

First Amendment Basics *Redux*: *Buckley v. Valeo* to *FEC v.* *Wisconsin Right to Life*

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In 2002, hard on the heels of the Enron debacle, Congress passed and President Bush signed the Bipartisan Campaign Finance Reform Act (BCRA, or McCain-Feingold).¹ The Act imposed extensive new regulations on and restrictions of campaign finance practices. Its two most notorious titles were Title I, which prohibited so-called soft-money contributions to national political parties,² and Title II, which prohibited corporations and unions from making independent expenditures from their general treasury funds to broadcast “electioneering communications”—communications that mention candidates for federal office by name within thirty days of a primary or sixty days of a general election.³ Profound differences of opinion existed about the wisdom and the likely effects of BCRA, and its

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¹Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

²*Id.* at 82. In brief, the soft money provisions bar national political parties from “solicit[ing], receiv[ing], or direct[ing] to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.” *Id.* The prohibition of soft money contributions was intended to prevent unregulated (and thus unlimited) contributions being made to political parties in order indirectly to benefit candidate campaigns and thus circumvent restrictions on direct, or hard money, contributions to candidates. For a summary of “soft money” rules and practices before the enactment of BCRA, see Note, Soft Money: The Current Rules and the Case for Reform, 111 Harv. L. Rev. 1323, 1323–28 (1998).

³Bipartisan Campaign Finance Reform Act, 116 Stat. at 88.

constitutionality was always in doubt.⁴ Indeed, conventional wisdom has it that President Bush signed the legislation only because he was convinced that the courts would invalidate it.⁵ The electioneering communications prohibition was thought to be particularly vulnerable to First Amendment challenge. In a 329-page set of opinions, however, rendered after taking volumes of testimony, a divided three-judge district court sustained the Act almost in its entirety.⁶ A majority of the Supreme Court affirmed in an opinion with respect to Titles I and II that was co-authored by Justices John Paul Stevens and Sandra Day O'Connor and joined by Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer.⁷

Champions of campaign finance regulation understandably regarded *McConnell* as a "stunning triumph,"⁸ and not merely because of the result. Although its reasoning has been called "unusually sloppy and incoherent" even by stalwart supporters of regulation,⁹ the majority opinion in *McConnell* was clear about one vitally important fact: it was an unambiguous rejection of the view that at the First Amendment's core is the principle of free political speech. Indeed, the majority in *McConnell* was quite plainly disheartened by

⁴See, e.g., Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech: Hearing Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary, 107th Cong. 5 (2001) (statement of Rep. Chabot, Chairman, Subcomm. on the Constitution) (noting that "the tension between certain campaign finance proposals and the first amendment is clear, even to those supporting such regulations").

⁵See, e.g., Akhil Reed Amar & Vikram David Amar, Breaking Constitutional Faith: President Bush and Campaign Finance Reform, FindLaw, Apr. 5, 2002, <http://writ.news.findlaw.com/amar/20020405.html> (suggesting that President Bush justified signing an unconstitutional bill "by punting to the judiciary"); Capital Gang (CNN television broadcast Mar. 23, 2002), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0203/23/cg.00.html> (last visited July 27, 2007) ("[President Bush] figures, as do many other people who voted for this bill, that the Supreme Court will strike down some of its more obnoxious, unconstitutional provisions.").

⁶*McConnell v. FEC*, 251 F.Supp.2d 176 (D.D.C. 2003).

⁷*McConnell v. FEC*, 540 U.S. 93 (2003).

⁸Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 Election L.J. 147 (2004).

⁹Richard L. Hasen, Symposium: The Law of Democracy: Campaign Finance after McCain-Feingold: Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of *McConnell v. Federal Election Commission*, 153 U. Pa. L. Rev. 31, 33 (2004).

what became of politics when free political speech was the universal baseline. Thus, it paid “only cursory attention to the First Amendment interests” at stake.¹⁰ At the same time, the majority exhibited no skepticism about the possibility either that the legislators who passed BCRA might have had malign self-protective motives or that BCRA might produce anything other than benign results.¹¹ *McConnell* did not purport to overrule *Buckley v. Valeo*,¹² the Court’s seminal campaign finance regulation case, but it did turn a very cold shoulder indeed to the First Amendment premises that had provided the touchstone of *Buckley*’s analysis (if not, perhaps, all of its holdings).¹³ In *Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL II)*,¹⁴ the case that is the subject of this essay, a new majority of the Court revived *Buckley* and thus breathed renewed life into the First Amendment.

Before sorting out the strands of *WRTL II*, though, it is necessary to make a brief return—one of several this essay will make—to *Buckley*. Returning to *Buckley* may seem unnecessary to aficionados of the “rich tapestry”¹⁵—or is it the “patternless mosaic?”¹⁶—of the First Amendment law of campaign finance regulation, who are already familiar with the doctrinal structure that that law is heir to. It is *Buckley*’s First Amendment foundations that are of interest here, not the rickety doctrinal house the Court built upon them. *WRTL II* returned to and rebuilt those foundations, and that is what matters most about it.

¹⁰*Id.* at 34.

¹¹Justice Stevens recognized, however, that this legislation would not be the final line of sandbags dropped in the way of the flood: “We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet.” *McConnell*, 540 U.S. at 224.

¹²424 U.S. 1 (1976) (per curiam).

¹³See generally Lillian R. BeVier, *McConnell v. FEC: Not Senator Buckley’s First Amendment*, 3 Election L.J. 127 (2004) (summarizing specific respects in which *McConnell* rejected *Buckley*’s underlying First Amendment premises).

¹⁴*Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL II*).

¹⁵Allison Hayward, *The Per Curiam Opinion of Steel: Buckley v. Valeo as Super-precedent? Clues from Wisconsin and Vermont*, 2005–06 *Cato Sup. Ct. Rev.* 195, 196 (2006).

¹⁶Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after Austin*, 21 *Capital U. L. Rev.* 381 (1992).

In *Buckley*, the Court addressed the constitutionality of the Federal Election Campaign Act of 1971, as amended in 1974 (FECA),¹⁷ which was at the time “by far the most comprehensive reform legislation” that Congress had ever passed.¹⁸ Among other provisions, FECA limited both contributions to and independent expenditures in behalf of candidates for federal office. The D.C. Circuit sustained most of those restrictions. It thought they served “a clear and compelling interest” in preserving the integrity of the electoral process.¹⁹ The Supreme Court reversed. In a *per curiam* opinion, which decisively announced the fundamental premises from which it reasoned, the Court insisted that

contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . . “[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”²⁰

Given this affirmation, it was surprising that the Court sustained the contribution limitations. This aspect of *Buckley* has been consistently both challenged by First Amendment partisans²¹ and exploited by advocates of reform.²² And a majority of the Court has never wavered

¹⁷Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

¹⁸*Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975), rev’d, 424 U.S. 1 (1976).

¹⁹*Id.* at 841. The D.C. Circuit held one provision of the FECA, § 437a, unconstitutionally vague and overbroad. *Id.* at 832.

²⁰*Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

²¹*Cf.*, e.g., *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 631 (1996) (Thomas, J., concurring) (arguing that the Court should “reach the facial challenge in this case” and advocating the “reject[ion of] the framework established by *Buckley v. Valeo*”).

²²*Cf.*, e.g., *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377 (2000) (deeming a state statute limiting campaign contributions constitutionally sufficient even without empirical evidence demonstrating the presence or perception of the corruption the regulation was enacted to combat); *Federal Election Comm’n v. Beaumont*, 539 U.S. 146 (2003) (holding that nonprofit advocacy organizations may also be constitutionally barred from making direct contributions and expenditures in particular electoral contexts); *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003) (sustaining a

from its conclusion that the contribution limitations “entailed only a marginal restriction on the contributor’s ability to engage in free communication”;²³ there was “no indication” that the limitations “would have any dramatic adverse effect on the funding of campaigns and political associations”;²⁴ and they served the compelling governmental interest in preventing *quid pro quo* corruption of “current or potential office holders” or the appearance of such corruption.²⁵

More directly relevant to *WRTL II*, however, is the Court’s conclusion in *Buckley* that the expenditure limitations imposed by FECA § 608(e)(1) constituted “substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”²⁶ The Court very narrowly construed § 608(e)(1), reading it to restrict only expenditures on words of express advocacy. Still the Court found that the restrictions served no compelling government interest. They did not serve to prevent corruption. And the reformers’ claim that government could use them in pursuit of an interest in “equality” was emphatically rejected. The equality goal embodied the “concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others,”²⁷ but the Court was emphatic that pursuit of such a goal was “wholly foreign to the First Amendment.”²⁸

BCRA is a far more ambitious attempt to remake the federal campaign finance process than FECA was. Advocates of BCRA had always chafed mightily against the First Amendment constraints that *Buckley* imposed on their reform efforts.²⁹ The rationale and results in a number of the campaign finance cases decided after 1976

ban on the use of soft money by political parties and upholding the prohibition of “electioneering communications”).

²³ *Buckley*, 424 U.S. at 20–21.

²⁴ *Id.* at 21.

²⁵ *Id.* at 26–27.

²⁶ *Id.* at 19.

²⁷ *Id.* at 48–49.

