and denying motion for recusal of Justice Gableman); *id.* (Order granting motions for leave to file non-party briefs and denying motion for recusal of Justice Prosser). In *Caperton v. A.T. Massey Coal Co.*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires a judge to recuse himself not only when actual bias has been demonstrated or when the judge has an economic interest in the outcome of the case but also when “extreme facts” create a “probability of actual bias.” 556 U.S. 868, 886–87 (2009).

<sup>236</sup> Brendan Fischer, *Prosecutor in Scott Walker Probe Asks Justices to Recuse*, PRWATCH (Feb. 13, 2015), <http://www.prwatch.org/news/2015/02/12734/walker-wisconsin-supreme-court-recuse>.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Marley & Spicuzza, *supra* note 228.

<sup>240</sup> *Id.*

<sup>241</sup> *State ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165 (Wis. 2015).

matter of Walker's campaign coordination with groups engaged in express advocacy.<sup>242</sup> Again in dissent, Justice Abrahamson called the majority's decision "an unprecedented and faulty interpretation of Wisconsin's campaign finance law and of the First Amendment."<sup>243</sup> Also dissenting, Justice Patrick Crooks stated that the majority's analysis of the campaign finance issue was flawed and "will profoundly affect the integrity of our electoral process."<sup>244</sup>

As a result of the court's ruling, candidates, including the justices who decided the case, can permissibly work hand-in-glove with "independent" groups that take unlimited, secret donations as long as they only coordinate regarding issue ads.<sup>245</sup> The effect of the court's decision is to render Wisconsin's post-Watergate contribution limits and public disclosure requirements applicable to candidates meaningless. Quoting Judge Easterbrook, Justice Abrahamson wrote, "[i]f campaigns tell potential contributors to divert money to nominally independent groups that have agreed to do the campaigns' bidding, these contribution limits become porous, and the requirement that politicians' campaign committees disclose the donors and amounts become useless."<sup>246</sup>

The Campaign Legal Center, a non-partisan body which seeks to strengthen the public's voice in the political arena, characterized the Wisconsin Supreme Court's opinion as an "absurdity" and declared that the court had abdicated its "responsibility to engage in reasoned judicial review of the laws at issue."<sup>247</sup> It further stated:

A fundamental precept of judicial decision-making is that a court should analyze the past precedents that most closely resemble the case at bar to render a decision . . . . [T]he [United States Supreme] Court has been unwavering in distinguishing between expenditure restrictions and contribution restrictions . . . . It has also been steadfast in supporting the theory that "all expenditures placed in cooperation with or with the consent of the candidate," i.e., coordinated expenditures, should be treated as "disguised contributions" subject to limitation and disclosure . . . . It is thus inexplicable that the Wisconsin court decided a constitutional case about coordinated spending without analyzing—or even referencing—a single [United States] Supreme Court case about coordinated spending.<sup>248</sup>

Another commentator wrote that the court's decision "is erroneous under federal precedent and fundamentally misunderstands the Supreme Court's holdings

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<sup>242</sup> *Id.*

<sup>243</sup> Brendan Fischer, *Five Things to Know About the Scott Walker John Doe Ruling*, PRWATCH (July 16, 2015), <http://www.prwatch.org/news/2015/07/12887/five-things-know-about-scott-walker-john-doe-ruling>.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Tara Malloy, *Judicial Oblivion: How the Wisconsin Supreme Court Ignored Legal Precedent to End the John Doe Investigation*, CAMPAIGN LEGAL CTR. (July 28, 2015), <http://www.campaignlegalcenter.org/news/blog/judicial-oblivion-how-wisconsin-supreme-court-ignored-legal-precedent-end-john-doe>.

<sup>248</sup> *Id.*

distinguishing between independent spending and spending coordinated with a candidate.”<sup>249</sup> The writer further noted that “the [Wisconsin Supreme] Court’s reasoning lacked a coherent basis or a foundation in federal case law,” and that the immediate effect of the decision would be to render Wisconsin’s regulatory scheme “inoperable” and to make contribution limits “meaningless.”<sup>250</sup> Thus, the court’s handling of the campaign coordination issue not only destroyed one of the few important remaining provisions of Wisconsin’s campaign finance law, but signified the further decline of a once respected judicial body.

One further aspect of the court’s handling of the campaign coordination case requires mention. For unknown reasons, the court was extremely concerned about the possibility that the evidence that the prosecutors had uncovered might be disclosed to someone.<sup>251</sup> So fearful was the court that when the prosecutors who wished to seek review of the decision in the United States Supreme Court asked for permission to show the evidence to their lawyers so that they could prepare a certiorari petition, the court refused.<sup>252</sup> As a result of this unbelievable decision, the prosecutors had to file their petition to the United States Supreme Court *pro se*.<sup>253</sup>

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<sup>249</sup> Brent Ferguson, *A New Threat to the Viability of Campaign Contribution Limits*, 65 EMORY L.J. ONLINE 2020, (2016), [http://law.emory.edu/elj/\\_documents/volumes/65/online/ferguson.pdf](http://law.emory.edu/elj/_documents/volumes/65/online/ferguson.pdf).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Order on Mot. to Amend John Doe Secrecy Orders, State *ex rel.* Two Unnamed Petitioners v. Peterson, No. 2014AP296-0A (Wis. Sup. Ct. Feb. 5, 2016).

