AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Campaign Finance

**Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449** (2007)

*In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA). Section 203 of the BCRA makes it a federal crime for any corporation to broadcast, within 30 days of an election, any “electioneering communication” that names a federal candidate for elected office and is targeted to the electorate. The Court upheld Section 203 against a facial challenge in* McConnell v. Federal Election Commission *(2003), concluding that the ban was valid against express advocacy and its functional equivalent even though some questions might remain about its validity relative to “genuine issue ads.”*

*In the summer of 2004, Wisconsin Right to Life, Inc., (WRTL) a nonprofit advocacy corporation, began running a radio ad urging Wisconsinites to call their two U.S. senators (which the ad named) in opposition to the use of the filibuster to obstruct the confirmation of judicial nominees. Arguably, Section 203 required that such ads be taken off the air by August 15, in anticipation of the Wisconsin primary when incumbent Democratic senator Russ Feingold would appear on the ballot unopposed. WRTL had in previous years operated a separate political action committee (PAC) to make explicit campaign expenditures in opposition to Feingold and other politicians, but did not do so in 2004.*

*WRTL filed suit before a three-judge federal panel against the Federal Election Commission seeking an injunction preventing the application of Section 203 against its ads. The panel dismissed the challenge, but the U.S. Supreme Court held that the challenge could go forward. On remand, a divided panel held that BCRA was unconstitutional as applied to the type of issue ads that the WRTL had been running. In a 5-4 decision, the U.S. Supreme Court affirmed that ruling. For the Court, the chief justice held that Section 203 had to be interpreted narrowly so as to apply only to ads “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” and not to ads that were perceived as having the intent or effect of aiding or hampering any particular candidate. Other members of the majority were skeptical that any test could be applied to distinguish between legal issue ads and illegal election ads, and thus thought Section 203 should be struck down in its entirety. The dissenting justices were similarly skeptical that any meaningful test could be developed, but thought that the BCRA should therefore be broadened to prohibit issue ads.*

CHIEF JUSTICE ROBERTS.

. . . .

“The freedom of speech … guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *First National Bank of Boston v. Bellotti* (1978). To safeguard this liberty, the proper standard for an as-applied challenge to BCRA §203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. . . . In short, it must give the benefit of any doubt to protecting rather than stifling speech.

In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. 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.

. . . .

At best, appellants have shown what we have acknowledged at least since Buckley v. Valeo (1976): that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” Thornhill v. Alabama (1940). Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.

We confronted a similar issue in Ashcroft v. Free Speech Coalition (2002), in which the Government argued that virtual images of child pornography were difficult to distinguish from real images. . . . As we explained: “The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.”

 Because WRTL’s ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of McConnell’s holding.

BCRA §203 can be constitutionally applied to WRTL’s ads only if it is narrowly tailored to further a compelling interest. *McConnell v. Federal Election Commission* (2003). . . .

. . . .

 This Court has long recognized “the governmental interest in preventing corruption and the appearance of corruption” in election campaigns. This interest has been invoked as a reason for upholding contribution limits. As Buckley explained, “[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.” We have suggested that this interest might also justify limits on electioneering expenditures because it may be that, in some circumstances, “large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions.”

. . . . Enough is enough. Issue ads like WRTL’s are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them. To equate WRTL’s ads with contributions is to ignore their value as political speech.

. . . .

A second possible compelling interest recognized by this Court lies in addressing a “different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” *Austin v. Michigan Chamber of Congress* (1990). . . .

 These cases did not suggest, however, that the interest in combating “a different type of corruption” extended beyond campaign speech. Quite the contrary. Two of the Justices who joined the 6-to-3 majority in Austin relied, in upholding the constitutionality of the ban on campaign speech, on the fact that corporations retained freedom to speak on issues as distinct from election campaigns. . . .

Accepting the notion that a ban on campaign speech could also embrace issue advocacy would call into question our holding in Bellotti that the corporate identity of a speaker does not strip corporations of all free speech rights. . . .

. . . .

*Affirmed*.

JUSTICE ALITO, concurring.

. . . . If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell v. Federal Election Commission* (2003).

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part.

