THE DIFFERENCE TWO JUSTICES MAKE: 
FEC V. WISCONSIN RIGHT TO LIFE, INC. II 
AND THE DESTABILIZATION OF 
CAMPAIGN FINANCE REGULATION

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INTRODUCTION

In the Bipartisan Campaign Reform Act (BCRA) of 2002, Congress banned corporations and unions from directly funding broadcast, satellite, or cable communications identifying federal candidates and targeting their electorates shortly before an election.\(^1\) In \textit{McConnell v. Federal Election Commission}, the Supreme Court upheld this ban against facial constitutional attack without discussing the availability of as-applied challenges.\(^2\) Last term, in \textit{Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL II)}, the Court held one such challenge successful.\(^3\) The Court split three ways: Justices Stevens, Souter, Ginsburg, and Breyer would have upheld the ban against both as-applied and facial attack.\(^4\) Justices Scalia, Kennedy, and Thomas, on the other hand, would have overruled \textit{McConnell}, decided only three years earlier, and found the ban unconstitutional on its face.\(^5\) The Court’s two new Justices, Chief Justice Roberts and Justice Alito, controlled the outcome. Although they did not overrule \textit{McConnell} and hold the ban unconstitutional on its face, they found it unconstitutional under an as-applied standard that robs the ban of any content.\(^6\) This essay analyzes this controlling opinion and discusses both its direct and certain effects on electioneering communications and its more indirect and uncertain effects on other aspects of campaign finance regulation. Although it tries hard to appear not to do so, the controlling opinion clearly breaks with the past and threatens to destabilize large areas of campaign finance law.


\(^3\) Fed. Election Comm’n v. Wis. Right to Life, Inc. (WRTL II), 127 S. Ct. 2652, 2659 (2007) (finding that the three advertisements at issue qualified for an as-applied exception to BCRA § 203).

\(^4\) Id. at 2687-05 (Souter, J., dissenting) (Justices Stevens, Ginsburg, and Breyer joined the dissenting opinion).

\(^5\) Id. at 2674-87 (Scalia, J., concurring in part and concurring in the judgment) (Justices Kennedy and Thomas joined the opinion which stated that “[t]oday’s cases make it apparent that . . . McConnell’s holding concerning § 203 was wrong.”).

\(^6\) See id. at 2659, 2674 (holding § 203 of the BCRA unconstitutional as applied).
I. WRTL II IN CONTEXT

Congress has long worried over the financial influence of corporations and unions in federal elections. In 1907, it passed the Tillman Act, which made it “unlawful for any corporation whatever to make a money contribution in connection with any [federal] election . . . .”7 The Taft-Hartley Act of 1947 extended this provision to make it “unlawful for any . . . corporation whatever, or any labor organization to make a contribution or expenditure in connection with any [federal] election . . . .”8 It thus expanded the Tillman Act in two ways: from corporations to unions and from contributions to “expenditures,” which now include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . . .”9

In Federal Election Commission v. Massachusetts Citizens For Life, Inc. (MCFL), the Supreme Court interpreted the reach of this term.10 Relying on the interpretation of a similar provision in Buckley v. Valeo,11 the Court held that “an expenditure must constitute ‘express advocacy’ in order to be subject to the prohibition . . . .”12 It said, “Buckley adopted the ‘express advocacy’ requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons.”13 The Court stated further that in Buckley, “a finding of ‘express advocacy’ depended upon the use of language such as ‘vote for;’ ‘elect,’ ‘support,’ etc.”14 MCFL thus made all spending on communications that avoided these “magic words” exempt from § 441b’s prohibition.15 Corporations and unions, in other words, could spend unlimited—and undisclosed—amounts of money funding advertisements that were intended to aid or harm federal candidates and which had that effect so long as they

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12 MCFL, 479 U.S. at 249 (discussing Buckley, 424 U.S. at 42).
13 Id.
14 Id. (quoting Buckley, 424 U.S. at 44 n.52).
avoided these few words. And they did.

Another important innovation occurred around this same time. In a series of advisory opinions, the Federal Election Commission (FEC) held that not all money given to national political party committees for the benefit of federal candidates was subject to the individual contribution limitations and the corporate and union source bans of the Federal Election Campaign Act (FECA). National political party committees could receive so-called “soft money” freely from any source and without any limitation so long as they spent that money on non-federal activity or, if on joint federal and non-federal activity, allocated the overall cost in any reasonable way between so-called “federal” and “non-federal” accounts. National party committees spent much of this money on generic overhead, voter drives, and party conferences, all of which could benefit both state and federal candidates. Taking their cue from corporations, however, they also asked if they could spend it on advertisements that referred to particular federal candidates but avoided any express advocacy or mention of a federal election. The FEC held that they could treat spending on such ads as either administrative expenses or generic voter drive costs. These expenses could be “allocated 60% to the Federal account and 40% to the non-federal account in non-presidential election years, and 65% to the Federal account and 35% to the non-federal account in presidential election years.”

This ruling effectively gave corporations three ways to freely fund advertising to influence federal elections—one direct and two indirect. They could (1) run as many advertisements as they wanted so long as they used no “magic words;” (2) contribute unlimited amounts of money to the non-federal accounts of national political party committees for them to use on such advertising; or (3) contribute unlimited and undisclosed amounts to an independent nonprofit identified by a party committee for it

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18 Id.
20 Id.
21 Id.
to spend on such advocacy.\textsuperscript{22} The choice involved tradeoffs. The money corporations spent on advertising could not be coordinated with the parties and so might not be as effective as advertising the parties themselves directed.\textsuperscript{23} But corporations did not have to disclose such spending and did not have to worry about matching it with funds from other sources.\textsuperscript{24} On the other hand, any soft money spent by party committees had to be matched at a fairly steep rate with hard money, which corporations and unions could not contribute from their general treasury funds.\textsuperscript{25} The matching requirement effectively discounted the value of soft money and made such contributions less attractive than they otherwise would be.\textsuperscript{26} A national party committee could effectively soften the discount by giving its soft money to the soft money account of a state party committee, which could match with hard money at a more favorable rate, but they necessarily lost some degree of control in doing so.\textsuperscript{27} The third alternative, directing a corporation that wished to help a party’s candidates to make a contribution to specific nonprofits for them to spend on non-express advocacy, gave national party committees even less control over the actual use of the money but provided some distance for the corporation from the ads themselves.\textsuperscript{28}

Such ads looked remarkably similar no matter how the corporation chose to fund them and could track very closely the kinds of ads the candidates themselves ran, which were clearly intended to influence the federal election.\textsuperscript{29} In 1996, for example, the Republican National Committee (RNC) ran the following television ad, called “The Story,” before the Dole-Clinton presidential election:

\textsuperscript{22} McConnell v. Fed. Election Comm’n, 540 U.S. 93, 129 (2003) (“As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent [the law’s] . . . limitations, asking donors . . . to give money to nonprofit corporations to spend on ‘issue’ advocacy.”).
\textsuperscript{26} Id.
\textsuperscript{27} McConnell, 540 U.S. at 131 (describing circulation of soft money between national and state party accounts).
\textsuperscript{28} Id. at 125.
\textsuperscript{29} Id. at 128.
Audio of Bob Dole: We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.

Voice Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called... he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.

Audio of Bob Dole: I went around looking for a miracle that would make me whole again.

Voice The doctors said he'd never walk again. But after 39 months, he proved them wrong.

Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.

Voice Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.

Audio of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.  

"The Story" did not focus on any public issues, rather it focused entirely on the personality traits and affect of Bob Dole. Although the RNC's political director thought that it "need[ed] to be run," he worried that "[m]aking this spot pass the issue advocacy test may take some doing." He need not have worried. As Bob Dole himself explained to Ted Koppel when asked why


31 Id.  

32 Id. at 4015.
such an ad would be considered “generic” issue advocacy which could be funded in part by soft money raised from corporations, “[i]t doesn’t say ‘Bob Dole for president.’ . . . [I]t talks about the Bob Dole story. It also talks about issues. . . . [I]t never says that I’m running for president, though I hope that it’s fairly obvious, since I’m the only one in the picture!” The absence of “magic words,” which the candidates themselves hardly use, made all the difference.

Congress enacted BCRA in 2002 in response to growing corporate and union soft money contributions and direct funding of campaign ads that supported or opposed candidates but avoided express advocacy. It had two major components, both of which were thought necessary to keep corporate and union treasury money out of federal elections. First, Title I regulated nearly all forms of federal soft money. Its central provision prohibited national party committees and their agents from soliciting, receiving, directing, or spending any soft money. Its remaining provisions aimed to prevent circumvention of this bar. One prevented state and local party committees from using soft money for activities affecting federal elections. Another prohibited national political parties from soliciting and donating funds to nonprofits that engage in electioneering activities. Another restricted federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal and even state and local elections. And another barred state and local candidates from raising or spending soft money for advertisements that promoted or attacked federal candidates.

Second, Title II of BCRA prohibited corporations and unions from funding so-called “electioneering communications” out of

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33 Id. at 4154.
36 Id.
37 Id.
39 Id. § 441i(b).
40 Id. § 441i(d).
41 Id. § 441i(e).
42 Id. § 441i(f).
their general treasuries. These consisted of broadcast, cable, and satellite ads appearing within thirty days before a primary or sixty days before a general election that referenced a clearly identified federal candidate and that targeted that candidate's electorate. Title II permitted individuals to fund such ads but required disclosure whenever more than $10,000 was spent on them in any calendar year. By so regulating "electioneering communications," Congress hoped to mute direct corporate and union influence in federal elections.

In McConnell, the Supreme Court upheld both BCRA's soft money and electioneering communications provisions from facial constitutional challenge. The Court found that Congress could ban soft money because doing so had "only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech . . . [while] regulat[ing] the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders." In particular, BCRA's various soft money restrictions met the relevant First Amendment test; they were "closely drawn to match a sufficiently important interest," and "prevent[ed] corruption and the appearance of corruption." However, the Court rejected the view that only traditional "quid pro quo" corruption could count. That approach, it thought, was "crabbed . . . [and] ignore[d] precedent, common sense, and the realities of political fundraising." The Court additionally embraced three broader theories. First, it found that the threat of "improper influence" supported many of the soft money rules. Under this theory, Congress could regulate in order to prevent "politicians [from

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45 Id. § 434(f)(1).
46 McConnell, 540 U.S. at 129.
48 McConnell, 540 U.S. at 138.
49 Id. at 136 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387-388 (2000)).
50 Id. at 142.
51 Id. at 143 (emphasis in original) (quoting Shrink, 528 U.S. at 389).
52 Id. at 152.
53 Id. at 143 (quoting Shrink, 528 U.S. at 389).
becoming] too compliant with the wishes of large contributors."

The Court not only respected “Congress’ judgment that if a large
donation is capable of putting a federal candidate in the debt of
the contributor, it poses a threat of corruption or the appearance
of corruption,” but also thought that this interest underlay, to
some degree, all the BCRA soft money provisions and was
supported in the record, which “connect[ed] soft money to
manipulations of the legislative calendar, leading to Congress’
failure to enact, among other things, generic drug legislation, tort
reform, and tobacco legislation.” The Court added, “[t]o claim
that [soft money] do[es] not change legislative outcomes surely
misunderstands the legislative process.”

Second, “access corruption” supported many of BCRA’s soft
money restrictions. Under this theory, enhanced access to
governmental officials, even if it came with no enhanced
influence over them, was itself problematic. As the Court put
it, “[e]ven if that access [does] not secure actual influence, it
certainly [gives] the ‘appearance of such influence.’” Moreover,


Third, although perhaps not strictly a form of corruption, the
Court found that Congress could regulate prophylactically to
prevent circumvention of other limits designed to deter
corruption or its appearance. As the Court stated, other
anticorruption “interests have been sufficient to justify not only
contribution limits themselves, but laws preventing the
circumvention of such limits,” and, it noted that, “[a]ll Members
of the Court agree that circumvention is a valid theory of


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54 McConnell, 540 U.S. at 143 (quoting Shrink, 528 U.S. at 389).
55 Id. at 167 (“Like the rest of Title I, § 323(b) is premised on [this]
judgment.”) (emphasis added).
56 Id. at 150.
57 Id.
58 Id. at 150, 155, 156, 165 n.61.
59 Id. at 150.
Republican Fed. Campaign Comm. (Colorado Republican II), 533 U.S. 431, 441
(2001)).
61 Id. at 151 (listing schedules of access in return for soft money).
62 Id. at 144, 165, 171, 175, 178-9, 182, 185.
63 Id. at 144.
corruption.64

These three broader theories of corruption often blended together to support Title I’s various soft money restrictions.65 In general, however, the Court saw the undue influence and access rationales as supporting primarily the restrictions on national party and candidate soft money activity, and the anticorruption rationale as supporting primarily the restrictions on state party committees, on state and local candidates, and on activity connected to nonprofits.66 Unsurprisingly, the further a player stood from the federal arena, the less work undue influence and access corruption performed and the more circumvention corruption had to perform.

The Supreme Court also upheld BCRA’s electioneering communications provisions against facial constitutional attack.67 First, the Court held that the Constitution did not require the presence of “magic words.”68 That part of Buckley, it found, “was the product of statutory interpretation rather than a constitutional command.”69 In other words, the magic words test represented only a narrowing construction of a vague statutory term in order to avoid constitutional difficulty and was not itself a constitutional requirement. Congress could, the Court believed, define the category differently, as it did in BCRA’s definition of electioneering communications.70 Finding BCRA’s definition “both easily understood and objectively determinable,” the Court saw no need to reconstrue it to avoid vagueness concerns.71 Then the Court upheld BCRA’s requirement that individuals spending over $10,000 in a calendar year on electioneering communications disclose their spending.72 The interests of “providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive

64 Id. (quoting Colorado Republican II, 533 U.S. at 456).
65 See id. at 165 & n.61 (citing access corruption in footnote to support influence corruption in text and then in next paragraph invoking congressional “prediction” of circumvention corruption).
66 Compare McConnell, 540 U.S. at 143, 150, 155-56, 167, 182 (invoking undue influence and access corruption), with id. at 171, 175, 178, 185 (invoking circumvention corruption).
67 Id. at 194.
68 Id. at 193.
69 Id. at 192.
71 McConnell, 540 U.S. at 194.
72 Id. at 194, 196.
electioneering restrictions" all supported that requirement.\textsuperscript{73}

The Court next considered BCRA's expansion of the ban on direct corporate and union spending from ads containing express advocacy to all statutorily defined electioneering communications.\textsuperscript{74} It rejected the challengers' central argument "that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications."\textsuperscript{75} The Court explained:

This argument fails to the extent 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. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect. The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief pre-election timespans but had no electioneering purpose is a matter of dispute. . . . Nevertheless, the vast majority of ads clearly had such a purpose.\textsuperscript{76}

Finding from the empirical evidence submitted in the district court that the lines drawn by BCRA were neither overbroad nor underinclusive, the Court upheld the ban on direct corporate and union funding.\textsuperscript{77} It did not, however, say anything about the possible availability of as-applied challenges in future cases.

Wisconsin Right to Life, Inc. (WRTL), a "nonprofit, nonstock . . . ideological advocacy corporation" asserted such a challenge.\textsuperscript{78} In 2004, it ran a series of ads in Wisconsin urging its audience to contact Senator Russell Feingold, who was running in the Democratic senatorial primary, and tell him to oppose the filibuster of President Bush's judicial nominees.\textsuperscript{79} The ads gave the audience no information about how to contact the senator but did reference a web site, which, in turn, did.\textsuperscript{80} WRTL used its general treasury funds to pay for these ads and recognized that BCRA would not allow it to run them in the thirty days before

\textsuperscript{73} Id. at 196.
\textsuperscript{74} Id. at 203-09.
\textsuperscript{75} Id. at 205-06.
\textsuperscript{76} Id. at 206.
\textsuperscript{77} McConnell, 540 U.S. at 207, 209.
\textsuperscript{79} Id. at 198-99.
\textsuperscript{80} Id. at 216.
the Democratic primary. It sued for a declaratory judgment that BCRA’s ban against direct corporate funding was unconstitutional as applied to its particular ads and for an injunction preventing the FEC from enforcing the ban against it. The district court denied relief concluding that “the reasoning of the McConnell Court leaves no room for th[is] kind of ‘as applied’ challenge.” On direct appeal, the Supreme Court vacated the district court’s judgment, holding that McConnell “did not purport to resolve future as-applied challenges’ to BCRA’s direct corporate funding ban] and remanded ‘for the District Court to consider the merits of WRTL’s as-applied challenge in the first instance.”

On remand, the district court noted that under McConnell, BCRA could constitutionally ban direct corporate and union funding of ads that expressly advocate the election or defeat of a candidate for federal office and their functional equivalents. But, limiting its inquiry to “language within the four corners” of the ads, the district court concluded that the ads were neither express advocacy nor its functional equivalent but “genuine issue ads.” Then, reaching the question the Supreme Court had said McConnell left open, the district court held that no compelling interest could justify BCRA’s regulation of genuine issue ads such as those WRTL sought to run.

On direct appeal to the Supreme Court a second time, WRTL argued that its ads should be protected as genuine grassroots lobbying. The Supreme Court, however, gave WRTL more than

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81 Id. at 199. WRTL could not claim a constitutional exemption available for many ideological corporations because it accepted money from some business corporations. Id. at 200 n.2; see also MCFL, 479 U.S. 238 (1986) (describing requirements for exemption).
84 Id. (quoting Wis. Right to Life, Inc. v. Fed. Election Comm’n (WRTL I), 546 U.S. 410, 412 (2006)).
86 Id. at 207-08, 204.
87 Id. at 210.
88 WRTL II, 127 S. Ct. at 2660. In its brief in the Supreme Court, WRTL presented the issue as follows:

Whether the electioneering communication prohibition at 2 U.S.C. § 441b is unconstitutional as applied to the facts of this case, and particularly

(a) the three specific grassroots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. (“WRTL”) here and/or
that. In his controlling opinion, the Chief Justice found a much broader category of advertising to be protected. He first found that the government, not WRTL, bore the burden of argument on the issue: “Because BCRA § 203[‘s funding ban] burdens political speech, it is subject to strict scrutiny. Under strict scrutiny, the Government must prove that applying BCRA to WRTL’s ads furthers a compelling interest and is narrowly tailored to achieve that interest.” The Chief Justice then laid out the government’s particular burden:

This Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent. So to the extent the ads in these cases fit this description, the FEC’s burden is not onerous; all it need do is point to McConnell and explain why it applies here. If, on the other hand, WRTL’s ads are not express advocacy or its equivalent, the Government’s task is more formidable. It must then demonstrate that banning such ads during the blackout periods is narrowly tailored to serve a compelling interest. No precedent of this Court has yet reached that conclusion.

The Chief Justice’s critical move came next. He rejected the test that the McConnell Court appeared to have adopted for “functional equivalen[cy]” when it said that “[t]he justifications for the regulation of express advocacy apply equally to ads [that] . . . are intended to influence the voters’ decisions and have that effect.” This language, the Chief Justice argued, was not a test for “future as-applied challenges,” but only “analysis . . . grounded in the evidentiary record” to “consider[] . . . possible facial overbreadth.” Having rejected the apparent McConnell standard as binding precedent for as-applied challenges, the Chief Justice then went on to reject an intent-and-effects test on the merits. An intent test, he explained, would impermissibly
"chill core political speech." An intent test would also ‘invite costly, fact-dependent litigation’... [and] could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another. The Chief Justice rejected an effects test, because

Such a test ‘puts the speaker... wholly at the mercy of the varied understanding of his hearers.’ It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

The Chief Justice found that all these concerns created a framework for any as-applied challenge:

[T]he proper standard for an as-applied challenge to BCRA §203['s corporate funding ban] must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. And it must eschew ‘the open-ended rough-and-tumble of factors,’ which ‘invites complex argument in a trial court and a virtually inevitable appeal.’ In short, it must give the benefit of any doubt to protecting rather than stifling speech.

To the Chief Justice, this framework pointed to a clear test: “In light of these considerations, a court should find that 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.” And “[u]nder this test,” there could be but one conclusion:

WRTL’s three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The 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 the

95 Id.
96 Id. at 2666.
97 Id. (citation and footnote omitted).
98 Id. (citation omitted).
100 Id. at 2667.
matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.\(^{101}\)

II. CAMPAIGN FINANCE IN WRTL II’S WAKE

WRTL II will have certain direct effects and some less certain indirect ones, all of which will be consequential. First, WRTL II clearly rolls far back Congress’s ability to regulate corporate and union advertising in federal elections. In practical terms, the test the Chief Justice adopts—that “a court should find that an ad is the functional equivalent of express advocacy [and thus subject to BCRA’s electioneering communications provisions] only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate”\(^{102}\)—overrules McConnell’s holding that Congress can regulate electioneering communications.\(^{103}\) Although it is certainly possible to imagine ads that would run afoul of this test, corporations would have no need to run them. They could run other, equally effective ads instead, which the new test would clearly allow them to fund. Consider, for example, those ads run by the candidates themselves. They surely aim to influence federal elections and have that effect. But many of the greatest of them would not qualify as “the functional equivalent of express advocacy” under the Chief Justice’s test.

Take for example, Victory, a thirty-second television ad run by the Bush campaign during the 2004 election. It sought to tie the United States military operations in Iraq to themes of freedom and democracy-building by focusing on that year’s summer Olympics, an event many Americans followed.

Voice Over:
In 1972 ... there were 40 democracies in the world.

Today ... 120.

\(^{101}\) Id.

\(^{102}\) Id.

Freedom is spreading throughout the world like a sunrise.

And this Olympics ... there will be two more free nations ... and two fewer terrorist regimes.

With strength, resolve and courage, democracy will triumph over terror.

And, hope will defeat hatred.¹⁰⁴

Absent the stand-by-your ad and source disclosures, which federal law separately mandates for candidate-run advertisements but not for similar corporate speech,¹⁰⁵ this ad would likely not be considered “the functional equivalent of express advocacy.”¹⁰⁶ By associating the President with “[f]reedom,” “sunrise,” “strength,” “democracy,” “courage,” “triumph over terror,” a “hope [that] will defeat hatred,” and “[m]oving America [f]orward,” not to mention the formal power and beauty of women’s Olympic butterfly swimming, the designers of the ad intended to influence voters in President Bush’s favor but the ad actually focuses on the Iraq war, a major campaign issue, and nowhere directly or expressly “promotes” or “supports” him.¹⁰⁷ It does not need to, of course. As the Supreme Court noted in McConnell, such heavy-handedness would be unnecessary and could backfire: “All advertising professionals

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¹⁰⁶ WRTL II, 127 S. Ct. at 2667.
¹⁰⁷ Victory, supra note 104.
understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their [sic] throat.”

Also, nothing in the ad refers to the upcoming election, President Bush’s candidacy for re-election, or his party affiliation. It simply does not need to. The audience could be counted on to know all that. In short, this ad “is susceptible of . . . reasonable interpretation other than as an appeal to vote for or against” President Bush. Under the Chief Justice’s test, corporations could run it out of their general treasury funds.

Another ad, Bear, from the 1984 presidential contest, makes this point even clearer. One of the most memorable in the campaign, it sought to defuse attacks that President Reagan had unnecessarily escalated military spending. In the ad, a bear, representing the Soviet Union, roams the woods until it eventually faces a human. The announcer asks whether the bear is threatening and “isn’t it smart to be as strong as the bear?”

ANNOUNCER: There is a bear in the woods.

For some people the bear is easy to see. Others don’t see it at all.

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109 Victory, supra note 104.

110 WRTL II, 127 S. Ct at 2667.

111 See id. (stating the test to determine which ads could be funded with general treasury monies).


113 See id. (suggesting it was necessary for President Reagan to raise military spending).

114 Id.

115 Id.
Some people say the bear is tame. Others say it's vicious and dangerous.

Since no one can really be sure who's right, isn't it smart to be as strong as the bear? If there is a bear?

This ad too is "susceptible of... reasonable interpretation other than as an appeal to vote for" President Reagan. First, the ad references, albeit cleverly, the live issue of national defense and, in particular, the proper degree of military preparedness against the Soviet Union. Second, it does not attribute any position on these issues to President Reagan—it does not need to. Third, it does not even urge the viewer to contact President Reagan, let alone vote for him. The ad is powerful and its intent and effect—to influence voters to favor President Reagan—are clear. Yet, corporations could run it with their general treasury funds as protected issue advocacy.

_Prouder, Stronger, Better_, known to many as President Reagan's "Morning in America" ad, was one of the most powerful television ads of any election. It still resonates with many and

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116 Id.
117 **WRTL II**, 127 S. Ct. 2652, 2667 (2007); Bear, supra note 112.
118 Bear, supra note 112.
119 Id.
120 Id.
121 See **WRTL II**, 127 S. Ct. at 2667 (stating the test to determine which ads could be funded with general treasury monies).
has, in fact, even given its name to the Reagan years. Its imagery of people going to work, moving into their new homes, marrying, and living under lowered inflation all effectively conveyed an upbeat image of American life under President Reagan.

ANNOUNCER: It's morning again in America. Today more men and women will go to work than ever before in our country's history.