<sup>253</sup> Since the decision in the campaign coordination case, Scott Walker has appointed two new justices to the court, Rebecca Bradley who replaced Justice Crooks who died and Dan Kelly who replaced Justice Prosser who retired. Both Bradley and Kelly have histories of making controversial statements.

In a column about Bill Clinton winning the 1992 presidential election, [Bradley] called voters either stupid or evil for electing ‘a tree-hugging, baby-killing, pot-smoking, flag-burning, queer-loving, draft-dodging, bull-spouting, ‘60s radical socialist adulterer to the highest office in our nation.’ ‘Either you condone drug use, homosexuality, AIDS-producing sex, adultery and murder, and are therefore a bad person, or you don’t know that he supports abortion on demand and socialism, which means you are dumb. Have I offended anyone? Good — some of you really need to wake up.’

Jason Stein, Mary Spicuzza & Patrick Marley, *Bradley Extra Marital Affair, Role in Child Placement Surface*, MILWAUKEE J. SENTINEL (Mar. 10, 2016), <http://www.jsonline.com/news/state-politics/bradley-extra-marital-affair-role-in-child-placement-surface-699684605z1-371700831.html>. In 2014, Kelly wrote that affirmative action and slavery were comparable. “Morally, and as a matter of law, they are the same.” This was so according to Kelly because both involve “an unwanted, economic relationship.” Bruce Murphy, *Walker’s Bizarre Choice for High Court*, URB. MILWAUKEE (July 28, 2016), <http://urbanmilwaukee.com/2016/07/28/murphys-law-walkers-bizarre-choice-for-high-court/> (quoting Daniel Kelly).

After her appointment, Bradley successfully stood for election. Once again, the biggest spender in her campaign against appellate court judge Joanne Kloppenburg was not a candidate but rather a dark money group which called itself the Wisconsin Alliance for Reform (“WAR”) and was registered by Lorri Pickens, a Koch network operative. Jessica Mason & Mary Bottari, *WAR on Voters: Big Money Streams into WI Supreme Court Race with No Disclosure*,

## V. WHAT IS TO BE DONE?

The Wisconsin legislature, as presently constituted, is unlikely to embark on a constructive reform of state campaign finance law. It recently enacted legislation that doubled the amount that donors can contribute to candidates, allowed corporations to give unlimited amounts to political parties and campaign committees, and eliminated the requirement that contributors identify their employer.<sup>254</sup> Worse, it codified the Wisconsin Supreme Court's decision authorizing candidates to coordinate with advocacy groups that sponsor issue ads.<sup>255</sup> No other state that limits contributions in elections allows such coordination.<sup>256</sup>

Thus, those who would like Wisconsin to be a model good government state once again have no alternative but to think about the long term. Ultimately, the Wisconsin legislature needs to enact a new campaign finance reform statute that, among other things, regulates sham issue ads and creates a robust system of partial public funding. For such a statute to survive a constitutional challenge, however, the United States Supreme Court will have to change direction on the issue of campaign finance reform legislation. When Justice Scalia was on the court, five justices took a single-mindedly libertarian view of the First Amendment.<sup>257</sup> The approach of these justices was one dimensional.<sup>258</sup> Their view tilted the Court's campaign finance jurisprudence heavily in favor of the rich and powerful and further contributed to undermining democracy in Wisconsin and elsewhere.<sup>259</sup>

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PRWATCH (Apr. 1, 2016), <http://www.prwatch.org/news2016/03/13073war-wisconsin-voters-b>. WAR spent some \$3 million in highly misleading sham issue ads including an ad accusing Kloppenburg of being soft on sex offenders. Steven Elbow, *Enthusiastic Republican Voters Push Bradley over Kloppenburg in Wisconsin Supreme Court Race*, CAPITAL TIMES (Apr. 6, 2016), [http://host.madison.com/ct/news/local/writers/steven\\_elbow/enthusiastic-republican-voters-push-bradley-over-kloppenburg-in-wisconsin-supreme/article\\_e6bebc64-fbb5-11e5-8eb5-571fad822fd7.html](http://host.madison.com/ct/news/local/writers/steven_elbow/enthusiastic-republican-voters-push-bradley-over-kloppenburg-in-wisconsin-supreme/article_e6bebc64-fbb5-11e5-8eb5-571fad822fd7.html).

Kelly has yet to face election. Interestingly, in 2008, Bradley and Kelly co-authored an article attacking a proposal of the Judicial Integrity Committee of the State Bar designed to discourage state supreme court candidates from employing false, unfair or offensive speech in their campaigns. Don Daugherty, *Improper Role for State Bar*, MILWAUKEE J. SENTINEL (Jan. 20, 2008), <http://www.jsonline.com/news/opinion/29578309.html>.

It is also worth noting that when Prosser retired, over the objection of numerous legislators, Chief Justice Roggensack announced that the State Law Library was being renamed after Prosser. Erica Strebel, *State Law Library to Be Named After Prosser*, WIS. L.J.COM (July 15, 2016), <http://wislawjournal.com/2016/07/15/state-law-library-to-be-named-after-prosser/>.

