

FEDERAL ELECTION COMMISSION v. WISCONSIN RIGHT TO LIFE, INC.

127 S.Ct. 2652 (2007)

[Wisconsin Right To Life, a non-profit ideological advocacy corporation, challenged section 203 of BCRA, which makes it a federal crime for a corporation to use its general treasury funds to pay for any “electioneering communication,” defined as any broadcast that refers to a candidate for federal office and is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction where that candidate is running, WRTL argued that section 203 was unconstitutional as applied to its activities. During the 2004 campaign, WRTL sought to broadcast advertisements declaring that a group of Senators was filibustering to delay and block federal judicial nominees and telling voters to contact Wisconsin Senators Feingold and Kohl to urge them to oppose the filibuster.

Each of the ads concluded: “A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple “yes” or “no” vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org. Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.”

In *McConnell v. FEC*, the Court upheld section 203 of BCRA against a facial challenge, arguing that there was no overbreadth problem when “issue advocacy,” speech about public issues that mentioned a candidate, was the “functional equivalent” of “express advocacy,” speech which promoted a particular candidate’s election or defeat. The court held 5-4 that BCRA was unconstitutional as applied to WRTL’s issue advertisements.

Chief Justice Roberts, writing only for himself and Justice Alito, argued that the question was not moot because it fell into the category of controversies that were “capable of repetition, yet evading review.” Chief Justice Roberts argued that the key issue in the case was whether WRTL’s ads were the “functional equivalent” of express campaign speech expressly advocating the election or defeat of a candidate for federal office, or whether they were “genuine” issue ads that could not be regulated under the First Amendment.]

ROBERTS, C.J. :In drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. We conclude that the speech at issue in this as-applied challenge is not the “functional equivalent” of express campaign speech. We further conclude that the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy, and accordingly we hold that BCRA § 203 is unconstitutional as applied to the advertisements at issue in these cases. . . .

The FEC, intervenors, and the dissent below contend that *McConnell* already established the constitutional test for determining if an ad is the functional equivalent of express advocacy: whether the ad is intended to influence elections and has that effect. . . . [We disagree] When the *McConnell* Court considered the possible facial overbreadth of § 203, it looked to the studies in the record analyzing ads broadcast during the blackout periods, and those studies had classified the ads in terms of intent and effect. The Court's assessment was accordingly phrased in the same terms, which the Court regarded as sufficient to conclude, on the record before it, that the plaintiffs had not “carried their heavy burden of proving” that § 203 was facially overbroad and could not be enforced in any circumstances. . . . More importantly, this Court in *Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates. After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms “ ‘of intent and of effect’ ” would afford “ ‘no security for free discussion.’ ” . . .

[W]e decline to adopt a test for as-applied challenges turning on the speaker's intent to affect an election. The test to distinguish constitutionally protected political speech from speech that BCRA may proscribe should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also “reflec[t] our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’ ” A test turning on the intent of the speaker does not remotely fit the bill.

Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to

a criminal prosecution would be that its motives were pure. An intent-based standard “blankets with uncertainty whatever may be said,” and “offers no security for free discussion.” The FEC does not disagree. In its brief filed in the first appeal in this litigation, it argued that a “constitutional standard that turned on the subjective sincerity of a speaker’s message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation.” . . . A test focused on the speaker’s intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another.

. . .
Buckley also explains the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test “ ‘puts the speaker . . . wholly at the mercy of the varied understanding of his hearers.’ ” It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

[T]he 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. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. And it must eschew “the open-ended rough-and-tumble of factors,” which “invi[te] complex argument in a trial court and a virtually inevitable appeal.” 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.

