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PROTECTING FREE SPEECH IN ELECTIONEERING COMMUNICATIONS: *FEC V. WISCONSIN RIGHT TO LIFE*

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In June 2007, the United States Supreme Court ruled in FEC. v. Wisconsin Right To Life ("WRTL"), *by a 5-4 decision, that section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") was unconstitutional. The Court's majority, however, could not agree to why BCRA was unconstitutional. The opinion by Chief Justice John Roberts held that there is a distinction between "issue advocacy" and "express advocacy" in the context of federal elections, and it was constitutionally impermissible for them to be lumped together. The concurring opinion by Justice Scalia held section 203 never should have been upheld in* McConnell v. FEC, *and BCRA is facially unconstitutional. The effect of the* WRTL *decision is that corporations and unions may now broadcast issue ads on television and radio using their general treasury funds in the days leading up to a federal primary or general election.*

I. INTRODUCTION

Freedom of speech is only free if it is unencumbered from governmental restrictions. Congress, in its infinite wisdom, has determined that in order to protect one's right to speak and be heard in the federal elections process, there must be some restrictions in the money spent and donated by individuals, organizations, unions, political action committees (PACs), and candidates. The Bipartisan Campaign Reform Act of 2002[2] ("*BCRA*") is Congress' latest attempt to keep "soft money" out of politics. Section 203 of BCRA bans corporations and unions from using general treasury funds on radio and television ads within thirty days of a primary election and within sixty days of a general

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[2] Pub. L. No. 107-155 (2007).

election.[3] On a facial challenge to this law in *McConnell v. FEC*,[4] the United States Supreme Court upheld this ban. This law was challenged again in 2003 when a nonprofit corporation, Wisconsin Right to Life, Inc. ("Life"), challenged this provision of BCRA. Life believed the *McConnell* ruling precluded them from running radio ads advocating for Senators Kohl and Feingold to end the filibuster against President Bush's judicial nominees. [5] Had Life persisted in trying to air these ads, stations may have refused to air them. If a station had aired the ads, Life would have potentially faced criminal charges.[6] In 2008, however, Life will be able to run these or similar advertisement because of the Supreme Court's ruling in *FEC v. Wisconsin Right to Life*.[7]

This paper argues that the opinion by Chief Justice John Roberts correctly chooses to protect free speech, rather than uphold campaign finance restrictions at the expense of some constitutionally protected speech. Roberts held in *WRTL* that there is a distinction between express advocacy and issue advocacy, and it is unconstitutional to preclude express advocacy at the expense of issue advocacy.[8] An express advocacy ad is one intended to influence through an appeal to vote for or against a candidate.[9] Express advocacy ads contain phrases such as "vote for," "elect," or "vote against."[10] An issue advocacy ad promotes a position on an *issue*, such as judicial appointments, instead of the election of a specific candidate.[11] An issue advocacy ad may mention one or more politicians, but the primary purpose of the ad is to advocate a position on an issue. Roberts concluded the *WRTL* opinion by stating, "[w]hen it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban . . . the Court should give the benefit of the doubt to speech, not

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[3] *Id.*
[4] 540 U.S. 93 (2003).
[5] FEC v. Wisconsin Right To Life, Inc. [hereinafter WRTL], 127 S. Ct. 2652, 2677 (2007) (Scalia, J., concurring).
[6] *Id.* at 2666.
[7] 127 S. Ct. 2652 (2007).
[8] *WRTL*, 127 S. Ct. at 2659.
[9] Buckley v. Valeo, 424 U.S. 1, 44–45 (1976).
[10] *Id.* at 44 n.52.
[11] *WRTL,* 127 S. Ct. at 2667.

censorship."[12] Thus, given the choice, Roberts argues the government must err on the side of too much political speech.[13]

The Internet provides for practically unlimited speech, as the barrier to entry is low, and unlike television and radio, space on the Internet is unlimited. The restrictions in section 203 of BCRA do not limit newspapers, so these limitations should not be placed on television and radio advertisements.[14] No special clause giving preference to print media over other technological means of communication exists in the Constitution. Instead, more accurate, timely, and accessible disclosure information as to who is making the donations should be required. To solve the "express advocacy" versus "issue advocacy" dilemma, the disclosure requirements should apply equally to both forms of advocacy.

