UNLEASHING ELECTIONEERING: ANALYZING THE COURT'S DECISION IN *FEDERAL ELECTION COMMISSION V. WISCONSIN RIGHT TO LIFE, INC.*, 127 S. CT. 2652 (2007)

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I. INTRODUCTION

Federal Election Commission v. Wisconsin Right to Life, Inc.[1] (*WRTL*) marks the most recent swing in the campaign finance reform struggle plaguing the federal election process for over a century. In *WRTL* the Supreme Court found Section 203 of the Bipartisan Campaign Reform Act[2] (BCRA) unconstitutional as applied to three issue advocacy advertisements. While upholding freedom of political speech over concerns of corruption, the Court narrowly construed its recent decision in *McConnell v. Federal Election Commission*.[3] The court also adhered to the framework of its landmark modern-era campaign finance reform case, *Buckley v. Valeo*, which held that money is speech.[4] In correctly finding Section 203 unconstitutional in a narrow, as-applied challenge, the Court created an exception to the BCRA that makes enforcement of campaign finance laws questionable at best, especially in light of traditionally complacent administration by the Federal Election Commission. Rather than the ineffectual increases in restrictions implemented over the past century, the legislature should try a new approach to campaign finance regulation: namely, Congress should unleash electioneering by tailoring back the restrictions to electioneering communication.

Section II of this casenote examines the background of campaign finance reform. Section III summarizes the facts; procedural history; and principal, concurring, and dissenting opinions in *WRTL* with respect to Parts III and IV of the opinion. Section IV analyzes the correctness of the Court's opinion by

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1. Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).
2. Bipartisan Campaign Reform Act (McCain-Feingold) § 203, 2 U.S.C. § 441b(a) (2006).
3. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).
4. Buckley v. Valeo, 424 U.S. 1 (1976).

discussing the arguments in favor of freedom of political speech versus avoiding corruption. Section IV also suggests an alternative approach to campaign finance regulation that balances freedom of speech with avoiding corruption by removing many of the barriers to electioneering communication.

II. BACKGROUND

A. Early Finance Reform

The history of campaign finance reform is rooted in the Eighteenth Century system of spoils and assessments, which by the mid-Nineteenth Century was the primary source for campaign funding.[5] In 1883, Congress took a broad step to change campaign financing by enacting the Pendleton Civil Service Act of 1883, creating a class of federal jobs that could not be given away through the spoils system.[6] This change dramatically reduced the funds political parties could receive through assessments and shifted the fundraising burden to businesses with significant interests in federal legislation.[7]

Responding to criticism of businesses financing political campaigns, Congress passed the 1907 Tillman Act which banned corporate contributions to federal candidates.[8] Despite the substantial changes made under the Tillman Act, a general presumption still existed that the wealthy had too much power over national politics. In 1910, Congress enacted the Federal Corrupt Practices Act and appreciably amended it in 1925 in response to the Teapot

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5. Under the spoils system, loyal party supporters were directly appointed to government positions and in return were required to give portions of their salaries to the political party that appointed them. These contributions were known as assessments. Campaign Legal Center, *The Campaign Finance Guide: The Nineteenth Century: Spoils and Assessments* [hereinafter *Spoils and Assessments*] (describing early American campaign finance reform), http://www.campaignfinanceguide.org/guide-30.html (last visited Nov. 6, 2008).
6. *Spoils and Assessments*, *supra* note 5.
7. *Id*. Corporations first emerged as an integral part of campaign financing during the Civil War since government contracts provided the bulk of corporate income. In 1864, President Abraham Lincoln predicted that "as a result of the war, corporations have become enthroned, and an era of corruption in high places will follow." MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 7 (2005).
8. Campaign Legal Center, *The Campaign Finance Guide: The Early 1900's: Progressive Era Legislation* [hereinafter *Progressive Era*] (describing American campaign finance reform in the early 20th century), http://www.campaignfinanceguide.org/guide-31.html (last visited Nov. 6, 2008). The Campaign Legal Center is a nonpartisan, nonprofit organization that represents the public interest in campaign finance laws and other related areas.

Dome scandal and pressure from reformists.[9] In creating the legislation, Congress had two considerations in mind: (1) the necessity of eradicating corporate influence over elections stemming from corporate financial contributions and (2) the moral belief that corporate officers had no right to make contributions to political parties using corporate funds without the consent of its stockholders.[10] The Act tightened campaign contribution reporting requirements, but proved predominantly ineffective because Congress did not charge any independent agency with its enforcement.[11]

In 1947 Congress enacted the Taft-Hartley Act in an effort to prevent corporations and unions from sidestepping direct contribution limitations.[12] The Act banned corporate and union expenditures made on behalf of federal candidates, including buying advertisements for candidates.[13]