²⁸ *Id.*

²⁹ See BeVier, *supra* note 13, at 140–41 (noting arguments of campaign finance reformers that demonstrated their disdain for *Buckley*).

had significantly weakened *Buckley's* First Amendment foundations.³⁰ Eventually, the advocates of reform were able to devise a strategy to exploit those weaknesses. BCRA embodied that strategy, the majority of the Court embraced it in *McConnell*, and *Buckley's* First Amendment foundations yielded to the sustained pressure.

In sustaining the soft money ban, *McConnell* relied principally on several post-*Buckley* cases that had interpreted *Buckley's* "lesser scrutiny" for contribution limitations to dictate virtually no judicial scrutiny of them at all. If *Buckley* could be thought to have rested on an implicit premise of distrust of legislative judgment regarding restrictions that "operated in an area of the most fundamental First Amendment freedoms," *McConnell* replaced it with an explicit premise of deference to legislatures. In addition, again relying on post-*Buckley* cases, the *McConnell* majority thoroughly repudiated *Buckley's* narrow definition of corruption as *quid pro quos* between contributors and candidates. Such an expansive "interpretation of the First Amendment would render Congress powerless to address the more subtle but equally dispiriting"³¹ kind of corruption represented by the granting of access to office-holders in exchange for soft money contributions. Indeed, the Court went so far as to announce that soft-money contributions could be regulated "[e]ven if . . . access did not secure actual influence, [because] it certainly gave the appearance of such influence."³²

The way the *McConnell* Court dealt with the electioneering communications ban is of more central concern here because what the Court actually held when it sustained the ban turns out to have been the source of the disagreement that drove the major doctrinal wedge between the majority and the dissent in *WRTL II*. A distinction between "express advocacy" and "issue advocacy" had emerged from the *Buckley* Court's reading of § 608(e)(1): that reading had left corporations and unions free to spend treasury funds on broadcast political ads about issues—ads that also mentioned federal candidates by name during election season—but only so long as the ads avoided the "magic words" of express advocacy—words like "vote for" or "vote against." *McConnell* held that the distinction was

³⁰ *Id.* at 129–35 (summarizing cases).

³¹ *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

³² *Id.* at 150.

merely “an endpoint of statutory interpretation, not a first principle of constitutional law.”³³ Nowhere in *Buckley*, the *McConnell* Court said, had the Court “suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.”³⁴ Therefore, since § 203’s electioneering communications restrictions raised “none of the vagueness concerns that drove our analysis in *Buckley*,”³⁵ the Court sustained them, reading its “prior decisions regarding campaign finance regulation” to dictate that it must “respect . . . the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.”³⁶

Instead of being concerned to fulfill what *Buckley* had understood as *the Court’s* distinctive role as guardian of “fundamental First Amendment freedoms,” *McConnell* invoked “Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.”³⁷ For this, among other reasons, the First Amendment law of campaign finance regulation that emerged from *McConnell* departed almost completely *in principle* from the law that had emerged from *Buckley*. Instead of paying tribute to freedom of political speech, the *McConnell* Court embraced restriction with an enthusiasm wholly unencumbered by skepticism about the possibility that malign legislative motives might have prompted BCRA’s passage or that perverse consequences might ensue from its enforcement. The upshot was that the *McConnell* majority effectively renounced free political speech in favor of a vision of the more perfect democracy that they believed BCRA’s regulatory regime embodied.³⁸

³³*Id.* at 190.

³⁴*Id.* at 192.

³⁵*Id.* at 194.

³⁶*Id.* at 205 (internal quotation marks omitted). The precise basis for the “respect for the legislative judgment” that the Court’s prior decisions supposedly embodied is not easy to discern in those cases. See BeVier, *supra* note 13.

³⁷*McConnell v. FEC*, 540 U.S. 93, 95 (2003) (emphasis added).

³⁸“[W]hat we have is two important values in direct conflict: free speech and our desire for healthy campaigns in a healthy democracy’ and ‘[y]ou can’t have both.’” *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2686 (2007) (Scalia, J., concurring) (quoting former House Minority Leader Richard Gephardt).

The *McConnell* majority lost its fifth vote when Justice O'Connor retired, and the new majority coalesced to resurrect *Buckley's* First Amendment premises in *WRTL II*.³⁹ Chief Justice John Roberts and Justice Samuel Alito, along with *McConnell* dissenters Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas, agreed to do this, although they disagreed about how to go about it. The chief justice and Justice Alito thought *Buckley* could be revived without overruling *McConnell*. Justices Kennedy, Scalia, and Thomas thought not. The important fact, though, is that for the moment, at least, freedom is once again triumphant. In what follows, I will describe this development and offer an assessment of its import.

I. From *McConnell* to *WRTL II*

A. *Randall v. Sorrell*

The new majority that decided *WRTL II* had its first encounter with the utopian dreams of reform advocates in *Randall v. Sorrell*,⁴⁰ a case that the Court decided in 2006. In a 6-3 decision, the Court invalidated Vermont's Act 64, a set of stringent restrictions on campaign giving and spending enacted by the Vermont legislature in 1997. Specifically, the act instituted strict ceilings on the total campaign expenditures a candidate for state office could make during a given election cycle, with the permissible amount dependent on the position sought.⁴¹ Contributions were also capped, limiting the sums that citizens could donate to both candidates and political parties during each electoral window.⁴²

Randall was a surprising and interesting decision for several reasons that bear mentioning here. First, although only Chief Justice Roberts joined his opinion in its entirety, it was Justice Breyer who announced the Court's judgment invalidating Act 64. That Justice

³⁹Federal Election Comm'n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007).

⁴⁰126 S. Ct. 2479 (2006).

⁴¹The expenditure limits correspond to the scope of the office's constituency and the importance of the job: "governor, \$300,000; lieutenant governor, \$100,000; other statewide offices, \$45,000; state senator, \$4,000 (plus an additional \$2,500 for each additional seat in the district); state representative (two-member district), \$3,000; and state representative (single member district), \$2,000." *Id.* at 2486.

⁴²The law permitted contributions of \$400, \$300, and \$200 to candidates for governor, state senator, and state representative, respectively, and a contribution of \$2,000 to a political party. *Id.*

Breyer wrote for the Court an opinion *invalidating* both contribution and expenditure limits is striking, since he had previously portrayed himself rather consistently as a champion of regulation—or at least as an advocate of the view that there are First Amendment interests on both sides of campaign finance regulation debates.⁴³

Second, Act 64 was the first head-on legislative challenge to *Buckley's* holding that limits on individual *expenditures* in candidate elections are unconstitutional. Justice Breyer's prior writings on⁴⁴ and off⁴⁵ the Court seemed to signal that he would be sympathetic to such a challenge. Indeed, he had quite explicitly stated his view that the *Buckley* holding with respect to expenditure limits ought to be read "to give the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance" and that, were it not so read, it would have to be reconsidered.⁴⁶ But his *Randall* opinion decisively invoked the principle of stare decisis in support of the conclusion that *Buckley* dictated not only that Vermont's expenditure limitations could not stand but also that the state's asserted justification for them—namely, that they were necessary to prevent elected officials from spending too much time raising money—had been decisively if only implicitly rejected by *Buckley*.⁴⁷

The third aspect of *Randall* that is worth noting here was that the Court had never before held that limits on contributions were too

⁴³"[T]his is a case where constitutionally protected interests lie on both sides of the legal equation. . . . We [cannot] expect that mechanical application of the tests associated with 'strict scrutiny'—the tests of 'compelling interests' and 'least restrictive means'—will properly resolve the difficult constitutional problem that campaign finance statutes pose." *Nixon v. Shrink Missouri Gov't. PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

⁴⁴"[T]he legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we. We should defer to its political judgment that unlimited spending threatens the integrity of the electoral process." *Id.* at 403–04.

⁴⁵See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 39–55 (2005).

⁴⁶*Nixon*, 528 U.S. at 405.

⁴⁷"In our view, it is highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley's* result. The *Buckley* Court was aware of the connection between expenditure limits and a reduction in fundraising time." *Randall*, 126 S. Ct. at 2490.

low. Instead, in case after case—beginning with *Buckley* and continuing up to and including *McConnell*—the Court had assumed an increasingly hands-off posture of deference to legislative judgments about appropriate contribution limits.⁴⁸ That in *Randall* it would not merely scrutinize but overturn the legislature’s determination was, to say the least, an unexpected development.