Despite these characteristics, appellants assert that the content of WRTL’s ads alone betrays their electioneering nature. Indeed, the FEC suggests that *any* ad covered by § 203 that includes “an appeal to citizens to contact their elected representative” is the “functional equivalent” of an ad saying defeat or elect that candidate. Brief for Appellant FEC 31. We do not agree. To take just one example, during a blackout period the House considered the proposed Universal National Service Act. There would be no reason to regard an ad supporting or opposing that Act, and urging citizens to contact their Representative about it, as the equivalent of an ad saying vote for or against the Representative. Issue advocacy conveys information and educates. An issue ad’s impact on an election, if it exists at all, will come only after the voters hear the information and choose-uninvited by the ad-to factor it into their voting decisions.^a

The FEC and intervenors try to turn this difference to their advantage, citing McConnell’s statements “that the most effective campaign ads, like the most effective commercials for products . . . avoid the [*Buckley*] magic words [expressly advocating the election or defeat of a candidate],” and that advertisers “would seldom choose to use such words even if permitted.” An expert for the FEC in these cases relied on those observations to argue that WRTL’s ads are especially effective electioneering ads because they are “subtl[e],” focusing on issues rather than simply exhorting the electorate to vote against Senator Feingold. Rephrased a bit, the argument perversely maintains that the less an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express

^aFor these reasons, we cannot agree with Justice SOUTER’s assertion that “anyone who heard the Feingold ads . . . would know that WRTL’s message was to vote against Feingold.” The dissent supports this assertion by likening WRTL’s ads to the “Jane Doe” example identified in *McConnell v. Federal Election Comm’n*. But that ad “condemned Jane Doe’s record on a particular issue.” WRTL’s ads do not do so; they instead take a position on the filibuster issue and exhort constituents to contact Senators Feingold and Kohl to advance that position. Indeed, one would not even know from the ads whether Senator Feingold supported or opposed filibusters. Justice SOUTER is confident Wisconsinites independently knew Senator Feingold’s position on filibusters, but we think that confidence misplaced. A prominent study found, for example, 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.

advocacy. This “heads I win, tails you lose” approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads. . . . Under appellants' view, there can be no such thing as a genuine issue ad during the blackout period-it is simply a very effective electioneering ad.

Looking beyond the content of WRTL's ads, the FEC and intervenors argue that several “contextual” factors prove that the ads are the equivalent of express advocacy. First, appellants cite evidence that during the same election cycle, WRTL and its Political Action Committee (PAC) actively opposed Senator Feingold's reelection and identified filibusters as a campaign issue. [They observe that the ads were to be aired near elections but not near actual Senate votes on judicial nominees, and that WRTL did not run the ads after the elections.] This evidence goes to WRTL's subjective intent in running the ads, and we have already explained that WRTL's intent is irrelevant in an as-applied challenge. Evidence of this sort is therefore beside the point, as it should be-WRTL does not forfeit its right to speak on issues simply because in other aspects of its work it also opposes candidates who are involved with those issues. . . . That the ads were run close to an election is unremarkable in a challenge like this. *Every* ad covered by BCRA § 203 will by definition air just before a primary or general election. If this were enough to prove that an ad is the functional equivalent of express advocacy, then BCRA would be constitutional in all of its applications. . . .

Given the standard we have adopted for determining whether an ad is the “functional equivalent” of express advocacy, contextual factors of the sort invoked by appellants should seldom play a significant role in the inquiry. . . . At best, appellants have shown what we have acknowledged at least since *Buckley* : 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.” 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.^b

BCRA § 203 can be constitutionally applied to WRTL's ads only if it is narrowly tailored to further a compelling interest. This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent. . . .

This Court has long recognized “the governmental interest in preventing corruption and the appearance of corruption” in election campaigns. *Buckley*. . . . 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.”

McConnell arguably applied this interest-which this Court had only assumed could justify regulation of express advocacy-to ads that were the “functional equivalent” of express advocacy. But to justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are not the functional equivalent of express advocacy. 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. . . . Appellants argue that an expansive definition of “functional equivalent” is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions. But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny. “[T]he desire for a bright-line rule ... hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom.”

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

^bJustice SCALIA thinks our test impermissibly vague. As should be evident, we agree with Justice SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of “contextual” factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech. And keep in mind this test is only triggered if the speech meets the brightline requirements of BCRA § 203 in the first place. . . .

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* invoked this interest to uphold a state statute making it a felony for corporations to use treasury funds for independent expenditures on express election advocacy. *McConnell* also relied on this interest in upholding regulation not just of express advocacy, but also its “functional equivalent.”

