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## ***WRTL II: The Sharpest Turn in Campaign Finance's Long and Winding Road***

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**WRTL II: THE SHARPEST TURN IN  
CAMPAIGN FINANCE’S LONG AND  
WINDING ROAD**

*Richard Briffault\**

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## INTRODUCTION

In *Federal Election Commission v. Wisconsin Right to Life, Inc.* (*WRTL II*), a closely divided and fragmented Supreme Court, without a majority opinion, held that the First Amendment requires the creation of a sweeping as-applied exception to § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>1</sup> which extended the ban on the use of corporate and union treasury funds in federal election campaigns to “electioneering communication.”<sup>2</sup> In so doing, the Court broke sharply with its 2003 decision in *McConnell v. Federal Election Commission*, which had, *inter alia*, rejected a facial challenge to the constitutionality of that BCRA provision.<sup>3</sup> Without formally overturning that part of *McConnell* or officially invalidating the recently sustained “electioneering communication” measure, *WRTL II* effectively did both.

In one sense, *WRTL II* fits easily within the Court’s pattern of campaign finance decision-making. For thirty years, campaign finance cases have been regularly marked by close decisions, lack of agreement even within the majority, and sharp shifts in doctrine.<sup>4</sup> The seminal 1976 campaign finance decision in *Buckley v. Valeo* was joined in full by just three of the eight participating justices.<sup>5</sup> Two decades later, the Court that decided *Colorado Republican Federal Campaign Committee v. Federal Election Commission* (*Colorado Republican I*) splintered into three groups, with no single set of views commanding majority support.<sup>6</sup> A decade after that, the Court in *Randall v. Sorrell* issued six separate opinions, no majority opinion, and a plurality

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<sup>1</sup> Fed. Election Comm’n v. Wis. Right to Life, Inc. (*WRTL II*), 127 S. Ct. 2652, 2659 (2007).

<sup>2</sup> Bipartisan Campaign Reform Act (BCRA) of 2002 Pub. L. No. 107-155, § 203, 116 Stat. 89-91 (codified at 2 U.S.C. § 441b(b)(2) (2000 & Supp. IV)).

<sup>3</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 209 (2003).

<sup>4</sup> See Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 807 (2007) [hereinafter Briffault, *WRTL and Randall*] (discussing the different patterns of the Supreme Court regarding campaign finance laws).

<sup>5</sup> *Buckley v. Valeo*, 424 U.S. 1, 6, 235 (1976) (per curiam).

<sup>6</sup> *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n* (*Colorado Republican I*), 518 U.S. 604, 608, 626, 648 (1996).

opinion announcing the judgment of the Court that was signed by just three – and, in one key part, just two – justices.<sup>7</sup> In 1978, the Court divided 5-4 in *First National Bank of Boston v. Bellotti*, holding that a state prohibition on corporate spending in a ballot proposition campaign is unconstitutional.<sup>8</sup> However, a dozen years later, the Court split 6-3 in *Austin v. Michigan State Chamber of Commerce*, holding that a state ban on corporate spending supporting or opposing election candidates is constitutional.<sup>9</sup> The Supreme Court determined in *Colorado Republican I*, on a 7-2 vote, that limiting party-independent spending supporting or opposing candidates is unconstitutional.<sup>10</sup> Just five years later followed the 5-4 vote in *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado Republican II)*, which held that a limit on party spending coordinated with a candidate is constitutional.<sup>11</sup> The Court's very deferential review in *Nixon v. Shrink Missouri Government PAC*, on a 6-3 vote, of state contribution limits in 2000,<sup>12</sup> was followed in 2006 by *Randall's* far more searching review, also on a 6-3 vote, of state contribution limits.<sup>13</sup> Moreover, the *McConnell* decision undermined in *WRTL II* itself represented a departure from the Court's earlier cases, notably *Buckley*, concerning the proper definition of election-related communications that may constitutionally be subject to regulation.<sup>14</sup>

Given this history, *WRTL II* can be seen as just one more turn in the long and winding campaign finance road.<sup>15</sup> Yet, *WRTL II*, and especially Chief Justice Roberts's lead opinion, do seem unusual, even within the campaign finance paradigm of close division, fragmentation, and doctrinal zigzags. Unlike the other

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<sup>7</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2485, 2500, 2501, 2506, 2511 (2006).

<sup>8</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978).

<sup>9</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 668-69 (1990).

<sup>10</sup> *Colorado Republican I*, 518 U.S. at 608.

<sup>11</sup> *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 464-65 (2001).

<sup>12</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 381 (2000).

<sup>13</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2491 (2006).

<sup>14</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 162 (2003).

<sup>15</sup> As Chief Justice Roberts's opinion actually received fewer votes than Justice Scalia's, it cannot be referred to as the plurality opinion. Justice Scalia repeatedly refers to the Chief Justice's opinion as the "principal opinion." *WRTL II*, 127 S. Ct. 2652, 2683 nn.6, 7 (2007) (Scalia, J., concurring in part and concurring in the judgment). I will refer to it as the "lead" opinion as it leads the other opinions in the published reports.

campaign finance cases in which the Court changed direction from the most relevant precedent, neither Chief Justice Roberts' opinion nor Justice Scalia's concurring opinion makes an effort to reconcile its analysis with the prior holding. Neither opinion sought to develop an as-applied exception that would fit within the *McConnell* framework. Rather, the decision broke with *McConnell* on virtually every point – not just the holding, but also *McConnell*'s reasoning, assumptions, and perspective.

In some of the prior cases involving doctrinal shifts, a justice apparently changed his or her mind; Justice Stevens, for example, was in both the *Bellotti* and *Austin* majorities.<sup>16</sup> Alternatively, a justice may have seen important differences in the specific facts or restrictions at issue in different cases, as Justice Breyer did in voting to uphold the contribution restrictions in *Nixon* while later voting to strike down the contribution limits in *Randall*.<sup>17</sup> This provided an impetus for opinions that offered rationales for holding the apparently conflicting results in different cases together. Although these rationales were not always persuasive – it has never been entirely clear why limits on corporate spending can be constitutional in the candidate setting but not in the ballot proposition context – at least some justices made the effort. In other cases, like *McConnell*, the Court justified its change in doctrine by stressing the unsatisfactory experience with the past precedent in practice.<sup>18</sup> The majority justices in *WRTL II*, however, made no effort to reconcile their decision with *McConnell* or to cite difficulties experienced in applying *McConnell*.<sup>19</sup> The shift in doctrine was due apparently, not to new facts or a change of mind, but solely to a change in the membership of the Court. All the *WRTL II* justices who had participated in *McConnell* adhered to their *McConnell* position,

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<sup>16</sup> First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767 (1978); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 654 (1990).

<sup>17</sup> *Shrink*, 528 U.S. at 405 (Justice Breyer joined the majority opinion upholding a Missouri statute restricting contributions ranging from \$250 to \$1,000); *Randall*, 126 S. Ct. at 2485, 2500, 2501, 2506, 2485 (Justice Breyer authored the opinion of the court which struck down on First Amendment grounds a Vermont campaign finance statute limiting campaign contributions).

<sup>18</sup> See, e.g., *McConnell*, 540 U.S. at 126-29 (discussing the distinction between express and issue advocacy).

<sup>19</sup> See *WRTL II*, 127 S. Ct. at 2704-05 (Souter, J., dissenting) (noting that no "serious argument" can be made that *McConnell* has been "unworkable in practice," and "nothing has changed about the facts" cited in *McConnell* to justify that decision).

but Justice Alito's replacement of Justice O'Connor shifted the balance of power within the Court concerning campaign finance much as it has in other areas of constitutional law.<sup>20</sup> The Scalia group clearly had no need to demonstrate any consistency with *McConnell*, a case they would overturn. Moreover, although the Chief Justice's opinion purported to be applying *McConnell*, it made no effort to hold its analysis together with *McConnell* either. Instead, as I will indicate below, it breaks with *McConnell* on virtually every important point.

As striking a feature of the *WRTL II* decision as the abrupt *volte-face* on *McConnell*, is the division within the majority between the three concurring justices who would have overturned *McConnell* outright, and the two justices in the lead opinion who voted to preserve the shell of *McConnell* while eviscerating it.<sup>21</sup> Whereas in other cases of fragmented majorities, the different opinions within the majority reflected different positions on questions of constitutional principle,<sup>22</sup> the two groups making up the *WRTL II* majority appear to agree entirely on principle. Indeed, the Chief Justice struggled to persuade Justice Scalia that the lead opinion was entirely consistent with the values articulated by the concurrence.<sup>23</sup> Nor,

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<sup>20</sup> See Anthony Lewis, *The Court: How 'So Few Have Quickly Changed So Much'*, 54 N.Y. REV. BOOKS 58 (No. 20, Dec. 20, 2007), available at <http://www.nybooks.com/articles/20899> (chronicling the Supreme Court's conservative shift during the 2006-07 term).

<sup>21</sup> See *WRTL II*, 127 S. Ct. at 2687 (Scalia, J., concurring in part and concurring in the judgment, with whom Justices Kennedy and Thomas join) (stating that they would overrule the *McConnell* decision, which upheld § 203 of BCRA); *id.* at 2674 (finding that the *McConnell* decision remains intact); *id.* (Alito, J., concurring) ("[I]t is unnecessary to go further and decide whether § 203 is constitutional on its face.").

<sup>22</sup> See, e.g., *Colorado Republican I*, 518 U.S. 604, 608 (1996) (striking down Federal Election Commission limits on certain party spending; Justices Breyer, O'Connor and Souter determined that the spending in question was independent of any candidate, and that the Court's prior rulings that the Constitution bars limits on independent spending applies to party spending too); see also *id.* at 630 (Kennedy, J., concurring in the judgment and dissenting in part, joined by Rehnquist, C.J., and Scalia, J.) (rejecting all limits on party spending on the theory that party spending is indistinguishable from candidate spending and, thus, like candidate spending, may not be limited); *id.* at 640-41 (Thomas, J., dissenting) (arguing that all contribution and expenditure restrictions should be invalidated).

