Bipartisan Campaign Reform Act of 2002 Violates Free Speech When Applied to Issue-Advocacy Advertisements: *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

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I. Introduction

Before the year 2002 corporations were free to sponsor any type of political speech they wanted so long as "that speech did not expressly advocate the election or defeat of a clearly identified federal candidate."[2] However, the passing of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which amended the Federal Election Campaign Act of 1971, restricted the extent to which corporations could engage and support political speech. In fact, it makes it a crime for a corporation or labor union to use treasury funds to finance any "electioneering communication."[3] The BCRA was enacted to "to purge national

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[2] *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

[3] § 441b(b)(2). Electioneering communication is "clear and expansive . . . and encompasses any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal election in the jurisdiction in which that candidate is running for office." § 434(f)(3)(A).

politics of what [is] conceived to be the pernicious influence of 'big money campaign contributions.'"[4]

In *Fed. Election Comm'n v. Wisconsin Right to Life*[5] the United States Supreme Court has chosen to uphold the First Amendment above the BCRA in an opinion presented by Chief Justice Roberts. This article will outline the different opinions put forth by the plurality, concurring and dissenting opinions. It will also explain why Chief Justice Roberts' opinion is the most persuasive.

II. Statement of the Case & Procedural History

The issue before the Court in *Fed. Election Comm'n* was whether or not radio advertisements broadcasted by Wisconsin Right to Life, Inc.("WRTL") were functionally equivalent to express campaign speech covered under BCRA § 203. WRTL is a non-profit[6] ideological advocacy corporation. It is devoted to creating and maintaining a grassroots movement that encourages local voters to contact their legislature to enact legislation that "protects human life."[7] The BCRA "makes it a federal crime

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[4] *United States v. Automobile Workers*, 352 U.S. 567 (1957).

[5] 127 S. Ct. 2652 (2007).

[6] The BCRA applies to both non-profit and for-profit corporations.

[7] http://www.wrtl.org. *Last visited* on November 19, 2007.

for any corporation to broadcast, shortly before an election, any communication that names a federal candidate for elected office and is targeted to the electorate."[8] Before *Fed. Election Comm'n* the BCRA's provisions had been challenged as facially overbroad under the United States Constitution's First Amendment in *McConnell v. Fed. Election Comm'n*.[9] There the Court held that § 203[10] withstood the facial challenge. *McConnell* additionally held that express advocacy, or its equivalent, by a corporation or a political candidate or opponent is prohibited under § 203 of the BCRA.

In 2004, WRTL wanted to begin running radio advertisements, paid for by their treasury funds, to incite voters to contact their senators and have them oppose a filibuster of judicial nominees. Being aware of BCRA's prohibition of electioneering communications, and yet convinced they had a First Amendment right to broadcast the ads, WRTL sued the Federal Election Commission ("FEC"). WRTL sought declaratory and injunctive relief. The District Court denied a preliminary injunction believing that *McConnell* did not grant the court the power to

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[8] 127 S. Ct. at 2658-59.

[9] 540 U.S. 93 (2003).

[10] Section 203 is the Prohibition of Corporate and Labor Disbursements for Electioneering Communications Part of the BCRA.

rule on an as-applied challenge. Consequently, the WRTL did not run their ads, and their complaint was dismissed. On appeal to the United States Supreme Court, the District Court's decision was vacated. It held that "*McConnell* did not purport to resolve future as-applied challenges to BCRA § 203."[11] On remand the District Court granted summary judgment to the WRTL's case, and found that § 203 was unconstitutional as applied to the WRTL's three advertisements.

The District Court held that the WRTL's ads were "genuine issue ads."[12] As a result, they were not the express or functionally equivalent of express advocacy banned under the BCRA pursuant to *McConnell*. Additionally, the District Court held that there was no compelling government interest present in the WRTL ads to warrant their being regulated by the BCRA.