Part II of this paper will focus on the ramifications of section 203 of BCRA, before the *WRTL* decision. Part III will discuss the facts surrounding the *WRTL* decision. Part IV will analyze the arguments for why this decision was proper. Part V will look critically at the decision and contrast the arguments made in Part IV. Finally, Part VI will discuss the post-*WRTL* world, how the Court's decision may affect the 2008 election, and what changes should be made to our campaign finance laws in the future, including those being considered by the FEC.

II. BCRA SECTION 203 PRE-*WRTL*

BCRA is the federal election campaign law that regulates the financing of federal political campaigns. One of its key provisions bans corporations and unions from spending general treasury funds in federal elections in the time immediately preceding a primary or general election. Shortly after President Bush signed BCRA, Republican Senator Mitch McConnell[15] filed a court challenge arguing that major portions of the Act, including section 203, were facially unconstitutional violations of the First Amendment of the

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[12] *Id.* at 2674.
[13] *Id.* at 2659.
[14] *Id.* at 2660.
[15] Senator Mitch McConnell (KY–R) has since been elected the U.S. Senate Minority Leader.

U.S. Constitution both for being overbroad and underinclusive.[16] In the unanimous portion of *McConnell*, the Court held that making a distinction between "express advocacy" and "issue advocacy" is not constitutionally required,[17] and that within thirty days of a primary or sixty days of a general election, issue advocacy is the "functional equivalent of express advocacy."[18] The Court went so far as to say that it was acceptable for some legally protected ads were prohibited, because a vast majority of the ads to be express advocacy ads and therefore excludable.[19] The standard per *McConnell* thus appeared to be an absolute bar on corporations or unions from using general treasury funds on any advertising that mentioned a candidate running for federal office. The intent of the ad and its timing as it may relate to the legislative calendar were considered irrelevant. Even whether a federal candidate was running unopposed was considered irrelevant.[20] Speech was substantially chilled.

As a result of the *McConnell* Court's denial of this facial challenge, corporations and unions could not air political advertisements on television or radio leading up to the primary and general elections in 2004 or 2006.[21] The system was open to an as-applied challenge, but the risks of ignoring the law included criminal penalties.[22] Meanwhile, "527 organizations"[23] were free to spend wildly. In 2004, the two dozen individuals who gave the most money to 527 organizations donated $142 million, which could be spent by the organizations at will.[24] As Justice Antonin Scalia noted in his concurring opinion in *WRTL*, section 203 did not regulate these groups.[25] The system thus permitted some

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[16] *See* McConnell v. FEC, 540 U.S. 93, 204 (2003).
[17] *Id.* at 204-05.
[18] *Id.* at 206.
[19] *Id.* at 207.
[20] FEC v. Wisconsin Right To Life, Inc., 127 S. Ct. 2652, 2663 (2007).
[21] *Id.* at 2662.
[22] *Id.* at 2666.
[23] 26 U.S.C. § 527 (2002) (Unregulated private political organizations named for the section of the U.S. tax code, pursuant to which they are organized.).
[24] *WRTL*, 127 S. Ct. at 2686 (Scalia, J., concurring).
[25] *Id.* at 2686 (Scalia, J., concurring). Justice Scalia was joined by Justices Anthony M. Kennedy and Clarence Thomas.

groups to be unfettered in running express advocacy ads, while precluding other groups from airing television and radio ads that were legitimate issue advocacy ads.[26]