<sup>23</sup> *WRTL II*, 127 S. Ct. at 2669 n.7. In a separate concurrence, Justice Alito, who joined the Chief Justice's opinion, appeared to signal that he was ready to join Justice Scalia and overturn *McConnell* in a future case. *Id.* at 2674. As *WRTL II* asked only for an as-applied exception, Justice Alito deemed it "unnecessary to go further and decide" whether the electioneering

although his opinion regularly cited *McConnell*, did the Chief Justice ever suggest that *McConnell* was correctly decided. Apparently, the sole difference dividing the lead from the concurring opinion was a tactical reluctance to overrule a precedent outright – what Justice Scalia sarcastically labeled the lead opinion’s “faux judicial restraint.”<sup>24</sup> Yet, whether it acknowledged the effect or not, the lead opinion, like the concurrence, overruled *McConnell*. Indeed, this is the first time, despite all the prior doctrinal zigs and zags, that the Court has actually overturned a campaign finance precedent.<sup>25</sup>

One particularly ironic result of the lead opinion’s disinclination to formally overrule *McConnell* is that although a central theme in both the Roberts and Scalia opinions is the need for clear rules to avoid chilling constitutionally protected speech, *WRTL II* produces a definition of constitutionally regulable “electioneering communication” that is far more vague and uncertain than the one upheld in *McConnell*, or than the earlier *Buckley* “express advocacy” standard which *McConnell* supplanted.<sup>26</sup>

At the very least, *WRTL II* is an unusually sharp and jolting curve in the campaign finance road. It could be a harbinger of more dramatic changes in the years to come. Or, if enough of the Court’s campaign finance skeptics continue to be both hostile to earlier decisions yet averse to formally overruling those decisions, campaign finance doctrine could become even more complex and internally inconsistent than it is today.

This article provides a brief analysis of *WRTL II*, with particular attention to Chief Justice Roberts’ opinion announcing the judgment of the Court. Part II frames the case against the quarter-century effort from *Buckley* to BCRA and *McConnell* to define the constitutionally permissible scope of campaign finance

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communication provision is “unconstitutional on its face.” *Id.* He then observed “we will presumably be asked in a future case to reconsider the holding in *McConnell*.” *Id.*

<sup>24</sup> *Id.* at 2684 n.7 (Scalia, J., concurring in part and concurring in the judgment).

<sup>25</sup> *See id.* (“[T]he change in the law [the Roberts opinion] works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so.”); *WRTL II*, 127 S. Ct. at 2704 (Souter, J., dissenting) (“There is neither a theoretical nor a practical basis to claim that *McConnell*’s treatment of § 203 [the ban on corporate and union electioneering communication] survives.”).

<sup>26</sup> *Id.* at 2695-96 (Souter, J., dissenting).

regulation, that is, in language I have previously used, to “draw the elections/politics line.”<sup>27</sup> Part III focuses on *WRTL I*’s relationship to *McConnell*, and its departures in analysis and tone from the major components of *McConnell*’s approach. Finally, Part IV considers the implications of *WRTL II* for the future development of campaign finance law. *WRTL II* continues the process, begun during the preceding Term, of changing the Court’s stance toward campaign finance regulation from relative deference to sharp skepticism,<sup>28</sup> and it raises new questions about older rulings, including other components of *McConnell*. It is not clear that *WRTL II*’s break from *McConnell* can be cabined to the treatment of corporate and union electioneering communication. On the other hand, Chief Justice Roberts’ reluctance, so far, to actually overturn precedents renders the future of campaign finance law more unpredictable and uncertain than ever.

### I. THE ROAD TO *WRTL II*

One of the most difficult questions in campaign finance law is the definition of election-related activity. The Supreme Court has repeatedly upheld regulations in the campaign context – mandatory disclosure of contributions and expenditures,<sup>29</sup> limitations on contributions,<sup>30</sup> prohibitions on the use of corporate and union treasury funds to make campaign contributions and expenditures<sup>31</sup> – that would surely be unconstitutional if applied to political activity more broadly.<sup>32</sup> As the Court has explained, it is not that these practices are any less burdensome for constitutionally protected speech and association rights in the electoral context; rather, the electoral setting

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<sup>27</sup> See generally Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999) [hereinafter Briffault, *Issue Advocacy*] (discussing the need to draw a line between political spending and election campaign spending).

<sup>28</sup> See generally Briffault, *WRTL and Randall*, supra note 4 (discussing how the first term of the Roberts Court marked a “pivotal moment in campaign finance law”).

<sup>29</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976) (per curiam).

<sup>30</sup> See, e.g., *id.* at 35.

<sup>31</sup> See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659-60 (1990); *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 162 n.8 (2003).

<sup>32</sup> See *Austin*, 494 U.S. at 666 (noting that statutes must be narrowly construed so as not to infringe on constitutional rights).

provides special justifications for these regulations.<sup>33</sup> Thus, the importance of an informed electorate has been cited in upholding disclosure requirements,<sup>34</sup> while the constitutionally compelling concerns of preventing corruption and the appearance of corruption have been held to justify disclosure,<sup>35</sup> contribution limits,<sup>36</sup> and the special restrictions on corporate and union treasury funds.<sup>37</sup> The sharply different treatment of electoral and non-electoral activity, however, requires criteria for distinguishing between these closely connected, if not overlapping, means of pursuing political goals. It might be easy to classify most spending by candidates as election-related, but the issue is far trickier when applied to political parties, and politically active individuals, organizations, and groups that engage in both electoral and non-electoral activities.

In *Buckley*, the Court, focusing on the constitutional imperatives of avoiding both vagueness and overbreadth, adopted “express advocacy” as the criterion for the regulation of non-candidates.<sup>38</sup> As the Court explained, the “express advocacy” definition of election-relatedness would “restrict the application” of the Federal Election Campaign Act (FECA) to “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”<sup>39</sup> This became known as the “magic words” test.<sup>40</sup> Political advertising by individuals, organizations, and groups that avoided use of the magic words of express advocacy – speech that became known as “issue advocacy” – was exempt from regulation.<sup>41</sup>

By the 1990s, the “express advocacy” requirement had become

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<sup>33</sup> See *Beaumont*, 539 U.S. at 156-57 (giving deference to congressional judgment that corporate contributions pose dangers to the electoral process).

<sup>34</sup> See *Buckley*, 424 U.S. at 66-68 (providing three governmental interests served by disclosure requirements).

<sup>35</sup> *Id.* at 67.

<sup>36</sup> *Id.* at 68.

<sup>37</sup> See *Austin*, 494 U.S. at 659-60 (recognizing that there are special dangers of corruption when corporate and union funds are used to influence elections).

<sup>38</sup> *Buckley*, 424 U.S. at 45.

<sup>39</sup> *Id.* at 44 n.52.

<sup>40</sup> See Briffault, *Issue Advocacy*, *supra* note 27, at 1755 (noting that lower courts assumed that the First Amendment prohibited any attempt at regulating political spending that did not use *Buckley*'s “magic words” of express advocacy”).

<sup>41</sup> *Id.* at 1752, 1754-55.

an easy escape hatch for most electorally active groups. Political parties, interest groups, and campaign specialists had little difficulty producing ads that effectively promoted or opposed federal candidates while eschewing the magic words of express advocacy.<sup>42</sup> One legally-validated technique was the use of ads that sharply criticized a candidate with respect to an election issue, but then included a tag line providing the sponsor's telephone number and making a request that the viewer call the sponsor for more information, or providing the criticized candidate's number and urging the viewer to call the candidate and "tell him what you think."<sup>43</sup> By advocating an action other than voting, these ads evaded the express advocacy label and became constitutionally protected issue advocacy.<sup>44</sup> By the 2000 election more than \$500 million was being spent on such issue ads.<sup>45</sup>

Closing the issue advocacy loophole, and thereby preventing easy evasion of FECA's disclosure requirements and restrictions on the use of corporate and union treasury funds, was one of the driving forces behind BCRA.<sup>46</sup> Mindful of the Court's concerns of vagueness and overbreadth, Congress created a new category of "electioneering communication" consisting of (i) "broadcast, cable, or satellite communications" that (ii) refer "to a clearly identified candidate for federal office," (iii) are aired within sixty days before a general election or thirty days before a primary election, and (iv) are targeted at the candidate's constituency.<sup>47</sup>

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<sup>42</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 126 (2003).

<sup>43</sup> *Id.* at 127.

<sup>44</sup> See Briffault, *Issue Advocacy*, *supra* note 27, at 1759-60 (stating that by creatively combining criticism of a candidate with encouragement to call the candidate criticized to inquire about an issue, ads can protect themselves from being labeled "express advocacy").

<sup>45</sup> *McConnell*, 540 U.S. at 128 n.20 (citing KATHLEEN HALL JAMIESON ET AL., ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA., *ISSUE ADVERTISING IN THE 1999-2000 ELECTION CYCLE 1-15* (2001)).

<sup>46</sup> *Id.* at 129-30, 133; see also COMM. ON GOVERNMENTAL AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. Rep. No. 105-167, Vol. 3, at 4535 (2d Sess. 1998) (noting the need for new legislation to close soft money and issue advocacy loopholes); see also *id.* Vol. 5, at 4611 ("The most insidious problem with the campaign finance system involved soft (unrestricted) money raised by both parties. The soft-money loophole, though legal, led to a meltdown of the campaign finance system that was designed to keep corporate, union and large individual contributions from influencing the electoral process.").

<sup>47</sup> BCRA, 2 U.S.C. § 434(f)(3)(A)(i)(I)-(III) (Supp. V 2005); *McConnell*, 540 U.S. at 190 n.73.

In case the Court determined that this definition reached too broadly, Congress added a “backup” definition that would apply if the principal definition were invalidated.<sup>48</sup> This backup definition was also aimed at broadcast and cable and satellite ads, but it discarded the temporal component of the main definition and instead limited itself to ads that promote, attack, support, or oppose a candidate and are “suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.”<sup>49</sup>

*McConnell* considered a facial challenge to most of BCRA’s provisions, including the new category of “electioneering communication.”<sup>50</sup> The Court upheld most of BCRA including, in particular, its extension of the corporate and union expenditure restriction from magic-words-style express advocacy to “electioneering communication.”<sup>51</sup> Looking to the development of the issue advocacy loophole and the practical impact of issue ads on campaigns,<sup>52</sup> the record before Congress,<sup>53</sup> and the expert evidence presented to, and the findings of the district court,<sup>54</sup> the *McConnell* majority determined that “the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy.”<sup>55</sup> *McConnell* distinguished *Buckley* by finding that its adoption of the “magic words” definition of express advocacy was simply an effort to deal with the vagueness of the 1974 FECA Amendments’ definition of election-related activity and was thus, “specific to the statutory language before us” in that case.<sup>56</sup> It was “an endpoint of statutory interpretation, not a first principle

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<sup>48</sup> 2 U.S.C. § 434(f)(3)(A)(ii).

<sup>49</sup> *Id.*

<sup>50</sup> *See McConnell*, 540 U.S. at 189-90 (discussing plaintiffs’ challenge to “electioneering communication” provision).

<sup>51</sup> *See id.* at 207 (finding that even if the BCRA might inhibit some constitutionally protected speech, this still wouldn’t be enough to “justify prohibiting all enforcement” of the law) (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)).

<sup>52</sup> *See id.* at 126-30 (highlighting examples of the many ways interest groups and others circumvented the restrictions).

<sup>53</sup> *See id.* at 131-32 (summarizing the findings of the 1998 report by the Senate Committee on Governmental Affairs).

<sup>54</sup> *Id.* at 193-94, 196-97.