B. The Federal Election Campaign Act (FECA) and *Buckley*

The growing popularity and expense of television advertising made previously legislated campaign contribution limitations impractical.[14] In 1971 Congress enacted the Federal Election Campaign Act (FECA) to address that problem and to correct the impotence of reporting procedures under the Corrupt Practices Act.[15] The FECA made three major reformations in campaign finance law: (1) it limited the amount candidates could contribute to their own campaigns, (2) it limited the amount candidates could spend on television advertising, and (3) it required full and timely reporting of all contributions exceeding $100.[16]

Despite the new spending limitations and reporting requirements, expenditures on advertising continued to rise exponentially.[17] The Watergate scandal and other publicized financial abuses triggered Congress to overhaul

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9. In the Teapot Dome scandal, oil developers gave gifts to federal officials in return for oil leases on public lands. *Progressive Era*, *supra* note 8.
10. U.S. v. Cong. of Indus. Orgs., 335 U.S. 106, 113 (1948).
11. *Progressive Era*, *supra* note 8.
12. Campaign Legal Center, *The Campaign Finance Guide: The New Deal: Expanding the Law* [hereinafter *The New Deal*] (describing changes in campaign finance reform after the New Deal) at http://www.campaignfinanceguide.org/guide-32.html (last visited Nov. 6, 2008).
13. MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 22 (2005).
14. Campaign Legal Center, *The Campaign Finance Guide: The Federal Election Campaign Act, A New Era of Reform* [hereinafter *A New Era*] (describing reforms arising from the FECA) http://www.campaignfinanceguide.org/guide-34.html (last visited Nov. 6, 2008).
15. *Id*.
16. *Id*.
17. In 1972 campaign spending rose to $425 million. *Id*.

FECA with the 1974 amendments.[18] Amended Section 441b prohibited corporations, labor unions, and national banks from making campaign contributions directly from their general treasury funds.[19] The amendments also created the Federal Election Commission (FEC), charged with administration and enforcement of federal campaign finance laws.[20]

Mere weeks after FECA's enactment, political candidates, parties, and organizations brought the first lawsuit challenging the constitutionality of the Act.[21] In reaching its decision in *Buckley v. Valeo*, the Court used three premises to evaluate political money.[22] First, the Court decided to apply the strict scrutiny standard of First Amendment review to political expenditures, opting to treat them as pure speech.[23] Second, the Court recognized a distinction between contributions and expenditures.[24] Third, the Court decided it would only accept certain justifications for the regulation of political money.[25] Under these premises, the Supreme Court upheld the contribution limitations as a means of preventing "corruption and the appearance of corruption,"[26] but invalidated the expenditure limitations as a means of promoting equality, concluding the expenditure limitations were a direct constraint on speech in violation of the First Amendment.[27] Due to vagueness concerns, the Court narrowly construed the independent expenditure provision of FECA to restrict its communications application to express advocacy of election or defeat, such as "vote for," "elect," "support," "defeat," "vote against," and "reject."[28] This construction created a bright-line test between express advocacy and so-called issue advocacy, in which an

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18. LAW AND ELECTION POLITICS: THE RULES OF THE GAME 44 (Matthew J. Streb ed., 2005). The Watergate scandal triggered an investigation into President Richard Nixon's campaign revealing a number of large contributions and improprieties including the acceptance of illegal corporate gifts and the existence of three undisclosed slush funds containing millions of dollars from which the Watergate break-in was financed. The investigation also raised concerns about the influence of money in the political process. ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 22 (2005).
19. *See* Bipartisan Campaign Reform Act § 203, 2 U.S.C. § 441b(a) (2006) (maintaining 1974 Amendments contribution prohibitions).
20. *A New Era*, *supra* note 14; FECA Amendments of 1974, Pub. L. No. 93–433, § 310, 88 Stat. 1263, 1291–93 (codified as amended at 2 U.S.C. 437(c)).
21. *A New Era*, *supra* note 14; *see generally* Buckley v. Valeo, 424 U.S. 1 (1976) (considering constitutionality of FECA).
22. Gerard J. Clark and Steven B. Lichtman, *The Finger in the Dike: Campaign Finance Regulation After McConnell*, 39 SUFFOLK U. L. REV. 629, 632 (2006).
23. *Buckley*, 424 U.S. at 25.
24. *See id.* at 19 and 21 (discussing contributions and expenditures separately).
25. *Id.* at 25–27.
26. *Id.* at 33.
27. *Id.* at 54.
28. *Id.* at 44 n.52.

advertisement addresses a clearly identifiable candidate's position on an issue but does not call for the candidate's election or defeat.[29]

In light of the *Buckley* decision, Congress amended FECA in 1976, removing or revising the portions found unconstitutional and eliminating the cap placed on the amount federal candidates could contribute to their own campaign fund.[30] For its first decade, FECA effectively regulated campaign financing.[31] Over time, however, aggressive party fundraising fueled by Federal Election Commission complacency towards FECA violations led to the virtual ineffectiveness of the Act.[32] One of the major problems which emerged in the 1980's was an explosion in the use of "soft money"[33] to fund federal election campaign activities that went unchecked by the FEC.[34] Since soft money fundraising began being reported in 1991, contributions ballooned from $201 million in 1991–1992 to $496.1 million in 2001–2002.[35] Party committees began using soft funds in 1996 to fund candidate-specific issue ads.[36] The parties avoided using the terms identified in *Buckley* as examples of express advocacy, thereby circumventing FECA limits.[37] The parties spent millions in soft money on issue advertisements during each election between 1996 and 2002 to get their candidates elected.[38]