III. *FEC v. WISCONSIN RIGHT TO LIFE* – THE DECISION

In the summer of 2004, Life was airing television ads calling for Senators Russ Feingold and Herb Kohl to stop the Democrats' filibuster against President Bush's judicial nominees and to give them an up-or-down vote in the Senate.[27] Both senators had a record of filibustering many of President Bush's judicial nominees.[28] On August 15, thirty days before the Democratic primary, Life had to stop airing the ads using their general treasury funds, or else risk the prospect of criminal penalties. At that time, section 203 of BRCA still prohibited corporations and labor unions from advertising by any means of "electioneering communication" in which the groups referred to a candidate running for federal office.[29] This prohibition went into effect within thirty days of a primary election and sixty days of a general election.[30] In this case, Life had to stop advertising thirty days before Senator Feingold's *uncontested* primary race.[31] Life's ability to be heard on the issue of judicial nominees was suspended for the next three months.[32] Two election cycles later, in June 2007, the Supreme Court ruled section 203 unconstitutional, so far as it was applied to Life's advertisements and the use of general treasury funds by

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[26] *Id.* at 2670 (The Roberts opinion in *WRTL* found the Life ads to be issue advocacy. In these ads, Life called on Senators Feingold and Kohl to vote for cloture, thus giving the president's judicial nominees an up-or-down vote in front of the full Senate.).

[27] *Id.* at 2660.

[28] News Release, REPUBLICAN NATIONAL COMMITTEE, Party Of Nine Becomes Party Of No, http://www.gop.com/News/Read.aspx?ID=5386 (Apr. 22, 2005) (on file with the North Carolina Journal of Law & Technology).

[29] *WRTL*, 127 S. Ct. at 2660. (Electioneering communication is defined in the statute as "any broadcast, cable, or satellite communication.").

[30] *Id.*

[31] *See id.* at 2663.

[32] *Id.* at 2661 (Section 203 of BRCA excludes corporations and unions from advertising thirty days before a primary, and sixty days before a general election. The sixty days started immediately following the September primary.).

corporations and unions for "issue advocacy." The result, a 5-4 decision, brought forward three different views of where corporate communication under section 203 of the BCRA stands.[33]

While arguing the Court was not overruling the *McConnell* decision,[34] Chief Justice Roberts was joined by Justice Alito in advocating a "new" standard by which corporate ads should be judged.[35] The standard holds, "[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."[36] Roberts argued this test[37] is most appropriate because if intent was a consideration there could be a situation where an ad by one group would be constitutionally protected; whereas the identical ad could bring criminal charges against another group.[38]

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[33] *See generally id.* (Roberts opinion arguing for issue versus express advocacy test; Scalia arguing for the entire BCRA section to be ruled unconstitutional; Souter dissenting and arguing McConnell has been reversed, giving corporate communications free reign to advertise with minimal limitation).

[34] *Id.* at 2674 (Roberts stated that *McConnell* is not being overruled because: "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. We have no occasion to revisit that determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban . . . we give the benefit of the doubt to speech, not censorship.").

[35] *See id.* at 2658.

[36] *Id.* at 2667.

[37] *Id.* at 2666. *Cf.* McConnell v. FEC, 540 U.S. 93, 206 (2003) (Critics disagree with this test because they argue the line between express advocacy and issue advocacy is illusory in the months leading up to an election.).

[38] *WRTL*, 127 S. Ct. at 2666 (Scalia, J., concurring) (Hypothetically, the U.S. Senate is debating a Medicare bill that Senators Dole and Burr are against. The AARP, a non-profit, non-partisan organization for men and women over fifty years of age, runs a radio ad criticizing both senators for opposing this bill. The intent is to pressure the senators to change their minds and vote for this bill. The AARP otherwise could not care whether either senator was re-elected. Thus, the intent would be considered "good" and thus the ad would be permissible. Under the same scenario, if the AFL-CIO ran this identical ad, they could potentially face criminal charges because labor unions traditionally support Democrats, thus

In his concurring opinion, Justice Scalia argued that section 203 "bans vast amounts of political advocacy indistinguishable from hitherto protected speech."[39] He argued that the prohibition in section 203 should be ruled altogether unconstitutional, thereby reversing the Court's decision in *McConnell*.[40] The dissent, written by Justice Souter,[41] argued that the Roberts opinion *had* in fact reversed *McConnell*, but simply refused to acknowledge this fact.[42] Justice Souter argued the Court made the correct decision in *McConnell* when they allowed express advocacy, or its functional equivalent, to be banned within the statute's time frame.[43] Whereas Chief Justice Roberts concluded that the Life advertisements include legitimate issue advocacy,[44] the dissent found that these ads should be subject to the regulations held constitutional in *McConnell*.[45]

IV. *WRTL* – THE ROBERTS OPINION

"[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it," Chief Justice Roberts wrote in *WRTL*.[46] The ruling in *McConnell v. FEC,* however, did just the opposite.[47] Rather than err on the side

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their intent may be to remove Republican Senators' Dole and Burr from office, and thus this intent may be considered "bad.").