<sup>55</sup> *Id.* at 206; *see also McConnell*, 540 U.S. at 126 (“While the distinction between ‘issue’ and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects.”).

<sup>56</sup> *Id.* at 192.

of constitutional law.”<sup>57</sup> “In narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.”<sup>58</sup>

The *McConnell* majority found that the BCRA definition avoided the Charybdis and Scylla of vagueness and overbreadth.<sup>59</sup> Its components “are both easily understood and objectively determinable,”<sup>60</sup> and therefore not vague. As for overbreadth, while the majority recognized that some broadcast ads that air in the pre-election periods and refer to clearly identified candidates might have “no electioneering purpose,” it concluded that “the vast majority of ads clearly had such a purpose.”<sup>61</sup> Whether “in an absolute sense or relative to its application to election-related advertising, the record strongly supports the conclusion” that BCRA’s regulation of non-electioneering, or “true” issue ads, is not substantial.<sup>62</sup> The Court further minimized the overbreadth problem by pointing out that “whatever the precise percentage” of “true” issue ads in the category of electioneering communication in the past, “in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund,”<sup>63</sup> that is, from the corporation’s or union’s political action committee (PAC) which, unlike corporate or union treasury funds, is not subject to the expenditure prohibition.

*McConnell* appeared to settle the authority of Congress to redefine the scope of campaign finance regulation in light of the realities of modern electoral campaigns. But a little more than a half-year after the decision was handed down, Wisconsin Right to

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<sup>57</sup> *Id.* at 190.

<sup>58</sup> *Id.* at 192.

<sup>59</sup> *Id.*

<sup>60</sup> *McConnell*, 540 U.S. at 194.

<sup>61</sup> *Id.* at 206; see also BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 73 (2001), available at [http://www.brennancenter.org/stack\\_detail.asp?key=97&subkey=10675](http://www.brennancenter.org/stack_detail.asp?key=97&subkey=10675) (select hyperlink for “Chapter 8: Closing the Loopholes: Assessing the Impact of Reform”) (“Of all group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4% were found to be electioneering issue ads.”).

<sup>62</sup> *McConnell*, 540 U.S. at 207.

<sup>63</sup> *Id.* at 206.

Life, Inc. (WRTL), an incorporated right-to-life organization, which accepts contributions from business corporations, began the process that would culminate in the undoing of *McConnell*.<sup>64</sup> In July 2004, WRTL aired ads calling on Wisconsinites to contact their two senators, Russell Feingold and Herbert Kohl, to urge them to oppose the filibustering of President Bush's judicial nominations.<sup>65</sup> With Senator Feingold running for reelection in 2004, the ads fell within BCRA's definition of electioneering communications on August 15 – thirty days before the September primary.<sup>66</sup> With the sixty-day general election blackout period starting even before the primary blackout ended, WRTL's ads could not be broadcast again until after the November general election unless WRTL chose to pay for the ads from its PAC or it chose to delete the specific reference to Senator Feingold.<sup>67</sup>

Asserting that the ads were “grass-roots lobbying” aimed at influencing the senators' votes and not Senator Feingold's reelection, WRTL contended the ads were constitutionally immune from restriction and entitled to an “as-applied” exception from BCRA.<sup>68</sup> The district court initially dismissed the case, holding that *McConnell's* statement that it had upheld “all applications” of BCRA's electioneering communication definition foreclosed an as-applied exception.<sup>69</sup> Moreover, the district court suggested that even if an as-applied exception were available in theory it would probably not protect the WRTL ad as WRTL was actively involved in opposing Senator Feingold's reelection.<sup>70</sup> The organization's PAC had endorsed candidates opposed to Senator Feingold, and those candidates had made Feingold's support of judicial filibusters a campaign issue.<sup>71</sup>

In January 2006, in the final days of Justice O'Connor's tenure, a unanimous Supreme Court reversed the district court.<sup>72</sup> In a

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<sup>64</sup> See generally *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, No. 04-1260, 2004 WL 3622736, at \*1 (D.D.C. Aug. 17, 2004) (describing WRTL's complaint seeking declaratory and injunctive relief declaring portions of the BCRA unconstitutional and unenforceable against it).

<sup>65</sup> *Id.* at \*2 (exhibits A, B, and C contain the text of the disputed advertisements).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at \*2, \*4.

<sup>68</sup> *Id.* at \*2.

<sup>69</sup> *Id.*

<sup>70</sup> *Wis. Right to Life, Inc.*, 2004 WL 3622736, at \*3.

<sup>71</sup> *Id.*

<sup>72</sup> *Wis. Right to Life, Inc. v. Fed. Election Comm'n (WRTL I)*, 546 U.S. 410, 411 (2006).

four-paragraph opinion, *Wisconsin Right to Life, Inc. v. Federal Election Commission* (WRTL I), the Court held that *McConnell* had considered only a facial challenge to BCRA so that the district court had erred in finding that *McConnell* precluded an as-applied challenge.<sup>73</sup> The WRTL I oral argument indicates that the Court's terse disposition masked a deep, underlying disagreement concerning the proper scope of campaign finance regulation – a disagreement which tracked the division in *McConnell* two years earlier.<sup>74</sup> In questioning WRTL's lawyer, most of the members of the *McConnell* majority contended that *McConnell* had resolved the issue.<sup>75</sup> The *McConnell* dissenters, led by Chief Justice Roberts who was then new to the Court, replacing *McConnell*-dissenter Chief Justice Rehnquist, emphasized the First Amendment issues at stake.<sup>76</sup> In the end, Justice O'Connor, who had co-authored the *McConnell* majority opinion, may have provided the formula for resolving the case before her impending departure from the Court when she observed, "[w]ell, I suppose you can say, yes, you can have an as-applied challenge, but this one doesn't meet the test."<sup>77</sup> Accordingly, WRTL I concluded that *McConnell* had not foreclosed WRTL's as-applied challenge, but it said nothing about the requirements for an as-applied challenge to succeed, nor anything about whether WRTL was likely to prevail on the merits.<sup>78</sup> Instead, it remanded the case to the district court.<sup>79</sup> The issue returned to the Court a year later – with Justice O'Connor replaced by Justice Alito – in WRTL II.<sup>80</sup>

## II. WRTL II'S BREAK WITH MCCONNELL

WRTL II held, 5-4, that WRTL had a constitutionally protected right to run its anti-filibuster ads.<sup>81</sup> More precisely, WRTL was entitled to use funds that came from business corporations to pay for the ads, to clearly identify a federal candidate in the ads, and

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<sup>73</sup> *Id.* at 411-12.

<sup>74</sup> Briffault, WRTL and Randall, *supra* note 4, at 814.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 815.

<sup>77</sup> Transcript of Oral Argument at \*29, WRTL I, 546 U.S. 410 (2006) (No. 04-1581).

<sup>78</sup> Briffault, WRTL and Randall, *supra* note 4, at 815-16.

<sup>79</sup> WRTL I, 546 U.S. at 412.

<sup>80</sup> WRTL II, 127 S. Ct. 2652 (2007).

<sup>81</sup> *Id.* at 2673.

to run the ads in the candidate's constituency in the pre-election period, notwithstanding BCRA's prohibition.<sup>82</sup> The seven justices who had been on the Court when *McConnell* was decided voted as they had in *McConnell*.<sup>83</sup> Justice Scalia, joined by Justice Thomas and Justice Kennedy, contended, as they had in *McConnell*, that the BCRA provision banning corporate and union treasury fund spending on electioneering communication was unconstitutional.<sup>84</sup> They saw no need to create an as-applied exception for WRTL.<sup>85</sup> Indeed, in their view any as-applied exception was likely to be unacceptably vague and unworkable in practice.<sup>86</sup> They concluded that the only constitutionally acceptable solution was to overturn *McConnell* and return to *Buckley's* express advocacy/magic words standard.<sup>87</sup> Justice Souter, in an opinion joined by Justices Stevens, Ginsburg, and Breyer – the remaining members of the *McConnell* majority – found that the WRTL ads fell exactly within the mainstream of the category of ads that were “issue” in form but electioneering in substance that had been the focus of Congress in enacting BCRA and of *McConnell* in sustaining it.<sup>88</sup> Without articulating their own criteria for what types of ads ought to obtain an as-applied exception, they would have denied one to WRTL. In so doing, the four dissenters reaffirmed their commitment to *McConnell's* holding.<sup>89</sup>

With the more senior justices locked into their previous positions, the decision turned on the views of the two justices who had joined the Court after *McConnell*: Chief Justice Roberts, who announced the judgment of the Court, and Justice Alito, the only justice who joined the Roberts opinion.<sup>90</sup> Without directly questioning *McConnell's* authority, and, indeed, while repeatedly invoking *McConnell*,<sup>91</sup> the Chief Justice and Justice Alito concluded that the First Amendment requires the creation of a

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<sup>82</sup> *Id.* at 2658-74.

<sup>83</sup> *Id.* at 2657; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 113 (2003).

<sup>84</sup> *WRTL II*, 127 S. Ct. at 2679 (Scalia, J., concurring in part and concurring in the judgment).

<sup>85</sup> *See id.* at 2687.

<sup>86</sup> *See id.* at 2685 (stating that an “administrable as-applied” exception is “illusory”).

<sup>87</sup> *Id.* at 2684.

<sup>88</sup> *Id.* at 2687, 2698-99 (Souter, J., dissenting).

<sup>89</sup> *Id.* at 2687.

<sup>90</sup> *WRTL II*, 127 S. Ct. at 2658. Justice Alito also authored a brief concurrence. *Id.* at 2674.

<sup>91</sup> *See, e.g., id.* at 2659, 2664-65, 2668.

capacious as-applied exception, which WRTL's ads easily fell within.<sup>92</sup> Despite its nominal fealty to *McConnell*, the Roberts opinion's standard for obtaining an as-applied exception is so broad, however, that it effectively invalidates the BCRA provision it contends it is not disturbing – as the other seven justices recognized in their concurring and dissenting opinions.<sup>93</sup> Indeed, the Roberts opinion's standard is virtually identical to BCRA's "backup definition" which was to come into effect only if the primary definition of electioneering communication was invalidated.<sup>94</sup> In effect, the Court reversed *McConnell*, invalidated the primary electioneering communication definition, and upheld the back-up definition *sub silentio*. Yet, Chief Justice Roberts's pivotal opinion left *McConnell* in place even as it stripped it of constitutional significance.

Although the Roberts opinion purported to rely on *McConnell* and repeatedly cited the earlier opinion, the Chief Justice's opinion was inconsistent with *McConnell* in at least four significant ways in addition to its outcome. First, it disregarded *McConnell*'s recognition that most so-called issue advocacy is the "functional equivalent" of express advocacy, so that the justifications for regulating express advocacy apply to such issue ads as well. Similarly, it rejected *McConnell*'s determination that the electoral context plays a key role in deciding whether an ad constitutes regulable election-related speech. Third, it treated the burden BCRA § 203 places on corporate and union participation in electoral politics as far more severe than *McConnell* had recognized. Lastly, and most fundamentally, it articulated a very different understanding of the values at stake in campaign finance regulation.