C. The Bipartisan Campaign Reform Act and Its Progeny

The enactment of the Bipartisan Campaign Reform Act of 2002 culminated six years of debate during which time every session of Congress was presented a version of the bill.[39] The BCRA served two primary

29. Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2677 (2007) (Scalia, J., concurring).
30. The 1976 Amendment did not lift the limit placed on presidential candidates who accepted public funds. *A New Era*, *supra* note 14; Pub. L. No. 94–283, §112, 90 Stat. 475, 486–87 (1976).
31. *A New Era*, *supra* note 14.
32. *Id*.
33. Soft money refers to non-federal money raised by party committees that fall outside of federal contribution limits, source restrictions, and disclosure requirements. JAN WITOLD BARAN, THE ELECTION LAW PRIMER FOR CORPORATIONS 67 (4th ed. 2004).
34. *A New Era*, *supra* note 14.
35. Center for Responsive Politics, *Soft Money's Impact at a Glance* (reporting annual soft money fundraising totals), http://www.opensecrets.org/bigpicture/ptytots.php?cycle=2006 (last visited Nov. 6, 2008).
36. *A New Era*, *supra* note 14.
37. *Id*.
38. *Id*.
39. Campaign Legal Center, *The Campaign Finance Guide: Bipartisan Campaign Reform Act: Restoring the Reforms* [hereinafter *Restoring the Reforms*] (summarizing the legislative history and post-enactment issues of the BCRA), http://www.campaignfinanceguide.org/guide-35.html (last visited Nov. 6, 2008).

purposes: (1) it reinstated the limits on sources and size of political party contributions and (2) it regulated the use of corporate and union treasury funds in federal elections.[40] Specifically, Congress corrected the soft money problem by prohibiting party committees from raising or spending soft money.[41] Section 203 of the Act purported to solve the candidate-specific issue advertising problem by making it a federal crime for a corporation to use its general treasury funds to pay for any "electioneering communications."[42] The BCRA defines electioneering communication as any broadcast that refers to a federal candidate and is aired within thirty days of a federal primary election or sixty days of a federal general election in the jurisdiction the candidate is running.[43] Congress intended the new definition to restrict the use of corporate or union money in funding campaign advertisements.[44] Even at its inception, the Executive greeted the BCRA with skepticism regarding its constitutionality. In a statement made after signing the bill into law, President George W. Bush stated,

> I . . . have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election. I expect that the courts will resolve these legitimate legal questions as appropriate under the law.[45]

The first challenge to the BCRA[46] was filed on the same day the Act was signed into law.[47]

The year after the statute's enactment, in *Federal Election Commission v. Beaumont*, the Supreme Court considered the constitutionality of extending the ban on direct corporate contributions to contributions made by nonprofit corporations.[48] Concluding that nonprofit corporations, like their for-profit counterparts, could accumulate substantial resources and presented a threat of

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40. *Id*.
41. *Id*.
42. Bipartisan Campaign Reform Act § 203, 2 U.S.C. § 441b(b)(2) (2006).
43. 2 U.S.C. § 434(f)(3)(A) (2006).
44. LAW AND ELECTION POLITICS: THE RULES OF THE GAME 70 (Matthew J. Streb ed., 2005).
45. STATEMENT BY THE PRESIDENT, GEORGE W. BUSH, THE WHITE HOUSE, 2002 WL 461393 at *1–2 *as reprinted in* 2002 U.S.C.C.A.N. 125, 125–126.
46. The first case to challenge the constitutionality of BCRA, though not the first decided by the Supreme Court, was *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). A leading critic of the Act, Republican Senator Mitch McConnell of Kentucky, filed the suit and eventually more that 80 plaintiffs joined before the court consolidated their cases under McConnell's name. Clark & Lichtman, *supra* note 22 at 640.
47. Clark & Lichtman, *supra* note 22 at 640.
48. Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003).

misuse by serving as conduits for circumventing the contribution limitations, the Court held the extension consistent with the First Amendment.[49]

In *McConnell v. Federal Election Commission*, the Supreme Court upheld Section 203 against a First Amendment facial challenge.[50] In doing so, the Court effectually upheld blackout periods preceding federal elections for not only express advocacy, but also for issue advocacy.[51] The Court held that there was no overbreadth concern where the speech at issue is the "functional equivalent" of express advocacy.[52] Additionally, the Court reasoned that the compelling governmental interest supporting limits on corporate expenditures for express advocacy also justified extending the limits to advertisements aired during the BCRA blackout period "to the extent [the ads] are the functional equivalent of express advocacy."[53]