[39] *Id.* at 2684.

[40] *Id.* (Justice Scalia argues *McConnell* should be overruled, but disagrees with the dissent that the Roberts *WRTL* opinion does in fact accomplish this goal. Scalia considers the Roberts opinion as being overly broad and does not go far enough). *See also* McConnell v. FEC, 540 U.S. 93 (2003).

[41] *See WRTL*, 127 S. Ct. 2652. (Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer joined Justice David Souter in his dissent.).

[42] *Id.* at 2704 (Souter, J., dissenting).

[43] *Id.*

[44] *Id.* at 2667.

[45] *Id.* at 2698 (Souter, J., dissenting).

[46] *Id.* at 2659.

[47] It is important to note the dynamics of the Court changed in the time between *McConnell* and *WRTL*. Justice Samuel Alito, who joined one of the plurality opinions, was appointed by President George W. Bush to replace Justice Sandra Day O'Conner. While Justice Alito is considered a conservative, Justice O'Conner was considered a more moderate member of the Court. Bill Mears, *Alito Sworn in as Nation's 110th Supreme CourtJustice*, CNN, Feb. 1,

of free speech, the majority in *McConnell* accepted the possibility of limiting some constitutionally protected speech in the name of eliminating "express advocacy."[48] In *WRTL*, Chief Justice Roberts rejected the majority's view in *McConnell* that it is unnecessary to differentiate between "express advocacy" and "issue advocacy."[49] While express advocacy is designed to explicitly support or reject a candidate; issue advocacy is focused on policy.[50] As Chief Justice Roberts correctly notes, candidates, and especially incumbents, run on their record and are tied to their votes on particular legislation.[51] While it may be appropriate to limit express advocacy to ensure fairness, debate over today's political issues should not end simply because an election is impending. If anything, greater debate should be encouraged as voters are gearing up to go to the polls.[52]

2006, http://www.cnn.com/2006/POLITICS/01/31/alito/index.html (on file with the North Carolina Journal of Law & Technology).

[48] McConnell v. FEC, 540 U.S. 93, 207 (2003).

[49] *WRTL,* 127 S. Ct. at 2659. The *WRTL* decision by the Court was widely heralded by many groups, and made for some unlikely bedfellows. It could be argued that you have found a problem when the ACLU, the AFL-CIO, and the NRA all agree a law is bad. (For the ACLU's stance see Brief Amicus Curiae of the ACLU In Support of Appellee, FEC v. Wisconsin Right To Life, Inc. 127 S. Ct. 2652 (2007) (Nos. 06-969 and 06-970), http://www.aclu.org/pdfs/scotus/fec_v_wisconsinrtl_aclu_amicus.pdf (Nos. 06-969 and 06-970) (last visited Nov. 17, 2007) (on file with the North Carolina Journal of Law &. Technology) [hereinafter *ACLU Amicus]*; for the AFL-CIO's stance *see* Edwin J. Feulner, Op-Ed., *Court Wisely Permits More Issue Ads in Weeks Before Vote*, CHI. SUN TIMES, July 4, 2007, at 23, *available at* 2007 WLNR 12713019 (on file with the North Carolina Journal of Law & Technology), *WRTL*, 127 S. Ct. at 2674; for the NRA's stance see Sandy Froman, *Dismantling Campaign Finance Reform: Restoring Your Free Speech*, TOWNHALL.COM, June 25, 2007, http://www.townhall.com/columnists/SandyFroman/2007/06/25/dismantling_campaign_finance_reform_restoring_your_free_speech (on file with the North Carolina Journal of Law & Technology)). In the instance of the ACLU, they were prohibited from running television ads, even though they were already required to obey the non-partisan tax-exempt status rules, and did not expressly encourage voting for or against a specific candidate. *ACLU Amicus*, *supra* at 2. On the other hand, maybe a law that upsets conservative and liberal special interest groups is actually accomplishing its intended effect.