The FEC appealed and was granted certiorari by the United States Supreme Court. It argued that the case was moot because the 2004 election had passed. However, this argument failed because the claim brought by WRTL fit under two exceptions to mootness: as a claim that is likely to be repeated in other actions and as a claim whose initial action duration was too

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[11] *Fed. Election Comm'n*, 127 S. Ct. at 2661.

[12] *McConnell*, 540 U.S. at 205-208.

short to be fully litigated.[13] The Court also upheld the District Court's decision that under the First Amendment it is unconstitutional to prevent issue-advocacy advertisements.

III. The Court Analysis

Chief Justice Roberts delivered the Court's 5-4 plurality opinion. The plurality consisted of Chief Justice Roberts, and Justices Alito, Scalia, Kennedy, and Thomas. Although they all agreed that *Fed. Election Comm'n* was not moot, they disagreed about the merits of the case.

Joined by Justice Alito, Chief Justice Roberts held that the BCRA was subject to strict scrutiny because of the substantial effect it has on free speech. As a result, the burden of proof was on the government to prove that the banning of the three WRTL ads "[was] narrowly tailored to serve a compelling interest."[14] Roberts goes on to reject FEC's argument that *McConnell* established an "intent-and-effect test for determining if a particular ad is the functional equivalent of express advocacy."[15] The Court then established a clear rule in the gaps arguably left open under *McConnell*. This rule states

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[13] These rules are laid out in *Spencer v. Kemna*, 523 U.S. 1 (1998).

[14] *Fed. Election Comm'n*, 127 S. Ct. at 2664.

[15] *Id.* at 2655.

that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretations other than as an appeal to vote for or against a specific candidate." Roberts held that in order to protect freedom of speech the test must be objective and leave out the subjective considerations overruled in previous Court decisions.[16] As applied to *Fed. Election Comm'n* the Court stated that the ads were "not the functional equivalent of express advocacy,"[17] because they just encouraged voters to address their representatives about legislative issues. Additionally, they did not make any statements about an "election, candidacy, political party or challenger."[18] Chief Justice Roberts then goes on to address the FEC's argument that "the content of WRTL's ads alone betrays their electioneering nature."[19] The FEC argued that any ad that is covered by § 203 and encourages voters to contact their elected representatives is the "functional equivalent of

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[16] This includes the intent-and-effect test overruled by *Buckley v. Valeo*. 424 U.S. 1 (1976) which held that "noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other . . . [and] analyzing the questions in terms of intent and of effect would afford no security for free discussion." *Fed. Election Comm'n*, 127 S. Ct. at 2665, citing *Buckely*, 424 U.S. at 43.

[17] *Fed. Election Comm'n*, 127 S. Ct. at 2667.

[18] *Id.*

[19] *Id.*

an ad saying defeat or elect that candidate."[20] Roberts disagreed with this argument, and held that the purpose of issue ads is to educate and inform the public. He declared that whatever impact an issue ad ultimately has on an election is based on that education and not on any invitation by the ads. He stated that the "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election."[21] Roberts then found that the government's compelling interest - reducing corruption in elections – did not justify infringing on the WRTL's First Amendment rights.[22] He concludes by finding that the Court should always err on the of side caution and protect political speech when First Amendment questions are involved. He does this by citing to the Constitution, "Congress shall make no law . . . abridging the freedom of speech," and finding that "[t]he Framer's actual words put these cases in proper perspective."[23]

Justice Scalia, joined by Justices Kennedy and Thomas issued a concurring opinion to that of Chief Justice Roberts and Justice Alito.[24] They begin by agreeing with Roberts and Alito

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[20] *Id.*

[21] *Id.* at 2669.

[23] *Fed. Election Comm'n,* 127 S. Ct. at 2674.