III. EXPOSITION OF *FEDERAL ELECTION COMMISSION v. WISCONSIN RIGHT TO LIFE INC.*

In *Wisconsin Right to Life*, the Court confronted the ongoing issue of political campaign speech. Specifically, the Court decided the issue of whether the Bipartisan Campaign Reform Act violated Wisconsin Right to Life, Inc.'s (WRTL) First Amendment rights. The highly divided Court produced a profusion of concurrences and dissents among the Justices. Chief Justice Roberts wrote the principal opinion. Justices Scalia, Kennedy, Thomas, and Alito joined with respect to Parts I and II of the opinion. Justice Alito also joined in Parts III and IV and filed a concurring opinion. Justice Scalia filed an opinion concurring in part and concurring in the judgment, in which Justices Kennedy and Thomas joined. Justice Souter filed a dissenting opinion joined by Justices Stevens, Ginsburg, and Breyer. This exposition will be limited to Parts III and IV of the opinion.

A. Facts and Procedural History

Wisconsin Right to Life, Inc., an ideological nonprofit corporation, began broadcasting advertisements, financed with its general treasury funds, on July 26, 2004, intending to run the ads throughout August.[54] The ads urged

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49. *Id.* at 160.
50. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).
51. *Id*. at 205–06.
52. *Id*.
53. *Id*.
54. Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2653 (2007).

voters to contact Wisconsin Senators Feingold and Kohl to compel them to oppose alleged filibustering by a group of Senators aimed at delaying and blocking federal judicial nominees.[55] Section 203 of the Bipartisan Campaign Reform Act, however, made it a federal crime for a corporation to use its general treasury funds to finance any "electioneering communication" within thirty days of a federal primary election.[56] Thus, WRTL would have to cease broadcasts on August 15.[57]

Consequently, WRTL brought suit against the Federal Election Commission seeking injunctive relief and a declaration that the "electioneering communications" provision of the Bipartisan Campaign Reform Act in Section 203 violated WRTL's First Amendment rights as applied to its three current ads and similar ads it may decide to air in the future.[58] The district court denied a petition for preliminary injunction, holding that *McConnell*'s reasoning was not overbroad and left room for "as-applied" challenges.[59] WRTL did not air its ads during the statutory blackout period.[60] Subsequently, the district court dismissed WRTL's action.[61] WRTL appealed directly to the Supreme Court where a split court vacated the dismissal and remanded the case for further proceedings, holding that *McConnell* "did not purport to resolve future as-applied challenges" to Section 203.[62] On remand, the District Court granted WRTL's motion for summary judgment, ruling that the BCRA violated the corporation's First Amendment rights as applied to its three ads.[63] The court reasoned that, under *McConnell*, the ads were genuine issue ads rather than express advocacy ads or their "functional equivalent" and that no compelling interest justified the Bipartisan Campaign Reform Act's regulation of the WRTL ads in question.[64] The FEC appealed the decision to the Supreme Court.[65]

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55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*. at 2653–54.
59. *Id*. at 2654; Fed. Election Comm'n v. Wis. Right to Life, Inc., No. 04 CV 01260, 2004 WL 3622736, at *3 (D.D.C. Aug. 17, 2004).
60. Fed. Election Comm'n v. Wis. Right to Life, Inc. [hereinafter *WRTL*], 127 S. Ct. 2652, 2654 (2007).
61. *Id*.; Fed. Election Comm'n v. Wis. Right to Life, Inc., No. 04 CV 01260, 2005 WL 3470512, at *1 (D.D.C. May 9, 2005).
62. *WRTL*, 127 S. Ct. at 2654; Fed. Election Comm'n v. Wis. Right to Life, Inc., 546 U.S. 410, 412 (2006).
63. *WRTL*, 127 S. Ct. at 2654; Fed. Election Comm'n v. Wis. Right to Life, Inc., 466 F. Supp. 2d 195, 210 (D.D.C. 2006).
64. *WRTL*, 127 S. Ct. at 2654; Fed. Election Comm'n v. Wis. Right to Life, Inc. 466 F. Supp. 2d at 209–10.
65. *See generally*, *WRTL*.

