THE DEVIL'S ADVOCATE
WMC, BRADY WILLIAMSON, AND ISSUE ADS

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Toward the end of our two-hour interview, Brady Williamson, who has been doing some fancy legal footwork and scoring here and there with a well-aimed jab of reason, senses opportunity and goes for the knock-out:

> The same principles that were at stake in *The Progressive* magazine case and the UW student fee case are present in the WMC case. In all three cases, the government either wanted to restrict speech, or punish speech.

Damn you, Brady. Don't bring up cases in which I agree with your position as being the same as this one. Yes, I know that you and your prestigious Madison law firm, LaFollette & Sinykin, represented the defendants in all three cases. I know that, in all three cases, your arguments prevailed, despite the unpopularity of the speech they sought to protect. But for God's sake, man, don't ask me to accept that a magazine's right to challenge nuclear secrecy or the right of students to say stupid and hurtful things is the same as the ability — I can't bring myself to say right — of corporations to run issue ads that mock the state's elections law and especially its ban on corporate spending in electoral campaigns.

That, however, is exactly what Williamson is asking me to concede, to great effect. His arguments are relentless, his logic like a steel trap.

"You don't need a First Amendment to protect the expression of popular views," he tells me, as if I didn't know. "The Constitution in general and First Amendment in particular are designed to protect unpopular speech."

In 1979, the U.S. government sought to block *The Progressive*, a small Madison-based magazine, from publishing an article that disclosed what were considered to be nuclear secrets. "There were few people who thought the magazine article was well-advised," says Williamson, who as newly hired lawyer at LaFollette & Sinykin was part of the magazine's defense team. "The First Amendment argument was about whether the magazine had the right to publish it without government interference."

In 1991, Williamson was one of the lead attorneys in a lawsuit backed by the ACLU

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against the UW Board of Regents, which had passed a rule forbidding students from using racist or discriminatory language. "The point of the case," he explains, "was not that people should use that language, but rather that the government should not be in a position of telling a student what he or she could not say."

In the present case, Williamson and his law firm represented the 4,700-member business lobby, Wisconsin Manufacturers and Commerce, against a spate of legal actions over its use of "issue ads" in electoral contests. The chief action was a prosecution by the state Elections Board, which charged that WMC broke election law by running the ads without registering and providing the requisite disclosure. In July, the Wisconsin Supreme Court upheld a lower court ruling in WMC's favor. In November, the U.S. Supreme Court let that ruling stand by refusing to hear the state's appeal.

"Pro-business group wins on issue ads," declared a front-page headline in the *Wisconsin State Journal*. Williamson and his law firm had done it again.

But, on closer inspection, it appears that WMC did not win as clearly as it would have liked. Indeed, the state Supreme Court urged the Legislature and Elections Board to draft new laws and rules to regulate issue ads. Almost certainly, this matter will be revisited by lawmakers and the courts.

Williamson is confident his clients will prevail. He says the U.S. Supreme Court, in a 1976 case called *Buckley v. Valeo*, drew what other federal courts have since dubbed a "bright line" regarding what speech is subject to government regulation. Such communications, the court held, must "expressly advocate the election or defeat of a clearly identified candidate." The issue ads run by WMC and other groups tiptoe to the edge of this line, but do not cross it.

"The reason the Supreme Court of the United States drew a bright line in *Buckley* is because, absent a bright line, you put government in a position of deciding who gets to talk," says Williamson. "The whole point of the First Amendment is to permit — indeed, encourage — free, robust and uninhabited discussion of public issues and candidates."

As Williamson and others are fond of pointing out, the use of issue ads in Wisconsin was pioneered not by the big bad business lobby but by the Sierra Club, a left-leaning grassroots environmental group.

James Buchen, WMC's vice president of government relations, says seeing ads the Sierra Club aired in the spring of 1996 to help defeat Sen. George Petak of Racine "triggered us to think about" running similar ads. "How do they do that?" he wondered.