The fourth and final aspect of the *Randall* opinions that is noteworthy for my purposes in this essay is that, just as they did in *McConnell*, and just as they continued to do in *WRTL II*, the opinions reflected profound and fundamental disagreements. The approaches of the two new justices’ to campaign finance regulation remained opaque after *Randall* because, on the crucial question of the validity of the restrictions at issue, each of them joined Justice Breyer’s opinion, which straddled rather than confronted the core issues. By contrast, the other justices’s differences with one another were not matters merely of analytical nuance, nor did they reflect simple disagreements about facts. Instead, their views were poles apart. Justice Stevens on one end of the continuum abandoned the First Amendment ship almost entirely. He was much more explicit about this in *Randall* than he had been in *McConnell*: whereas in *McConnell* he purported to leave *Buckley* intact, in *Randall* he asserted in no uncertain terms that he thought that *Buckley* had been “quite wrong to equate money and speech”⁴⁹ because, as he had noted in his *Shrink Missouri* concurrence, “money is property; it is not speech.”⁵⁰ Thus, in Justice Stevens’s view, the Court should grant the same generous and uncritical deference to legislative judgments about contribution and expenditure limitations that it presently accords to regulations of the time, place, and manner of speech. Tenaciously at the other end of the continuum, Justices Thomas and Scalia also asserted that *Buckley* had been wrongly decided—but they thought that, in permitting legislatures to limit contributions, *Buckley* “provide[d]

⁴⁸See *Buckley*, 424 U.S. at 83 (asserting that the appropriate contribution threshold is “best left in the context of this complex legislation to congressional discretion”); *McConnell*, 540 U.S. at 95 (applying a “less rigorous review standard [that] shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise”).

⁴⁹*Randall v. Sowell*, 126 S. Ct. 2479, 2508 (2006) (Stevens, J., dissenting).

⁵⁰*Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

insufficient protection to political speech,”⁵¹ not that it provided too much.

B. Back to Buckley—Again

McConnell upheld the facial validity of BCRA § 203’s ban on corporate and union spending for “electioneering communications.” In 2006, however, the Court unanimously concluded that *McConnell* did not preclude as-applied challenges,⁵² and it was just such a challenge that *WRTL II* sustained. But the decision goes so far toward eviscerating § 203 that it effectively overrules *McConnell*’s holding that the section is valid on its face. Indeed, a majority of the justices are quite explicit that this is the decision’s effect. Chief Justice Roberts’s principal opinion claimed that the Court had “had no occasion to revisit”⁵³ *McConnell*, but Justice Scalia’s concurring opinion for himself and Justices Kennedy and Thomas scorned the claim for its “faux judicial restraint.”⁵⁴ And Justice Souter’s dissent, joined by Justices Stevens, Ginsburg, and Breyer, similarly concluded that “*McConnell*’s holding that § 203 is facially constitutional is overruled.”⁵⁵

Understanding the claim about *WRTL II*’s overruling effect requires another short return to *Buckley* and then to *McConnell* and the facial attack against which *McConnell* sustained § 203. That facial attack was grounded in the claim that § 203 was overbroad. How eager the Court should be—or has been in the past—to sustain as-applied challenges to facially-valid laws is a matter of some dispute.⁵⁶

⁵¹*Id.* at 2505 (Thomas, J., dissenting).

⁵²*Wisconsin Right to Life, Inc. v. Federal Election Comm’n.*, 546 U.S. 410 (2006) (*WRTL I*).

⁵³*Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2674 (2007).

⁵⁴*Id.* at 2683 n.7 (Scalia, J., concurring).

⁵⁵*Id.* at 2699 (Souter, J., dissenting).

⁵⁶Compare Brief for Appellants John McCain et al. at 39, *McCain v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (No. 06-970) (“[A]n as-applied challenge should succeed only if the plaintiff can show that the ad itself and the circumstances of its creation and airing demonstrate that there is no reasonable prospect the ad is likely to influence the election.”), with Brief for Appellee Federal Election Commission at 41–42, *McCain v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007) (Nos. 06-969, 06-970) (asserting that, although “the overbreadth of the prohibition is not sufficiently substantial for facial invalidation,” this “does not shift the strict scrutiny burden from the government and force challengers to prove that the mentioned options are inadequate”).

In principle, of course, a facially valid law regulating First Amendment activity is not necessarily constitutional in all its applications. The conclusion that a law is not facially overbroad does not entail either that it can never be unconstitutional as-applied or that the Court should tend to be systematically unsympathetic to as-applied challenges.⁵⁷ And, again in principle, there is no reason why a decision such as *WRTL II* that sustains an as-applied challenge to a law that the Court has previously explicitly held to be facially valid should be thought entirely to compromise the law's facial validity, as so many people think that *WRTL II* does. It is plausible to conclude, for example, that a law that prohibits civil service employees from actively engaging in partisan political activities or soliciting campaign contributions from their coworkers might be constitutional on its face but unconstitutional if applied to prohibit them from wearing political buttons or displaying bumper stickers.⁵⁸ Nevertheless, *WRTL II* is thought completely to eviscerate *McConnell* because of the way *McConnell* supposedly resolved the question about the source of the *Buckley* Court's narrow construction of FECA's expenditure limitations.

Thus, we must once again return to *Buckley* itself and FECA § 608(e)(1), because the language the Court used when evaluating that section was once again the source of controversy. The Court held that the language of § 608(e)(1) that limited individual and group expenditures "relative to a clearly identified candidate"⁵⁹ was unconstitutionally vague, and to eliminate the vagueness, it thought itself impelled to interpret the phrase "relative to" to mean "advocating the election or defeat of" a candidate.⁶⁰ Even this interpretation did not eliminate the vagueness problem, however, because of the stubborn fact that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."⁶¹ Then, in the holding whose

⁵⁷Cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (holding that overbreadth challenges may be sustained only when a statute's overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

⁵⁸Cf. *id.*

⁵⁹Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(e)(1), 88 Stat. 1265 (codified at 18 U.S.C. § 601(e)(1)) (repealed 1976).

⁶⁰*Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

⁶¹*Id.*

constitutional underpinnings became the subject of so much debate, the Court concluded that

in order to preserve the provision against invalidation on vagueness grounds . . . [§ 608(e)(1)] must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.⁶²

And in a footnote announcing what became known as the “magic words” test of express advocacy, the Court acknowledged that its construction

would restrict the application of § 608(e)(1) to communications containing words of express advocacy of election or defeat, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject.”⁶³

Nearly all the appellate courts that had considered this aspect of *Buckley* had concluded that the holding was not merely a product of statutory construction necessitated by the need to cure the vagueness inherent in the difficulty of distinguishing in practice between “discussion of issues and candidates” and “advocacy of election or defeat of candidates.”⁶⁴ Rather, they thought the narrow construction had been dictated by the First Amendment need to protect discussion of issues.⁶⁵ They read *Buckley* to hold that any exception to the

⁶²*Id.* at 44.

⁶³*Id.* at 44 n.52

⁶⁴*Id.* at 42.

⁶⁵See, e.g., *FEC v. Christian Action Network*, 110 F.3d 1049, 1064 (4th Cir. 1997) (concluding that *Buckley* limited the FEC’s regulatory authority over express advocacy to communications containing the “magic words”); *Maine Right to Life Comm. v. FEC*, 914 F. Supp. 8, 10–11 (D. Me. 1996) (concluding that *Buckley* and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), taken together, require the “magic words” approach), *aff’d*, 98 F.3d 1 (1st Cir. 1996), cert. denied, 522 U.S. 810 (1997). Two frequently cited passages in the *Buckley* opinion seemed to support this conclusion. In one, the Court stated that “[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.” *Buckley*, 424 U.S. at 45. In the other, it asserted that “[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.” *Id.* at 48.

First Amendment that would permit restrictions of expenditures on express advocacy would have to be confined within a very narrow regulatory space so as to keep “the discussion of political policy generally or advocacy of the passage or defeat of legislation”⁶⁶ as free as possible.

Although many champions of free political speech have criticized *Buckley* for not protecting enough speech,⁶⁷ the decision actually left a very considerable amount of speech unrestricted.⁶⁸ To the dismay of reform advocates, it turned out to be very easy for corporations and unions to engage in political advertising during election campaigns without using words of express advocacy. When political activists, primarily but not exclusively non-profit advocacy corporations, realized the full implications of what *Buckley* left them free to do, they began spending enthusiastically from their corporate treasuries on such advertising.⁶⁹ The amount of this spending, and the content of the ads on which it was spent, alarmed reform advocates. They mobilized their own constituencies and brought considerable intellectual and financial resources to bear on a First Amendment counter-attack.⁷⁰

⁶⁶ *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

⁶⁷ See Brief of Amici Curiae the Center for Competitive Politics et al. in Support of Appellees at 6–7 *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (Nos. 06-969, 06-970) (contending that “*Buckley* . . . denigrated the First Amendment value of candidate contributions as a form of expression and association by arguing that such contributions involved only symbolic and inarticulate expressions of support and ultimately produced only speech-by-proxy”).

⁶⁸ Prior to BCRA, expenditures on issue ads by political parties, labor unions, trade and business associations, corporations, and ideological interest groups were not subject to either the contribution limits or the disclosure requirements that restricted the giving and spending of those who contributed to candidate campaigns or expressly advocated the election or defeat of particular candidates. For a summary of the statutory scheme that applied to issue ads, see David A. Pepper, *Recasting the Issue Ad: The Failure of the Court’s Issue Advocacy Standards*, 100 W. Va. L. Rev. 141 (1997).

