

Berkeley Center for Law, Business and the Economy  
Boalt Hall School of Law - University of California, Berkeley

## **Campaign Finance After *WRTL***

July 2007

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On June 25, 2007, the United States Supreme Court issued an important decision on campaign finance in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, --- S. Ct. ----, 2007 WL 1804336 (*WRTL*). The opinion is likely to bolster corporate and union spending on political advertisements just prior to elections.

At issue in *WRTL* was the interpretation of the Bipartisan Campaign Reform Act of 2002 (BCRA), better known under its legislative moniker, the McCain-Feingold Act. BCRA targeted business and union involvement in political campaigns generally, and specifically the use of soft money and political advertising in ways designed to influence electoral outcomes. Among its many pieces, BCRA attempts to distinguish political ads that “expressly advocate” for or against a candidate from ads that “issue advocate” to influence mass opinion on policy questions. The boundary separating these two forms of advocacy is elusive: debates about candidates for office unavoidably implicate public issues and vice versa. Yet the distinction is critical, at least to the bi-partisan coalition that passed McCain-Feingold: if policymakers cannot define express advocacy in law, the argument went, then business and labor interests could easily sidestep limits on campaign contributions by running their own advertisements endorsing candidates.

To make this distinction, BCRA adopted an ostensibly clear rule: any broadcast ad that mentions the name of a candidate for federal office within 60 days of a general election or 30 days of a primary or caucus was considered illegal “electioneering communication.” The non-profit corporation Wisconsin Right to Life challenged this provision of BCRA with a television ad excoriating the practice in the Senate of using the filibuster to block federal judicial nominees. The ad mentioned by name Senator Feingold less than 30 days before he was up for reelection in the Wisconsin primary, and consequently it ran afoul of BCRA as interpreted in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). The ad did not state that Senator Feingold supported the filibuster or that *WRTL* opposed his candidacy, but the *WRTL* website made these positions clear. *WRTL* sued the FEC for a declaration that BCRA violated the First Amendment as it applied to this advertisement. The district court agreed that BCRA was unconstitutional and the FEC appealed.

A five-Justice majority sided with Wisconsin Right to Life and declared BCRA unconstitutional, but only as applied to this advertisement. Three Justices in the majority, Scalia, Kennedy, and Thomas, sought to declare the relevant section of BCRA unconstitutional on its face. Doing so would require a departure by the Court from the precedent that appeared to have been set in *McConnell*. However, the two swing Justices in the majority, Roberts and Alito, declined to go so far and instead limited the reach of *McConnell* by moving away from a bright-line rule. In its place, they announced the following test for electioneering communication: “an ad is the functional equivalent of express advocacy [and therefore can be proscribed under BCRA] only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” This test pares back BCRA by resolving ambiguity over whether an ad is express or issue advocacy in favor of the latter. Under the plurality’s approach, a disputed ad only qualifies as express advocacy—and is therefore proscribed under BCRA—if *no* reasonable construction places it in the issue advocacy category. In making this determination, courts and the FEC must confine themselves to the “four corners” of the ad itself. Contextual information, such as the *WRTL* website that called for Senator Feingold’s defeat, is irrelevant to such an inquiry.

*WRTL* has significant legal and policy implications. Most immediately, corporate and union-sponsored ads that mention candidate names and run before elections may now be permissible under BCRA so long as they qualify as issue advocacy under the Roberts/Alito test. The casuistic nature of this test is almost certain to tempt a greater volume of political advertisements prior to future elections that name (and possibly criticize / defend) candidates while providing sufficient issue content to satisfy the Roberts/Alito test. Policing these ads may then entail costly, case-by-case adjudication rather than enforcement with bright-line rules. More generally, because the opinion is rooted in First Amendment principles, it constrains future legislative efforts by Congress to regulate express advocacy, rendering off limits the regulation of any advertisement activity that passes muster under the Roberts/Alito standard.

The changes wrought by *WRTL* may also represent the early stages of future turbulence within the Roberts Court, both within campaign-finance jurisprudence and outside of it. As mentioned above, only two of the nine Justices support the test laid out above, and consequently its shelf life may be limited. Three of the Justices—Scalia, Kennedy, and Thomas—maintained a willingness simply to overturn *McConnell* and declare parts of BCRA facially unconstitutional. (Justice Alito expressed a willingness to consider this as well.) The wildcard in this equation is Chief Justice Roberts, whose judicial philosophy suggests a strong reluctance to overturn established precedent. Roberts, in fact, had indicated in an earlier decision that he is unwilling to overrule

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*Buckley v. Valeo*, the Court's seminal opinion in this area. However, *WRTL* may suggest a willingness by Roberts to distinguish and/or limit earlier rulings he disagrees with, so long as so doing does not explicitly abandon precedent.

*WRTL* clearly expands First Amendment protections, but that freedom may come with a price: more money in politics, and more opportunities for corruptive relationships between politicians and their supporters within corporations and organized labor. More generally, when juxtaposed to other 5-4 decisions during this Term, this case indicates what a dramatic effect Justices Roberts and Alito have had on the balance of political power on the Court.

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