These cases did not suggest, however, that the interest in combating “a different type of corruption” extended beyond campaign speech. . . . 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. It would be a constitutional “bait and switch” to conclude that corporate campaign speech may be banned in part because corporate issue advocacy is not, and then assert that corporate issue advocacy may be banned as well, pursuant to the same asserted compelling interest, through a broad conception of what constitutes the functional equivalent of campaign speech, or by relying on the inability to distinguish campaign speech from issue advocacy.

The FEC and intervenors do not argue that the *Austin* interest justifies regulating genuine issue ads. Instead, they focus on establishing that WRTL's ads are the functional equivalent of express advocacy—a contention we have already rejected. We hold that the interest recognized in *Austin* as justifying regulation of corporate campaign speech and extended in *McConnell* to the functional equivalent of such speech has no application to issue advocacy of the sort engaged in by WRTL.

[Justice Alito joined Chief Justice Roberts’ opinion, but noted that “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 Comm’n*, that § 203 is facially constitutional.”]

SCALIA, J., concurring in the judgment, joined by Kennedy and Thomas, JJ.: Though the principal opinion purports to recognize the “imperative for clarity” in this area of First Amendment law, [it] falls far short. . . .^a

If a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it. Especially since a consequence of the express-advocacy interpretation was the invalidation of the entire limitation on independent expenditures, in part because the statute (as thus narrowed) could not be an effective limitation on expenditures for electoral advocacy. . . . The Court eschewed narrowing constructions that would have been more faithful to the text and more effective at capturing campaign speech *because those tests were all too vague*. . . . Indeed, 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.^b

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

^aThe principal opinion's test . . . hinges on assessment of the reasonableness of a determination that something does not constitute advocacy of the election or defeat of a candidate.[relocated footnote]

^bThe same must be said, I think, of the test proposed by the principal opinion. While its coverage is not entirely clear, it would apparently protect even *McConnell*'s paradigmatic example of the functional equivalent of express advocacy—the so-called “Jane Doe ad,” which “condemned Jane Doe's record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’” Indeed, it at least arguably protects the most “striking” example of a so-called sham issue ad in the *McConnell* record, the notorious “Yellowtail ad,” which accused Bill Yellowtail of striking his wife and then urged listeners to call him and “[t]ell him to support family values.” The claim that § 203 on its face does not reach a substantial amount of speech protected under the principal opinion's test—and that the test is therefore compatible with *McConnell*—seems to me indefensible. Indeed, the principal opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation.

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. . . . *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. In light of the weakness in *Austin's* rationale, and in light of the longstanding acceptance of the clarity of *Buckley's* express-advocacy line, it was adventurous for *McConnell* to extend *Austin* beyond corporate speech constituting express advocacy. Today's cases make it apparent that the adventure is a flop, and that *McConnell's* holding concerning § 203 was wrong.

[T]he *McConnell* regime is unworkable because of the inability of any acceptable as-applied test to validate the facial constitutionality of § 203-that is, its inability to sustain proscription of the vast majority of issue ads. . . . The 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 illusory. . . .

Perhaps overruling this one part of *McConnell* with respect to one part of BCRA would not “ai[d] the legislative effort to combat real or apparent corruption.” But the First Amendment was not designed to facilitate legislation, even wise legislation. Indeed, the assessment of former House Minority Leader Richard Gephardt, a proponent of campaign-finance reform, may well be correct. He said that “ ‘[w]hat we have is two important values in direct conflict: freedom of speech and our desire for healthy campaigns in a healthy democracy,’ ” and “ ‘[y]ou can't have both.’ ” (He was referring, presumably, to incumbents' notions of healthy campaigns.) If he was wrong, however, and the two values can coexist, it is pretty clear which side of the equation this institution is primarily responsible for. It is perhaps our most important constitutional task to assure freedom of political speech. And when a statute creates a regime as unworkable and unconstitutional as today's effort at as-applied review proves § 203 to be, it is our responsibility to decline enforcement.