⁶⁹ See Deborah Beck et al., *Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1996 Campaign* 3 (1997) (discussing the ascendancy of the “thorny new practice” of issue advocacy); Jeffrey D. Stanger & Douglas G. Rivlin, *Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1997–1998 Election Cycle* 1 (1998) (estimating that spending on issue ads during the 1997–1998 election cycle had grown to between \$275 and \$340 million); Glenn Moramarco, *Regulating Electioneering: Distinguishing Between “Express Advocacy” & “Issue Advocacy”* 9 (Brennan Ctr. for Justice Campaign Fin. Reform Series, 1998) (identifying “multi-million dollar electioneering campaigns [engaged in] under the guise of ‘issue advocacy’”).

⁷⁰ The Illinois Civil Justice League reports that more than “\$140 million was spent” by the campaign finance reform lobby during the decade preceding 2005. Illinois

The strategy the reformers developed had three principal components. The first component consisted of crafting and developing the implications of an argument to the effect that a constitutionally significant difference exists between “election-related” spending, which the First Amendment permits to be regulated, and spending on general “political speech,” which the First Amendment protects.⁷¹ The argument implied, of course, that restrictions on “election-related” speech about candidates—speech that had the intent or the effect of influencing voters and thereby of affecting federal election outcomes—were more likely to survive First Amendment scrutiny than were restrictions on speech about general political issues.

Civil Justice League, *Watching the Watchdogs: How George Soros & Other Special Interest Foundations Have Hijacked Campaign Finance Reform in Illinois 2* (April 12, 2005), <http://www.icjl.org/WatchingWatchdogs.pdf>. The Brennan Center for Justice, an organization heavily involved in the research underpinning the holding in *McConnell*, was the recipient of “contributions totaling \$3.8 million from the Soros, Joyce, Ford and Carnegie foundations” during the same period. *Id.* at 4. An editorial printed in the *Washington Times* further details giving by “liberal foundations” to “campaign-finance ‘reform’ groups like . . . the Brennan Center for Justice,” citing “a recent report by the nonpartisan Political Money Line [entitled] Campaign Finance Lobby: 1994–2004. Propaganda and the Money Trail, Wash. Times, Mar. 23, 2005, at A16. The report asserts that “Pew [Charitable Trusts] spent an average of \$4 million a year over 10 years promoting reform” and that “[s]even other foundations—including the Carnegie Corp. (\$14 million), the Joyce Foundation (\$13.5 million), George Soros’ Open Society Institute (\$12.6 million)—cumulatively ponied up another \$83 million.” *Id.*

⁷¹See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. C.R.-C.L. L. Rev. 1, 49–50 (1998) (drawing a line “between election-oriented expression and the broader realms of political expression” for the purposes of First Amendment analysis); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751, 1763 (1999) (noting the existence of a “line that distinguishes electoral speech from other political speech”); Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 St. Louis U. L.J. 789, 808–10 (1998). Professor Neuborne’s article provides convincing evidence that distinguishing between election-related speech and other political speech emerged from the shared agenda of campaign finance reformers. See Neuborne, 42 St. Louis U. L. J. at 800 n.47:

I acknowledge a debt to Professor C. Edwin Baker who raised the possibility of viewing election campaigns as discrete institutions at a campaign finance symposium at Brooklyn Law School, and who subsequently circulated a thoughtful draft of an article urging his position. I also benefited from a Brennan Center working group on campaign finance reform chaired by Ronald Dworkin, that includes Frank Sorauff, Roy Schotland, Rick Pildes, Richard Briffault, Josh Rosenkranz, and myself.

(citation omitted).

The second component of the reformers' strategy was rhetorical. It consisted of relentlessly asserting that, because they mentioned candidates by name, many so-called issue advocacy advertisements were "intended to affect the outcome of federal elections" and were therefore "not really advertisements about issues but . . . a form of electioneering without the words of express advocacy" and hence amounted to "sham issue advocacy."⁷² Characterizing independently funded ads that mentioned both candidates and issues during election campaigns as "sham issue ads" implied that ads that mentioned candidates were *by definition* not issue ads. In addition, the reformers implied that such ads were dishonorable, dishonest, and illegitimate by virtue of what the reformers asserted to be the fact that they were intended to influence candidate elections rather than solely to engage in discussion of issues.⁷³

The third component of the reform advocates' intellectual strategy was to persist in claiming that *Buckley's* "magic words" holding did not reflect a *constitutionally mandated* limitation on Congress's ability to restrict election-related speech. They did not regard such a limitation as necessary in order that discussion of issues during election campaigns would not be caught in the regulators' net. Instead, they argued, the magic words holding was merely an artifact of vagueness concerns. The vagueness problem could be cured by statutory specificity, which reform advocates were able to supply with their precise definition of "electioneering communications."⁷⁴ Then, assuming the Court could be persuaded of the merits of the constitutional argument that restrictions on corporate and union spending for election-related speech were different from and more tolerable than restrictions on political speech generally, Congress could close the "loop-hole" that permitted corporations and unions to engage in the "sham

⁷²Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advertising*, 48 *UCLA L. Rev.* 265, 267–68 (2000).

⁷³See, e.g., Hasen, *supra* note 72.

⁷⁴"The term 'electioneering communication' means any broadcast, cable, or satellite communication which—(I) refers to a clearly identified candidate for Federal office; (II) is made within—(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before the primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (cc) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i).

issue advocacy” that mentioned candidates by name during election campaigns.

Two other developments helped regulatory advocates make their case that *Buckley* was no longer a firewall of protection for political speech but rather had become a platform of support for further restrictions. First, in cases decided since *Buckley*, the Court had made clear its willingness to embrace an increasingly broad view of what constituted the “corruption” whose reality or appearance legislatures could prevent. For example, in *Austin v. Michigan Chamber of Commerce*,⁷⁵ the Court relied on an anti-corruption rationale to sustain state legislation prohibiting corporations and unions from making independent expenditures on candidate elections. In doing so, the Court said that the concept of corruption included “the corrosive and distorting effects [on the integrity of the electoral process] of immense aggregations of wealth that are accumulated with the help of the corporate form.”⁷⁶ Henceforward, it appeared, legislatures could restrict contributions and expenditures in order to prevent not merely the corruption of *officeholders* or potential officeholders but also to cure a much more amorphous kind of corruption, namely the corruption of *the political process*. And later, in *Nixon v. Shrink Missouri Government PAC*,⁷⁷ the Court expanded the conception of corruption of officeholders so that it “was not confined to bribery of public officials, but extended to the broader threat from politicians too compliant with the wishes of large contributors.”⁷⁸

The second post-*Buckley* development that helped reform advocates was the Court’s ever-increasing willingness to defer to legislative judgments about the necessity for restrictions on political giving and spending. From the somewhat less skeptical attitude it adopted in *Buckley* to contribution limitations than to expenditure restrictions, the Court progressed in *Austin* to permissiveness about a complete ban on independent corporate expenditures in support of or opposition to candidates and thence, in *FEC v Beaumont*,⁷⁹ to a general posture of explicit and uncritical deference to legislative judgments

⁷⁵494 U.S. 652 (1990).

⁷⁶*Id.* at 660.

⁷⁷528 U.S. 377 (2000).

⁷⁸*Id.* at 389.

⁷⁹Federal Election Comm’n v. Beaumont, 539 U.S. 146 (2003).

restricting the political spending of corporations. The Court read its own prior cases as having acknowledged that the “special characteristics of the corporate structure” required such deference.⁸⁰ It refused to “second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared,” because the “special benefits conferred by the corporate structure . . . [carry a genuine] potential for distorting”⁸¹ the political process.

C. *The First Amendment Resurrected*

BCRA and the *McConnell* decision that sustained its provisions were the culmination of the intellectual and judicial developments just described. *WRTL II* goes far, in turn, to subvert them. *WRTL II* challenges *McConnell*'s fundamental First Amendment premises, thereby substantially undermining its authority. It is time now to turn to it.

Wisconsin Right to Life, Inc. (WRTL), is a non-profit ideological advocacy corporation. In August 2004 it wanted to fund with general treasury funds some broadcast ads objecting to the filibusters by Senate Democrats of several of President Bush's judicial nominees. The proposed ads, which WRTL labeled “grass roots lobbying,” would have mentioned incumbent Senator Russ Feingold by name, though without using the “magic words” of express advocacy, within 30 days of the 2004 Wisconsin primary. WRTL knew the ads would violate § 203's prohibition on electioneering communications but it believed it had a First Amendment right to run them. Accordingly, WRTL sought declaratory and injunctive relief against § 203's enforcement by the Federal Election Commission (FEC). The district court denied the requested relief on the ground that, when the Court in *McConnell* sustained § 203 on its face, its reasoning had left “no room for the kind of ‘as applied’ challenge” that WRTL sought to bring.⁸² The Supreme Court unanimously disagreed, held that

⁸⁰*Id.* at 153 (quoting *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982)) (citing *National Right to Work*, 459 U.S. at 207; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658–59 (1990); *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257–58 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 500–501 (1985)).

⁸¹*Id.* at 157–58 (citations and internal quotation marks omitted).

⁸²*Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 2004 U.S. Dist. LEXIS 29036, at 6 (D.D.C. 2004).

