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# The Constitutionality of Regulating Political Advertisements: An Analysis of *Federal Election Commission v. Wisconsin Right to Life, Inc.*

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## Summary

On June 25, 2007, in a 5-4 decision, the Supreme Court in *Wisconsin Right to Life, Inc. v. FEC (WRTL II)* affirmed a lower court ruling, finding that a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibiting corporate or labor union treasury funds from being spent on advertisements broadcast within 30 days of a primary or 60 days of a general election, was unconstitutional as applied to ads that Wisconsin Right to Life, Inc. sought to run. While not expressly overruling its 2003 ruling in *McConnell v. FEC*, which upheld the BCRA provision against a First Amendment facial challenge, the Court limited the law's application. Specifically, it ruled that advertisements that may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate are not the functional equivalent of express advocacy and, therefore, cannot be regulated.

## Background and Case History

Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA)[1] prohibits corporate or labor union treasury funds from being spent for "electioneering communications." BCRA defines "electioneering communication" as any broadcast, cable, or satellite transmission made within 30 days of a primary or 60 days of a general election (sometimes referred to as the "blackout periods") that refers to a candidate for federal office and is targeted to the relevant electorate.[2] In a 2003 decision, *McConnell v. Federal Election Commission (FEC)*,[3] the U.S. Supreme Court upheld Section 203 of BCRA against a First Amendment facial challenge even though the provision regulates

[1] P.L. 107-155. This law is also known as "McCain-Feingold," referring to the principal Senate sponsors of the legislation.

[2] *See* 2 U.S.C. § 441b(b)(2).

[3] 540 U.S. 93 (2003).

not only campaign speech or "express advocacy," (speech that expressly advocates the election or defeat of a clearly identified candidate), but also "issue advocacy," (speech that discusses public policy issues, while also mentioning a candidate). Specifically, the Court determined that the speech regulated by Section 203 was the "functional equivalent" of express advocacy.[4]

On July 26, 2004, Wisconsin Right to Life (WRTL), a corporation that accepts contributions from other corporations, began broadcasting advertisements exhorting viewers to contact Senators Feingold and Kohl to urge them to oppose a Senate filibuster to delay and block consideration of federal judicial nominations. WRTL planned to run the ads throughout August 2004 and to finance them with its general treasury funds, thereby running afoul of Section 203, as such ads would have been broadcast within the 30-day period prior to the September 14, 2004, primary. Anticipating that the ads would be illegal "electioneering communications," but believing that they nevertheless had a First Amendment right to broadcast them, WRTL filed suit against the FEC, seeking declaratory and injunctive relief and alleging that Section 203's prohibition was unconstitutional as applied to the ads and any future ads that they might plan to run.

Just prior to the BCRA 30-day blackout period, a three-judge district court denied a preliminary injunction, finding that *McConnell v. FEC* left no room for such an "as-applied" challenge. Accordingly, WRTL did not broadcast its ads during the blackout period, and the district court subsequently dismissed the complaint in an unpublished opinion. On appeal, in *Wisconsin Right to Life, Inc. v. FEC (WRTL I)*,[5] the Supreme Court vacated the lower court judgment, finding that by upholding Section 203 against a facial challenge in *McConnell*, "we did not purport to resolve future as-applied challenges."[6] On remand, after permitting four Members of Congress to intervene as defendants, the three-judge district court granted WRTL summary judgment, determining that Section 203 was unconstitutional as applied to WRTL's ads.[7] It concluded that the ads were genuine issue ads, not express advocacy or its "functional equivalent" under *McConnell*, and held that no compelling interest justified their regulation.[8] The FEC appealed.

## Supreme Court Decision

***Overview.*** In a 5 to 4 decision, *Wisconsin Right to Life, Inc. v. FEC (WRTL II)*,[9] the Supreme Court affirmed the lower court ruling, finding that Section 203 of BCRA was unconstitutional as applied to the WRTL ads, and that they should have been permissible to broadcast. In a plurality opinion, written by Chief Justice Roberts, joined by Justice Alito — Justice Scalia wrote a separate concurrence, joined by Justices Kennedy and

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[4] *Id.* at 204-205, 206.

[5] 546 U.S. 410 (2006).

[6] *Id.* at 412.

[7] Wisconsin Right to Life, Inc. v. Federal Election Commission, 466 F. Supp. 2d 195 (D.D.C. 2006).

[8] *Id.* at 210.

[9] No. 06-969 (U.S. June 25, 2007).