A Moroccan cartoonist once defended his criticism of the Moroccan monarch (lèse majesté being a serious crime in Morocco) as follows: “‘I’m not a revolutionary, I’m just defending freedom of speech. . . . I never said we had to change the king—no, no, no, no! But I said that some things the king is doing, I do not like. Is that a crime?’” Well, in the United States (making due allowance for the fact that we have elected representatives instead of a king) it is a crime, at least if the speaker is a union or a corporation (including not-for-profit public-interest corporations) and if the representative is identified by name within a certain period before a primary or congressional election in which he is running. That is the import of §203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), the constitutionality of which we upheld three Terms ago in McConnell v. Federal Election Commission (2003). As an element essential to that determination of constitutionality, our opinion left open the possibility that a corporation or union could establish that, in the particular circumstances of its case, the ban was unconstitutional because it was (to pursue the analogy) only the king’s policies and not his tenure in office that was criticized. Today’s cases present the question of what sort of showing is necessary for that purpose. For the reasons I set forth below, it is my view that no test for such a showing 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 (as pronounced in McConnell). I would therefore reconsider the decision that sets us the unsavory task of separating issue-speech from election-speech with no clear criterion.

. . . .

Buckley might well have been the last word on limitations on independent expenditures. Some argued, however, that independent expenditures by corporations should be treated differently. That argument should have been foreclosed by Buckley for several reasons: (1) the particular provision at issue in Buckley . . . was directed to expenditures not just by “individuals,” but by “persons,” with “‘persons’” specifically defined to include “‘corporation[s]’”; (2) the plaintiffs in Buckley included corporations; and (3) Buckley cited a case that involved limitations on corporations in support of its striking down the restriction at issue, Miami Herald Publishing Co. v. Tornillo (1974). Moreover, pre-Buckley cases had accorded corporations full First Amendment protection. *NAACP v. Button* (1963); *Grosjean v. American Press Co*. (1936). . . .

Indeed, one would have thought the coup de grâce to the argument that corporations can be treated differently for these purposes was dealt by First National Bank of Boston v. Bellotti (1978). . . .

The Court strayed far from these principles, however, in one post-Buckley case: Austin v. Michigan Chamber of Commerce (1990). This was the only pre-McConnell case in which this Court had ever permitted the Government to restrict political speech based on the corporate identity of the speaker. . . . How did the Court manage to reach this result without overruling Bellotti? It purported to recognize a different class of corruption: “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

Among the many problems with this “new” theory of corruption was that it actually constituted “the same ‘corrosive and distorting effects of immense aggregations of wealth,’ found insufficient to sustain a similar prohibition just a decade earlier,” in Bellotti. Indeed, Buckley itself had cautioned that “[t]he First Amendment’s protection against governmental abridgment of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.” . . .

. . . .

Like the Buckley Court and the parties to these cases, I recognize the practical reality that corporations can evade the express-advocacy standard. I share the instinct that “[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.” But the way to indulge that instinct consistently with the First Amendment is either to eliminate restrictions on independent expenditures altogether or to confine them to one side of the traditional line—the express-advocacy line, set in concrete on a calm day by Buckley, several decades ago. Section 203’s line is bright, but it bans vast amounts of political advocacy indistinguishable from hitherto protected speech.

The foregoing analysis shows that McConnell was mistaken in its belief that as-applied challenges could eliminate the unconstitutional applications of §203. They can do so only if a test is adopted which contradicts the holding of McConnell—that §203 is facially valid because the vast majority of pre-election issue ads can constitutionally be proscribed. . . .

. . . .

There is wondrous irony to be found in both the genesis and the consequences of BCRA. In the fact that the institutions it was designed to muzzle—unions and nearly all manner of corporations—for all the “corrosive and distorting effects” of their “immense aggregations of wealth,” were utterly impotent to prevent the passage of this legislation that forbids them to criticize candidates (including incumbents). 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. . . . And in the fact that while these wealthy individuals dominate political discourse, it is this small, grass-roots organization of Wisconsin Right to Life that is muzzled.

I would overrule that part of the Court’s decision in McConnell upholding §203(a) of BCRA. . . .

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

. . . .

The indispensable ingredient of a political candidacy is money for advertising. . . .

The indispensability of these huge sums has two significant consequences for American Government that are particularly on point here. The enormous demands, first, assign power to deep pockets. . . .