McConnell did not foreclose as-applied challenges, and remanded the case.⁸³ In a complete about face, the district court then sustained WRTL's as-applied challenge.⁸⁴ It read *McConnell* to have held that BCRA was constitutional only insofar as it proscribed corporate and union expenditures on express advocacy and its "functional equivalent."⁸⁵ Whether WRTL's proposed ads constituted express advocacy's functional equivalent depended on whether the court should consult only the "language within the four corners"⁸⁶ of the ads or try to evaluate them in their context—*i.e.*, by looking to their purpose and intended effects. The FEC and the interveners (FEC hereafter), including Senator McCain, argued that the ads should be interpreted in their appropriate context and that when that were done it could be seen that they did constitute the functional equivalent of express advocacy. WRTL argued that only the words mattered, and the words were not the functional equivalent of express advocacy. The district court decided that its analysis should be confined to the ad's language. It agreed with WRTL that

[d]etermining intent and the likely effect of an ad on the viewing public is . . . too conjectural and wholly impractical if future as-applied challenges are going to be evaluated on an emergency basis by three-judge panels prior to and during the BCRA blackout period leading up to federal primary and general elections.⁸⁷

And, read literally, the court held, the ads did not constitute express advocacy or its functional equivalent.

Thus the key district court holdings that the Supreme Court affirmed in *WRTL II* were, first, that whether an ad constitutes the functional equivalent of express advocacy should be determined by its words alone and not by its purpose or effect and, second, that the words of WRTL's proposed ads were not express advocacy's functional equivalent. It is these holdings that are thought to eviscerate *McConnell's* conclusion that § 203 is facially valid. I agree that

⁸³Wisconsin Right to Life, Inc. v. Federal Election Comm'n, 546 U.S. 410 (2006) (per curiam) (WRTL I).

⁸⁴Wisconsin Right to Life, Inc. v. Federal Election Comm'n, 466 F. Supp. 2d 195 (2006).

⁸⁵*Id.* at 204.

⁸⁶*Id.* at 207.

⁸⁷*Id.* at 205.

WRTL II guts *McConnell*, but it does so not alone or even most significantly by virtue of its holding. More importantly, it guts *McConnell* because it resurrects the First Amendment.

The chief justice's principal opinion repeatedly signals a perspective that represents an entirely different view of the First Amendment than the one reflected in *McConnell*. The opinion affirmed in no uncertain terms that "[b]ecause BCRA § 203 burdens political speech, it is subject to strict scrutiny"⁸⁸—surprisingly citing *McConnell* for the point. (On the very page of the opinion that the chief justice cited, however, *McConnell* had emphasized its "respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'"⁸⁹) And the chief justice invoked, as *Buckley* did,⁹⁰ but *McConnell* most definitely did not,⁹¹ the implications of *New York Times v. Sullivan*'s "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open."⁹²

Chief Justice Roberts understood, as had the district court, that resolving the as-applied challenge to § 203 required the Court to distinguish between issue advocacy and the functional equivalent of express advocacy, a distinction he well understood often dissolved in practice. Accordingly, he emphasized the importance of crafting a test that would "provide a safe harbor for those who exercise First Amendment rights."⁹³ The FEC claimed that *McConnell* established that the constitutional test for functional equivalence was "whether

⁸⁸Federal Election Comm'n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2664 (2007).

⁸⁹*McConnell*, 540 U.S. at 205 (internal citations omitted).

⁹⁰*Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

⁹¹In the portion of the *McConnell* opinion that sustained the ban on corporate and union spending for electioneering communications, the Court did not mention *New York Times*. *McConnell*, 540 U.S. at 203–09. And when it did mention the case in connection with the disclosure requirements, it disdained its relevance. *Id.* at 197 (quoting the district court opinion, 251 F. Supp. 2d at 237, that celebrated "informed choices in the political marketplace" and implied that *New York Times* was antithetical to "precious First Amendment values."). For discussion of the *McConnell* Court's treatment of *New York Times*, see BeVier, *supra* note 13, at 142–44.

⁹²*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁹³*WRTL II*, 127 S. Ct. at 2665.

the ad is intended to influence elections and has that effect.”⁹⁴ Rejecting that claim, the Chief Justice exhibited the kind of concern to protect free political debate that was at the heart of *Buckley*: the intent-based standard was unacceptable, he said, because it “would chill core political speech.”⁹⁵ An objective standard was required, one that would entail minimal discovery, eliminate the threat of protracted litigation, and preclude both open-ended factual inquiries and complex legal arguments.⁹⁶ He announced a test and applied it as follows:

[A]n 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.⁹⁷

Chief Justice Roberts characterized the FEC as having advocated the “perverse[.]” view that “there can be no such thing as a genuine issue ad during the blackout period.”⁹⁸ Emphasizing once again

⁹⁴ *Id.* at 2664.

⁹⁵ *Id.* at 2665.

⁹⁶ *Id.* at 2666.

⁹⁷ *Id.* at 2667. Justice Souter’s dissenting opinion asserts that the backup provision of BCRA’s electioneering communication definition is “essentially identical” to the chief justice’s test. *Id.* at 2704 (Souter, J., dissenting). The backup provision defines electioneering communications as ads that are “*suggestive of no plausible meaning other than an exhortation to vote for or against*” a candidate. 2 U.S.C. § 434(f)(3)(A)(ii) (italics added). Note Justice Souter’s implicit claim, which is that the italicized language carries the identical meaning as “*susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.*” It is a sure bet that Chief Justice Roberts would not be persuaded that the two phrases carry identical meanings.

⁹⁸ Federal Election Comm’n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2668 (2007).

“what we have acknowledged at least since *Buckley*: that ‘the distinction between discussion of issues and candidates [which is protected] and advocacy of election or defeat of candidates [which may be restricted] may often dissolve in practical application,’”⁹⁹ the chief justice proceeded neatly to hoist the appellants on the petard of the highly speech-protective rationale that the Court recently deployed to protect virtual child pornography: “‘The Government may not suppress lawful speech [i.e., genuine issue ads] as the means to suppress unlawful speech [i.e., express advocacy]. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.’”¹⁰⁰

Since WRTL’s proposed ads were not the functional equivalent of express advocacy, the next question was whether any compelling governmental interests justified restricting them. The FEC had attempted to bring the spectre of circumvention to bear on this analysis by arguing that regulating express advocacy was necessary to prevent speakers from subverting the compelling governmental interest in preventing candidate corruption. *McConnell* had conceded that the risk of circumvention of contribution limits might be posed by some large independent expenditures for express advocacy and on issue ads that were their functional equivalent. The FEC tried to bootstrap this concession into support for the proposition that only an intent-and-effect definition of “functional equivalent” could ensure that expenditures on issue ads did not circumvent the rule against independent expenditures on express ads—which might be regulated to avoid circumvention of the rule against corporate contributions.¹⁰¹ But “[e]nough is enough,” said the chief justice.¹⁰² “[A] prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.”¹⁰³

The First Amendment perspective reflected in *McConnell* was finally completely eradicated when Chief Justice Roberts rejected the argument that the ban on issue ads could be supported by the interest in preventing the kind of corruption to which the Court

⁹⁹ *Id.* at 2669 (citing *Buckley*, 424 U.S. at 42).

¹⁰⁰ *Id.* at 2670 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)).

¹⁰¹ Cf. *McConnell v. FEC*, 540 U.S. 93, 205 (2003).

¹⁰² *WRTL II*, 127 S. Ct. at 2672.

¹⁰³ *Id.*

referred in both *Austin* and *McConnell*, namely, the corruption represented by “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”¹⁰⁴ Accepting the argument, the chief justice said, “would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all First Amendment rights.”¹⁰⁵

The unqualified reliance on *Bellotti* seems particularly significant. It suggests that *WRTL II*, despite the fact that it sustains only an as-applied challenge, will not readily succumb to interpretations that limit its First Amendment implications. *WRTL* originally couched its challenge to § 203 as a frontal attack, for example, insisting that all—and, by negative implication, only—“grass roots lobbying” should be exempt from its prohibitions. Chief Justice Roberts’s opinion in *WRTL II* speaks of the necessity to protect *political speech*, not just grass roots lobbying. In addition, some of *WRTL*’s amici had thought that *WRTL*’s status as a non-profit advocacy corporation should be the factor that protected its speech, but the Chief Justice’s reliance on *Bellotti* belies such a limitation. Thus, although it is true that Chief Justice Roberts did not explicitly overrule *McConnell*, his opinion seems to have sustained an as-applied challenge to BCRA in First Amendment terms even broader than either *WRTL* had originally sought or many of its amici had advocated.¹⁰⁶

Justice Scalia wrote a vigorous opinion concurring in the judgment, and the fact and nature of his dispute with the Chief Justice occasioned considerable attention in the national media.¹⁰⁷ He refused to join Chief Justice Roberts’s opinion not because he read the opinion as having gone too far to undermine § 203’s facial validity but rather because he thought the First Amendment required the Court to go further. The chief justice’s refusal to overrule *McConnell* outright, Justice Scalia argued, amounted to an ill-conceived and unwarranted attempt at judicial moderation—“faux judicial restraint” tantamount to “judicial obfuscation.”¹⁰⁸ “[T]he principal

¹⁰⁴ *Austin*, 494 U.S. at 660.

¹⁰⁵ *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2673 (2007) (citing *First National Bank v. Bellotti*, 435 U.S. 765, 778 (1978)).