<sup>254</sup> Patrick Marley, *Donor, Elections Bills Head to Walker*, MILWAUKEE J. SENTINEL, Nov. 17, 2015, at A1.

<sup>255</sup> Patrick Marley, *Assembly Approves GAB Split*, MILWAUKEE J. SENTINEL, October 22, 2015, at A1.

<sup>256</sup> *Id.*

<sup>257</sup> Lawrence H. Tribe, *Dividing 'Citizens United': The Cases v. the Controversy* 30 (March 9, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2575865](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575865).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

As Wisconsin's experience indicates, one essential reform is to ensure that sham issue ads are regulated like other political advertisements. If such a reform were adopted, many, if not most, sham issue ads would disappear. Yet, in a 5–4 decision in *FEC v. Wisconsin Right to Life*,<sup>260</sup> the United States Supreme Court announced a standard that makes such regulation difficult. The Court stated that an issue ad can be regulated consistent with the First Amendment only if it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” and that the context of the ad should not play a “significant role” in the analysis.<sup>261</sup> This approach seems perversely unconnected to reality. Few, if any, issue ads have any purpose other than to influence votes, and few involve any discussion of issues that is not entirely incidental to the goal of electing a candidate. More accurate is Justice Souter's statement in dissent that “the line between ‘issue’ broadcasts and outright electioneering [is] a patent fiction.”<sup>262</sup>

The United States Supreme Court has also made creating an effective public funding system more difficult. The court has constrained legislatures from establishing any kind of rescue fund for candidates who, because of heavy spending by privately financed candidates or independent committees, are placed at a substantial financial disadvantage.<sup>263</sup> In *Davis v. FEC*,<sup>264</sup> another 5–4 decision, the Court struck down the Millionaires Amendment, which increased contribution limits for House candidates facing self-financed opponents who spent more than \$350,000 of their own money.<sup>265</sup> The Court held that the law impermissibly burdened wealthy candidates.<sup>266</sup> Also, in *Arizona Free Enterprise Club's Freedom Pac v. Bennett*,<sup>267</sup> the Court invalidated a statute that provided additional funds up to a certain amount to publicly financed candidates facing big spending by privately financed opponents.<sup>268</sup>

Overturning the Court's campaign finance jurisprudence obviously will not occur overnight. But as John Gardner once said, “[r]eform isn't for the short winded.”<sup>269</sup> Someday, a future president will appoint justices who are open to campaign finance reform.<sup>270</sup> Constitutional scholars have developed a rich set of alternative understandings of the First Amendment which would allow reasonable regulation of money in politics consistent with the Constitution, American history, and democratic

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<sup>260</sup> *FEC v. Wis. Right to Life, Inc.* 551 U.S. 449, 457 (2007).

<sup>261</sup> *Id.* at 452.

<sup>262</sup> *Id.*

<sup>263</sup> Ferguson, *supra* note 250.

<sup>264</sup> *Davis v. FEC*, 554 U.S. 724, 744 (2008).

<sup>265</sup> 2 U.S.C. § 441a-1(a) (2002).

<sup>266</sup> *Davis*, 554 U.S. at 743.

<sup>267</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

<sup>268</sup> Ronald Dworkin, *The Court's Embarrassingly Bad Decisions*, N.Y. REV. OF BOOKS (May 26, 2011), <http://www.nybooks.com/articles/archives/2011/may/26/courts-embarrassingly-bad-decisions/>.

<sup>269</sup> Elizabeth Drew, *How Money Runs Our Politics*, N.Y. REV. OF BOOKS (June 4, 2015), <http://www.nybooks.com/articles/archives/2015/jun/04/how-money-runs-our-politics/>.

<sup>270</sup> *Id.*

values.<sup>271</sup> Waiting in the wings are well-thought-out approaches that would provide political spending with significant First Amendment protection and would, at the same time, accommodate competing constitutional values such as electoral integrity and political equality.<sup>272</sup>

Signs indicate that as the result of the United States Supreme Court's decision in *Citizens United*<sup>273</sup> and the large sums of money that special interest groups are spending to elect their favored candidates, the public has become increasingly aware of the need to do something to contain campaign spending.<sup>274</sup> Possibly, the idea has begun to take hold that if governmental bodies in the United States are to function democratically and in the public interest, campaign finance laws must be dramatically reformed. Those who have reached that conclusion need only point to the state of Wisconsin to prove their case.

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<sup>271</sup> Conference Summary, *Money in Politics 2030: Toward a New Jurisprudence*, BRENNAN CTR. FOR JUST., <http://www.brennancenter.org/sites/default/files/events/Money%20in%20Politics%202030%20-%20Toward%20a%20New%20Jurisprudence%20-%20Conference%20Summary.pdf>.

<sup>272</sup> *Id.*

<sup>273</sup> See generally *Citizens United v. FEC*, 558 U.S. 310 (2009).

<sup>274</sup> Caplan, *Destruction of the Wisconsin Supreme Court*, *supra* note 193.