

Components of an Effective Coordination Law

Given the vast sums of money that have flooded into politics since the *Citizens United* decision, one might not realize that there are still some financial limits. Contribution limits to candidates are alive and well, and have been uniformly upheld by the courts.

This is not the case, however, when it comes to contributions to “independent” groups. When the Supreme Court gave the green light for unlimited expenditures, it assumed that such spending would not be coordinated with candidates and would not undermine the anti-corruption purpose of contribution limits to candidates.¹ A great deal of real-world evidence shows that the Court’s assumption was flawed.² In fact, the laws of many states, as well as the federal government, do not go far enough to address the realities of coordinated spending. Independent groups are often little more than unregulated arms of candidate campaigns. The notion that there is no “coordination” is a polite fiction.

Coordinated spending between candidates and outside groups moves power away from ordinary citizens in favor of deep-pocketed donors. This is especially true in state and local elections, where campaigns are less costly.³ In these races, a fairly modest sum can buy significant influence: as one Montana regulator told the Brennan Center, a mere “\$20,000 would be a lot of money for a legislative seat.”⁴ It is no wonder, then, that outside groups have funneled money into every level of state and local government, from gubernatorial and legislative elections, to attorney general and secretary of state races, to mayoral, city council, and district attorney contests.⁵

Certain types of conduct can be evidence of coordination. One indicator is when candidates fundraise for the “independent” groups that support them.⁶ Other coordination activities could include the sharing between a candidate’s campaign and the outside group of information material to electioneering, staff or vendors, such as political consultants, and public communications or materials.⁷

Notably, although candidate-specific groups have often come in the guise of super PACs, issue advocacy nonprofits have increasingly become a vehicle for candidate coordination.⁸ Whereas super PACs must publicly report donor information under federal law and the law of many states, issue advocacy nonprofits are typically exempt from disclosure requirements.⁹ The secrecy that these groups enjoy raises special concerns about corruption.¹⁰

Many jurisdictions’ laws have not caught up with these realities. Often, these laws provide only a basic, statutory definition of coordination, enabling candidates and spenders to plead ignorance when certain cooperative actions are not clearly covered.¹¹ State and local laws need to provide clearer guideposts and capture a realistic range of coordinated activity.

1 See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 360 (2010) (“By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”).

2 See Money in Politics: Empirical Evidence Database, Brennan Ctr. for Justice, <https://www.brennancenter.org/analysis/money-politics-database> (last visited Apr. 3, 2018).

3 Chisun Lee et al., Secret Spending in the States 3-4, 10 (2016), https://www.brennancenter.org/sites/default/files/analysis/Secret_Spending_in_the_States.pdf.

4 Chisun Lee et al., After *Citizens United*: The Story in the States 6 (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf (hereinafter “After *Citizens United*”).

5 See *id.*

6 See *id.* at 10-12.

7 Testimony of Daniel I. Weiner, Counsel, Brennan Center for Justice at NYU School of Law, Submitted to the Philadelphia Bd. of Ethics (Sept. 17, 2014), available at <http://www.brennancenter.org/analysis/brennan-center-urges-adoption-enhanced-coordination-rules-philadelphia#7>.

8 Lee et al., After *Citizens United*, *supra* note 4, at 8.

9 *Id.*

10 *Id.*

11 *Id.* at 4, 28.

States and cities that have strengthened and enforced their coordination laws have helped to ensure that unlimited spending is independent. For example, in California, regulations presume that spending is coordinated if it involves anyone who has provided campaign or fundraising strategy services to the candidate within the same election.¹² The law also prevents groups from making independent expenditures to support a candidate who has helped the group to raise money.¹³ And in Vermont, in response to a flood of candidate-specific outside money, the legislature enacted an unusually **strong requirement** for outside groups to conduct their activities “entirely independent of candidates” if they wish to raise unlimited funds.¹⁴

Meaningfully curbing potentially corruptive coordination requires a comprehensive approach. We recommend using all of the following ideas together as a package of reforms, rather than picking and choosing among them.¹⁵

- 1. Make sure the law applies to a realistic range of spending.** The weakest laws exclude large amounts of outside spending from coordination regulation by covering only express advocacy (that is, advocacy that directly solicits a vote for or against a candidate), rather than including election-season advertisements that promote or attack candidates’ stances on issues.¹⁶ The latter type of ad is far more common.¹⁷ Maine, Ohio, and the federal government have laws that consider a reasonably broad range of activity in regulating coordination.¹⁸
- 2. If a candidate raised money for a group, treat all spending by that group on behalf of the candidate as coordinated.**¹⁹ When candidates raise money for a group that then spends on communications to promote their election, they are cooperating to make those expenditures.²⁰ A candidate’s ability to solicit funds for a supportive and unlimited spender raises concerns about corruption analogous to those that justify limits on direct campaign contributions.²¹ **Minnesota’s law** provides a strong example of how to address this problem: any expenditure to promote the election of a candidate who has raised money for the spender is viewed as coordinated.²² Weaker provisions, as in Connecticut, allow a candidate’s fundraising role for an outside group to be viewed merely as *evidence* of coordination, but do not go so far as to automatically view it as coordination per se.²³
- 3. Provide sensible “cooling off” periods before a candidate’s former staff can work for a group making unlimited expenditures for the candidate’s election.**²⁴ Without such safeguards, there is a substantial risk that outside spending will be de facto coordinated with the candidate, increasing the risk of corruption.²⁵ The federal rules currently contemplate a too-short cooling-off period of a mere 120 days. Such a window is too brief, especially given that super PACs work year-round to advance candidates’ interests.²⁶

12 *Id.* at 18; *see also* 2 Cal. Code Regs. § 18225.7(d)(3).