With interest rates at half the record highs 1980, nearly two thousand families today will buy new homes, more than at any time in the past four years.

This afternoon, 6,500 young men and women will be married.

and with inflation at less than half of what it was just four years ago, they can look forward with confidence to the future.

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123 See, e.g., Ben Yagoda, My Heart Belongs to 'Mother', N.Y. TIMES, May 14, 2006, § 4, at 14 (describing the time period as "morning-in-America Reagan years").

124 Prouder, Stronger, Better, supra note 122.
It's morning again in America and under the leadership of President Reagan our country is prouder and stronger and better.

Why would we ever want to return to where we were less than four short years ago?125

The ad is clearly “susceptible of... reasonable interpretation other than as an appeal to vote for” President Reagan.126 It does not attribute a position on any pending issue to President Reagan, nor does it ask viewers to contact him, let alone vote for him. It also avoids mentioning the election, President Reagan’s candidacy, or his political affiliation.127 It does reference several then-current issues.128 It is littered with references to the standard, ever-present concerns of inflation and homeownership—not to mention marriage and the family, the focus of much federal social policy.129 To some, the phrase “under the leadership of President Reagan our country is prouder and stronger and better” may come uncomfortably close to “taking] a position on a candidate's character, qualifications, or fitness for office,” one of the subsidiary “indicia of express advocacy.”130 But, if a court were to obediently follow the Chief Justice's admonition that “it must give the benefit of any doubt to protecting rather than stifling speech,” the corporations sponsoring the ad need not worry.131 To avoid any danger, a risk-averse corporation could simply drop the six words “under the leadership of President Reagan,” which represent approximately three seconds of the sixty-second ad.132

Slight revision would have allowed corporations to similarly fund the most famous example of negative candidate-sponsored

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125 Id.
126 WRTL II, 127 S. Ct. at 2667; Prouder, Stronger, Better, supra note 122.
127 Prouder, Stronger, Better, supra note 122.
128 Id.
129 Id.
130 WRTL II, 127 S. Ct. at 2667; Prouder, Stronger, Better, supra note 122.
131 WRTL II, 127 S. Ct. at 2667.
132 Prouder, Stronger, Better, supra note 122.
advertising: the 1964 Lyndon B. Johnson campaign’s “Daisy” ad.\textsuperscript{133} In this ad, the Johnson campaign powerfully suggested that the election of Barry Goldwater would lead the country to nuclear destruction.\textsuperscript{134} It was so effective that the campaign paid to run it only once.\textsuperscript{135} News commentary during the rest of the campaign gave it sufficient life of its own. The ad begins with a little girl counting, as best she can, from one to ten while plucking petals from a daisy.\textsuperscript{136} When she gets almost to ten, an ominous male voice replaces hers, counting backwards in a countdown to the ignition of a nuclear bomb.\textsuperscript{137} President Johnson’s voice, echoing a poem of W.H. Auden, then gives voters the choice: “To make a world in which all of God’s children can live, or to go into the darkness.”\textsuperscript{138}

\begin{center}
\textbf{SMALL CHILD [with flower]:} One, two, three, four, five, seven, six, six, eight, nine, nine.
\textbf{MAN:} Ten, nine, eight, seven, six, five, for three, two, one, zero.
\end{center}

[Sounds of exploding bomb].

\begin{center}
\textbf{JOHNSON:} These are the stakes: To make a world in which all of God’s children can live, or to go into the darkness.
\end{center}

\textsuperscript{133} The Living Room Candidate: Presidential Campaign Commercials 1952-2004, Peace Little Girl (Daisy), http://livingroomcandidate.movingimage.us/style/index.php?nav_action=style\&nav_subaction=110 [hereinafter Daisy] (select play symbol to see the commercial or select “transcript” to view only the transcript of the commercial) (last visited Nov. 23, 2007).
\textsuperscript{135} Id.
\textsuperscript{136} Daisy, supra note 133.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
We must either love each other, or we must die.

ANNOUNCER:
Vote for President Johnson on November 3rd. The stakes are too high for you to stay home.\textsuperscript{139}

One minor change, which would not greatly diminish the power of the ad, would allow a corporation to run the ad from general treasury funds without any disclosure under the Chief Justice's test. The words “for President Johnson” would have to be dropped from both the imagery and the voiceover because they clearly represent express advocacy. But if instead the ad ended with a simple shot of a smiling, relaxed President Johnson, the ad would have had the same effect.\textsuperscript{140}

Second, although nothing in \textit{WRTL II} speaks to BCRA's regulation of soft money, its test for as-applied challenges to bans on corporate funding of electioneering communications robs the soft money provisions of any practical effect. BCRA's soft money prohibitions were meant to work hand-in-hand with its electioneering communications provisions.\textsuperscript{141} Congress understood, when it enacted BCRA that it could not effectively regulate soft money unless it addressed direct corporate funding of campaign ads at the same time.\textsuperscript{142} To corporations, soft money

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} One other feature of the ad, not relevant to the Chief Justice's constitutional test, would have to be changed to make it permissible. Someone other than Johnson himself would have to intone the words associated with the fourth and fifth frames. Using Johnson's own voice would make the ads a prohibited “coordinated communication.” \textit{See} 11 C.F.R. \textsection 109.21(a) (2007) (defining the term “coordinated communication”).