B. Court Opinion and Holding

In Parts III and IV of the court's opinion, the Chief Justice discussed whether Section 203 of the Bipartisan Campaign Reform Act violated Wisconsin Right to Life, Inc.'s constitutional right to free speech under the First Amendment as applied to its three August 2004 advertisements.[66] The Chief Justice applied a strict scrutiny standard of review because Section 203 placed a burden on political speech.[67] Strict scrutiny required the FEC to prove that applying the BCRA to WRTL's ads "further[ed] a compelling interest and [was] narrowly tailored to achieve that interest."[68]

To resolve the issue, the Court had to determine whether the speech constituted the "functional equivalent" of express advocacy of the election or defeat of a federal candidate rather than a genuine issue ad.[69] While the Court drew a distinction between express and issue advocacy since *Buckley*, candidates' intimate ties to particular issues convoluted the practical application of the distinction.[70] The distinction was necessary, nonetheless, in order to promote the competing interests of regulating express advocacy while promoting issue ads.[71] In drawing the distinction, however, the First Amendment requires the promotion of political speech to trump suppression of such speech.[72]

WRTL conceded that its ads are prohibited by BCRA Section 203 and that its ads do not fit under any of the BCRA's exceptions to "electioneering communication."[73] The pertinent question then became whether the BCRA's prohibition of the ads violated the First Amendment.[74]

The primary point of contention between the parties revolved around the correct interpretation of *McConnell*'s stance on as-applied "functional equivalent" issues.[75] The FEC contended that the proper test was whether the ad intended to influence the election and consequently had the intended effect.[76] WRTL, on the other hand, argued that *McConnell* did not adopt any

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66. *WRTL*, 127 S. Ct. at 2663–74.
67. *Id*. at 2663.
68. *Id*. at 2664.
69. *Id*. at 2659 (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 206 (2003)).
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*. at 2663.
74. *Id*.
75. *Id*. at 2664.
76. *Id*. FEC cited the following statement in *McConnell*: "The justifications for the regulation of express advocacy apply equally to ads aired during [the blackout] periods if the ads are intended to influence the voters' decisions and have that effect." McConnell v. Fed. Election Comm'n, 540 U.S. 93, 206

test for as-applied challenges.[77] The Court agreed with WRTL, stating that the analysis in *McConnell* was grounded in the facts of the case and that it did not purport to adopt any test for future as-applied First Amendment challenges.[78] The *McConnell* Court never stated that it was adopting a test for determining what constitutes a functional equivalent of express advocacy and the record is replete of any evidence warranting such a conclusion.[79] Additionally, the *Buckley* Court explicitly rejected an intent-and-effect test and *McConnell* did not overrule or even address *Buckley*'s holding on the matter.[80] *Buckley* explained that an intent-and-effect analysis would afford "no security for free discussion."[81] Using the same reasoning in *Buckley*, the *WRTL* Court declined to adopt an intent-and-effect test for as-applied challenges to BCRA Section 203.[82]

In formulating a test to adopt for future as-applied challenges, the Court stated a number of considerations: (1) the test should "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open;'"[83] (2) the test must be objective, focusing on the content of the communication in order to protect First Amendment liberties; (3) it must entail minimal discovery to facilitate speedy resolution; (4) the test must avoid open-ended factors that lead to prolonged litigation; and (5) it must give the benefit of the doubt to protecting speech rather than regulating it.[84] In light of such broad considerations, the Court held that the correct test for as-applied challenges to BCRA Section 203 is that an ad is a functional equivalent of express advocacy "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[85]

Under this test WRTL's three ads were not the functional equivalent of express advocacy.[86] Consistent with that of a genuine issue ad, they focused and took a position on a legislative issue, urged the public to adopt their position, and beseeched the public to contact public officials regarding the issue.[87] Additionally, the content of the ads lacked any indication of express

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(2003).

77. Fed. Election Comm'n v. Wis. Right to Life, 127 S. Ct. 2652, 2664 (2007).
78. *Id*.
79. *Id*. at 2665.
80. *Id*. at 2666.
81. *Id*. (quoting Buckley v. Valeo, 424 U.S. 1, 43 (1976)).
82. *Id*.
83. *Id*. (quoting *Buckley*, 424 U.S. at 14).
84. *Id*. at 2666–67.
85. *Id*. at 2667.
86. *Id*.
87. *Id*.

advocacy: they did not mention an election, candidate, or political party nor did they take a position on a candidate's qualifications for office.[88]

The Chief Justice also rejected the necessity of regulating issue advocacy to prevent corruption in campaigning financing fed by the immense wealth of corporations.[89] In rejecting that contention, the Court upheld a prior decision that the corporate identity of a speaker does not strip the corporation of its First Amendment rights.[90]

Thus, because WRTL's advertisements were not express advocacy or its functional equivalent and no compelling interests were raised to support burdening the corporation's speech, the Court held BCRA Section 203 to be unconstitutional as applied to WRTL's three ads.[91]

C. Justice Alito's Concurring Opinion

Justice Alito concurred with the principal opinion and adopted its functional equivalent test.[92] He concluded that BCRA Section 203 as applied cannot ban any ad that may reasonably be interpreted as anything other than express advocacy and that the WRTL's ads may be reasonably interpreted as something other than express advocacy.[93] Justice Alito also foreshadowed future challenges to the BCRA in light of *WRTL*'s unconstitutional as-applied holding, calling on the Court to reconsider the *McConnell* decision upholding the facial constitutionality of Section 203.[94]

D. Justices Scalia's Opinion Concurring in Part and Concurring in Judgment

Similarly, Justice Scalia, joined by Justice Kennedy and Justice Thomas, concurred with the Chief Justice's judgment, but overruled the part of *McConnell* upholding BCRA Section 203 and critiqued the analysis of the principal opinion for that reason.[95]

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88. *Id*.
89. *Id*. at 2672. *McConnell* utilized this interest to uphold regulating functional equivalents to express advocacy. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 205–06 (2003).
90. Fed. Election Comm'n v. Wis. Right to Life, 127 S. Ct. at 2673 (referring to First Nat'l. Bank of Boston v. Bellotti, 435 U.S. 765, 820 (1978)).
91. *Id*.
92. *Id*. at 2674 (Alito, J., concurring).
93. *Id*.
94. *Id*.
95. *Id*. at 2687 (Scalia, J., concurring).