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<sup>92</sup> *Id.* at 2673.

<sup>93</sup> *See id.* at 2683 (Scalia, J., concurring in part and concurring in the judgment) ("[A]ny clear rule that would protect all genuine issue ads would cover such a substantial number of ads prohibited by [BCRA] § 203 that [BCRA] § 203 would be rendered substantially overbroad.") (emphasis in original); *see id.* at 2704 (Souter, J., dissenting) ("[T]he principal opinion institute[s] the very standard that would have prevailed if the Court formally overruled . . . *McConnell*'s treatment of [BCRA] § 203.").

<sup>94</sup> *See WRTL II*, 127 S. Ct at 2680 (Scalia, J., concurring in part and concurring in the judgment) (explaining that Chief Justice Roberts's test "bear[s] a strong likeness to BCRA's backup definition."); *see also id.* at 2704 (Souter, J., dissenting) (explaining that BCRA's backup definition "is essentially identical to the Chief Justice's test for evaluating an as-applied challenge to the original definition of 'electioneering communication.'").

A. *The “Functional Equivalent” of Express Advocacy*

The Chief Justice’s opinion begins with *McConnell*’s recognition that in the years before BCRA’s enactment most so-called issue advocacy advertising was the “functional equivalent” of express advocacy.<sup>95</sup> *McConnell* saw the emergence of issue ads as the response of creative political operatives to *Buckley*’s express advocacy test.<sup>96</sup> The *McConnell* Court recognized that ads could have electoral significance even if they lacked the magic words of express advocacy and even if their terms appeared to address issues not electoral outcomes; indeed, *McConnell* pointed out that like most modern commercial advertising, the ads were likely to be more effective because they “avoid the use of the magic words” of advocacy.<sup>97</sup> Such ads were the “functional equivalent” of or “functionally identical” to express advocacy not because they were linguistically or syntactically similar to express advocacy ads but because they had the same function – to affect elections.<sup>98</sup> As the Constitution permits the regulation of express advocacy, *McConnell* reasoned, it permits the regulation of the functional equivalent – broadcast ads that mention a candidate and that are aired to the candidate’s constituency in the defined pre-election period.<sup>99</sup>

Chief Justice Roberts, however, turned *McConnell*’s use of the “functional equivalent” phrase on its ear, converting it from an expansive term intended to capture the creativity of contemporary election advertising to a rule of limitation that

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<sup>95</sup> *Id.* at 2659 (stating that the Court has “long recognized that the distinction between campaign advocacy and issue advocacy ‘may often dissolve in practical application.’”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 42 (1976)).

<sup>96</sup> *See McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 126 (2003) (explaining that since this Court in *Buckley* “construed FECA’s disclosure and reporting requirements, as well as its expenditure limitations, ‘to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate’ political operatives simply used or omitted “magic words” to place the same communication into the category of “issue advocacy.”) (quoting *Buckley*, 424 U.S. at 80).

<sup>97</sup> *Id.* at 127.

<sup>98</sup> *See id.* at 126, 206 (explaining that express advocacy ads and issue advocacy ads are both “used to advocate the election and defeat of clearly identified federal candidates,” and they both have the effect of “influenc[ing] voters’ decisions,” “even though the so-called issue ads eschewed the use of magic words.”).

<sup>99</sup> *See id.* at 127 (explaining that the fact that issue ads “were specifically intended to affect election results was confirmed by the fact that almost all of them were aired in 60 days immediately preceding a federal election.”).

would push electioneering back to express advocacy. For Chief Justice Roberts, an ad is the functional equivalent of express advocacy only if it is the linguistic equivalent of an express ad.<sup>100</sup> As he put it, an ad is the 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.”<sup>101</sup> Any ad which discusses both issues and candidates and avoids an appeal to vote for or against a candidate is “susceptible” of a “reasonable interpretation” that it is not an appeal to vote for or against a candidate. Thus, even if the ad is broadcast in the pre-election period by an electorally active organization and it names a candidate, it is not the functional equivalent of express advocacy and is entitled to an as-applied exemption from BCRA. This resurrects the “magic words” test, albeit without the specific magic words requirement.

The shift in the meaning of functional equivalence from *McConnell* to *WRTL II* is perhaps best seen by considering how the Roberts test would apply to the hypothetical “Jane Doe” ad, which the *McConnell* Court gave as Exhibit A of the need to extend the definition of regulable campaign speech from “express advocacy” to BCRA’s “electioneering communication.”<sup>102</sup> As the Court in *McConnell* explained, “[l]ittle difference exist[s], for example, between an ad that urged viewers to ‘vote against Jane Doe’ and one that condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’”<sup>103</sup> Yet, under the Chief Justice’s test, it could be argued that the second Jane Doe ad is exactly what it nominally purports to be – an effort to persuade viewers to call Jane Doe and get her to change her vote on a pending issue. As the Chief Justice put it, the WRTL ads qualified for the as-applied exception because “[t]he ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to that matter.”<sup>104</sup>

To be sure, at one point the Chief Justice notes that the Jane

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<sup>100</sup> *WRTL II*, 127 S. Ct. at 2667.

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

<sup>102</sup> *See id.* at 2667 (comparing and contrasting the Jane Doe ad in *McConnell* with the three ads at issue in *WRTL II*).

<sup>103</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 126-27 (2003).

<sup>104</sup> *WRTL II*, 127 S. Ct. at 2667.

Doe ad “condemned Jane Doe’s record on a particular issue,”<sup>105</sup> unlike WRTL’s ads, which refrained from literal condemnation of Senator Feingold.<sup>106</sup> But nothing in the Chief Justice’s formal test for the as-applied exception precludes an exemption for ads that contain language criticizing or praising a candidate. Roberts’s only requirement is that the ad be “susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>107</sup> Surely, an ad that criticizes a senator’s position on an issue and then urges voters to contact her to get her to change her mind is “susceptible” of the “reasonable interpretation” that it is aimed at influencing her Senate vote rather than the public’s vote in an upcoming election. On Roberts’s own terms, the ad condemning Jane Doe, which was so central to *McConnell*’s case for the constitutionality of the regulation of electioneering communication, is entitled to a constitutional exemption.<sup>108</sup>

### B. Context and Certainty

Roberts’s *WRTL II* opinion breaks with *McConnell* in its treatment of the role of context in determining whether an ad can be regulated. The heart of *McConnell* was that the electoral context is crucial in assessing whether an ad is sufficiently election-related that the special justifications for regulating electoral activity apply.<sup>109</sup> *McConnell* gave great weight to the impact of proven campaign practices in the determination of legal standards. According to the *McConnell* Court, *Buckley*’s distinction between express advocacy and issue advocacy “seemed neat in theory”<sup>110</sup> but was effectively undermined by the

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<sup>105</sup> *Id.* at 2667 n.6 (quoting a statement made by Justice Souter in his dissenting opinion).

<sup>106</sup> *Id.* (“WRTL’s ads . . . take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position.”).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 2684 n.7 (Scalia, J., concurring in part and concurring in the judgment) (Roberts’s test “would apparently protect even *McConnell*’s paradigmatic example of the functional equivalent of express advocacy – the so-called ‘Jane Doe ad.’”).

<sup>109</sup> *See* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 126 (2003) (explaining that issue and express advocacy were both used to advance “the election or defeat a clearly identified federal candidates.”).

<sup>110</sup> *Id.* (“While the distinction between ‘issue’ and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects.”).

development of electoral ads that eschewed the language of express advocacy.<sup>111</sup> *McConnell* looked to the statements of officeholders, candidates, interest group advocates, corporate executives, campaign strategists, and political scientists in the district court's record to find that these ads, when "aired in the 60 days immediately preceding a federal election" are "specifically intended to affect election results" and are "the most effective campaign ads."<sup>112</sup> In upholding BCRA § 203, *McConnell* considered both the electoral purpose of the sponsors and the likely electoral effect of the ads, with the timing of the ads – "those relatively brief preelection timespans" – as well as the language naming specific candidates critical for determining both purpose and impact.<sup>113</sup>

Chief Justice Roberts dismissed the significance of intent, effect, and context.<sup>114</sup> He explained that intent and effect are "amorphous considerations" that would inject constitutionally unacceptable uncertainty into the determination of whether an ad is statutorily proscribed or constitutionally protected.<sup>115</sup> "No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure."<sup>116</sup> An effects test would provide no greater security, as "[i]t would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result."<sup>117</sup> Context was generally problematic because of the danger that it would "become an excuse for discovery or a broader inquiry" that due to its costs and uncertainty "raises First Amendment concerns."<sup>118</sup> In assessing whether an ad qualifies for the as-applied exception, "there generally should be no discovery or inquiry into . . . 'contextual' factors."<sup>119</sup>

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 127.

<sup>113</sup> *Id.* at 206.

<sup>114</sup> See *WRTL II*, 127 S. Ct. 2652, 2669 n.7 (2007) (dismissing both the intent-and-effect test and the inquiry into "contextual factors").

<sup>115</sup> *Id.* at 2666 (explaining that in order to protect freedom of speech "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.") (citing *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam)).

<sup>116</sup> *Id.*

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

<sup>118</sup> *Id.* at 2669.

<sup>119</sup> *Id.* at 2669 n.7 (confronting Justice Scalia's concerns regarding the vagueness of the majority's test).

It is difficult to see how a court can determine the “reasonable interpretation” of an ad, as Chief Justice Roberts requires, without giving some attention to context.<sup>120</sup> As Justice Kennedy once observed, “[s]peech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or reader and the context of its transmission.”<sup>121</sup> Justice Scalia, in his *WRTL II* concurrence, was also comfortable imputing a “purpose” to WRTL’s sponsorship of the anti-filibuster ads and in drawing on the political “context” to determine the “fair import” of the ads.<sup>122</sup> Even Chief Justice Roberts acknowledged that courts can consider “basic background information that may be necessary to put an ad in context – such as whether an ad ‘describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future’” – although he rejected any broader use of context.<sup>123</sup> Words take on meaning in context, yet the Chief Justice’s opinion would prevent most attention to context in assessing the meaning of a pre-election ad.

Ironically, although the Chief Justice’s principal argument for eschewing consideration of context is the need to avoid uncertainty and the costs of litigation, his approach of creating an as-applied exception rather than overruling *McConnell* has the result of producing a test for the scope of election-regulation that is more vague and uncertain than either the statutory test

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<sup>120</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1507 (2000) (“Interpretation is a matter of making sense of the speech or action in its context.”).

<sup>121</sup> Fla. Bar v. Went for It, Inc., 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting); see also Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (stating that statutory interpretation “depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”) (emphasis added); Howard Delivery Serv., Inc. v. Zurich American Ins. Co., 126 S. Ct. 2105, 2120 (2006) (Kennedy, J., dissenting) (“The definition of a term in one statute does not necessarily control the interpretation of that term in another statute, for where the purposes or contexts are different the terms may take on different meanings.”).

<sup>122</sup> *WRTL II*, 127 S. Ct. at 2684 n.8 (Scalia, J., concurring in part and concurring in the judgment) (“The purpose of the ad was to put political pressure upon Senator Feingold to change his position on the filibuster—not only through the constituents who accepted the invitation to contact him, but also through the very existence of an ad bringing to the public’s attention that he, Senator Feingold, stood athwart the allowance of a vote on judicial nominees.”).

<sup>123</sup> *Id.* at 2669 (quoting the district court opinion).

upheld in *McConnell* itself or *Buckley*'s earlier magic words standard. *WRTL II* does not limit regulation to the magic words of express advocacy.<sup>124</sup> Presumably some electioneering communications that do not use the magic words are still subject to BCRA's restriction, otherwise all ads would fall within the as-applied exception. *WRTL II*'s standard for an as-applied exemption is that the ad be "susceptible" to a "reasonable interpretation" other than as a call to vote for or against a candidate.<sup>125</sup> But how can a sponsor of an ad, run during the immediate pre-election period, that combines discussion of an issue with sharp criticism of a candidate be sure that the Federal Election Commission (FEC) or a court will find that issue advocacy, and not electioneering, is a reasonable interpretation of the ad?

The Chief Justice's opinion compounds the uncertainty with its justification of why *WRTL*'s ads were entitled to an as-applied exception. Instead of simply stating that the ads were "susceptible" to the "reasonable interpretation" that their goal was to persuade viewers to influence Senator Feingold's position on judicial filibusters, the Chief Justice stressed that "[t]he ads focus on a legislative issue, take a position on the issue, . . . do not mention an election, candidacy, political party, or challenger; and . . . do not take a position on a candidate's character, qualifications, or fitness for office."<sup>126</sup> In other words, in the effort to show that *WRTL*'s exception is an easy case, the Chief Justice may have provided the FEC or other proponents of regulation with an argument for denying an exemption in a case in which the advertisement mentions a candidacy or criticizes a candidate. But given the Chief Justice's articulated standard for an exemption, would it have made a difference if the *WRTL* ads expressly criticized Senator Feingold's position on the filibuster issue, criticized his record of voting on filibusters, or had urged voters to take the filibuster question into account in the upcoming election?

In the notorious Bill Yellowtail ad, discussed in *McConnell*, the sponsors criticized a Montana congressional candidate for "preach[ing] family values" but hitting his wife.<sup>127</sup> The tag line

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<sup>124</sup> See *id.* at 2669 n.7 (discussing the Court's use of the "magic words" of express advocacy in *Buckley*).

<sup>125</sup> *Id.* at 2667.

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

<sup>127</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194 n.78 (2003).

urged viewers to “[c]all Bill Yellowtail. Tell him to support family values.”<sup>128</sup> This ad did not mention an election, party or candidacy, although it did mention a challenger, Yellowtail; it criticized a candidate’s character; and its not clear whether it took a position on a legislative issue, since it is not clear whether “family values,” untethered to a particular legislative measure, is a legislative issue. It contained sharp criticism of a candidate and did not mention a specific legislative proposal. It was much less issue-oriented than the WRTL ads and was, arguably, the functional equivalent of express advocacy. Certainly the five justices in the *McConnell* majority, who wrote that “[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity,” thought so.<sup>129</sup> Yet, applying the Chief Justice’s standard of “no reasonable interpretation,” and his commitment to rejecting the electoral context, is it completely clear that there is no reasonable interpretation that this is about issues?

Justice Scalia found that the Chief Justice’s standard “at least arguably protects” the Yellowtail ad.<sup>130</sup> If that ad is protected, then the category of corporate and union electioneering communications subject to BCRA’s proscription is probably a null set. The as-applied exception would vacuum out all the cases from the statute, notwithstanding *McConnell*’s finding that the “vast majority” of ads covered by the electioneering communication provision were actually electioneering ads.<sup>131</sup> On the other hand, if the Yellowtail ad is subject to regulation, then the Chief Justice’s standard has surely increased the amount of vagueness in this area, with corporations, labor unions, the FEC and the courts condemned to crafting standards for sorting out the WRTL ads from the Yellowtail ads, and working out what to do about the thousands of ads between these polar extremes. Indeed, Justice Scalia – no friend of BCRA – would only go so far as to say that the Chief Justice’s standard “arguably” protects ads like the Yellowtail ad.<sup>132</sup> If an ad is arguably protected, then it is also arguably not protected.

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *WRTL II*, 127 S. Ct. at 2684 n.7 (Scalia, J., concurring in part and concurring in the judgment).

<sup>131</sup> *McConnell*, 540 U.S. at 206.

<sup>132</sup> *WRTL II*, 127 S. Ct. at 2684 n.7 (Scalia, J., concurring in part and concurring in the judgment).

The Chief Justice's test closely resembles the test adopted by the United States Court of Appeals for the Ninth Circuit two decades ago in *Federal Election Commission v. Furgatch*, when it sought to expand the scope of regulable election-related advertising beyond the limitations of the magic words test.<sup>133</sup> *Furgatch*, like *WRTL II*, found that a message could be deemed express advocacy, even without the magic words, so long as it is "susceptible of no other reasonable interpretation but as an exhortation to vote."<sup>134</sup> However, unlike in *WRTL II*, the court in *Furgatch* determined that context, particularly the timing of the ad relative to the election, was "relevant to a determination of express advocacy."<sup>135</sup> In fact, the *Furgatch* court gave great weight to the fact that the ad ran just days before the upcoming election.<sup>136</sup> The *Furgatch* ruling was codified in an FEC regulation, and it is clearly the source of BCRA's backup definition of electioneering communication, as well as the Chief Justice' standard for an as-applied exception.<sup>137</sup> However, during the period between the *Furgatch* decision and *McConnell*, virtually every federal court that considered the express advocacy/issue advocacy question rejected *Furgatch* for introducing unacceptable vagueness, and the concomitant chilling effect on speech, into the regulation of campaign spending.<sup>138</sup>

In effectively overruling *McConnell*, the Chief Justice's opinion does not return the law to *Buckley*'s magic words test, but leaves it at *Furgatch*, albeit without *Furgatch*'s attention to timing and context. This might modestly increase the constitutionally permissible scope of regulation compared with the pre-BCRA era, although it is not certain that it does. What is clear is that an opinion which rejects context in the name of certainty has embraced a vague and uncertain standard.

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<sup>133</sup> Fed. Election Comm'n v. *Furgatch*, 807 F.2d 857, 860 (9th Cir. 1987) ("The test is whether or not the advertisement contains a message advocating the defeat of a political candidate," however, the "words contained in the advertisement [are] not determinative.").

<sup>134</sup> *Id.* at 864.

<sup>135</sup> *Id.* at 863, 865.

<sup>136</sup> *See id.* at 865 ("Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.").

<sup>137</sup> BCRA, 2 U.S.C. § 434(3)(A)(ii) (Supp. V 2005).

<sup>138</sup> Briffault, *Issue Advocacy*, *supra* note 27, at 1757-59.

*C. The Burden of Regulation*

In addition to recognizing that issue ads can be the “functional equivalent” of express advocacy ads once the electoral context is taken into account, *McConnell* gave relatively short shrift to the burden that BCRA’s regulation places on corporate and union communications.<sup>139</sup> BCRA prohibits the use of corporate and union treasury funds to electioneer in support of or against federal candidates.<sup>140</sup> Under *McConnell*, that need not seriously affect non-electoral corporate and union broadcasts even if the statutory definition reaches ads that combine references to candidates with discussions of issues.<sup>141</sup> A corporation or a union could use treasury funds without running afoul of BCRA “by simply avoiding any specific reference to federal candidates,” and a corporate or union sponsor could air ads that mention both candidates and issues “by paying for the ad from a segregated fund,” that is, a political action committee (PAC).<sup>142</sup> A corporation or union can establish a PAC and enable it to solicit funds from persons affiliated with the corporation or union, such as officers, shareholders, or members.<sup>143</sup> The parent corporation or union can then direct the PAC to spend those voluntarily donated funds on ads supporting or opposing candidates.<sup>144</sup> “The ability to form and administer [PACs] . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in” electoral activity.<sup>145</sup> In other words, *McConnell* treated BCRA more as a channeling mechanism – true issue ads to be paid for by treasury funds, campaign ads to be paid for by PACs financed by voluntary contributions – than as a prohibition.

The Court had taken a similar view of the relationship between corporate treasury spending and PAC activity in earlier cases. In *Federal Election Commission v. Beaumont*, for example, the Court stated that it is “simply wrong” to characterize the statutory prohibition on corporate donations to federal

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<sup>139</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 206 (2003).

<sup>140</sup> *Id.* at 204; 2 U.S.C. § 441b(b)(2) (2000 & Supp. V 2005).

<sup>141</sup> *McConnell*, 540 U.S. at 202-09.

<sup>142</sup> *Id.*

<sup>143</sup> 2 U.S.C. § 441b(b)(2)(C).

<sup>144</sup> *See, e.g.*, *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 426 (1972) (discussing the ability of unions to establish and administer PACs, solicit contributions, and also determine the disposition of monies raised).

<sup>145</sup> *McConnell*, 540 U.S. at 203.

candidates as “a complete ban.”<sup>146</sup> Rather, the Court observed, a corporation or union can engage in electoral activity through its PAC.<sup>147</sup> “The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.”<sup>148</sup> Similarly, in upholding the prohibition on corporate campaign expenditures, the *Austin* Court agreed that such a restriction is not an “*absolute* ban on all forms of corporate political spending” because it “permits corporations to make independent political expenditures through separate segregated funds.”<sup>149</sup>

*WRTL II* dismissed the *Austin-Beaumont-McConnell* view of the law as not a ban but a mere channeling of corporate and union participation through funds voluntarily donated to PACs. Chief Justice Roberts repeatedly referred to the BCRA provision as “suppressing” campaign speech,<sup>150</sup> “censoring” WRTL’s speech,<sup>151</sup> or as a “ban on campaign speech.”<sup>152</sup> In his view, the ability of a corporation or union to use a PAC to pay for campaign ads does not ameliorate BCRA § 203’s effect as “PACs impose well-documented and onerous burdens, particularly on small nonprofits.”<sup>153</sup> The Chief Justice dismissed *McConnell*’s determination that PACs provide corporations and unions “with a constitutionally sufficient opportunity” to electioneer by noting that *McConnell* was limited to express advocacy and its functional equivalents, thus tying *WRTL II*’s burden analysis to its crabbed linguistic definition of functional equivalence.<sup>154</sup> The Chief Justice’s opinion similarly rejected *McConnell*’s position that a corporation or union could escape BCRA by refraining from mentioning a candidate in its ad — a position it ascribed solely to Justice Souter’s dissent without acknowledging it had

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<sup>146</sup> Fed. Election Comm’n v. Beaumont, 539 U.S. 146, 162 (2003).

<sup>147</sup> *Id.* at 162-63.

<sup>148</sup> *Id.* at 163.

<sup>149</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (discussing section 54(1) of the Michigan Campaign Finance Act, which is modeled on § 441(b) of the Federal Election Campaign Act).

<sup>150</sup> *WRTL II*, 127 S. Ct. 2652, 2659, 2669, 2671 (2007).

<sup>151</sup> *Id.* at 2669, 2674 (“[W]e give the benefit of the doubt to speech, not censorship.”).

<sup>152</sup> *Id.* at 2673.

<sup>153</sup> *Id.* at 2671 n.9. *But see id.* at 2697 (Souter, J., dissenting) (noting that WRTL did have a PAC which it had used in two prior elections to fund independent expenditures against Senator Feingold).

<sup>154</sup> *Id.* at 2671 n.9.

been the view of the *McConnell* majority<sup>155</sup> — because of the “fundamental rule of protection under the First Amendment” that a speaker ought to be free to determine the content of its own messages.<sup>156</sup>

The Chief Justice’s position is not unprecedented. Two decades ago, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*, the Court similarly expressed the concern that forcing a corporation to participate politically through a PAC rather than with its treasury funds involves regulatory and administrative costs that can burden a corporation’s constitutional rights.<sup>157</sup> In the years since *MCFL*, however, the Court had minimized the burden of requiring a corporation or union to use the PAC.<sup>158</sup> Indeed, the Court had closely linked the PAC requirement to the dangers posed by corporate or union spending — that is, the “distortion caused by corporate spending” due to resources that reflect corporate success in the economic marketplace and not popular support for the corporation’s electoral positions — and the concern that the use of treasury funds is unfair to shareholders or union members who dissent from the corporation’s or union’s electoral preferences.<sup>159</sup> Use of the PAC assures that corporate and union campaign spending reflects the voluntary support of officers and shareholders, or members, for the corporation’s or union’s political agenda.<sup>160</sup> As I will suggest in Part IV, Chief Justice Roberts’ return to the older view of the PAC as a burden rather than a solution may have implications for the underlying issue of the constitutionality of the ban on the use of treasury funds for campaign contributions and expenditures.

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<sup>155</sup> *WRTL II*, 127 S. Ct. at 2671 n.9.

<sup>156</sup> *Id.* (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)).

<sup>157</sup> *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986); *see also id.* at 266 (O’Connor, J., concurring) (discussing that the burden comes from the organizational restraints that the Act imposes).

<sup>158</sup> *See Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 163 (2003) (holding that regulatory burdens do not render a PAC unconstitutional).

<sup>159</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 665-66 (1990); *see also Beaumont*, 539 U.S. at 154 (discussing how the ban furthers the duty to protect the individuals who have contributed money from supporting candidates they oppose).

<sup>160</sup> *See McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 204 (2003) (stating that the PAC option permits “corporate political participation” while also permitting the government to regulate campaign activity, without “jeopardizing the associational rights of advocacy organizations’ members.”) (quoting *Beaumont*, 539 U.S. at 163).

*D. The Values at Stake in Campaign Finance Regulation*

Finally, and most significantly, *WRTL II* broke with *McConnell* on the fundamental question of what is at stake in campaign finance regulation. *McConnell* saw campaign finance as not simply placing burdens on First Amendment freedoms but also as protecting the integrity of the electoral process and promoting public faith in democracy.<sup>161</sup> As Justice Breyer had previously explained, campaign finance law involves not one set of principles but the reconciliation of “competing constitutional [values].”<sup>162</sup> Campaign finance laws are not, or not only, speech-impairing but also democracy-promoting. Among the consequences of *McConnell*’s “democracy-centered perspective” was a willingness to accept some burdens on political speech and association in exchange for measures that promote other democratic values,<sup>163</sup> “proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise,”<sup>164</sup> and a willingness, born of the Court’s recognition of the ability of politicians and interest groups to evade salutary restrictions, to let Congress regulate broadly to prevent such “circumvention of regulations” and to assure the effectiveness of measures intended “to protect the integrity of the political process.”<sup>165</sup>

That sense of campaign finance law as the balancing of competing democratic values, with effectiveness in preventing corruption and promoting political integrity counting as much as freedom of political participation, largely drops out of *WRTL II*. The lead opinion framed the case entirely from a First Amendment perspective; it was not about the rules governing the corporate role in financing elections but simply “about political speech.”<sup>166</sup> What the Court in *McConnell* saw as the potential for the corporate abuse of economic resources in the electoral marketplace, Chief Justice Roberts portrayed as merely a “[d]iscussion of . . . issues [which] may also be pertinent in an

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<sup>161</sup> *Id.* at 136-37.

<sup>162</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402-03 (2000) (Breyer, J., concurring).

<sup>163</sup> Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 *ELECTION L.J.* 147, 149, 174 (2004) [hereinafter Briffault, *McConnell v. FEC*].

<sup>164</sup> *McConnell*, 540 U.S. at 137.

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

<sup>166</sup> *WRTL II*, 127 S. Ct. 2652, 2673 (2007).

election.”<sup>167</sup> When campaign finance regulation is seen solely through the prism of the First Amendment, all regulation looks like “censorship” or speech “suppression.” Instead of trying to weigh and balance competing legitimate considerations going into financing democratic elections, or respecting Congress’s efforts to do so, the Court’s primary duty is to free speech. Indeed, the Chief Justice drove home that point by making it twice: “The First Amendment’s command . . . demands” that “the benefit of the doubt” goes to “speech, not censorship,”<sup>168</sup> and even more sharply, “[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.”<sup>169</sup>

The Chief Justice was particularly dismissive of the anti-circumvention justification for regulation, which had loomed large in *McConnell* and other cases earlier in the decade.<sup>170</sup> *McConnell*’s greater attention to electoral context and political practice included a recognition that politicians, donors, and interest groups often found ways around FECA’s requirements and restrictions, so that in order to effectively achieve campaign finance’s constitutionally substantial goals Congress could regulate more broadly to deal with such circumvention.<sup>171</sup> But to Chief Justice Roberts, restriction of electioneering communication in order to prevent circumvention of the restriction on express advocacy smacked of a “prophylaxis-upon-prophylaxis approach to regulating expression [that] is not consistent with strict scrutiny” required by the First Amendment.<sup>172</sup>

To be sure, the Chief Justice did not reject campaign finance regulation altogether. His opinion cited largely without comment the justifications previously accepted by the Court for campaign

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<sup>167</sup> *Id.* at 2669.

<sup>168</sup> *Id.* at 2667, 2674.

<sup>169</sup> *Id.* at 2669.

<sup>170</sup> Briffault, *McConnell v. FEC*, *supra* note 163, at 148, 152-54; Fed. Election Comm’n v. Beaumont, 539 U.S. 146, 155-56 (2003) (discussing how regulation is meant to curb corruption); *Colorado Republican II*, 533 U.S. 431, 456-57 (2001) (discussing the importance of government regulation of contribution limits, and in particular the prominence of circumvention as a justification).

<sup>171</sup> See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 223-24 (2003) (observing the notion that “[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.”) (citing *Burroughs v. United States*, 290 U.S. 534, 545 (1934)).

<sup>172</sup> *WRTL II*, 127 S. Ct. at 2672.

finance restrictions.<sup>173</sup> He did not question any campaign finance law or any campaign holding of the Court. Indeed, he was careful to avoid formally invalidating the electioneering communication provision. But he gave the impression that in his view the First Amendment was already strained by existing campaign finance rules and could not be stretched further to reach most electioneering communications.<sup>174</sup> Or, as he put it in his pithiest phrase, “[e]nough is enough.”<sup>175</sup>

The First Amendment focus was also, unsurprisingly, central to Justice Scalia’s concurrence. In asserting the primacy of the First Amendment to campaign finance doctrine, however, Justice Scalia was perhaps more candid than the lead opinion in acknowledging the existence of a tension between the *WRTL II* majority’s approach and the needs of democratic elections. Quoting a statement of former House Minority Leader Richard Gephardt that “freedom of speech and our desire for healthy campaigns in a healthy democracy” are “in direct conflict,”<sup>176</sup> Justice Scalia observed that Gephardt “may well be correct” but that whether or not Gephardt is right, “it is pretty clear which side of the equation *this institution* is primarily responsible for. It is perhaps our most important constitutional task to assure freedom of political speech.”<sup>177</sup> In putting the commitment to the primacy of the First Amendment in terms of the Court’s particular institutional role, Justice Scalia is, of course, too modest. Given the Court’s control over constitutional interpretation and its power to invalidate federal and state legislation it finds unconstitutional, the *WRTL II* Court’s commitment to the primacy of the First Amendment, unbalanced by other democratic values, will constrain and displace the decisions of Congress, the fifty state legislatures, voter initiatives, and the multiple elected local governments that might otherwise choose to reconcile these competing visions of democracy differently.

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<sup>173</sup> See *id.* at 2672-73 (referring to reasoning from *Buckley*, *McConnell*, and *Austin*).

<sup>174</sup> *Id.* at 2672 (“But to justify regulation of WRTL’s ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy.”) (emphasis in original).

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

<sup>176</sup> *Id.* at 2686 (Scalia, J., concurring in part and concurring in the judgment) (quoting Nancy Gibbs, *The Wake-Up Call*, TIME, Feb. 3, 1997, at 22, 25).

<sup>177</sup> *Id.* (emphasis in original).

### III. LOOKING FORWARD: CAMPAIGN FINANCE REGULATION AFTER *WRTL II*

Following *WRTL I* and *Randall*, *WRTL II* makes it clearer than ever that the Court has left behind the period at the start of the decade in which it regularly deferred to federal and state campaign finance regulations,<sup>178</sup> and has entered an era in which campaign finance rules will receive close and skeptical scrutiny. Moreover, as the capacious as-applied exception to BCRA § 203 indicates, a majority of the Court is prepared not simply to reject new laws,<sup>179</sup> but at the very least to open loopholes in previously-approved laws, even if not to invalidate such laws outright. The division within the majority over whether to overturn a past precedent or, instead, to read it as narrowly as possible, with the implication that the Chief Justice and Justice Alito are reluctant to break formally with past decisions, however, makes it particularly difficult to determine the broader implications of *WRTL II* for the future of campaign finance doctrine. The “music” of the case is surely hostile to campaign finance regulation, but the “words” were carefully limited to the particular issue at hand.