Thomas[10] — the Court announced that "[b]ecause WRTL's ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore, fall outside the scope of *McConnell's* holding."[11] In determining the threshold question, as required by *McConnell,* of whether the ads were the "functional equivalent" of speech expressly advocating the election or defeat of a candidate for federal office or genuine issue advocacy, the Court observed that it had long recognized that the practical distinction between campaign advocacy and issue advocacy can often dissolve because candidates, particularly incumbents, "are intimately tied to public issues involving legislative proposals and governmental actions."[12] Nonetheless, the Court stated, its jurisprudence in this area requires it to make such a distinction, and "[i]n drawing that line, the First Amendment requires ... err[ing] on the side of protecting political speech rather than suppressing it."[13]

***Analysis.*** In *WRTL II,* the FEC appealed the lower court ruling arguing that in view of the fact that *McConnell* had already held that Section 203 was facially valid, WRTL — and not the government — should bear the burden of demonstrating that BCRA is unconstitutional as applied to its ads.[14] Rejecting the FEC's contention, the Court pointed out that Section 203 burdens political speech and is therefore subject to strict scrutiny.[15] Under strict scrutiny, the Court determined that the FEC — not the regulated community — had the burden of proving that the application of Section 203 to WRTL's ads furthered a compelling interest, and was narrowly tailored to achieve that interest.[16] As it had already ruled in *McConnell* that Section 203 "survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent," the Court found that in order to prevail, the FEC needed to show that the WRTL ads it sought to regulate fell within that category.[17] On the other hand, if the speech that the FEC sought to regulate is not express advocacy or its functional equivalent, the Court cautioned that the FEC's task is "more formidable" because it must demonstrate that banning such ads during the

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[10] In a concurrence, Justice Scalia found that the attempt in the Court's ruling to distinguish *McConnell* is "unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices ... having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so." *Id.,* slip op. at 17, n. 7 (Scalia, J. concurring in part and concurring in the judgment).

[11] *Id.,* slip op. at 22.

[12] *Id.,* slip op. at 2 (quoting Buckley v. Valeo, 424 U.S. 1, 42 (1976)).

[13] *Id.,* slip op. at 2-3.

[14] *Id.,* slip op. at 10.

[15] *Id.,* slip op. at 10 (citing McConnell v. FEC, 540 U.S. 93, 205 (2003); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658 (1990); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 252 (1986); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 1, 44-45 (1976)).

[16] *Id.,* slip op. at 11 (finding "[e]specially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing ... 'the burden is on the government to show the existence of [a compelling] interest.'"(quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. at 786)).

[17] *Id.* (quoting McConnell v. FEC, 540 U.S. at 206).

blackout periods is narrowly tailored to serve a compelling governmental interest, a conclusion that no precedent has reached.[18]

In response to the FEC's and the dissent's[19] argument that *McConnell* established a test for determining whether an ad is the functional equivalent of express advocacy, that is, "whether the ad is intended to influence elections or has that effect," the Court disagreed, finding that it had not adopted any type of test as the standard for future as-applied challenges.[20] Instead, the Court found that its analysis in *McConnell* was grounded in the evidentiary record, particularly studies showing that the BCRA definition of "Electioneering Communications accurately captures ads having the purpose or effect of supporting candidates for election to office."[21] Hence, when the *McConnell* Court made its assessment that the plaintiffs in that case had not sufficiently proven that Section 203 was overbroad and could not be enforced in any circumstance, it did not adopt a particular test for determining what constituted the "functional equivalent" of express advocacy. Indeed, the Court held, the fact that in *McConnell* it looked to such intent and effect "neither compels nor warrants accepting that same standard as the constitutional test for separating, in an as-applied challenge, political speech protected under the First Amendment from that which may be banned."[22]

Accordingly, the Court turned to establishing the proper standard for an as-applied challenge to Section 203 of BCRA, finding that such a standard "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect," involving "minimal if any discovery" so that parties can resolve disputes "quickly without chilling speech through the threat of burdensome litigation," and eschewing "'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.'"[23] In summation, the Court

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[18] *Id.*

[19] The dissenting opinion maintained that the principal opinion establishes a "new test to identify a severely limited class of ads that may constitutionally be regulated as electioneering communications, a test that is flatly contrary to ... [and] simply inverts" the Court's holding in *McConnell*. *Id.*, slip op. at 24 (Souter, J., dissenting)(quoting McConnell v. FEC, 540 U.S. at 206-207, n. 88). While the Court in *McConnell* had "left open the possibility" of a "'genuine' or 'pure' issue ad that might not be open to regulation under §203," the dissent argued that the Court meant that an issue ad that did not contain campaign advocacy could escape the regulation, not that "if an ad is susceptible to any 'reasonable interpretation other than as an appeal to vote for or against a specific candidate,' then it must be a 'pure' or 'genuine' issue ad." *Id.*, slip op. at 24-25 (Souter, J., dissenting)(quoting WRTL II, slip. op. at 16.)

[20] *Id.*, slip op. at 12.

[21] *Id.*

[22] *Id.*, slip op. at 13. The Court further noted that in its seminal 1976 campaign finance decision, *Buckley v. Valeo*, it had expressly "rejected an intent-and-effect test for distinguishing between discussions of issues and candidates," finding that such an analysis would afford "'no security for free discussion.'" *Id.* at 13-14 (quoting Buckley v. Valeo, 424 U.S. 1, 43-44 (1976), quoting Thomas v. Collins, 323 U.S. 516 (1945)).