[50] *WRTL,* 127 S. Ct. at 2667.

[51] *Id.* at 2659 (quoting Buckley v. Valeo, 424 U.S. 1, 42 (1976)).

[52] The United States is fighting a global war on terror in Iraq, Afghanistan, and other parts of the world. Social Security is scheduled to run out, though

In *First National Bank of Boston v. Belotti* the Court noted that "The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[53] If the legality of an advertisement is based upon the intent of the organization, the effect will be to chill free speech.[54] The Supreme Court has rejected a test based on intent-and-effect time and again.[55] The possibility of criminal sanctions if the finder of fact decides the intent of the speech was express rather than issue-based advocacy effectively puts a halt to *all* speech.[56] Thus, the Court is right to reject any test that has such a consequence.

Under the Court's *WRTL* ruling, groups like the ACLU and other organizations have clear direction from the judiciary when advertising in the future. It is true that the new standard from the Roberts opinion essentially shatters section 203 of the BCRA. However, section 203 significantly curtails issue advocacy, which is protected by the First Amendment. As the ACLU argued in its amicus curiae brief, the year preceding a presidential election is a time of significant legislative debate.[57] Corporations and unions have a right for the public to hear their message. As long as there is a strong dose of issue advocacy in the advertisement, the Court has properly said they ought to receive the benefit of the doubt.

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how soon is hotly contested. We have a shortage of judges on the federal bench; and illegal immigration is a significant problem with few viable solutions on the table. These are only a few of the issues in today's political debate, and only through discussion will we find politically and socially viable solutions.

[53] *WRTL*, 127 S. Ct. at 2666 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)) (internal quotation marks omitted).

[54] *Id.* at 2665.

[55] *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 43-44 (1976) (Rejecting test for distinguishing between discussions of issues and candidates)); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open."); M. Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* 91 (2001) ("[A] speaker's motivation is entirely irrelevant to the question of constitutional protection.").

[56] *See supra* note 38 and accompanying text.

[57] *ACLU Amicus*, *supra* note 49 at 10.

V. A SETBACK FOR CAMPAIGN FINANCE AND FREE SPEECH

The day after the Court issued its opinion in *WRTL*, the *New York Times* published an editorial entitled "Three Bad Rulings."[58] The *Times'* Editorial Board decried the ruling as reversing *McConnell* and section 203, which had been constructed "to prevent corporations and labor unions from circumventing the ban on their spending in federal campaigns by bankrolling phony 'issue ads.'"[59]

The dismissal of the Court's differentiation between "express advocacy" and "issue advocacy" advertisements is the crux of the objection to the Court's ruling. The *New York Times* and groups like Democracy 21 argue that while there *may be* a difference between "express advocacy" and "issue advocacy" advertisements, the difference is negligible leading up to an election, as both types of ads have the same intended effect, which is to influence voters.[60] Thus "issue ads" serve as the functional equivalent to "express ads."[61] The dissent argues the political advocacy banned in section 203 was practically indistinguishable from any protected speech,[62]

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[58] Editorial, *Three Bad Rulings*, N.Y. TIMES, June 26, 2007, at A20.

[59] *Id.*

[60] *See id.*; *see also* Statement by Democracy 21 President Fred Wertheimer on Supreme Court Decision Today in *WRTL* Case, June 25, 2007, *available at* http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7b1772BBCD-191F-4076-AAEF-2C061BACB0EC%7d&DE=%7bE10F2EDA-C4F2-402C-947D-30B1D7736C81%7d (on file with the North Carolina Journal of Law & Technology) [hereinafter *Statement*]. Democracy 21 is a non-profit, non-partisan watchdog organization focused on campaign finance reform that disfavors soft money being spent on elections. Democracy 21, *About Us*, http://www.democracy21.org/index.asp?Type=B_PR&SEC={3E522118-9BCF-4129-A19D-A568670FEBBF} (last visited Nov. 17, 2007) (on file with the North Carolina Journal of Law & Technology).