¹⁰⁶ *Id.* at 2673 n.10.

¹⁰⁷ See, e.g., Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash*, *N.Y. Times*, June 28, 2007, at A1.

¹⁰⁸ *WRTL II*, 127 S. Ct. at 2684 n.7 (Scalia, J., concurring).

opinion's attempt at distinguishing *McConnell* is unpersuasive enough,"¹⁰⁹ wrote Justice Scalia, and "[t]he promise of an administrable as-applied rule that is both effective in the vindication of First Amendment rights and consistent with *McConnell*'s holding is [so] illusory"¹¹⁰ that Chief Justice Roberts' refusal to overrule could not be justified. Justice Scalia regarded any test—including the test that the principal opinion adopted—that turned on the public's or a court's perception of an ad's import as inevitably failing to provide "the degree of clarity necessary."¹¹¹

For Justice Scalia, as for the chief justice, the important thing was to "avoid the chilling of fundamental political discourse."¹¹² He, too, emphasized that "the line between electoral advocacy and issue advocacy dissolves in practice," but for him this fact represented "an indictment of the statute, not a justification of it."¹¹³ He found each of the clear rules that advocates had offered "incompatible with *McConnell*'s holding that § 203 is facially constitutional."¹¹⁴ Indeed, he said, "any clear rule that would protect all genuine issue ads would cover such a substantial number of ads prohibited by § 203 that § 203 would be rendered substantially overbroad"¹¹⁵ and therefore facially invalid. Justice Scalia's conclusion was that *McConnell*'s contrary holding that § 203 is facially valid *should* and *could* be overruled, and he offered three reasons for this conclusion. First, it was wrongly decided in the first place. Second, it was impossible to devise an administrable as-applied rule to protect issue advocacy. And third, the case had not generated a settled body of law that relied upon it.

Justice Souter wrote for the dissenters. His opinion paid virtually no attention to the First Amendment premises on which the majority relied. His footnotes addressed some of the details of the chief justice's argument, but in the body of his opinion he did not make a sustained effort to refute either the chief justice's or Justice Scalia's

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2685.

¹¹¹ *Id.* at 2680.

¹¹² *Id.*

¹¹³ *Id.* at 2681.

¹¹⁴ *Id.* at 2683.

¹¹⁵ *Id.*

fundamental premises.¹¹⁶ Justice Souter began his dissent by describing neither the facts of the case before the Court nor the specifics of the doctrinal dispute that it presented. Rather, he offered a lengthy introduction that emphasized that huge sums of money are spent on political campaigns, recounted the empirical support he thought existed for the proposition that these sums—in particular insofar as they derive from the “concentrations of money in corporate and union treasuries”—represent a threat to democratic integrity, summarized the legislative efforts that had tried to control the money flow, and recapitulated the case law that had sustained it.¹¹⁷ He read what *McConnell* had said about § 203 as having “exemplified a tradition of repeatedly sustain[ing] legislation aimed at the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”¹¹⁸ Before undertaking to address the specific issue before the Court, he concluded his opening paragraphs with the following assertion, which captures the essence of his view that corporate participation in politics threatens democracy:

From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated monies in their treasuries to electioneering.¹¹⁹

In view of this introduction and of the assumptions about corporate involvement in politics upon which it is based, it was hardly surprising that when Justice Souter finally addressed the merits of the controversy before the Court in *WRTL II* he disagreed with virtually every one of the chief justice’s conclusions. To him it

¹¹⁶Chief Justice Roberts also responded specifically to Justice Souter’s arguments (as he did to Justice Scalia’s) in footnotes rather than in the text of his opinion. However, in the process of responding to the FEC’s arguments and refuting their First Amendment premises, the chief justice implicitly responded to Justice Souter’s very similar views.

¹¹⁷*Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2687 (2007) (Souter, J., dissenting).

¹¹⁸*Id.* at 2696 (citing *McConnell*, 540 U.S. at 205) (omitting internal quotations and citations).

¹¹⁹*Id.* at 2697.

seemed blindingly obvious that WRTL's ads were the functional equivalent of express advocacy:

[A]ny Wisconsin voter *who paid attention* would have known that Democratic Senator Feingold supported filibusters against Republican presidential judicial nominees, that the propriety of the filibusters was a major issue in the senatorial campaign, and that WRTL along with the Senator's Republican challengers opposed his reelection because of his position on filibusters.¹²⁰

Justice Souter thought that the chief justice's "severely limited" test for "functional equivalence" was "flatly contrary to *McConnell*,"¹²¹ that his refusal to consider the context of an ad and its electioneering purpose amounted to an unwarranted blindness to the fact that any ad's "electioneering purpose" will easily be "objectively apparent from [its] content and context," and that the PAC alternative provides corporations "'with a constitutionally sufficient opportunity to engage in express advocacy.'"¹²²

II. What's Next: An Assessment

The disagreement between the majority and the dissenters in *WRTL II* has deep roots in the fundamentally different premises from which they reason about the First Amendment and campaign finance reform legislation. In *WRTL II*, that disagreement played itself out in doctrinal terms in a difference of opinion about how the First Amendment requires the Court to deal with the intractable fact that drove the Court in *Buckley* to hold FECA § 608(e)(1) unconstitutionally vague, which the majority in *WRTL II* repeatedly emphasized, namely, that

¹²⁰ *Id.* at 2698 (emphasis added). Chief Justice Roberts questioned whether Justice Souter's confidence in his implicit conclusion that Wisconsin voters routinely "paid attention" was justified. He cited a "prominent study" that found "that during the 2000 election cycle, 85 percent of respondents to a survey were not even able to name at least one candidate for the House of Representatives in their own district." *Id.* at 2667 n.6 (citation omitted).

¹²¹ *Id.* at 2699.

¹²² *Id.* at 2702 (citing *McConnell*, 540 U.S. at 203–04 (quoting *Beaumont*, 539 U.S. at 162)). Chief Justice Roberts responded to this argument of Justice Souter in a footnote, asserting that he had "overstate[d] his case" because "PAC's impose well-documented and onerous burdens, particularly on small nonprofits. See *MCFL*, 479 U.S. 238, 253–55 (1986) (plurality opinion)." *Id.* at 2671 n.9.

the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.¹²³

The basic issue is whether the Court is required to maintain the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates when setting the limits of legislative power to regulate the political speech of corporations. Should the Court regard discussion of “issues and candidates” as *more* protected, *less* protected, or protected *to the same extent* as “advocacy of election or defeat of candidates”? The answer has become more divisive since the Court seems to have accepted the proposition that it is sometimes permissible to prohibit corporations and unions from making independent expenditures from their general treasury funds on express advocacy.¹²⁴ The practical difficulty of discerning the difference between express advocacy and discussion of issues has forced the Court to decide whether legislative power to restrict express advocacy should include the power also to restrict issue advocacy.

For the *WRTL II* majority, the answer to this question is a resounding no. Whatever difficulties might be presented in practice by the

¹²³ *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

¹²⁴ A majority of the Court has never directly questioned this conclusion, though members of the Court have challenged it from time to time. In *United States v. UAW-CIO*, 352 U.S. 567 (1957), the Court held that indirect contributions to union officials were covered by 18 U.S.C. § 610, which prohibited any corporation or labor organization from making a “contribution or expenditure in connection with” any election for federal office. The majority did not reach the issue of the statute’s constitutionality, but Justice William O. Douglas did, in a dissent joined by Chief Justice Earl Warren and Justice Hugo Black. Justice Douglas described the constitutional issue, which he regarded as “fundamental to the electoral process and to the operation of our democratic society,” as being “whether a union can express its views on the issues of an election and on the merits of the candidates, unrestrained and unfettered by the Congress.” 352 U.S. at 593 (Douglas, J., dissenting). He objected to the majority’s “innuendo” that ““active electioneering”” by union spokesmen is not covered by the First Amendment because he thought such a conclusion “ma[de] a sharp break with our political and constitutional heritage.” *Id.* at 595 (Douglas, J., dissenting).

distinction between express and issue advocacy, the majority thinks that a clear First Amendment difference exists *in principle* between the two. They think that this difference requires the Court to exercise great care to define express advocacy narrowly. That is what *Buckley* tried to do when it described the “magic words” test, and it is plausible (though barely) to argue that *McConnell* preserved this narrow definition by concluding (if it did conclude) that § 203’s prohibition of “electioneering communications” was constitutional only insofar as it applied to the functional equivalent of magic words. For the *WRTL II* majority, the conclusion that follows from that narrow definition of the speech that can be banned is that the Court must strictly police the boundary of express advocacy so as to leave discussion of issues *and candidates* as free as possible—since “candidates, especially incumbents, are intimately tied to public issues.”