Justice Scalia believed that no test for as-applied challenges can comport with the clarity requirement of freedom of political speech and simultaneously be compatible with the facial validity of Section 203 upheld in *McConnell*.[96] Consequently, he said he would revisit *McConnell* and overrule that part of the decision that upheld the facial validity of Section 203.[97]

The "susceptible of no reasonable interpretation" standard created in the principal opinion was not exempt from Justice Scalia's vagueness critique.[98] The test ultimately depended on judicial or jury judgment as to what constitutes "reasonable."[99] That judgment is inherently subjective in nature and potentially influenced by the decision maker's determination of the importance of the challenged speech and is therefore a vague standard.[100] In light of such unpredictability, speakers may choose to abstain from protected speech rather than potentially face federal prosecution. Such abstention would harm the forbearing speaker and society as a whole by depriving the marketplace of ideas.[101]

E. Justice Souter's Dissenting Opinion

Justice Souter contends that *WRTL* effectively overruled the decision in *McConnell*, replacing a workable standard for an unadministrable subjective test.[102] *McConnell* held that all corporate and union electioneering speech was "prohibitable;" not just speech using express advocacy words, but all speech that had the purpose of effecting election outcomes.[103] The *McConnell* terms "genuine" and "pure" had clear implications: if an ad, reasonably understood, did more than discuss issues, it was, by definition, not "genuine" or "pure."[104] The *WRTL* test, however, took the opposite approach by applying a reasonableness standard to any interpretation other than express advocacy.[105]

Additionally, the BCRA's ban on contributions by corporations and unions and the limitations on their spending became almost meaningless as a result of the principal opinion.[106] Corporations and unions can circumvent the BCRA and save candidates the expense of advertising directly by running

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96. *Id*. at 2675.
97. *Id*.
98. *Id*. at 2680.
99. *Id*.
100. *Id*. at 2680–81.
101. *Id*. at 2681.
102. *Id*. at 2700 (Souter, J., dissenting).
103. *Id*. at 2695–96.
104. *Id*. at 2699.
105. *Id*.
106. *Id*. at 2705.

issue ads avoiding express advocacy or by funneling money through independent corporations such as WRTL.[107]

IV. ANALYSIS

A. The Decision Perpetuates the Tension Between Freedom of Political Speech and Inhibiting Corruption

In the narrow context of WRTL's as-applied challenge to Section 203, the court properly found the BCRA violated the corporation's rights to free speech; however, the court should have overridden that part of *McConnell* which upheld the facial validity of BCRA Section 203. The majority correctly considered freedom of political speech fundamental to a democratic government and embraced the seminal holding in *Buckley* that money is speech.[108] While acknowledging that "candidates . . . are intimately tied to public issues,"[109] the court left discussion of issues and consequently candidates as free as possible. In making this determination, the court maintained the important democratic condition of informed voters. The majority, however, does not believe that corporate or union expenditure of money to engage political speech could harm the political process.[110] This is where the majority and this Casenote diverge, as explained in Part C below.

Justice Souter and the dissenters, on the other hand, believe the important issue of campaign finance regulation is the neutralization of money's political leverage.[111] They repeatedly state that the democratic process is threatened by "large sums of money,"[112] "money in self-interested hands,"[113] "vast sums"[114] of money, and "immense aggregations of wealth."[115] On this point, the dissenters and this Casenote agree. The dissenters continue the debate, however, stating that freedom of political speech concerns take a back seat to the need to inhibit "electoral leverage of concentrations of money . . . ."[116]

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107. *Id*.
108. Lillian R. BeVier, *First Amendment Basics Redux: Valeo to FEC v. Wisconsin Right to Life*, 2007 CATO SUP. CT. REV. 77, 108 (2007).
109. Fed. Election Comm'n v. Wis. Right to Life, Inc. [*WRTL*], 127 S. Ct. 2652, 2659 (2007).
110. BeVier, *supra* note 108 at 108.
111. *Id*. at 110.
112. *WRTL*, 127 S. Ct. at 2688.
113. *Id*. at 2689.
114. *Id*. at 2694.
115. *Id*. at 2696.
116. *Id*. at 2687.