[61] *See supra* notes 40-51 and accompanying text. This opinion was also supported in Brief Amicus Curiae of The Center for Governmental Studies In Support of the Appellees, McConnell v. FEC, 540 U.S. 93 (2003) (No. 02-1674 et al.), *available at* http://faculty.lls.edu/hasen/cgs-amicus.pdf [hereinafter *CGS Amicus*].

[62] *WRTL,* 127 S. Ct. at 2684; *cf. id.* at 2659 (stating that "practically indistinguishable" is not the same as "indistinguishable" and that it is better to err on the side of too much protection for speech than to preclude constitutionally protected free speech.)

and thus it was appropriate to uphold a ban of this speech within the timeframe allotted by the statute.[63]

The Center for Governmental Studies ("CGS")[64] asserts that section 203 provides a bright-line test of what can and cannot be advertised as well as a timeline for permissible advertising. [65] This bright-line test advocated by the CGS and supported in *McConnell* is necessary to maintain effective campaign finance laws and to prevent campaign finance abuse.[66] This sentiment is echoed by the dissent in *WRTL*.[67] Specifically, Justice Souter noted that no evidence suggests the bright-line rule, set by section 203 and affirmed in *McConnell*, is difficult to apply.[68] Thus, the only question for Justice Souter is whether the bright-line test is politically viable in application.[69]

Before this bright-line test there was the "magic words" test. Justice Souter argued that, following the majority opinion in *WRTL*, the "magic words" standard is once again in effect—stating: "The Chief Justice thus effectively reinstates the same toothless magic words criterion of regulable electioneering that led Congress to enact BCRA in the first place."[70] Quoting from *McConnell*, Justice Souter also argued:

> The presence or absence of magic words cannot meaningfully distinguish electioneering speech, which is prohibitable, "from a true issue ad," we said, since ads that "eschew the use of magic words . . . are no less clearly intended to influence the election." We thus found "little difference" . . . between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular

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[63] *Id.* at 2703 (Souter, J., dissenting).

[64] Ctr. for Governmental Studies; http://www.cgs.org/ (last visited Sept. 26, 2007) (on file with the North Carolina Journal of Law & Technology).

[65] *See CGS Amicus*, *supra* note 61 at 20-21.

[66] *See id.*

[67] *WRTL*, 127 S. Ct. at 2704 (Souter, J., dissenting).

[68] *Id.*

[69] *See WRTL*, 127 S. Ct. at 2674, 2684 (Scalia, J., concurring). The majority opinion does not question the viability of *applying* this bright-line test. The objection is in the *use* of this test, arguing that it improperly infringes on a corporation's First Amendment right to free speech.

[70] *Id.* at 2702 (Souter, J., dissenting).

> issue before exhorting viewers to 'call Jane Doe and tell her what you think.'[71]

Democracy 21 correctly notes that by avoiding the "magic words,"[72] corporations and labor unions will be significantly better-protected as a result of the ruling in *WRTL*.[73] Democracy 21 thus argues that the *WRTL* ruling opens the floodgates, allowing corporations and unions to pour money into the 2008 election, thereby increasing the likelihood of corruption.[74]

VI. A LOOK AHEAD TO 2008 AND CHANGES BEING CONSIDERED

Following the *WRTL* ruling, the FEC announced two alternative proposals on electioneering communications.[75] The first proposal allows corporations and unions "to use their general treasury funds to pay for electioneering communications that qualify for the exemption the Supreme Court described, but would require financial disclosures to the FEC."[76] The second proposal,

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[71] *Id.* at 2695-96 (quoting McConnell v. FEC, 540 U.S. 93, 193 (2003)).

[72] *Id.* at 2667 (citing *McConnell*, 540 U.S. at 127). These words include "vote for," "elect," "defeat," and any other word or phrase explicitly advocating the election or defeat of a federal candidate. Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976).

[73] *See* Statement, *supra* note 60.