For the *WRTL II* dissenters, on the other hand, the distinction between express and issue advocacy was not merely difficult to draw but had become meaningless over the years—“a line in the sand drawn on a windy day.”¹²⁵ They read *McConnell* as having held that all corporate and union “electioneering speech”—not just speech using words of express advocacy but all speech that has the purpose of affecting election outcomes—is “prohibitible.”¹²⁶ What that implied for them was that, in order to *maximize* legislative power rather than to minimize it, the line had to be drawn between electioneering speech “clearly intended to influence the election” and “pure” issue ads. In other words, only “pure” issue ads were exempt from restriction. “[I]f an ad is reasonably understood as going beyond a discussion of issues (that is, if it can be understood as electoral advocacy), then by definition it is not ‘genuine’ or ‘pure.’”¹²⁷ The dissent did not read *McConnell* as even having acknowledged a First Amendment freedom to spend corporate funds on genuine issue ads. In fact, they read it to have *rejected* the idea that “speakers possess an inviolable First Amendment right to engage in” issue

¹²⁵Federal Election Comm’n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2694 (2007) (Souter, J., dissenting) (citing *McConnell*, 540 U.S. at 126 n.16 (quoting “the former director of an advisory organization’s PAC”).

¹²⁶*Id.* at 2695.

¹²⁷*Id.* at 2699.

advocacy.¹²⁸ To the dissenters, *McConnell* merely “left open the possibility of a ‘genuine’ or ‘pure’ issue ad that might not be open to regulation under § 203.”¹²⁹

Given that the majority and dissenting opinions approach and answer the basic issue posed in *WRTL II* so differently, perhaps Justice Scalia’s criticism of the “faux judicial restraint” of the chief justice’s opinion is well-taken. Perhaps judicial honor—and the rule of law—would have been fully satisfied only by a straightforward overruling of a precedent left standing with its theoretical heart cut out and its head severed. It is most definitely true that the fundamental premises of the chief justice’s opinion were thoroughly inconsistent with those that animated the *McConnell* majority. And, despite its potential vagueness, the as-applied test he announced clearly did eviscerate § 203. Justice Souter, moreover, certainly understood that the chief justice’s test would render § 203’s limitations on “corporations corrosive spending when they enter the political arena . . . open to easy circumvention.”¹³⁰ Chief Justice Roberts insisted that in future cases where doubts exist the tie must “go[] to the speaker, not the censor,”¹³¹ and he tried to soothe Justice Scalia’s doubts by carefully specifying that “no reasonable interpretation” means “no reasonable interpretation.”¹³² His admonitions may well prove insufficient to curb the enthusiasm of regulators, of course. Much will depend on how the FEC interprets *WRTL II*. Justice Alito’s short concurrence suggests that, should regulators and courts misread the clear message of the principal opinion, the Court is likely to step in¹³³—a promise of potential relief from abuse that Justice Scalia found wholly inadequate.¹³⁴ Nevertheless, what is worth emphasizing—and worth celebrating—is that it is *Buckley*’s theoretical heart, and not *McConnell*’s, that is now pumping with renewed vigor.

That reality is no doubt what most disturbed Justice Souter and the other dissenting justices. *WRTL II* is just the latest in the line of

¹²⁸ *Id.* at 2695 (citing *McConnell*, 540 U.S. at 190).

¹²⁹ *Id.* at 2699 (citing *McConnell*, 540 U.S. at 206–07).

¹³⁰ *Id.* at 2705.

¹³¹ *Id.* at 2669.

¹³² *Id.* at note 7.

¹³³ *Id.* at 2674 (Alito, J., concurring).

¹³⁴ *Id.* at 2682 n.5 (Scalia, J., concurring).

cases in which Justices Souter, Stevens, and Ginsburg have appeared to regard the right to free political speech that *Buckley* endorsed and *WRTL II* reaffirmed as a threat to, rather than the fundamental building block of, democracy.¹³⁵ (Justice Breyer has more often joined them than not.¹³⁶ Because of his *Randall* opinion, however, which purported to rely in part on *Buckley*, he must be credited with a tendency to value freedom somewhat more highly than his colleagues.)

In what follows, I will try to expose the nub of the controversy among the justices over the First Amendment and campaign finance regulation. I aim for transparency, and in doing so I will generalize about the roots of the controversy in a manner that I acknowledge runs the risk of oversimplifying what are in fact complex and subtle lines of argument. But the nub of the controversy lies in this: the majority and the dissents in *WRTL II* (or in any of the campaign finance cases that the Court has decided since *Austin*) occupy *no* common First Amendment ground. Though they disagree in good faith, both of their points of view cannot be right, and the differences that exist between them are at such a fundamental level that they leave scant room for compromise. Some commentators imply that “balancing” might help to untie the Gordian knot,¹³⁷ but without more clarity than they or the Court itself has provided about the nature and content of the interests to be assessed a balancing approach carries little prospect of success. Reading the differing opinions in search of an opening wedge for genuine engagement, one finds the justices talking past one another. They share neither empirical assumptions nor theoretical premises. For the majority in *WRTL II*, freedom to spend money on political speech—including

¹³⁵Cf. *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377 (2000); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604 (1996); *Federal Election Comm’n v. Beaumont*, 539 U.S. 146 (2003); *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003); *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

¹³⁶See cases cited *supra* note 135.

¹³⁷Richard L. Hasen, *supra* note 9, at 62 (urging the Court to engage in “careful balancing and policing for self-dealing under the participatory self-government rationale”); cf. Allison Hayward, *supra* note 15, at 216 (suggesting that, while there is “no coherent middle road,” it is nevertheless impossible to “reason a path absent some ad hoc balancing based on the justices’ individual experience, biases, and what may appear ‘perfectly obvious’ to them”).

freedom of corporations to spend money on political speech about issues—is *the answer*. More speech coming from more points of view is always better than less speech coming from fewer. Restricting speech threatens democracy. Chief Justice Roberts, for example, thought that *WRTL II* was quintessentially a case “about political speech.”¹³⁸ And in Justice Scalia’s view, “perhaps [the Court’s] most important constitutional task is to assure freedom of political speech.”¹³⁹

The dissenters take an utterly opposing view. From their perspective, corporate and union freedom to spend money on political speech is *the problem*. Justice Souter’s dissent articulates their position in a nutshell:

Devoting concentrations of money in self-interested hands to the support of political campaigning [as freedom permits corporations and unions to do] . . . threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves. These are the elements summed up in the notion of political integrity, giving *it* [not freedom] a value second to none in a free society.¹⁴⁰

The competing positions have manifested themselves in a multiplicity of ways as the debate on the Court has played out. The issues and the arguments have varied in detail, of course, and I have described the doctrinal point at which they came to a head in *WRTL II*. A few examples of the major differences in basic perspective will suffice to illustrate the irreconcilable tension these differences reflect. First, a caveat about what follows. I acknowledge that I am convinced by the First Amendment views expressed by Chief Justice Roberts and Justice Scalia. I will not undertake in these pages further to advocate the merits of their views—or of my own. In many forums, I have articulated and attempted to defend my normative position

¹³⁸ *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2673 (2007).

¹³⁹ *Id.* at 2686 (Scalia, J., concurring).

¹⁴⁰ *Id.* at 2689 (Souter, J., dissenting) (emphasis added).

that most campaign finance regulations are unconstitutional, ineffective, and likely to do more harm than good.¹⁴¹ In addition I have in prior writings tried to make clear both the many deficiencies I observe in the empirical underpinnings of the case for regulation, as well as the difficulty I think exists in giving meaningful content to rhetorical invocations of such vague concepts as “electoral integrity” and the like.¹⁴²

The current majority believes that political freedom is both unambiguously good and central to democratic government. They regard it, moreover, as having been very much at stake in *WRTL II*. They think that the First Amendment protects the right to spend money to speak about politics because freedom to speak about political issues is at the amendment’s core, and speaking costs money. When corporations and unions spend money to engage in political speech, the majority does not worry that the ideas and issues that they discuss—or the fact that it is corporations and unions that discuss them—will corrode or distort or harm the political process. It has sometimes been thought that the First Amendment protects corporate and union speakers because corporations and unions *qua* corporations and unions, just like natural persons have First Amendment rights, but the majority in *WRTL II* implicitly rejected such a conclusion. Instead, the majority justices focused on protecting the *speech*:

¹⁴¹See, e.g., Lillian R. BeVier, Campaign Finance ‘Reform’ Proposals: A First Amendment Analysis (Cato Institute, 1997) (providing “a full accounting of regulation’s cost to political freedoms”); Lillian R. BeVier, Money and Politics: The First Amendment and Campaign Finance Reform, 73 Cal. L. Rev. 1045 (1985) (arguing that the general application of fatal strict scrutiny analysis to laws regulating political giving and spending is “not merely plausible but probably correct”); Lillian R. BeVier, Campaign Finance Reform: Specious Arguments, Intractable Dilemmas, 94 Colum. L. Rev. 1258 (1994) (articulating “a number of reasons for skepticism about the soundness of contemporary arguments in support of campaign finance reform” as of the Court’s ruling in *Austin v. Michigan Chamber of Commerce*); Lillian R. BeVier, The Issue of Issue Advocacy, 85 Va. L. Rev. 1761 (1999) (identifying “the explicitly normative, quasi-theoretical, nondoctrinally anchored case for regulating issue advocacy” and “outlining some reasons for rejecting it”); Lillian R. BeVier, What Ails Us? A Review of Ackerman and Ayres, Voting with Dollars: A New Paradigm for Campaign Finance, 112 Yale L.J. 1135 (2003) (asserting that “reforming [the campaign finance] system” will not remedy the problems of citizen disengagement and interest-group competition); BeVier, *supra* note 13 (noting that the McConnell majority “turned the First Amendment around”).