[24] Justice Alito also wrote a concurring opinion. He agreed with the reasoning put forth in the majority opinion. However, he

that the case was not moot, and therefore the Court had jurisdiction to hear it. In their opinion *McConnell*, and its as-applied provision to challenge BCRA § 203's constitutionality that was left open for future suits, complicates the Court's ability to have a clear rule of law. They state "that there is no test . . . [that] can both (1) comport with the requirement of clarity that unchilled freedom of political speech demands, and (2) be compatible with the facial validity of § 203." [25] Scalia states that the Court should "reconsider the decision [*McConnell*] that sets [the Court] the unsavory task of separating issue-speech from election-speech with no clear criterion.[26]" Scalia then examines the precedent that led up to *McConnell*, and concludes that its as-applied challenge exception was mistaken. He argues that in *Buckley v. Valeo*[27] the Court ruled that such vague tests were disallowed in statutory tests. Therefore, the vague as-applied test in *McConnell* must also be disallowed. Scalia proceeds to examine the five-factor test that

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also agreed with the second concurring opinion by Justices Scalia, Kennedy and Thomas which stated that if the as-applied standard "impermissibly chills political speech" the Court will have to revisit their decision in *McConnell. Fed. Election Comm'n*, 127 S. Ct. at 2674.

[25] *Id.* at 2675.

[26] *Id.*

[27] 424 U.S. 1 (1976).

was proposed by the District Court to determine which ads are express advocacy and which ones are issue advocacy ads.[28] He states that each part of the test contains the fundamental flaw of being "impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights of the large segment of society to which § 203 applies."[29] Scalia also uses a consequentialist argument to predict that in the future many voters and organizations will simply abstain from protected political speech all together. This is because they will not want to risk having to enforce their First Amendment rights through the courts. He argues this effect will hurt society as well as individual actors, because it will deprive society of a variety of ideas and viewpoints. In conclusion, Scalia argues

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[28] This five-factor test examines whether the ad under review is express or issue advocacy. It is express advocacy if it :

> "(1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate."

Wisconsin Right to Life v. Fed. Election Comm'n, 466 F. Supp. 2d 195, 207 (DC 2006).

[29] *Fed. Election Comm'n,* 127 S. Ct. at 2680.

that *stare decisis* should not prevent the Court from overruling *McConnell*. This is because the standard for overruling constitutional cases is less stringent than for overruling non-constitutional ones.[30]

Finally, Justice Souter wrote a dissenting opinion that was joined by Justices Stevens, Ginsberg, and Breyer. The dissent seems very concerned with the long term effects of this ruling. They examine the intent of the BCRA, and the reason why Congress enacted it. The dissent gives three reasons motivating their concern:

> " [1] the demand for campaign money in huge amounts from large contributors, whose power has produced a cynical electorate; [2]the congressional recognition of the ensuing threat to democratic integrity as reflected in a century of legislation restricting the electoral leverage of concentrations of money in corporate and union treasuries; [3] and *McConnell* declaring the facial validity of the most recent Act of Congress in that tradition, a decision that is effectively, and unjustifiably, overruled today."[31]

IV. Conclusion

The decision in *Fed. Election Comm'n* is the product of a divided Court as evidenced by two concurring opinions and the three-justice dissenting opinion. The Court's split

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[30] *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

[31] *Fed. Election Comm'n,* 127 S. Ct. at 2687.

is a reflection of the significant tension between Congress' desire to protect the integrity of the political process through the BCRA, and the Court's mandate to uphold the First Amendment. In addition to these two main tensions there is the Court's obligation to uphold past decisions under the principle of *stare decisis*.

In spite of these tensions, Chief Justice Roberts puts forth a clear opinion by choosing to protect the most important issue presented in *Fed. Election Comm'n* - freedom of speech. This decision will affect the avenues groups have available to them to promote issues they find important. It will also strengthen the tools pro-life groups such as WRTL and other religious non-profit and grassroots groups have to inform the public. This is evidenced by the types of groups that supported the WRTL in this decision which include the strong conservative religious organization Focus on the Family.[32]

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[32] *Fed. Election Comm'n*, 127 S. Ct. at 2674. Other organizations include: National Rifle Associations, American Federation of Labor and Congress of Industrial Organizations, Chamber of Commerce of the United States of America, Coalition of Public Charities, and the Cato Institute.