WRTL's 5–4 split exemplifies the tension between protection of political free speech and protection against corruption in politics. The decision upholding the latest round of campaign finance regulation as constitutional on its face yet unconstitutional as applied to a typical nonprofit corporation's issue ads perpetuates the ambiguity regarding which principle is dominant.

B. Impact of *Federal Election Commission v. Wisconsin Right to Life, Inc.*

WRTL's decision upholding the facial validity of Section 203, while finding it unconstitutional in a basic as-applied challenge, created an exception to BCRA's prohibition on the use of corporate and labor union treasury funds in federal elections which provides significant opportunities for evasion. It is highly doubtful the FEC will be able to enforce Section 203 in light of this ruling. Similarly situated corporations will likely fund issue ads through their general treasury funds and air those ads during the black out period preceding the federal elections in 2008, gambling either on the FEC's continued traditional laissez-faire enforcement or the strength of *WRTL* as a precedent in the event of ensuing litigation.

C. Suggestions to Remedy the Campaign Finance Regulation Dilemma

For over a century Congress has been struggling to control corruption without violating First Amendment rights by enacting gradually more restrictive legislation. With each successive legislation, the reforms have proven ineffective in cutting off the appearance of corruption caused by the concentration of wealth in corporations and unions: money always found a way through the regulatory tapestry. With FECA and BCRA, Congress created a regulatory regime that concentrated power in Washington-based interest groups, stifled grass roots political activity, and undermined the incentives voters have to participate in their government.[117] Additionally, powerful corporate conglomerates have found solace in the First Amendment, using political speech as a means of advancing their business interests.[118] Perhaps it is time for Congress to try a new approach: rather than continually increasing the restrictions on political communication, Congress should unleash electioneering. The Supreme Court can communicate to Congress that it has gone too far in regulating free speech by finding that the BCRA unconstitutionally infringes on political free speech by prohibiting corporate

117. BeVier, *supra* note 108 at 110.

118. Symposium, *Corporations and the First Amendment: Examining the Health of Democracy*, 30 SEATTLE U. L. REV. 931 (2007).

contributions to candidates, setting donation caps, and cutting off advocacy speech as elections draw near.

Congress, in turn, should make the following amendments to the BCRA: (1) eliminate the restrictions on electioneering communication, (2) increase disclosure requirements, (3) eliminate the ban on corporate and union contributions, (4) increase contribution limits, and (5) set fundraising limits.

1. Eliminate Black Out Periods on Electioneering Communication

Section 203 of the BCRA, which banned the use of corporate or union money (including incorporated non-profits organizations) to broadcast ads that mentioned a federal candidate within thirty days of a primary election or sixty days of a general election, should be eliminated.[119] The weeks immediately preceding an election is the time most crucial for the dissemination of information voters' need to make an informed decision. Many voters have not made their final decision on which candidate to cast their vote for, so any withholding of information hinders the voter's ability to make an informed decision. Additionally, by creating black out periods, the Act eliminates free speech for corporations that desire to run advertisements during those times. *WRTL* took a significant step in the right direction by creating an exception for issue ads, but the entire section should be invalidated in order to allow advertisements directly supporting or opposing candidates to be aired.

2. Increase Disclosure Requirements

Opponents of the BCRA condemned the bill for its limited disclosure requirements stating, "[v]oters have significant difficulty determining how much credibility to lend a communication when they do not know the source of the communication. Without real disclosure of the sources of money funding sham issue ads, the ability of the voters to make informed decisions is severely undermined."[120] Disclosure does not limit one's ability to speak, it merely makes information on who is speaking available to voters.[121] Further, disclosure helps to prevent corruption by making information on who funds candidates' campaigns available to voters.[122] Disclosure will alert

119. Bipartisan Campaign Reform Act § 203, 2 U.S.C. § 441b(b)(2) (2006).
120. H.R. REP. NO. 107–132 (2001), 2001 WL 772996.
121. Bradley A. Smith, *A Moderate, Modern Campaign Finance Reform Agenda*, 12 NEXUS 3, 15 (2007).
122. *See* Randall v. Sorrell, 548 U.S. 230, 242 (2006); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 96 (2003); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (2000); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 202 (1999); Colo. Republican Fed. Campaign Comm., 518 U.S. 604, 607 (1996); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87,

voters to where a candidate's alliances and interests may lie.[123] Candidates should be required to disclose all campaign contributions, regardless of their amount, use, or whether made directly or indirectly to the candidate. Through complete disclosure, candidates will be more likely to police their own fundraising practices in order to avoid appearances of corruption which could damage their credibility with voters.