\textsuperscript{141} \textit{See} McConnell v. Fed. Election Comm'n, 540 U.S. 93, 129 (2003) (“As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations . . . .”).

\textsuperscript{142} \textit{See}, e.g., \textit{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 4480 (2d Sess. 1998), \textit{available at} http://hsgac.senate.gov/sireport.htm (scroll to the bottom and click on the link to the investigative report) (quoting testimony of Professor Daniel R. Ortiz found in section thirty-two on the website “[t]o anyone interested in campaign finance reform, issue advocacy is the 800-pound gorilla. Without taming it, campaign
contributions and campaign ads are close economic substitutes. As the McConnell Court noted in upholding BCRA’s soft money restrictions, “[t]he proliferation of sham issue ads has driven the soft-money explosion. Parties have sought out every possible way to fund and produce these ads with soft money . . . .”\(^{143}\) While a corporation can, after WRTL II, always run such ads itself,\(^{144}\) it is easier for a corporation to contribute soft money to a party to allow it to run campaign ads supporting its own candidates. Direct corporate funding is not a problem so long as it avoids any “indicia of express advocacy” and casts the ads, as the candidates themselves often do, as “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”\(^{145}\) To curry the kind of favor with candidates and parties that soft money permitted, corporations have had only to run themselves the same kind of “issue ads” that parties did before BCRA with their soft money. Disclosure requirements, of course, might make running certain ads unattractive to corporations but are unlikely to stop them generally. That is, of course, assuming that Congress can constitutionally require disclosure of the funding of ads not meeting Chief Justice Roberts’ test—something his opinion in WRTL II does not directly address.\(^{146}\)

Third, although the Chief Justice’s controlling opinion did not address BCRA’s soft money provisions, his reasoning places the constitutional justification for some of them into question. As previously discussed, McConnell found constitutional support for BCRA’s different soft money regulations in somewhat different corruption rationales.\(^{147}\) The ban against national political party committees receiving or spending soft money, for example, rested on the need to prevent traditional quid pro quo corruption, the appearance of that type of corruption, and access corruption.\(^{148}\)

\(^{143}\) McConnell, 540 U.S. at 185.

\(^{144}\) WRTL II, 127 S. Ct. 2652, 2674 (2007) (“McConnell held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. . . . But when it comes to defining what speech qualifies as the functional equivalent of express advocacy . . . [the Court] give[s] the benefit of the doubt to speech, not censorship.”).

\(^{145}\) Id. at 2667.

\(^{146}\) See id. (stating the Chief Justice’s test).

\(^{147}\) See discussion supra Part I, pp. 148-50.

\(^{148}\) McConnell, 540 U.S. at 156.
The non-profit regulations, by contrast, rested largely on anti-circumvention rationales. In analyzing BCRA's ban on direct corporate funding of campaign ads, the Chief Justice expressly recognizes the power of quid-pro-quo and appearance-of-corruption arguments, but is silent as to access corruption and actively hostile to anti-circumvention rationales. In rejecting the FEC's argument "that an expansive definition of 'functional equivalent' is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions," he stated that "such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny." It reflected, he thought, only "[t]he desire for a bright-line rule[, which] hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom."

Although the Chief Justice's remark is technically inapposite to BCRA's soft money regulations, which McConnell upheld under "less rigorous scrutiny," his disdain for "prophylaxis-upon prophylaxis," which quickly followed a cry that "[e]nough is enough," reveals at least some discomfort with such rationales. In light of Justices Thomas and Scalia's strong belief that all contribution limitations should be judged under strict scrutiny and Justice Kennedy's belief that only quid pro quo corruption can justify soft money regulations whatever standard of scrutiny applies, the Chief Justice's reasoning here casts some doubt on the continuing constitutionality of soft money provisions justified primarily by anti-circumvention rationales, particularly, the ban against national, state, and local party committees "solicit[ing] any funds for, or mak[ing] or direct[ing] any donations" to any tax-exempt organizations that make federal election

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149 Id. at 129.
150 WRTL II, 127 S. Ct. at 2672 (“This Court has long recognized ‘the governmental interest in preventing corruption and the appearance of corruption’ in election campaigns.”).
151 Id.
152 Id. (emphasis in original) (quoting MCFL, 479 U.S. 238, 263 (1986)).
153 McConnell, 540 U.S. at 141 n.43.
154 WRTL II, 127 S. Ct. at 2672.
155 McConnell, 540 U.S. at 266 (Thomas, J., concurring in part, concurring in result in part, concurring in judgment in part, and dissenting in part, joined by Scalia, J., in part).
156 Id. at 301 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II).
expenditures.\footnote{157}{2 U.S.C. § 441i(d) (Supp. V 2005); see McConnell, 540 U.S. at 174 (finding ban constitutional for anti-circumvention reasons).} Finally, although \textit{WRTL II} did not address whether Congress can require disclosure by those who fund ads qualifying for the Chief Justice’s as-applied exemption, his reasoning creates a question where none previously existed. In addition to barring direct corporate and union funding of electioneering communications, BCRA required individuals and certain associations who were allowed to fund such ads to disclose their spending if it amounted to over $10,000 in any calendar year.\footnote{158}{2 U.S.C. § 434(f)(4).} Now that \textit{WRTL II} allows corporations and unions to fund many of these ads, they too are subject to disclosure.\footnote{159}{\textit{WRTL II}, 127 S. Ct. at 2673.} Under the Chief Justice’s reasoning, however, anyone covered by this disclosure provision should be able to challenge it as-applied. The only question is whether such challenges will be successful. The answer is very unclear and depends on whether his opinion in \textit{WRTL II} heightens the standard of review that traditionally has applied to disclosure requirements.