* * *

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. (In the 2004 election cycle, a mere 24 individuals contributed an astounding total of \$142 million to 527s.) 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.

SOUTER, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.: [N]arrowing the corporate-union electioneering limitation to magic words soon reduced it to futility. . . . [T]he “ingenuity and resourcefulness” of political financiers revealed the massive regulatory gap left by the “magic words” test. It proved to be the door through which so-called “issue ads” of current practice entered American politics.

An issue ad is an advertisement on a political subject urging the reader or listener to let a politician know what he thinks, but containing no magic words telling the recipient to vote for or against anyone. By the 1996 election cycle, between \$135 and \$150 million was being devoted to these ads, and because they had no magic words, they failed to trigger the limitation on union or corporate expenditures for electioneering. Experience showed, however, just what we foresaw in *Buckley*, that the line between “issue” broadcasts and outright electioneering was a patent fiction, as in the example of a television “issue ad” that ran during a Montana congressional race between Republican Rick Hill and Democrat Bill Yellowtail in 1996:

“ ‘Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But ‘her nose was not broken.’ He talks law and order ... but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments-then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.’ ”

There are no “magic words” of “express advocacy” in that statement, but no one could deny with a straight

face that the message called for defeating Yellowtail.

There was nothing unusual about the Yellowtail issue ad in 1996, and an enquiry into campaign practices by the Senate Committee on Governmental Affairs found as a general matter that “the distinction between issue and express advocacy ... appeared to be meaningless in the 1996 elections.” . . . Nor was it surprising that the Senate Committee heard testimony that “ ‘[w]ithout taming’ ” the vast sums flowing into issue ads, “ ‘campaign finance reform-no matter how thoroughly it addresses ... perceived problems-will come to naught.’ ” . . . The Committee predicted that “if the course of non-action is followed, ... Congress would be encouraging further growth of union, corporate nonprofit and individual independent expenditures.” The next two elections validated *2695 the prediction: during the 1998 cycle, spending on issue ads doubled to between \$270 and \$340 million, and the figure climbed to \$500 million in the 2000 cycle. A report from the Annenberg Public Policy Center concluded that “[t]he type of issue ad that dominated depended greatly on how close we were to the general election Though candidate-centered issue ads always made up a majority of issue ads, as the election approached the percent [of] candidate-centered spots increased ... such that by the last two months before the election almost all televised issue spots made a case for or against a candidate.” Issue Advertising in the 1999-2000 Election Cycle 14 (2001). . . . They were worth the money of those who ultimately paid for them. According to one former Senator, “ ‘Members will ... be favorably disposed to those who finance’ ” interest groups that run “ ‘issue ads’ ” when those financiers “ ‘later seek access to discuss pending legislation.’ ”

The congressional response was § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 91, which redefined prohibited “expenditure” so as to restrict corporations and unions from funding “electioneering communication[s]” out of their general treasuries. The new phrase “electioneering communication” was narrowly defined in BCRA’s § 201 as “any broadcast, cable, or satellite communication” that

“(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 a 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

“(III) 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.” § 434(f)(3)(A)(i).

In *McConnell*, we found this definition to be “easily understood and objectiv[e],” . . . [and] that the resulting line separating regulated election speech from general political discourse does not, on its face, violate the First Amendment. We rejected any suggestion “that Buckley drew a constitutionally mandated line between express advocacy [with magic words] and so-called issue advocacy [without them], and that speakers possess an inviolable First Amendment right to engage in the latter category of speech.” . . . “[T]he presence or absence of magic words cannot meaningfully distinguish electioneering speech,” which is prohibitable, “from a true issue ad,” we said, since ads that “esche [w] the use of magic words ... are no less clearly intended to influence the election.” We thus found “[l]ittle difference ... between an ad that urged viewers to ‘vote against Jane Doe’ and one that condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’ ”

We understood that Congress had a compelling interest in limiting this sort of electioneering by corporations and unions, for § 203 exemplified a tradition of “repeatedly sustained legislation aimed at ‘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.’ ” Nor did we see any plausible claim of substantial overbreadth from incidentally prohibiting ads genuinely focused on issues rather than elections, given the limitation of “electioneering communication” by time, geographical coverage, and clear reference to candidate. . . . Finally, we underscored the reasonableness of the § 203 line by emphasizing that it defined a category of limited, but not prohibited, corporate and union speech: “Because corporations can still fund electioneering communications with PAC money, it is ‘simply wrong’ to view [§ 203] as a ‘complete ban’ on expression rather than a regulation.” Thus “corporations and unions may finance genuine issue ads [in the runup period] by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated [PAC] fund.”