3. Eliminate the Ban on Corporate and Union Contributions

The BCRA ban on corporate and union contributions does not stop the flow of money from these sources into campaigns. Large corporations and unions can circumvent the ban by establishing political action committees (PAC) with independent treasury funds. PACs are exorbitantly expensive to operate so small corporations are unable to utilize them.[124] Thus, in effect, the ban only prevents small businesses and unions from having a monetary voice in politics.[125] If the end is to eliminate corruption, it is difficult to see how financing electioneering communication from small businesses is more corruptive than communication funded by large corporate or union PAC funds.[126] By eliminating the corporate ban, small corporations and unions would have an equal opportunity to have at least some voice in campaigns and politics.[127]

4. Increase Contribution Limits

The contribution allowed to come from a single entity has not kept up with inflation or population growth.[128] As a result candidates must spend more time fundraising and soliciting money from more sources in order to meet the financial requirements of their campaign. As a result, candidates must spend an excessive amount of time fundraising rather than meeting constituents, giving speeches, interviewing with the press, or otherwise communicating to voters. An increase in contribution limits would thus free-

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92 (1982); United Steel Workers of America AFL-CIO-CLC v. Sadlowski, 457 U.S. 102, 130–31 (1982) (White, J. dissenting); Buckley v. Valeo, 424 U.S. 1, 67 (1976).

123. *Brown*, 459 U.S. at 92. *See also* Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment").

124. Smith, *supra* note 121 at 13.

125. *Id*.

126. *Id*. at 14.

127. *See id*.

128. *Id*. at 18.

up candidates to conduct the sort of speech meaningful to help voters make an informed decision. Concerns of corruption resulting from increased contribution limits would be offset by the increased disclosure requirements discussed above.

5. Set Fundraising Limits

At first glance, this suggestion does not seem like it is unleashing electioneering. Taken in context with the amount of time candidates spend fundraising rather than campaigning, it becomes evident that fundraising limits will actually encourage more electioneering communication. Since money is speech, election outcomes seemingly ride on which candidate raises the most money.[129] In the 2006 election cycle, the candidate for the House of Representatives that raised the most money won 96.6%[130] of the time and the candidate for the Senate that raised the most money won 80%[131] of the time. Additionally, in a study conducted from 1999–2004 that factored out the benefits of incumbency in Congressional elections, the candidate who spent the most money still won 80% of the time.[132] This reality means that the most crucial part of the democratic system does not occur when voters cast their ballots, it occurs earlier when candidates raise money to fund their electioneering communication.[133] A cap on fundraising would place candidates on a more even financial field allowing voters more equal

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129. Symposium, *Corporations and the First Amendment: Examining the Health of Democracy*, 30 SEATTLE U. L. REV. 931, 943 (2007).

130. Opensecrets.org, *The Big Picture, 2006 Cycle: Winning v. Spending*, [hereinafter *Big Picture*] (charting rations between Senate election winners and the second-highest-vote-getter), http://www.opensecrets.org/bigpicture/bigspenders.asp?Display=A&Memb=H&Sort=D (last visited on Nov. 6, 2008).

131. *Big Picture* (charting rations between House election winners and the second-highest-vote-getter), http://www.opensecrets.org/bigpicture/bigspenders.asp?Display=A&Memb=S&Sort=D (last visited Nov. 6, 2008).

132. Symposium, *supra* note 129, at 943 (citing CHRISTOPHER M. DUQUETTE, CENTER FOR NAVAL ANALYSES, DOES MONEY BUY ELECTIONS? EVIDENCE FROM RACES FOR OPEN-SEATS IN THE US HOUSE OF REPRESENTATIVES, 1990–2004 at 3 (2006)).

133. *Id*. at 944. In fact, this reality accurately predicted the outcome of the 2008 Presidential election. Democratic candidate Barack Obama raised $639 million as of October 27, 2008, a staggering $279 million more than the Republican candidate, John McCain. *See*, Opensecrets.org, *Race for the White House: Banking on Becoming President*, http://www.opensecrets.org/pres08/index.asp?cycle=2008 (last visited Nov. 4, 2008) (listing amounts raised by each Presidential hopeful). Fundraising comparisons also accurately predicted the Democratic candidate. Obama surpassed Hillary Clinton's fundraising totals in early 2008 and subsequently beat her in the delegate race, winning the Democratic primary contest in June 2008. *See*, Opensecrets.org, *Presidential Candidate Hillary Clinton*, (financially summarizing Clinton's campaign), http://www.opensecrets.org /pres08/summary.php?cid=N00000019&cycle=2008 (last visited Nov. 4, 2008).

inundation of information about the candidates and, consequently, make a campaign victory more about the issues and less about money.

V. CONCLUSION

While the Supreme Court correctly decided the narrow issue in *WRTL* by holding Section 203 unconstitutionally infringes on the corporation's right to freedom of political speech, the court should have gone farther by overruling *McConnell*'s Section 203 facially valid holding. These conflicting rulings resulted in an exception to the BCRA that will make enforcement by the FEC unlikely. In light of the tension between freedom of political speech and curtailing corruption, Congress should try a new approach to campaign finance reform: unleashing electioneering. Specifically, Congress should consider eliminating restrictions on electioneering communications, increasing disclosure requirements, eliminating the ban on corporate and union contributions, increasing contribution limits, and setting fundraising limits.