[23] *Id.*, slip op. at 16 (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).

announced that the standard "must give the benefit of any doubt to protecting rather than stifling speech."[24] Taking such considerations into account, the Court held that

> [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. Under this test, 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 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.[25]

Moreover, the Court cautioned, contextual factors "should seldom play a significant role in the inquiry." Although courts are not required to ignore basic background information that provides relevant contextual information about an advertisement — such as whether the ad describes a legislative issue that is under legislative consideration — the Court found that such background information "should not become an excuse for discovery."[26]

In applying the standard it developed for as-applied challenges to the ads that WRTL sought to broadcast, the Court determined that the FEC had failed to demonstrate that such ads constituted the functional equivalent of express advocacy because they could reasonably be interpreted as something other than a vote for or against a candidate. The Court's established jurisprudence has recognized the governmental interest in preventing corruption and the appearance of corruption in elections, which has been invoked in order to justify contribution limits and, in certain circumstances, spending limits on electioneering expenditures that pose the risk of *quid pro quo* corruption. In *McConnell*, the Court noted, it had applied this interest in justifying the regulation of express advocacy and its functional equivalent, but in order to justify regulating WRTL's ads, "this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy."[27] In strongly worded opposition to extending the application of this governmental interested yet again, the Court announced, "[e]nough is enough." The WRTL ads are not equivalent to contributions — they are political speech — and the governmental interest in avoiding *quid pro quo* corruption cannot be used to justify their regulation.[28] The Court also announced that the discussion of issues cannot be suppressed simply because the issues may also be relevant to an election: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."[29]

In an equally strongly worded dissent, Justice Souter — with whom Justices Stevens, Ginsburg, and Breyer joined — argued that *WRTL II* overruled that portion of *McConnell*

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[24] *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[25] *Id.*

[26] *Id.*, slip op. at 20.

[27] *Id.*, slip op. at 26 (emphasis included).

[28] *Id.*

[29] *Id.*, slip op. at 21.

*v. FEC* upholding Section 203 of BCRA against a facial constitutional challenge. Among other points in opposition to the Court's ruling, the dissent observed that Section 203 was less restrictive than the Court's opinion would indicate in that it did not effect a *complete* ban on corporate and labor union funds being spent on electioneering communications. Indeed, the dissent remarked, quoting *McConnell*, "'corporations and unions may finance genuine issue ads [in the runup period] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated [PAC] fund.'"[30] Moreover, the dissent added, a nonprofit corporation, regardless of its source of funding, may communicate its criticism or support of a particular candidate within days of an election by speaking via a newspaper ad or on a website and, in accordance with earlier Court precedent, may use its general treasury funds to pay for electioneering communications so long as it does not finance such ads with funding from business corporations and unions.[31] Of particular significance, the dissent cautioned that it is possible, based on the reasoning of the Court's ruling, that even advertisements containing express words of advocacy — known as "magic words" — could now escape regulation under Section 203.[32]

## Conclusion

While the ultimate impact and aftermath of the Supreme Court's decision in *WRTL II* remains to be seen,[33] application of the federal law prohibiting corporate and labor union treasury funds from being spent on ads that are broadcast 30 days before a primary and 60 days before a general election has been limited. As a result of this ruling, only ads that are susceptible of no reasonable interpretation other than an exhortation to vote for or against a candidate can be regulated. While the Court's ruling was careful not to overrule explicitly its earlier upholding of this portion of the Bipartisan Campaign Reform Act (BCRA) in its 2003 decision, *McConnell v. FEC, WRTL II* seems to indicate that the FEC's ability to regulate the "electioneering communication" ban has nonetheless been circumscribed.[34]

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[30] *Id.*, slip op. at 18 (Souter, J., dissenting)(quoting McConnell v. FEC, 540 U.S. 93, 206 (2003)).

[31] *Id.*, slip op. at 18-19 (Souter, J., dissenting)(referencing the Court's holding in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)(establishing a three-part test exempting certain ideological corporations from campaign finance regulation)).

[32] *Id.*, slip op. at 23, 25 (Souter, J., dissenting).

[33] On June 28, 2007, Federal Election Commission (FEC) Chairman Robert Lenhard indicated that the FEC is considering how to respond to this Supreme Court ruling, but that it has not yet made any decisions. "FEC Still Pondering Next Step After Ruling on Grassroots Lobbying," MONEY AND POLITICS, June 29, 2007.

[34] For example, commentator Lyle Denniston, on SCOTUSBLOG, observed that what remains of the *McConnell v. FEC* decision upholding the BCRA prohibition on electioneering communications "deeply divided the Court" and "the end result is that, if it is hanging on, it is just by a thread." "Commentary: The assault on 'faux judicial restraint,'" [http://www.scotusblog.com/movabletype/archives/2007/06/commentary_the_4.html] last visited June 28, 2007.