Nonetheless, *WRTL II* raises three questions almost immediately. First, in BCRA, Congress used the “electioneering communication” definition parsed in *WRTL II* not only to extend corporate and union speech restrictions but also, in § 201, to expand the scope of disclosure.<sup>180</sup> *McConnell* upheld that

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<sup>178</sup> See Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 886 (2005) (referring collectively to *McConnell*, *Nixon*, *Colorado Republican II*, and *Beaumont* as the cases exhibiting such deference). Writing at the time not long ago when these cases were exemplars of the Court’s approach, Rick Hasen referred to them as the “New Deference Quartet.” *Id.*

<sup>179</sup> See *Randall v. Sorrell*, 126 S. Ct. 2479, 2500 (2006) (rejecting Vermont’s expenditure limits and very low contribution limits because they violate the First Amendment).

<sup>180</sup> BCRA, 2 U.S.C § 434(f)(4) (Supp. V 2005).

[T]he term ‘disclosure date’ means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of \$10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing *electioneering communications* aggregating in excess of \$10,000 . . . .

*Id.* (emphasis added).

provision.<sup>181</sup> Does *WRTL II* undermine that holding? Second, *McConnell* also upheld BCRA's curbs on political party soft money, including, the issue ads of political parties.<sup>182</sup> Does *WRTL II* affect the scope, or constitutionality, of the ban on soft-money funding of party issue ads, or of the soft money restrictions more broadly? Third, both *McConnell* and *WRTL II* dealt with the extension of the longstanding ban on the use of corporate and union treasury funds to issue ads.<sup>183</sup> Does *WRTL II* affect the constitutionality of the underlying ban? It is not possible to answer any of these questions with certainty. Some preliminary speculation may be in order.

#### A. Disclosure

BCRA's definition of "electioneering communication" enlarges the sphere of mandatory reporting and disclosure.<sup>184</sup> BCRA § 201 requires that any person who makes disbursements totaling more than \$10,000 in a calendar year for the direct cost of producing and airing electioneering communication to file a report with the FEC within twenty-four hours of the expenditure exceeding \$10,000.<sup>185</sup> In addition, if the expenditure is made by a corporate or union PAC or by an individual who has collected contributions from others, the disclosure must identify those who contributed \$1,000 or more.<sup>186</sup> *McConnell* upheld this enhanced disclosure requirement by a vote of 8-1, as even Justices Scalia

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<sup>181</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 199 (2003).

<sup>182</sup> *Id.* at 161.

<sup>183</sup> *See id.* at 203-04; *WRTL II*, 127 S. Ct. 2660.

<sup>184</sup> 2 U.S.C. § 434(f)(3)(A)(i).

The term 'electioneering communication' means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

*Id.*

<sup>185</sup> *Id.* § 434(f)(1).

<sup>186</sup> *Id.* § 434(f)(2)(E), (F); *McConnell*, 540 U.S. at 194-95.

and Kennedy and then-Chief Justice Rehnquist, who all voted to strike down most of BCRA's provisions, agreed that this measure extending disclosure to some forms of issue advocacy advertising was constitutional.<sup>187</sup>

Given that it relies on the exact same term – “electioneering communication” – that was at stake in *WRTL II*, it would appear that BCRA's disclosure provision is ripe for the claim that it too is subject to a capacious as-applied exception. It would hardly be surprising if, fresh from its Supreme Court victory, *WRTL* were to seek an as-applied exception for disclosure of its issue ad expenditures of the large donors to its issue ad campaigns. By denying donors' anonymity, and compelling politically active groups to incur the costs of collecting and reporting information to the government, disclosure burdens constitutional rights of political speech and association.<sup>188</sup> *Buckley* articulated and applied the express advocacy standard in the context of the constitutional concerns implicated by FECA's disclosure requirement.<sup>189</sup> One might think that if it is constitutional to regulate only the “functional equivalent” of express advocacy, and in the context of corporate and union treasury expenditures “functional equivalent” now means “no reasonable interpretation” as anything other than a call to vote for or against a candidate without regard to the timing or context in which the ad is aired, then it ought to mean the same thing in the disclosure context, so that most issue ads would now be exempt from BCRA's disclosure requirement, as well.

However, that might not necessarily be the case. Consistent with the Court's disclosure jurisprudence, *McConnell* already provided an as-applied exception to the disclosure requirement for individuals or groups for whom the loss of anonymity would produce a serious risk of harm or reprisal.<sup>190</sup> Although disclosure does impose administrative obligations on campaign ad sponsors,

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<sup>187</sup> See *McConnell*, 540 U.S. at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II) (stating that since the regulation substantially relates to other interests, the regulation is constitutional).

<sup>188</sup> See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (finding that, although anonymous pamphleteering might shield those who intend to commit fraud, an Ohio statute seeking to prevent misuse of anonymous election-related speech is unconstitutional because it interferes with “an honorable tradition of advocacy and dissent”).

<sup>189</sup> *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (per curiam).

<sup>190</sup> See *McConnell*, 540 U.S. at 199.

those burdens are surely less onerous than the prohibition on the expenditure of corporate or union treasury funds. Whereas the *WRTL II* majority considered the application of the electioneering communication definition to corporate and union spending to be a speech “ban,” and a form of “censorship,”<sup>191</sup> “disclosure requirements are constitutional because they ‘d[o] not prevent anyone from speaking.’”<sup>192</sup> As Justice Kennedy, joined by Justice Scalia and the late Chief Justice Rehnquist, acknowledged in *McConnell*, the BCRA provision “does substantially relate” to the interest in providing the electorate with information which the Court has regularly relied upon to uphold disclosure requirements.<sup>193</sup> Moreover, the justices who joined Justice Scalia’s *WRTL II* concurrence were sharply critical of the vagueness and uncertainty of Chief Justice Roberts’s “functional equivalent of express advocacy” standard,<sup>194</sup> so it is doubtful there is a majority to apply that standard to BCRA’s disclosure requirement.

Thus, although BCRA applies the “electioneering communication” term to two types of regulations, it is not at all clear that the same type of as-applied exception will be available in both settings. Pragmatically, given *McConnell*’s 8-1 vote to uphold § 201, BCRA’s enhanced disclosure is likely to be safe from the Court’s reconsideration of its facial validity. As a result, it is quite possible that the Constitution will be held to permit one application of “electioneering communication” for one set of regulations, but a different application of the very same term for a different set of regulations.

### *B. The “Public Communications” of State and Local Political Parties*

In addition to addressing the proliferation of electioneering ads that took the form of issue advocacy advertising, BCRA also clamped down on “soft money,”<sup>195</sup> that is contributions to political

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<sup>191</sup> *WRTL II*, 127 S. Ct. 2652, 2669, 2673 (2007).

<sup>192</sup> *McConnell*, 540 U.S. at 201 (quoting Brief for FEC in Opposition at 112, *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (No. 02-582)).

<sup>193</sup> *Id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II).

<sup>194</sup> *WRTL II*, 127 S. Ct. at 2680-81 (Scalia, J., concurring in part and concurring in the judgment).

<sup>195</sup> BCRA, 2 U.S.C. § 441i(a)(1) (Supp. V 2005) (“A national committee of a

parties in excess of the dollar limits on individual donations and in violation of the ban on corporate and union contributions, and *McConnell* upheld that ban.<sup>196</sup> One reason for the explosive growth of party soft money in the 1990s was that the parties discovered, and the FEC agreed, that soft money could be used to pay for advertising concerning federal candidates as long as those ads avoided the magic words of express advocacy.<sup>197</sup> BCRA addressed the soft money problem by, first, barring the national political parties from soliciting, accepting, or using any funds other than those that comply with FECA's dollar limitations and source prohibitions.<sup>198</sup> Second, to deal with the likelihood that big donors and the parties would seek to circumvent the restriction on the national parties, BCRA also prohibited state and local political parties from using soft money for a defined set of "federal election activities" including "public communication,"<sup>199</sup> which was further defined as any communication that "refers to a clearly identified candidate for Federal office" and that "promotes," "attacks," "supports" or "opposes" ("PASO") that candidate.<sup>200</sup>

"Public communication" is, thus, the political party counterpart to "electioneering communication" and was part of Congress's broader effort to redraw the elections/politics line. As *McConnell* observed, "[s]uch ads were a prime motivating force behind BCRA's passage."<sup>201</sup> The "public communication" definition is considerably broader than the "electioneering communication" standard applied to pre-election disclosure and to the corporate and union spending restriction. It is neither limited to broadcast media, nor to the pre-election period. On the other hand, the PASO requirement does condition regulation on some linguistic terms that signal an effort to help or hurt a candidate; mere mention of a clearly identified candidate, even within the pre-election period, would not suffice.<sup>202</sup>

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political party . . . may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.").

<sup>196</sup> *McConnell*, 540 U.S. at 188-89.

<sup>197</sup> *Id.* at 123-24; Briffault, *McConnell v. FEC*, *supra* note 163, at 153.

<sup>198</sup> Briffault, *McConnell v. FEC*, *supra* note 163, at 150.

<sup>199</sup> *Id.*

<sup>200</sup> 2 U.S.C. § 431(20)(A)(iii).

<sup>201</sup> *McConnell*, 540 U.S. at 169.

<sup>202</sup> *See* 2 U.S.C. § 431(20)(A)(iii) (stating that the mere mention of a candidate would not be enough, but would have to be accompanied by an effort

*McConnell* had little difficulty finding that the PASO standard was not overly broad.<sup>203</sup> Expenditures that support or attack a candidate “directly affect[] the election in which he is participating,” with the “overwhelming tendency . . . to benefit directly federal candidates.”<sup>204</sup> With that benefit, federal officeholders would likely be “grateful” for the state and local party public communications and for the contributions that made such public communications possible, thus raising the danger that the officeholder beneficiaries would feel beholden to the soft money donors.<sup>205</sup> The extension of contribution restrictions to the federal election activities of state and local political parties, including such public communications, was found to be “closely drawn to the anticorruption interest it is intended to address.”<sup>206</sup>

Nor did the law raise a vagueness question.<sup>207</sup> Rather, it “clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision.”<sup>208</sup> This was “particularly” so “since actions taken by political parties are presumed to be in connection with election campaigns.”<sup>209</sup>

Does *WRTL II*'s limitation of “electioneering communication” as the functional equivalent of express advocacy affect BCRA’s requirement that the “public communications” of state and local political parties be funded only by hard money? Arguably, PASO statements, which by definition include praise or criticism of candidates, are the functional equivalent of express advocacy. Unlike *WRTL*'s ads, such a party communication “take[s] a position on a candidate’s character, qualifications, or fitness for office.”<sup>210</sup> On the other hand, one can imagine a party taking out an ad that discusses a matter which is both a legislative and a campaign issue and criticizes the position of the incumbent, who also happens to be the opposing candidate. Such an ad might not be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,”<sup>211</sup> as it could be

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to “promote, support, attack or oppose” that opponent in order to qualify as a “federal election activity”).