[74] *See id.* The problem with this assumption is that it implies that the system under the BCRA was working. Recent news stories, however, would indicate otherwise. Congressman Duke Cunningham pled guilty to bribery, tax evasion, and conspiracy. Ed Henry & Mark Preston, *Congressman resigns after bribery plea*, CNN.COM, Nov. 28, 2005, http://www.cnn.com/2005/POLITICS/11/28/cunningham/ (on file with the North Carolina Journal of Law & Technology). Bob Ney pled guilty to conspiracy and making false statements. Andrea Koppel & Deidre Walsh, *Ohio Congressman linked to Abramoff resigns*, CNN.COM, Nov. 3, 2006, http://www.cnn.com/2006/POLITICS/11/03/ney.resignation/index.html?iref=newssearch (on file with the North Carolina Journal of Law & Technology). William Jefferson ("indicted . . . by a federal grand jury on 16 corruption-related felony counts") has not been deterred from taking bribes because of the new campaign finance laws. David Johnston and Jeff Zeleny, *Congressman Sought Bribes, Indictment Says*, N.Y. TIMES, June 5, 2007, at A1, A19.

[75] Electioneering Communications, 72 Fed. Reg. 50,261 50262 (proposed Aug. 31, 2007) (to be codified at 11 C.F.R pt. 100, 104, and 114).

[76] News Release, *FEC Issues Notice of Proposed Rulemaking on Electioneering Communications,* http://www.fec.gov/press/press2007/

which is far broader, exempts any communication qualifying under *WRTL* from both funding restrictions and reporting requirements.[77]

The route chosen by the FEC will largely dictate the impact of *WRTL* in the 2008 election cycle. If the FEC adopts the first proposal, it will essentially be trying to faithfully uphold the spirit of the BCRA but will largely be ignoring what the Court held in *WRTL*. This proposal "would incorporate the new exemption into the rules prohibiting the use of corporate and labor organization funds for electioneering communications."[78] However, the point of the majority opinion in *WRTL* was that the ads in question were *not* actually electioneering communications.[79] Thus, the problem cannot be solved simply by making an exemption to the definition of electioneering communication, since the Court ruled in *WRTL* that the ads were never actually electioneering communications. Instead, the Roberts *WRTL* opinion held that Life's ads were legitimate issue advocacy ads, and thus section 203 was overbroad by including them.

Part of the reason the FEC is struggling with this issue is because the definition of "functional equivalent of express advocacy" is unclear. While the Court said that the BCRA could limit this speech in *McConnell*,[80] the Court has all but done away with this idea in *WRTL*. If the definition of express advocacy is communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,"[81] what remains to be its "functional equivalent"?

The second proposal offered by the FEC would permit corporations and unions to be just as secretive and unaccountable as 527s have been over the past two election cycles. While this

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20070823nprm.shtml (Aug. 23, 2007) (on file with the North Carolina Journal of Law & Technology).

[77] *See* Electioneering Communications, *supra* note 75 at 50,264.

[78] *Id.* at 50,262.

[79] FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2667 (2007).

[80] *See generally* McConnell v. FEC, 540 U.S. 93, 104 (2003) (holding on a facial challenge to BCRA that express and issue advocacy were substantial equivalents within the timeframe specified in Section 203 of the statute).

[81] *WRTL,* 127 S. Ct. at 2667.

would, in fact, put the FEC in accordance with the Court's ruling, it would move far away from the original purpose of the BCRA, which is to prevent corruption and take some of the soft money out of politics.[82] However, of the two proposals, this is the one the FEC should adopt. The FEC must recognize it cannot adopt a proposal that completely twists the Court's ruling. The Court did not say that the ads in question were legitimate election ads; it held Life's ads were not in fact election ads and thus must be afforded the First Amendment's protection without limitation.