Buchen, a lawyer, researched the issue. And WMC's attorneys, without identifying their client, submitted sample ads to the state Elections Board for review. In a letter dated October 2, 1996, the Elections Board Executive Director, Kevin Kennedy, advised that the ads appeared to be outside the scope of the state's regulatory authority.

"There are no terms of express advocacy contained in the communications," wrote Kennedy. "There are no references made to the election or voting, although the subject matter of the ads involve issues that are clearly part of several legislative campaigns this fall." While noting that the timing, just prior to an election, "could raise the suggestion that these are essentially candidate advocacy ads," Kennedy nonetheless flashed a green light.

WMC, under the aegis of the WMC Issues Mobilization Council, proceeded to produce and air a series of commercials criticizing Democratic candidates. A sample ad:

> State Sen. Lynn Adelman is standing in the way of reform. Voting against curbs of frivolous lawsuits that cost Milwaukee jobs. What's worse, Adelman's made a career out 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.

Naturally, the targets of this pabulum were not pleased. They complained to the Elections Board, and when it did not promptly act, they turned to the courts for injunctive relief. WMC, meanwhile, turned to Brady Williamson and LaFollette & Sinykin.

On one hand, it was an odd choice: Williamson is a Democratic Party stalwart, a man whose politics are much more in sync with Lynn Adelman than WMC. On the other, as Buchen notes, LaFollette & Sinykin is rightly regarded as the state's top First Amendment law firm.

Since 1996, WMC has raised and spent nearly half a million dollars on legal fees defending its right to run issue ads. "The one thing this whole exercise has taught me is to be appreciative of what these [other First Amendment] fights were all about," says Buchen. "You may not like what those people are saying, but you can't have government deciding which points of view are allowed."

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Ironically, WMC lost at precisely the stage of the game where First Amendment protections are supposed to be highest. On October 31, 1996, Dane County Circuit Court Judge Mark Frankel ordered WMC's ads off the air; other state courts promptly followed suit.

Like Federal Judge Robert W. Warren in *The Progressive* case, Judge Frankel engaged in "prior restraint" — stopping speech from happening. U.S. Supreme Court Chief Justice Warren Burger, in rejecting the Nixon administration's attempt to block publication of the Pentagon Papers in 1971, declared that:

> ...prior restraints on speech and publication are the most serious and least tolerable infringements on First Amendment rights.

Jim Pugh, a former journalist who now works for WMC, rips the media for not coming to WMC's defense.

> It was a dark day for Wisconsin journalism when no newspaper editorialized against prior restraint when Frankel knocked the ads off the air. We're not taking about making H-bombs. We're talking about Chuck Chvala's voting record.

Dave Zweifel, editor of *The Capital Times* and president of the Wisconsin Freedom of Information Council, says it's "ridiculous" to equate "an ad designed to influence an election campaign" to the kind of politically protected speech that journalists engage in.

That may be, but the First Amendment has been used to protect flag desecration and porno films. Why not a business lobby that wants to criticize public officials?

"Who decides what's good speech and what's bad speech?" asks Williamson. "Who decides what corporations are good and which are bad? If you say the government, let's hope it's a government with which you agree."

Heavens! What are the chances of that?

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In March 1997, the state Elections Board had a change of heart. It found that WMC's Issues Mobilization Council and others "had engaged in express advocacy" during the 1996 elections and therefore must file reports disclosing where its money came from and where it was spent. WMC refused, and in June 1997 the Elections Board charged the group with breaking the law.

At the circuit court level, Judge Sarah O'Brien ruled in favor of WMC. The state, through the office of Attorney General James

Doyle, appealed, and the case was waived directly to the Wisconsin Supreme Court.

Williamson, backed by friend of the court briefs from the ACLU and national business groups, advanced two main arguments: The ads were not express advocacy and any attempt to regulate them in the absence of clearly promulgated rules violated WMC's right to due process. Grouses Williamson, "The notion that [WMC] would be punished for running the very ads the Elections Board said were not illegal violates basic standards of fairness."