We may add that a nonprofit corporation, no matter what its source of funding, is free to pelt a federal candidate like Jane Doe with criticism or shower her with praise, by name and within days of an election, if it speaks through a newspaper ad or on a website, rather than a “broadcast, cable, or satellite communication,” 2 U.S.C. § 434(f)(3)(A)(i) (2000 ed., Supp. IV). And a nonprofit may use its general treasury to pay for clearly “electioneering

communication[s]” so long as it declines to serve as a conduit for money from business corporations and unions. . . .

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.

[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. 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.

Given these facts, it is beyond all reasonable debate that the ads are constitutionally subject to regulation under *McConnell*. There, we noted that BCRA was meant to remedy the problem of “[s]o-called issue ads” being used “to advocate the election or defeat of clearly identified federal candidates.” We then gave a paradigmatic example of these electioneering ads subject to regulation, saying that “[l]ittle difference existed ... between an ad that urged viewers to ‘vote against Jane Doe’ and one that condemned Jane Doe's record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’ ”

The WRTL ads were indistinguishable from the Jane Doe ad; they “condemned [Senator Feingold's] record on a particular issue” and exhorted the public to contact him and “tell [him] what you think.” And just as anyone who heard the Jane Doe ad would understand that the point was to defeat Doe, anyone who heard the Feingold ads (let alone anyone who went to the website they named) would know that WRTL's message was to vote against Feingold. If it is now unconstitutional to restrict WRTL's Feingold ads, then it follows that § 203 can no longer be applied constitutionally to *McConnell*'s Jane Doe paradigm.

McConnell's holding that § 203 is facially constitutional is overruled. By what steps does the principal opinion reach this unacknowledged result less than four years after *McConnell* was decided? First, it lays down a new test to identify a severely limited class of ads that may constitutionally be regulated as electioneering communications, a test that is flatly contrary to *McConnell*. An ad is the equivalent of express advocacy and subject to regulation, the opinion says, only if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Since the Feingold ads could, in isolation, be read as at least including calls to communicate views on filibusters to the two Senators, those ads cannot be treated as the functional equivalent of express advocacy to elect or defeat anyone, and therefore may not constitutionally be regulated at all. But the same could have been said of the hypothetical Jane Doe ad [or] the actual Yellowtail ad. Yet in *McConnell*, we gave the Jane Doe ad as the paradigm of a broadcast message that could be constitutionally regulated as election conduct, and we explicitly described the Yellowtail ad as a “striking example” of one that was “clearly intended to influence the election.”

The principal opinion, in other words, 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.

Second, the principal opinion seems to defend this inversion of *McConnell* as a necessary alternative to an unadministrable subjective test for the equivalence of express (and regulable) electioneering advocacy. [Yet] in *McConnell* we said that “[t]he justifications for the regulation of express advocacy apply equally to ads aired during [the period shortly before an election] if the ads are intended to influence the voters' decisions and have that effect.” . . . THE CHIEF JUSTICE says that statement in *McConnell* cannot be accepted at face value because we could not, consistent with precedent, have focused our First Amendment enquiry on whether “the speaker actually intended to affect an election.” . . .

But *McConnell* 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.