The campaign finance system in place under the BCRA is far from perfect. The goals are to take money and corruption out of politics, yet both of these goals have failed.[83] Both the Roberts opinion and the dissent in *WRTL* recognized preventing corruption as a legitimate and compelling state interest. The restrictions under section 203 did not further this interest. It is difficult to argue that by precluding corporations and unions from advertising, but allowing 527s to operate in secrecy and spend unlimited amounts of cash, corruption is somehow eliminated. Instead of silencing corporations and unions, the campaign finance laws should focus on reporting. In an age of high-speed Internet, requiring corporations, unions, PACs, 527s, political parties, and of course candidates to post meticulous records regarding the source of their money in a timely manner[84] will go much further in keeping corruption out of politics. Let the voters decide if they mind that twenty-four individuals donated $142 million in one election cycle.[85] As the *WRTL* dissent noted, a Governor's Blue-Ribbon Commission on Campaign Finance Reform in Wisconsin reported:

> The explosive growth of campaign-based advocacy, without even disclosure of its activities and funding sources, poses a grave risk to the integrity of elections. It has created a two-tiered campaign process: one, based in candidates and political parties, which is tightly regulated and controlled; the other, based in interest group activity under the guise of

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[82] *See id.* at 2672 (citing Buckley v. Valeo, 424 U.S. 1, 45, 96 (1976)).

[83] *See supra* notes 24, 74 and accompanying text.

[84] For example, a law requiring all donations to be reported within twenty-four hours of receipt in a centralized online database could be one option for ensuring full disclosure.

[85] See *supra* note 24 and accompanying text.

> "issue advocacy" but actually quite clearly election-focused, which lies beyond accountability.[86]

Plenty of wealthy individuals are spending a lot of money on elections every two years. The *WRTL* ruling is not a defeat for the average American, it is a victory. This ruling allows corporations and unions to once again be heard, and it counter-balances the special interest groups that have had free reign over the microphone in the last two election cycles.

A proposal to meet the constitutional demands set forth in *WRTL* and keep part of the BRCA's objectives intact would require the FEC to combine the two proposals. First, the Court ruled that the ads in question were not considered "electioneering communications" and thus cannot be limited under the BCRA. This recognition, which is part of the second proposal, must be preserved. Disclosure, as advocated in the first proposal, is most prevalent in preserving the goals of BCRA. Instead, requiring full disclosure on the Internet by *all* advocacy groups participating in the political process, whether they are 527s, unions, corporations, or individuals, would give people the most information regarding the source of the money they are receiving.[87] Spending limits may still be applied, but they must be applied equally and must exclude issue advocacy. The voting public will then be capable of accessing this information and assessing how much weight to give a specific advertisement.

VII. CONCLUSION

While Chief Justice Roberts refused to explicitly reverse *McConnell,*[88] it seems that for all practical purposes, *McConnell* has, in fact, been reversed. The *WRTL* ruling essentially brings us

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[86] *WRTL*, 127 S. Ct. at 2695 n.10 (Souter, J., dissenting) (citing Governor's Blue-Ribbon Commission on Campaign Finance Reform, State of Wisconsin: Report of the Commission, *available at* http://www.lafollette.wisc.edu/campaign_reform/final.htm).

[87] This may require Congress to amend the BCRA.

[88] *See WRTL,* 127 S. Ct. at 2674. In their concurrence, Justices Scalia, Kennedy, and Thomas argued that the Court should have explicitly reversed *McConnell.*

back to a "magic words" test.[89] With the fundamental right of speech at stake, the Court must apply strict scrutiny.[90] In analyzing the three Life ads in question, the dissent spoke unequivocally that, "[g]iven these facts, it is beyond all reasonable debate that the ads are constitutionally subject to regulation under *McConnell*."[91] Justice Roberts argued just as vehemently that "[Life]'s three ads are plainly not the functional equivalent of express advocacy."[92] If the members of the U.S. Supreme Court, some of this nation's most sound legal minds, cannot agree whether an advertisement violates the First Amendment, it is best to let the words be spoken. As Chief Justice Roberts so aptly argues, it is no solution to err on the side of suppressing free speech.[93]

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[89] Roberts explains this test another way: "[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." *Id.* at 2667.

[90] *Id.* at 2664 ("Because BCRA section 203 burdens political speech, it is subject to strict scrutiny").

[91] *Id.* at 2698 (Souter, J., dissenting).

[92] *Id.* at 2667.

[93] *Id.* at 2659.