The state Supreme Court largely embraced WMC's due-process argument. Justice Patrick Crooks, writing the majority opinion, said the Elections Board "engaged in retroactive rule-making" when it attempted to declare the ads express advocacy based on the context in which they ran — just prior to an election in hotly contested districts.

But the court also ruled that the Legislature or Elections Board was free to define a new standard of express advocacy. Indeed, wrote Crooks, "We encourage them to do so, as we are well aware of the types of compelling state interests which may justify some very limited restrictions on First and Fourteenth Amendment rights." Importantly, the court affirmed that this new definition need not be limited to *Buckley's* list of "magic words" like "vote for" or "defeat."

Mike McCabe of Wisconsin Democracy Campaign, a proponent of campaign finance reform, is pleased by this part of the ruling:

> An open invitation was given to the Legislature and the Elections Board to define issue advocacy in a way that allows those ads to be regulated.

And William Bablitch, one of the justices on the prevailing side of the court's 4-2 decision, advanced an argument that could have come straight off Wisconsin Democracy Campaign's Web page:

> Nobody, including the Elections Board, is trying to stop WMC from saying anything they want to say during the election season. What is at stake here is whether the public has a right to know who is paying for whatever it is WMC wants to say during the election season.

Bablitch said he sided with the majority because he was eager to provide guidance to others seeking a constitutional standard for regulating these ads. But he agreed with the dissenting opinion, which ripped the majority for "dodging the issue" by not itself drafting the clearer standard it felt was needed.

That dissent, written by Justice Ann Walsh Bradley and joined by Justice Shirley Abrahamson, said WMC's ads clearly crossed the line drawn by the U.S. Supreme Court:

> The essential nature of these advertisements is candidate advocacy, not issue advocacy. These advertisements mention issues only as a vehicle for propping up or tearing down a particular candidate.

Indeed, of the six justices only David Prosser bought WMC's First Amendment arguments. Prosser, a former legislator, ripped both the majority and the dissenters for "soar[ing] into pronouncements about speech regulation." The First Amendment, he chided,

> ...does not countenance enforcement against speech on a case-by-case basis where government regulators are permitted to draw inferences from circumstances or guess about people's motives.

In sum, Williamson and WMC largely failed to persuade the state Supreme Court that issue ads merit constitutional protection.

WMC's critics accuse it of hiding behind the First Amendment in order to defy the law against corporate involvement in electoral campaigns. Says Zweifel, "What you have is an organization that wants to influence elections, but the people who want to influence elections don't want the public to know who they are." McCabe agrees: "They don't want to say who's paying for those ads."

The reason WMC doesn't want to say, its critics believe, is that the money comes from corporations, which are prohibited under

Wisconsin law from direct spending on electoral campaigns. Marc Eisen, my editor at *Isthmus,* has accused WMC of "exploiting a judicial loophole" to circumvent this ban, pushed through in 1907 by "Fightin' Bob" La Follette, then Wisconsin's governor. Eisen, after quoting La Follette's warning about a political landscape in which "corporations, not men, would rule," issued this withering rebuke:

> How sad that the La Follette family law firm, LaFollette & Sinykin, has provided WMC's legal firepower in undermining one of Fightin' Bob's great accomplishments.

"The First Amendment is not a loophole," responds Williamson, cleverly demanding to know why the Sierra Club, like WMC a nonprofit corporation, shouldn't be allowed to run issue ads in support of its members' positions. As to the argument that he has spat upon the legacy of Fightin' Bob, whose son Phil co-founded his law firm, Williamson notes that there have been major changes in the political landscape since 1907, including the advent of labor unions like the Wisconsin Education Association Council (WEAC), which are not covered by the ban.

That said, Williamson doesn't think Wisconsin should let corporations contribute directly to campaigns or expressly advocate the election or defeat of particular candidates, as they can in Illinois, California, and quite a few other states. "I don't think it's consistent with our political fabric."