¹⁴²See sources cited in *supra* note 141.

“These cases are about political speech,”¹⁴³ affirmed the chief justice, who was echoed by Justice Scalia’s insistence that it is the Court’s “most important constitutional task to assure freedom of political speech.”¹⁴⁴

The majority has obviously concluded that having access to many voices and being able to evaluate the differing views they express enables citizens to hold their government accountable more effectively than they can when speech—whatever the identity of the speaker—is restricted. Perhaps as a corollary, they also appear to think that legislators are too likely to be self-interested and too eager to retain the power they have already acquired to be trusted to guard the “integrity of democracy.”¹⁴⁵ As the majority sees the political world, a host of intractable realities renders legislators impotent to reduce the amount of money spent on attempting to acquire political power. They think efforts by legislators to rid politics of money—even if such efforts were benignly motivated—will always be plagued by unintended consequences and hence that such efforts have been and always will be futile.¹⁴⁶

With FECA and BCRA, Congress has created a pervasive regulatory regime that has concentrated power in Washington-based interest groups, stifled grass roots political activity, embedded incumbent office-holders, and undermined the already fragile incentives that individuals have to participate in efforts to hold their government

¹⁴³WRTL II, 127 S. Ct. at 2673. Except to dismiss the “notion that a ban on campaign speech could also embrace issue advocacy,” because to do so would call into question the Court’s holding in “*Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights,” the chief justice took almost no notice of the fact that Wisconsin Right to Life is a corporation. *Id.*

¹⁴⁴*Id.* at 2686 (Scalia, J., concurring).

¹⁴⁵See *McConnell*, 540 U.S. 93, 263 (Scalia, J., dissenting):

Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country. . . The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.

¹⁴⁶See *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2686-87 (2007) (Scalia, J., dissenting) (finding “wondrous irony” in the “fact that the effect of BCRA has been to concentrate more political power in the hands of the country’s wealthiest individuals and their so-called 527 organizations, unregulated by § 203”).

accountable. Thus, the majority's perception of how the First Amendment requires the Court to go about determining the constitutionality of campaign finance regulations marries its commitment to the political freedom that is at stake to its deep skepticism about whether government regulation of political activity can ever be benignly motivated or benevolent in its effects.

The current dissenters disagree both about what is at stake and about political reality. To them, campaign finance regulation is not about freedom. It is about money, and about the need to neutralize its political leverage. Justice Souter's dissent repeatedly invokes the threat to "political integrity,"¹⁴⁷ posed by "money in huge amounts,"¹⁴⁸ "huge sums"¹⁴⁹ of money, "money in self-interested hands,"¹⁵⁰ "vast sums" of money,¹⁵¹ and "immense aggregations of wealth."¹⁵² The dissenters think that the need to "restrict[] the electoral leverage of concentrations of money in large corporations"¹⁵³ trumps whatever interest in political freedom might be at stake. Indeed, Justice Souter's dissent suggests that freedom to spend money to speak about political issues is no more protected by the First Amendment than is freedom to spend money to grow wheat for one's own consumption¹⁵⁴ or to pay child laborers.¹⁵⁵ That at least seems to be an appropriate inference: the Court should accord legislators the same deference when regulating political expenditures as it accords them when regulating the economy. Perhaps the dissenters simply do not value political freedom as highly as they value "democratic integrity," but there is no doubt that they do not regard freedom as importantly at risk in the regulation of expenditures on political speech by corporations and unions.

When they turn to assessing political reality, and they review the history of campaign finance, the dissenters perceive that Congress

¹⁴⁷*Id.* at 2689 (Souter, J., dissenting).

¹⁴⁸*Id.* at 2687.

¹⁴⁹*Id.* at 2688.

¹⁵⁰*Id.* at 2689.

¹⁵¹*Id.* at 2694.

¹⁵²*Id.* at 2696.

¹⁵³*Id.* at 2687.

¹⁵⁴*Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁵⁵*Hammer v. Dagenhart*, 247 U.S. 251 (1918).

has achieved “steady improvement of the national election laws.”¹⁵⁶ They regard BCRA as but the most recent step on the road to a well-functioning democracy.¹⁵⁷ From those facts, and from the perspective implicit in the lengthy introduction to Justice Souter’s *WRTL II* opinion, one can infer that the dissenters regard the progression of laws regulating campaign finance practices since the Tilman Act in 1907 as having achieved their goal of “sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.”¹⁵⁸ For the dissenters, the fact that BCRA and its antecedent statutory reforms are necessary to counter the threat that “concentrated wealth” poses to “electoral integrity”—especially the concentrated wealth possessed by corporations—is both palpable and self-evident:

This century-long tradition of legislation and judicial precedent rests on facing undeniable facts and testifies to an equally undeniable value. Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries, with no redolence of ‘grassroots’ about them. . . . From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.¹⁵⁹

Yet parsing Justice Souter’s opinion for the “undeniable facts” upon which he claims the “century-long tradition” rests, one does not find much empirical evidence regarding anything other than evidence of the amounts of money that have recently been spent on state and federal elections,¹⁶⁰ of the statements of politicians who have railed against moneyed interests,¹⁶¹ and of the increasingly

¹⁵⁶ *McConnell v. FEC*, 540 U.S. 93, 117 (2003).

¹⁵⁷ *Id.* at 224.

¹⁵⁸ *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2690 (2007) (Souter, J., dissenting).

¹⁵⁹ *Id.* at 2697.

¹⁶⁰ *Id.* at 2687–88.

¹⁶¹ *Id.* at 2689–90.

stringent legislation that Congress has passed.¹⁶² Opinion polls are cited, for example, to support the factual claim that “pervasive public cynicism” exists;¹⁶³ congressional debates and Senate reports are cited for the proposition that more reforms were needed when BCRA was being considered;¹⁶⁴ and rhetoric on the floor of the Senate is cited as though it reliably stated empirical fact.¹⁶⁵ In addition, the “value” to which Justice Souter says century-long tradition testifies is only “undeniable” if one ignores, as his opinion unfortunately does, the competing values that others—not merely, but certainly including, the current majority—have identified.¹⁶⁶ The value that Justice Souter treasures may indeed be the one that ought to trump, but its primacy is at the very least hardly “undeniable.” Still, Justice Souter’s words stand as vivid exemplars of the unbridgeable chasm between his and the other dissenters’ fundamental premises and the deeply held convictions of those in the current majority on the Court who disagree.

There is little hope for reconciliation of the competing views of the current majority and the dissenters. Their disagreement is far more fundamental than a simple dispute about doctrine or about what *McConnell* held and whether *WRTL II* actually or only in effect overrules it. The problem—and it is a problem that has plagued the

¹⁶²*Id.* at 2689–97. A few scholarly efforts have been made to challenge some of the empirical assumptions that support Justice Souter’s opinion, but he does not join issue with their claims. See, e.g., David M. Primo and Jeffrey Milyo, Campaign Finance Laws and Political Efficacy: Evidence from the States, 5 *Election L.J.* 23, 36 (2006) (reporting results of a study of the link between campaign finance laws and citizen perceptions of democratic rule, which found that “the effect of campaign finance laws is sometimes perverse, rarely positive, and never more than modest”); Nathaniel Persily and Kelli Lammie, *The Law of Democracy: Campaign Finance after McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 *U. Pa. L. Rev.* 119, 174 (2004) (reporting results of a study concluding that citizens of countries with radically different systems of campaign finance regulation share Americans’ lack of “confidence in the system of representative government,” which suggests that campaign finance reformers might be surprised and “disappointed by the intractability and psychological roots of that lack of confidence”).

¹⁶³*Id.* at 2688.

¹⁶⁴*Id.* at 2694.

¹⁶⁵*Id.* at 2690 (recounting the lamentation of an early reformer).

¹⁶⁶See, e.g., Richard A. Epstein, *McConnell v. Federal Election Commission: A Deadly Dose of Double Deference*, 3 *Election L.J.* 231 (2004).

Court since *Buckley*—is that the justices do not reason from the same premises, either as a matter of First Amendment principle or as a matter of the empirical assumptions that drive their respective analyses. They assess the worth of political freedom differently. They entertain wildly divergent assessments of the need for legislation to “promote democracy.”¹⁶⁷ And they hold entirely disparate views about either the possibility that legislation can actually effectuate genuine improvement or the reliability of the elected officeholders who claim to have acted as guardians of the interests of those who seek to have them voted out of office.

I have not aimed in this brief essay to make once again the case for freedom and against regulation. My aim, rather, has been to demonstrate the nature of the chasm of theory, perception, and passionate conviction that separates those who advocate regulation of the political process from those who reject it in principle. Bridging the gap that exists between them will require more than cogent legal argument about matters of doctrinal detail. Rather, it will require one group or the other to relinquish fundamental beliefs about our constitutional democracy and about the role of the Court in preserving it. Compromise on such matters is not in the cards. Thus, the prospects for reconciliation cannot be thought bright.

¹⁶⁷Briffault, *supra* note 8, at 149.