This provision’s constitutionality was clear before \textit{WRTL II}, although the applicable constitutional test was not. Over the dissent of only one Justice,\footnote{160}{See McConnell, 540 U.S. at 275 (Thomas, J., concurring in part, concurring in result in part, concurring in judgment in part, and dissenting in part) (“I must now address an issue on which I differ from all of my colleagues: the disclosure provisions in BCRA.”).} McConnell upheld BCRA’s disclosure requirement against facial challenge and suggested that as-applied challenges, although permitted, would turn on the nature of the group funding the ads, not on the nature of the ads themselves.\footnote{161}{Id. at 194-202.} McConnell, however, did not identify the controlling constitutional test and apply it. Rather, it gestured at \textit{Buckley}\footnote{162}{Id. at 196 (“We agree with the District Court that the important state interests that prompted the \textit{Buckley} Court to uphold FECA’s disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA.”)} and \textit{Buckley} did not clearly identify the controlling constitutional test either. It had held that disclosure requirements “must survive exacting scrutiny” and in the next sentence “insisted that there be a ‘relevant correlation’ or
‘substantial relation’ between the governmental interest and the information required to be disclosed." The former requirement appears close to strict scrutiny; the latter far from it. Its “relevant correlation” condition seems similar to reduced scrutiny’s “rational relationship test,” and its “substantial relation” test seems closer to reduced scrutiny or to intermediate scrutiny than to strict scrutiny, which the Chief Justice accurately described as traditionally requiring that the statute be “narrowly tailored” to achieve “a compelling interest.” In *Buckley*, moreover, the Court never actually held that the interests supporting disclosure—providing voter information, deterring corruption and avoiding the appearance of corruption, and gathering data to help enforce the campaign finance laws’ more substantive provisions—were “compelling.” Rather, the Court found them to be “substantial governmental interests,” which was, the Court believed, all the First Amendment then required.

*WRTL II* confuses the level of scrutiny further. In the controlling opinion, the Chief Justice appears to adopt a position like that long espoused by Justice Thomas: that all “campaign finance laws are subject to strict scrutiny.” The Chief Justice writes, in identifying the proper level of scrutiny to apply to the corporate funding ban, that “[b]ecause BCRA . . . burdens

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163 Buckley v. Valeo, 424 U.S. 1, 64 (1976) (plurality opinion) (footnotes omitted).

164 See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (“Under rational-basis review . . . a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”) (citation omitted) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).


168 *Buckley*, 424 U.S. at 66-68.

169 Id. at 68.

political speech, it is subject to strict scrutiny.” If any burden on political speech triggers “strict scrutiny,” as his analysis here suggests, then the disclosure provisions should trigger it too. Indeed, Buckley found this predicate satisfied. It upheld the disclosure requirements not because they posed no burden—the Buckley Court found, in fact, that they imposed “significant encroachments on First Amendment rights” but because there existed “governmental interests sufficiently important to outweigh” them. If the Chief Justice’s reasoning is not restricted to the corporate funding of campaign ads—and nothing suggests that it is—disclosure requirements will be subject to stricter constitutional scrutiny than before. This is not to say, of course, that WRTL makes it unconstitutional to compel disclosure for campaign ads that do not contain express advocacy or its “functional equivalent,” but only that it suggests that may be true.

III. CONCLUSION

The Chief Justice works very hard in WRTL to appear not to unsettle precedent. Unlike his more conservative colleagues, he formally respects McConnell and makes no noise about overruling or even narrowing it. The practical effects of his reasoning, however, will undo much of BCRA, which McConnell stridently upheld, and threatens to undermine the legal justifications supporting many soft money regulations and destabilize areas, like the constitutionality of disclosure requirements, thought settled since Buckley. His is a remarkable achievement. It accomplishes much and promises more—all the while insisting on its own modesty and meekness. As performance, it is perhaps less breathtaking than unconvincing. None of the seven Justices who refused to join his opinion, after all, found its own description of what it was

171 WRTL II, 127 S. Ct. at 2664.
172 Buckley, 424 U.S. at 64.
173 Id.
174 Id. at 66.
175 WRTL II, 127 S. Ct. at 2670.
177 See WRTL II, 127 S. Ct. at 2684 n.7 (Scalia, J., concurring in part and concurring in the judgment) (describing the Chief Justice's "faux judicial restraint [as] judicial obfuscation.").
doing remotely credible. But despite any failure of self-description, the Chief Justice’s opinion promises to change campaign finance law in many important ways.

178 See id. ("[T]he principal opinion’s attempt at distinguishing McConnell is unpersuasive enough, and the change in the law it 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.").