<sup>203</sup> *McConnell*, 540 U.S. at 170.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 145, 168.

<sup>206</sup> *Id.* at 170.

<sup>207</sup> *Id.* at 170 n.64.

<sup>208</sup> *Id.*

<sup>209</sup> *McConnell*, 540 U.S. at 170 n.64.

<sup>210</sup> *WRTL II*, 127 S. Ct. 2652, 2667 (2007).

<sup>211</sup> *Id.*

argued that such an ad is intended to influence the incumbent's legislative position. Nor is it clear that the Court would still accept the *McConnell* conclusion that the First Amendment's strict scrutiny requirement would be satisfied by the presumption that party ads that pass the PASO test are electioneering.

More generally, *WRTL II*'s criticism of the anti-circumvention rationale could raise new questions concerning the justification for the restrictions on soft money. BCRA's soft money provisions are essentially anti-circumvention measures. BCRA bars soft money donations to the national parties to avoid circumvention of the rules on donations to candidates, and it restricts soft money donations to the state and local parties to avoid circumvention of the ban on soft money donations to the national parties.<sup>212</sup> The *McConnell* majority found that these measures were justified by the dangers soft money posed for the integrity of the political process.<sup>213</sup> But, the four *McConnell* dissenters countered that Congress had not mustered the evidence the First Amendment requires to demonstrate that contributions to political parties so raise the danger of the corruption of officeholders as to justify BCRA's broad restriction.<sup>214</sup> They would have rejected the total ban on soft money donations to the national parties so that, *a fortiori*, the anti-circumvention rationale did not for them justify restrictions on soft money donations to state and local parties, or their use to pay for "public communications."<sup>215</sup>

Given Chief Justice Roberts's "enough is enough" rhetoric, the anti-circumvention rationale as a justification for the regulation of soft money may be at risk. Moreover, the Court's shift in perspective, from striving to balance free speech and the protection of governmental integrity to a more strongly First-Amendment-centric approach, may mean that there is a majority on the Court that is more sensitive to the *McConnell* dissent's claim that more proof is needed before soft money can be deemed to be corrupting.

Of course, it would be premature to say that BCRA's soft money proscriptions, whether on state and local party public

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<sup>212</sup> *McConnell*, 540 U.S. at 143, 161.

<sup>213</sup> *Id.* at 143, 164-65.

<sup>214</sup> *Id.* at 298 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II, joined by the late Chief Justice Rehnquist and Justices Scalia and Thomas).

<sup>215</sup> *Id.* at 303-04.

communications or more broadly, are at risk. Unlike the electioneering communication provision at issue in *WRTL II*, the soft money rules technically are contribution restrictions – aimed at enforcing the dollar limits on individual donors and the prohibitions on corporate and union contributions – not expenditure limitations. And, since *Buckley*, the Court has been far more deferential to contribution controls than expenditure restraints.

Nor is it clear that there is an opportunity to use an “as-applied” exception to undermine the limits. *McConnell* flatly held that “the Government’s strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting *all* donations to national parties to the source, amount, and disclosure limitations of FECA.”<sup>216</sup> Although *McConnell* applied the limit on soft money funding of state and local party federal election activities only on its face,<sup>217</sup> the Court indicated that an “as-applied” challenge would be available only if a party could show that the limit is so constraining that it impairs the party’s ability to engage in effective advocacy.<sup>218</sup>

In practice, the soft money limits have not been nearly as burdensome to party election activities as critics had predicted. Indeed, in 2004, the major political parties raised more in hard money than in hard and soft money combined in the prior presidential election.<sup>219</sup> The growing role of the Internet in reducing the costs of fundraising may mitigate the loss of big soft money donors still further. In the absence of a showing of an impact on party capacity to raise enough money to participate effectively in an election, any effort to undo the soft money ban would require a head-on reconsideration of *McConnell*. Chief Justice Roberts’s and Justice Alito’s hesitation to overrule *McConnell* in *WRTL II* suggests that even if a majority of the Court would have invalidated the soft money restrictions had they seen them for the first time, there may not be a majority ready for such a dramatic move right now.

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<sup>216</sup> *Id.* at 156 (emphasis added).

<sup>217</sup> *Id.* at 173.

<sup>218</sup> *McConnell*, 540 U.S. at 173.

<sup>219</sup> Anthony Corrado, *Party Finance in the Wake of BCRA: An Overview*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 19*, 25 (Michael J. Malbin ed., 2006).

*C. The Corporate and Union Treasury Fund Restriction*

In *McConnell*, the four dissenters to the Court's upholding of BCRA § 203 focused little attention on the definition of electioneering communication *per se* or on the reasons for expanding the prohibition.<sup>220</sup> Instead, they aimed their fire on the underlying rule itself and called for the overruling of the 1990 *Austin* decision which had upheld a state corporate spending prohibition.<sup>221</sup> *McConnell* was thus as much a 5-4 decision on the corporate and union spending ban as on the scope of constitutionally regulable campaign speech.<sup>222</sup> In *WRTL II*, the three *McConnell* dissenters who were still on the Court reiterated their call to overrule *Austin*.<sup>223</sup>

Although our oldest federal campaign finance law – the Tillman Act of 1907<sup>224</sup> – imposed special restrictions on corporations, and the corporate and union spending ban dates to 1947,<sup>225</sup> this spending prohibition sits uneasily with the Court's general hostility towards expenditure limitations. Neither does it coincide with the 1978 *Bellotti* decision, which struck down a state law limiting corporate spending in a ballot proposition election.<sup>226</sup> Moreover, Chief Justice Roberts's *WRTL II* opinion, by repeatedly referring to BCRA's electioneering communication provision as either a “ban,” “censorship,” or the “suppression” of speech, called into question *McConnell*'s treatment of the

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<sup>220</sup> *McConnell*, 540 U.S. at 322-41 *passim* (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II, joined by the late Chief Justice Rehnquist and Justices Scalia and Thomas).

<sup>221</sup> *Id.* at 322-23.

<sup>222</sup> *Id.*

<sup>223</sup> *WRTL II*, 127 S. Ct. 2652, 2679 (2007) (Scalia, J., concurring, joined by Justices Kennedy and Thomas).

<sup>224</sup> Tillman Act, ch. 420, 34 Stat. 864 (1907) (codified and incorporated in scattered sections of 2 U.S.C.); see *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 152-53 (2003) (noting that the Tillman Act was the first federal campaign finance law).

<sup>225</sup> Labor-Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-120, § 304, 61 Stat. 159 (1948) (codified and incorporated in scattered sections of 2 U.S.C.).

<sup>226</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978). *Austin* is not completely an outlier either. Other post-*Buckley* cases have upheld federal laws imposing tighter restrictions on corporations and unions than on other campaign actors. See, e.g., *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210-11 (1982) (holding that unions, corporations, and similar organizations should be treated differently than individuals); see also *Beaumont*, 539 U.S. at 159 (distinguishing between “advocacy corporations” and “traditional business corporations”).

underlying expenditure restriction as a mere channeling device, requiring corporations and unions to participate in elections through PACs rather than use their treasury funds. The lead opinion's analysis, thus, serves to emphasize the burden on speech that the restriction on corporate and union treasury funds creates.<sup>227</sup> Moreover, the opinion's general emphasis on the importance of viewing campaign finance restrictions solely through the prism of the First Amendment provides further basis for wondering whether *Austin* might be ripe for reconsideration.

On the other hand, the lead opinion also treated *Austin* as governing, and never called it into question.<sup>228</sup> Indeed, the lead opinion carefully argued that the expansive as-applied exception to § 203 was actually required by *Austin* and *Austin*'s distinction of *Bellotti*'s invalidation of corporate political expenditure restrictions outside the candidate-election setting.<sup>229</sup> The opinion's treatment of *Austin* suggests that these justices accept *Austin*, even though they are loathe to expand its reach. Though, to be sure, there is nothing in the *WRTL II* lead opinion that directly supports *Austin* either.

Of course, there may be no need for the Court to actually reconsider *Austin*; *WRTL II* may have done the necessary work. With the corporate and union expenditure restrictions now turned back to the "functional equivalent" of express advocacy, the restrictions are unlikely to have much bite. As the record in the years leading up to BCRA demonstrated, corporations and unions had little difficulty deploying effective campaign ads that did not involve the use of literal, express advocacy. It is unlikely those skills atrophied in the three and a half years between *McConnell* and *WRTL II*. Corporations and unions that want to spend money in support of or in opposition to federal candidates are likely to be able to do so even if *Austin* remains good law. *WRTL II*'s as-applied exception to the electioneering communication provision effectively creates a capacious exception to the general restriction on corporate and union treasury funds as well.

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<sup>227</sup> See *WRTL II*, 127 S. Ct. at 2673 (referring to *Austin* as a "ban on campaign speech").

<sup>228</sup> *Id.* at 2672-73.

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

As these speculations suggest, the immediate doctrinal consequences of *WRTL II* are difficult to predict. They may not necessarily be large, especially for campaign finance issues that have already been settled.<sup>230</sup> What *WRTL II* most obviously does is heighten the uncertainty in what is already a complex field marked by fine distinctions, uneasily consistent rulings, and cases pointing in different directions.

Campaign finance law establishes the rules of the game for how we pay for our elections. For many decades legislators, judges, politicians, and academics have struggled over how those rules ought to accommodate multiple competing concerns – freedom of speech and association, political equality, electoral competitiveness, and controlling the undue influence of money on the political process. Compromise, arbitrary line-drawing, and dissatisfaction with the content of the rules in place are inevitable, but there is consensus that whatever rules are adopted ought to be clear and stable with predictable consequences for campaign participants. Reasonable people can disagree over whether *WRTL II*'s decision to cut back on regulatory control over corporate and union campaign spending substantively improves the law. But it is hard to avoid the conclusion that this sharp swerve in doctrine, the lead opinion's failure to acknowledge the inconsistency between its analysis and holding and *McConnell*'s, the vagueness of the lead opinion's test, and the uncertainty of its implications for the rest of BCRA and for campaign finance law more broadly are anything but setbacks for the vital rule of law values of clarity, stability, and predictability.

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<sup>230</sup> There may, of course, be consequences for developing areas of the law. Some public funding systems, for example, contain measures providing additional funds to publicly funded candidates if they are opposed by high spending privately funded candidates or if they are targeted by independent expenditures. See, e.g., Jason B. Frasco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 CORNELL L. REV. 733, 771-76 (2007) (discussing the "rescue fund" component of North Carolina's judicial election public funding program). I owe this point to an observation by Roy Schotland.