A similarly mistaken fear of an unadministrable and speech-chilling subjective regime seems to underlie THE CHIEF JUSTICE's unwillingness to acknowledge the part that consideration of an ad's context necessarily plays in any realistic assessment of its meaning. A reasonable Wisconsinite watching or listening to WRTL's ads would likely ask and answer some obvious questions about their circumstances. Is the group that sponsors these ads the same one publicly campaigning against Senator Feingold's reelection? THE CHIEF JUSTICE says that this information is “beside the point,” because WRTL's history of overt electioneering only “goes to [its] subjective intent.” Did these “issue” ads begin appearing on the air during the election season, rather than at the time the filibuster “issue” was in fact being debated in the Senate? This, too, is said to be irrelevant. And does the website to which WRTL's ads direct viewers contain material expressly advocating Senator Feingold's defeat? This enquiry is dismissed as being “one step removed from the text of the ads themselves.” But these questions are central to the meaning of the ads, and any reasonable person would take account of circumstances in coming to understand the object of WRTL's ad. And why not? Each of the contextual facts here can be established by an objective look at a public record; none requires a voter (or a litigant) to engage in discovery of evidence about WRTL's operations or internal communications, and none goes to a hidden state of mind.

[A]lthough THE CHIEF JUSTICE ostensibly stops short of categorically foreclosing consideration of context, . . . 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.

Third, . . . 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.” Thus, a successful as-applied challenger to § 203 should necessarily show, at the least, that it could not constitutionally be subjected to the administrative rules that govern a PAC's formation and operation. This would be an uphill fight, after our repeated affirmations that the PAC structure does not impose excessive burdens, and WRTL has a particularly weak position on this point: it set up its own PAC long before the 2004 election, used it to campaign openly against Senator Feingold in the past, and could have raised noncorporate donations to it in the 2004 election cycle. Any argument that establishing and maintaining a PAC is unconstitutionally burdensome for WRTL would thus likely be futile, and certainly should not prevail on WRTL's summary judgment motion.

For that matter, even without the PAC alternative, it would be untrue that § 203 “banned” WRTL from saying anything a genuine issue ad would say, for WRTL could have availed itself of either or both of the following additional options. It is undisputed that WRTL's ads could have been broadcast lawfully in the runup to the election (and bankrolled from WRTL's general treasury) if Senator Feingold's name had been omitted and the Senator not otherwise singled out. Since members of today's majority apparently view WRTL's broadcasts either as “genuine issue ad[s],” or as “lobby[ing] Wisconsin voters concerning the filibustering of the President's judicial nominees,” a

claim that omitting Senator Feingold's name would “ban” WRTL's message is specious. Yet one searches my Brothers' opinions in vain for any persuasive reason why substituting the phrase “Contact your Senators” for the phrase “Contact Senators Feingold and Kohl” would have denied WRTL a constitutionally sufficient (and clearly lawful) alternative way to send its message. If WRTL is to be believed when it claims that the issue was the point of the ads, it would have lost nothing by referring simply to the “Senators.”

Finally, the suggestion that § 203 is a ban on political speech is belied by *MCFL's* safe harbor for nonprofit advocacy corporations: under that rule, WRTL would have been free to attack Senator Feingold by name at any time with ads funded from its corporate treasury, if it had not also chosen to serve as a funnel for hundreds of thousands of dollars from other corporations. Thus, what is called a “ban” on speech is a limit on the financing of electioneering broadcasts by entities that refuse to take advantage of the PAC structure but insist on acting as conduits from the campaign war chests of business corporations.

In sum, *McConnell* does not graft a subjective standard onto campaign regulation, the context of campaign advertising cannot sensibly be ignored, and § 203 is not a ban on speech. What cannot be gainsaid, in any event, is that in treating these subjects as it does, the operative opinion produces the result of overruling *McConnell's* holding on § 203, less than four years in the Reports. . . .

After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear. The ban on contributions will mean nothing much, now that companies and unions can save candidates the expense of advertising directly, simply by running “issue ads” without express advocacy, or by funneling the money through an independent corporation like WRTL.

But the understanding of the voters and the Congress that this kind of corporate and union spending seriously jeopardizes the integrity of democratic government will remain. The facts are too powerful to be ignored, and further efforts at campaign finance reform will come. It is only the legal landscape that now is altered, and it may be that today's departure from precedent will drive further reexamination of the constitutional analysis: of the distinction between contributions and expenditures, or the relation between spending and speech, which have given structure to our thinking since *Buckley* itself was decided.