Some major contributors get satisfaction from pitching in for their candidates, but political preference fails to account for the frequency of giving “substantial sums to both major national parties,” a practice driven “by stark political pragmatism, not by ideological support for either party or their candidates.” What the high-dollar pragmatists of either variety get is special access to the officials they help elect, and with it a disproportionate influence on those in power. . . .

Voters know this. Hence, the second important consequence of the demand for big money to finance publicity: pervasive public cynicism. . . .

Devoting concentrations of money in self-interested hands to the support of political campaigning therefore 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 a value second to none in a free society.

. . . . .

  In sum, Congress in 1907 prohibited corporate contributions to candidates and in 1943 applied the same ban to unions. In 1947, Congress extended the complete ban from contributions to expenditures “in connection with” an election, a phrase so vague that in 1986 we held it must be confined to instances of express advocacy using magic words. Congress determined, in 2002, that corporate and union expenditures for fake issue ads devoid of magic words should be regulated using a narrow definition of “electioneering communication” to reach only broadcast ads that were the practical equivalents of express advocacy. In 2003, this Court found the provision free from vagueness and justified by the concern that drove its enactment.

 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. Neither Congress’s decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete quid pro quo; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions. 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.

. . . .

In sum, any 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. Any alert voters who heard or saw WRTL’s ads would have understood that WRTL was telling them that the Senator’s position on the filibusters should be grounds to vote against him.

. . . .

 The principal opinion . . . simply inverts what we said in McConnell. While we left open the possibility of a “genuine” or “pure” issue ad that might not be open to regulation under §203, we meant that an issue ad without campaign advocacy could escape the restriction. The implication of the adjectives “genuine” and “pure” is unmistakable: if 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.” But the principal opinion inexplicably wrings the opposite conclusion from those words: if an ad is susceptible to any “reasonable interpretation other than as an appeal to vote for or against a specific candidate,” then it must be a “pure” or “genuine” issue ad. This stands McConnell on its head, and on this reasoning it is possible that even some ads with magic words could not be regulated.

. . . .

If The Chief Justice were correct that McConnell made the constitutional application of §203 contingent on whether a corporation’s “motives were pure,” or its issue advocacy “subjective[ly] sincer[e],” then I, too, might be inclined to reconsider McConnell’s language. But McConnell did not do that. It did not purport to draw constitutional lines based on the subjective motivations of corporations (or their principals) sponsoring political ads, but merely described our test for equivalence to express advocacy as resting on the ads’ “electioneering purpose,” which will be objectively apparent from those ads’ content and context (as these cases and the examples cited in McConnell readily show). We therefore held that §203 was not substantially overbroad because “the vast majority of ads clearly had such a purpose,” and consequently could be regulated consistent with the First Amendment.

. . . . [T]he application of his test here makes it difficult to see how relevant contextual evidence could ever be taken into account the way it was in McConnell, and it is hard to imagine The Chief Justice would ever find an ad to be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,” unless it contained words of express advocacy. The Chief Justice thus effectively reinstates the same toothless “magic words” criterion of regulable electioneering that led Congress to enact BCRA in the first place.

 [I]t may be that the principal opinion rejects McConnell on the erroneous assumption that §203 flatly bans independent electioneering communications by a corporation. The Chief Justice argues that corporations must receive “the benefit of any doubt,” whenever we undertake the task of “separating … political speech protected under the First Amendment from that which may be banned.” But this is a fundamental misconception of the task at hand: we have already held that it is “‘simply wrong’ to view [§203] as a ‘complete ban’ on expression,” because PAC financing provides corporations “with a constitutionally sufficient opportunity to engage in express advocacy.” . . .

. . . .

The price of McConnell’s demise as authority on §203 seems to me to be a high one. The Court (and, I think, the country) loses when important precedent is overruled without good reason, and there is no justification for departing from our usual rule of stare decisis here. The same combination of alternatives that was available to corporations affected by McConnell in 2003 is available today: WRTL could have run a newspaper ad, could have paid for the broadcast ads through its PAC, could have established itself as an MCFL organization free of corporate money [*Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (1986)], and could have said “call your Senators” instead of naming Senator Feingold in its ads broadcasted just before the election. Nothing in the related law surrounding §203 has changed in any way, let alone in any way that undermines McConnell’s rationale. . . .

. . . .