The overriding issue for Williamson is not what Fightin' Bob did in 1907 but what the U.S. Supreme Court did in 1976, when it ruled that "any regulation in the area of free speech must be limited to express advocacy." Says Williamson, "If there is a quarrel here, the quarrel is with the U.S. Supreme Court in *Buckley v. Valeo.*"

Bingo.

Does Williamson agree with this decision, which has been widely criticized for equating speech and money? "It doesn't matter whether I agree with the law or not," he responds. "It is the law of this country — until the court changes its mind, if it ever does."

Further, *Buckley* and other court rulings will likely confound those who seek new controls on issue ads. For instance, a proposal by former state Senate Minority Leader Mike Ellis says an ad or mailing that mentions a party, candidate or office can be considered express advocacy, subject to regulation, if it appears within 60 days of an election. Williamson says such efforts have been consistently rejected by federal courts.

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"Express advocacy is an unsatisfying theory," concedes Williamson, "but it is a bright line." It means that the authority of government to regulate speech is limited to speech that expressly calls for the election or defeat of a particular candidate.

McCabe calls it "preposterous" and Zweifel "a subterfuge" for WMC to claim its ads respect this distinction. The whole point of these ads, they say, is to influence the election. Williamson and Buchen don't deny this, but insist it doesn't matter. "The test is not influencing the election," says Williamson. "The test is whether it's express advocacy."

Clearly, the advent of issue ads in Wisconsin prompts strong division, and even stronger rhetoric. At a recent panel discussion sponsored by the Wisconsin Merchants Federation, McCabe called issue ads a "sham" and "fundamentally undemocratic," telling the audience, "We should all be ashamed." Buchen, meanwhile, warned ominously of "violence in the streets" if the system does not accommodate the desire of groups like his to have "meaningful input into the political process."

Neither the Legislature nor the Elections Board has passed language regulating issue ads in time for this fall's elections. A Democratic campaign group was recently formed for the express purpose of running issue ads "to counter spending by Wisconsin Manufacturers and Commerce." The Wisconsin Realtors Association is also raising money for issue ads.

UW-Madison political science Professor Don Kettl, the head of Governor Tommy Thompson's thoroughly ignored commission on campaign-finance reform, has warned that the upcoming electoral contests will have "no rules, no disclosure and no way to hold the people who are speaking accountable for their speech."

Zweifel's perspective is just as dire: "It seems to me to be dangerous to the future of this country if we're going to allow huge groups like WMC to poison the elections atmosphere." The ultimate result, he believes, will be "a further turning off of the American electorate." The public will conclude that money talks, money buys elections and money drives policy, so it's a waste of their time to vote or otherwise seek to influence the political process.

Williamson, for his part, paraphrases U.S. Supreme Court Justice Oliver Wendell Holmes from a landmark 1919 ruling:

> We rely on a marketplace of ideas and more speech is better than less speech, and the thing to be most avoided is government deciding who shall speak, and who shall be prosecuted for what they say.

(In Holmes' words, "the ultimate good desired is better reached by free trade in...the marketplace of ideas" and "we should be eternally vigilant against attempts to check the expression of opinions we loath.")

A study by John Coleman and Paul Manna of the UW-Madison correlated high campaign spending with high levels of public awareness about campaigns, candidates and issues. Campaign spending, they concluded, "improves the quality of elections while not damaging public trust or involvement."

It's another question entirely whether special-interest ads serve the interests of the groups that run them. Bob Dreps, Williamson's co-counsel on the WMC case, says its ads failed to resonate with voters:

> I don't think the voters are nearly as gullible and naive as regulators seems to think. I think it's paternalistic to suggest that you can buy an election.

Indeed, a study by UW-Madison political scientist Kenneth Mayer found that WMC was on the losing side of the most of the contests in 1996 and 1998 in which it ran issue ads. Issue advocacy, concluded Mayer, "appears to be a remarkably ineffective way to influence elections."

Buchen, whose agrees that spending on key contests will reach new heights next fall, challenges this conclusion, saying Mayer tallied but otherwise overlooked independent expenditures made by WEAC on the other side. "In every one of those races," says Buchen, "we were outspent."