13 Brent Ferguson, State Options for Reform 3 (2015), https://www.brennancenter.org/sites/default/files/publications/State_Options_for_Reform_FINAL.pdf; 2 Cal. Code Regs. § 18225.7(d)(5).

14 Lee et al., After *Citizens United*, *supra* note 4, at 20; *see also* 17 V.S.A. § 2901(10) (2014) (defining “independent expenditure-only political committee” as a political committee that conducts its activities “entirely independent of candidates”); *id.* § 2944 (2014) (outlining “accountability for related expenditures”).

15 Lee et al., After *Citizens United*, *supra* note 4, at 29.

16 *Id.* at 27.

17 *See id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 28; Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Opinion 437, at 1 (Feb. 11, 2014), *available at* <http://www.cfboard.state.mn.us/ao/AO437.pdf>.

23 Lee et al., After *Citizens United*, *supra* note 4, at 28.

24 *Id.*

25 Testimony of Daniel I. Weiner and David Earley, Counsel, Brennan Center for Justice, to Federal Election Commission (Jan. 15, 2015), *available at* <https://www.brennancenter.org/analysis/comment-fec-wake-supreme-court-decisions-fix-disclosure-and-coordination-rules-and-enforce>.

26 Lee et al., After *Citizens United*, *supra* note 4, at 28.

More reasonable examples could include a full calendar year, as Maine law provides,²⁷ or 18 months, as in Connecticut.²⁸

4. **Treat as coordinated any spending that reproduces material produced by the candidate’s campaign.**²⁹ For example, in 2014, the Philadelphia Board of Ethics approved changes to the city’s coordination law, providing, among other things, that if an outside group reproduced a candidate’s campaign material, the expenditures for the reproduction would be counted as a contribution.³⁰ A similar proposal passed in San Diego in 2014.³¹
5. **Publish scenario-based examples of what constitutes prohibited coordination and what does not.** Strong laws publish examples of prohibited activity in realistic contexts. For example, Connecticut provides a detailed list of scenarios that create a rebuttable presumption of coordination.³² Federal law is unnecessarily narrow, but still provides more detailed guidance than the laws of many states.³³
6. **Treat as coordinated any spending to promote the election of a candidate, when the spender uses a consultant or vendor who has also served the candidate in a position privy to related campaign information.**³⁴ Federal regulations address this issue by providing that an outside spender may not use a vendor that a candidate has used in the last 120 days.³⁵ As noted in the above discussion of “cooling off” periods, such a window is too short. California and Maine regulate the same conduct, but without such a brief window.³⁶
7. **Allow the use of firewalls under appropriate circumstances to demonstrate that an outside group’s spending was truly independent.**³⁷ When a vendor provides services to both a candidate and an outside group, the vendor may use an adequate firewall to separate the two streams of work and mitigate the risk of coordination.³⁸ States should allow proof of a formal, written policy prohibiting the exchange of relevant information to serve as evidence that no coordination occurred.³⁹
8. **Ensure adequate enforcement and deterrence.** Tough rules have no meaning if they are not enforced. A single entity should be vested with clear, primary authority to enforce the law.⁴⁰ That entity should not only react to private complaints but should also conduct investigations on their own initiative into possible coordinated activity.⁴¹ The law should also deter coordination by providing for graduated penalties.⁴² The size of the penalty should correspond to the severity of the violation. There should be allowances for de minimis transgressions, but there should also be adequate consequences for significant and deliberate wrongdoing.⁴³

27 94-270 C.M.R. Ch. 1, § 6(9)(B)(1) (an expenditure is presumed to be coordinated when, among other things, the spender has “had a paid or unpaid position managing the candidate’s campaign, or has received any campaign-related compensation or reimbursement from the candidate” in the last twelve months preceding the expenditure).

28 Conn. Gen. Stat. § 9-601c(b)(5) (2013) (applying 18-month cooling off period to individuals who served as employee or consultant to candidate’s candidate committee or opponent’s candidate committee).

29 Lee et al., After *Citizens United*, *supra* note 4, at 28.

30 Philadelphia, Pa. Bd. of Ethics Reg. No. 1.40 (2014); see also Leigh Hartman, *Philadelphia Regulation Attempts to Reign in Coordinated Spending*, Brennan Ctr. For Justice (Nov. 7, 2014), available at <https://www.brennancenter.org/blog/philadelphia-regulation-attempts-reign-coordinated-spending>.

31 Joe Yerardi, *San Diego’s Ethics Commission votes to reign in independent committees*, inewsource (July 11, 2014), available at <https://inewsource.org/2014/07/11/san-diegos-ethics-commission-votes-to-reign-in-independent-committees/>.

32 See Conn. Gen. Stat. § 9-601c(b) (2013) (listing expenditures that raise rebuttable presumption of coordination).

33 Lee et al., After *Citizens United*, *supra* note 4, at 28.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at 29.

38 *Id.*

39 *Id.*

40 *Id.* at 28.

41 *Id.*

42 See *id.*

43 *Id.*

For More Information on Coordination

BRENT FERGUSON, *STATE OPTIONS FOR REFORM* (2015), <https://www.brennancenter.org/publication/state-options-reform>

CHISUN LEE, BRENT FERGUSON, & DAVID EARLEY, *AFTER CITIZENS UNITED: THE STORY IN THE STATES*, (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf