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**CORPORATE POLITICAL SPEECH AND THE BALANCE OF
POWERS: A NEW FRAMEWORK FOR CAMPAIGN FINANCE
JURISPRUDENCE IN *WISCONSIN RIGHT TO LIFE***

FRANCES R. HILL*

Wisconsin Right to Life v. FEC (WRTL II) is an agenda-setting, framework-defining case that can be only partially understood by focusing on the specific issue before the Court.¹ *Wisconsin Right to Life's* (WRTL) as-applied challenge to the electioneering communication provision of the Bipartisan Campaign Reform Act of 2002 (BCRA) § 203² provided the Court's new majority an opportunity to consolidate as a majority position the political speech framework for campaign finance jurisprudence that its long-serving members had previously articulated in their dissents.³ This political speech framework serves as the foundation for an agenda centered on expanding the political speech rights of corporate entities. Taken together, the political speech framework and the corporate political speech agenda could well result in overturning most elements of the Federal Election Campaign Act (FECA)⁴ and the case law interpreting it.

Chief Justice Roberts captured the core of this framework in his assertion that "[t]hese cases are about political speech."⁵ Consistent with this political speech framework, the Court's new majority viewed campaign finance as a

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1. The Supreme Court heard issues in this case twice. In the first case, *Wisconsin Right To Life v. FEC (WRTL I)*, 546 U.S. 410 (2006), the Court held that as-applied challenges to the electioneering communication provision were permissible. In the second case, *FEC v. Wisconsin Right To Life (WRTL II)*, 127 S. Ct. 2652 (2007), the Court upheld WRTL's as-applied challenge. I filed a pro bono amicus brief in support of the government's position in *WRTL I*. Brief of Professor Frances R. Hill, University of Miami School of Law as Amici Curiae Supporting Appellee, *Wis. Right To Life v. Fed. Election Comm'n*, 546 U.S. 410 (2006) (No. 04-1581).

2. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 91 (codified as amended at 2 U.S.C. § 441b(b)(2) (2006)).

3. The dissents of Justice Scalia, Justice Thomas, and Justice Kennedy in the major campaign finance cases are discussed throughout this article.

4. Federal Election Campaign Act, 2 U.S.C. § 431-57.

5. *WRTL II*, 127 S. Ct. at 2673.

First Amendment issue. The majority held that BCRA § 203 burdened the speech rights guaranteed by the First Amendment. Throughout his opinion,⁶ Chief Justice Roberts described BCRA § 203, which deals with how electioneering communications are financed, as a “ban” on speech or a “prohibition” on political speech.⁷

The new majority’s political speech framework is linked to a corporate political speech agenda dedicated to enlarging the right of corporate entities to use their general treasury funds for political speech. Permitting WRTL to use its general treasury funds to finance three electioneering communications is an initial step toward this end, but it is by no means the final step. The anticipated end point is the elimination of distinctions among types of political speech and types of political speakers.

The transformative force of *WRTL II* is obscured by the division within the new majority over timing and tactics. Justice Scalia, joined by Justices Thomas and Kennedy, would have declared the electioneering communication provision facially unconstitutional and would have overruled the part of *McConnell v. FEC*⁸ upholding it.⁹ The language of this concurrence is at times acerbic, with very pointed critiques of Chief Justice Roberts’ approach and reasoning. At times the opinion bespeaks a kind of weary resignation with what it calls the “faux judicial restraint” of the principal opinion.¹⁰

If, however, one looks past the rhetorical flourishes, the critical fact remains that five Justices agreed on the holding as well as on the political speech framework and the corporate political speech agenda. Indeed, the holding, the framework, and the agenda have not been created by Chief Justice Roberts but developed over time in the dissenting opinions of Justices Scalia, Thomas, and Kennedy. There is a new majority on campaign finance, and all five members of this new majority agree that the framework set forth in *McConnell* should be replaced.¹¹

6. Chief Justice Roberts wrote the principal opinion in this case. Parts I and II were joined by Justices, Scalia, Thomas, Alito, and Kennedy and will be referred to as the majority opinion. Parts III and IV were joined by Justice Alito and will be referred to as the principal opinion.

7. Chief Justice Roberts framed the issue as follows: “The only question, then, is whether it is consistent with the First Amendment for BCRA § 203 to prohibit WRTL from running these three ads.” *Id.* at 2663 (principal opinion).

8. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

9. *WRTL II*, 127 S. Ct. at 2684–87 (Scalia, J., concurring). In his brief concurring opinion, Justice Alito served notice that he would reconsider a facial challenge to *McConnell* if the as-applied standard in the principal opinion “impermissibly chills political speech.” *Id.* at 2674 (Alito, J., concurring).

10. *Id.* at 2683–84, n.7.

11. See *McConnell*, 540 U.S. at 114–242. See also *WRTL II*, 127 S.Ct. at 2687, 2701 (Souter, J. dissenting, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer).

The majority in *McConnell* had based its holding on a very different framework supporting a very different agenda. The *McConnell* majority set forth a democratic integrity framework and a public participation agenda which addressed the threat arising from corruption and the appearance of corruption.¹² The corruption took the form of campaign contributions and expenditures made more to gain preferential access to the policy process than to express a point of view.¹³ The majority opinion began with a history of reform initiatives and the efforts that had been made to circumvent these reforms and stated repeatedly that Congress had ample authority to legislate in this area to curtail abuses and thereby protect the integrity of the democratic system.¹⁴ *McConnell* expressed the view that reform would be an ongoing process because the search for preferential access would continue.¹⁵ In *WRTL II* this democratic integrity framework appears in the dissent written by Justice Souter joined by Justices Stevens, Ginsburg, and Breyer.¹⁶

WRTL II rejected not only the democratic integrity framework and the public participation, but it also rejected the *McConnell* Court's determination that Congress properly plays a central role in campaign finance reform.¹⁷ The *McConnell* dissents argued passionately that the Court, and only the Court, could protect the First Amendment.¹⁸ If anything, Justice Scalia's opinion in *WRTL II* represents an even sharper attack on Congress and its actions. Chief Justice Roberts' opinion links this balance of powers dispute to an argument for limited government by seeking to restrict the role of courts in campaign finance cases. To Chief Justice Roberts, litigation involving prolonged discovery can itself burden First Amendment rights and no branch of government should burden political speech.¹⁹ The new majority seeks not only to overturn past legislative actions but also to interdict any future legislative initiatives not consistent with the political speech framework and the corporate political speech agenda. In rejecting the circumvention rationale and the concept of continuing reform, Chief Justice Roberts announced, "[e]nough is enough."²⁰

12. *See McConnell*, 540 U.S. at 205.

13. *See id.* at 352 (Rehnquist, C.J., dissenting).

14. *See id.* at 115–122.

15. *Id.* at 224 (“[w]e are under no illusion that BCRA will be the last congressional statement on the matter”).

16. *WRTL II*, 127 S. Ct. at 2687 (Souter, J., dissenting).

17. *McConnell*, 540 U.S. at 187. *See infra* Part V.

18. *Id.* at 340–341 (Kennedy, J., dissenting) (arguing Congress could not be trusted with the First Amendment). *See also id.* at 264–86 (Thomas, J. dissenting) (providing a preliminary statement of many of the arguments which subsequently appeared in Justice Robert's opinion in *WRTL II*).

19. *WRTL II*, 127 S. Ct. at 2666 (principal opinion).

20. *Id.* at 2672.

Part I of this article analyzes the political speech framework and the corporate political speech agenda. Part II discusses the decision in *WRTL II*. It focuses on Chief Justice Roberts' approach and his rejection of the far more limited, minimalist grounds put forward in *WRTL*'s pleadings. Part III considers the implications of the decision for the larger political speech agenda. Part IV considers the implications of the decision for implementing the corporate political speech agenda. Part V analyzes the limited government and balance of power assertions made under the political speech framework and shows how these relate to the corporate political speech agenda. This article concludes with some thoughts on the possible course of the contest between the two frameworks for campaign finance jurisprudence.

I. DEFINING THE FRAMEWORK AND SETTING THE AGENDA

The Court has been searching for a jurisprudential framework for election law cases since it entered the political thicket in *Baker v. Carr*.²¹ Election law cases, including the campaign finance cases, have featured long discussions of the values of a democratic society on which the opinion was or, in a particular Justice's view, should be grounded. These discussions are generally not compelled by or even closely related to the facts of the case. They read more like essays in political theory than like judicial opinions.²²

This is not a misplaced effort. Frameworks matter. A framework shapes the Court's determinations in particular cases, provides guidance to lower federal courts in more encompassing terms than a decision in a particular case, and serves notice to Congress and the Federal Election Commission regarding the Court's views on issues that each is likely to consider.²³ A framework defines an organizing principle, characterizes an activity, identifies an issue, formulates a constitutional claim, and links the constitutional claim to a democratic value. This is particularly important in the case of campaign finance jurisprudence because the Constitution does not address this issue expressly or allocate it to any of the three branches of government or even address the question of whether this is an issue that any government may regulate. Frameworks for campaign finance jurisprudence thus address fundamental shortcomings in the constitutional scheme.

Two frameworks now co-exist in considerable tension in campaign finance jurisprudence, and each of these frameworks is consolidated and entrenched in the majority opinion of a significant case. The democratic integrity framework

21. *Baker v. Carr*, 369 U.S. 186, 187–88 (1962).

22. The most recent of these exercises in an election law case other than a campaign finance case is found in *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

23. For example, the FEC relied on the principal opinion, not just the majority opinion, in crafting its new regulations on electioneering communications. Notice 2007-26, 72 Fed. Reg. 72899 (Dec. 26, 2007), codified at 11C.F.R. 104.

is consolidated in the majority opinion in *McConnell*²⁴ and its reiteration in the *WRTL II* dissent²⁵ represents an effort to entrench that framework in the face of a changing majority on the Court. The political speech framework was consolidated in the dissents in *McConnell*²⁶ and effectively entrenched in the Roberts opinion and the concurrence in *WRTL II*.²⁷ The process of framework consolidation and entrenchment does not mean that there are no commonalities between the frameworks even when, as now, the Court is quite markedly divided. The campaign finance frameworks share a commitment to democratic values despite their sharp differences over what priority should be accorded to these various values.²⁸

As frameworks consolidate, they become more closely allied with agendas for deciding future cases. Opinions may well be written with an eye to the larger agenda and not just the case before the Court. This does not necessarily result in coherence.²⁹ Cases are decided and opinions written to entrench the framework and advance the agenda.

The new majority's political speech framework for campaign finance jurisprudence is linked to a corporate political speech agenda.³⁰ The overall objective of the corporate political speech agenda is to eliminate current limitations on the use of general treasury funds to finance political speech. Realizing this objective involves two elements. The first is to eliminate distinctions among types of political speech, and the second is to eliminate distinctions among political speakers.³¹ Achieving these objectives and implementing the corporate political speech agenda will result in overturning the central elements of federal election law. This corporate political speech agenda is as ambitious as the political speech framework is transformative.

A. *Defining the Political Speech Framework*

Seen in this light, a framework may be quite far ranging, especially in its formative stages. One might suggest that *McConnell* marked the consolidation and crystallization of the frameworks of both sides in the campaign finance

24. *McConnell v. FEC*, 540 U.S. at 114–224.

25. *WRTL II*, 127 S.Ct. at 2687–2705 (Souter, J., dissenting).

26. *McConnell*, 540 U.S. at 247–64 (Scalia, J., dissenting); 540 U.S. at 264–86 (Thomas, J., dissenting); 540 U.S. at 286–350 (Kennedy, J., dissenting); 540 U.S. at 350–53 (Rehnquist, C.J., dissenting).

27. *WRTL II*, 127 S.Ct. at 2674–87 (Scalia, J., concurring).

28. *See infra* Part IV.

29. Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 32 (2004); Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 850–51 (2007).

30. *See infra* Part I.B. and Part IV.

31. *See infra* Part I.B. and Part IV.

doctrinal dispute, and that this consolidation of both positions has made compromise far more difficult in particular cases because both sides see that not only a limited number of issues are at stake but also, and more importantly, the framework is as well.

While frameworks are broad ranging, they can be described and compared in terms of certain core elements. Identifying these core elements is best understood as a heuristic that promotes understanding rather than providing a full description or capturing every nuance in the jurisprudence.³² A heuristic in this sense is akin to a model, or identification of elements, that is not a complete theory, or a set of propositions about the necessary relationships among various forms of the core elements. Viewed as a heuristic, the elements through which a campaign finance framework can be described are an organizing principle, an activity, an issue, a constitutional claim, and one or more democratic values.

The organizing principle in *WRTL II* is political speech,³³ while the organizing principle in *McConnell* is democratic integrity.³⁴ These two organizing principles identify the activities at issue in *WRTL II* differently. The political speech framework defines the activity as political speech and the issue as burdening, banning or prohibiting political speech.³⁵ The democratic integrity framework identifies the activity as financing political speech and the issue as enhancing public participation and government responsiveness by preventing corruption or the appearance of corruption.³⁶ The democratic speech framework focuses on banning political speech as a threat to liberty, while the political integrity framework focuses on the threat of corruption or

32. For broad-ranging discussion, see GERD GIGERENZER & CHRISTOPH ENGLE (EDS.), *HEURISTICS AND THE LAW* (2004).

33. *WRTL II*, 127 S.Ct. at 2673 (“these cases are about political speech”) (Roberts, C.J., principal opinion).

34. *McConnell*, 540 U.S. at 115–32 traces the history of efforts to limit the influence of large contributions made to replace the public interest with special interests. In *WRTL II*, 127 S.Ct. at 2689, the dissent noted disapprovingly “the demand for campaign money in huge amounts from large contributors, whose power has produced a cynical electorate” and noted approvingly “the congressional recognition of the ensuing threat to democratic integrity as reflected in a century of legislation restriction the electoral leverage of concentrations of money in corporate and union treasuries.” (Souter, J. dissenting).

35. Chief Justice Roberts refers repeatedly to “banning” or “prohibiting” or “censoring” speech by disallowing the use of general treasury funds for campaign speech. *WRTL II*, 127 S.Ct. at 2663–64, 2673 (Roberts, C.J.) (principal opinion).

36. The new majority in *McConnell*, 540 U.S. at 115 cites Elihu Root, who concluded that large political contributions made for the purpose of advancing special interests at odds with the public interest were “a growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government.” (citing E. ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 143 (1916)).

the appearance of corruption as a threat to meaningful participation and representation.³⁷ The political speech framework locates the issue in the First Amendment and reads the language of the First Amendment as very close to an absolute limitation on the authority of Congress to burden speech.³⁸ The democratic integrity framework locates the issue not only in the First Amendment but also in Article I, defining the powers of Congress, the first sentence of the Constitution, which identifies the people as the source of sovereign authority, and, far more broadly, in the system of checks and balances designed to prevent aggregation of power.³⁹ These differences are apparent in the two cases identified in this article with the competing campaign finance frameworks and agendas.

In broad outline, the *McConnell* framework was grounded on a relationship between elections and the public policy process and the conviction that campaign finance laws were integral to the integrity of both.⁴⁰ The political integrity framework treats politicians and those seeking to buy undue influence in the policy process as the target of campaign finance laws.⁴¹ The goal of the law in this area was to ensure opportunities for participation by ordinary individuals, including the right of individuals to form organizations to amplify their voices in public policy debates and in election campaigns.⁴² The majority opinion interpreted the history of campaign finance law as a series of efforts to interdict use of financial power to gain favored access to and disproportionate influence over public policy processes.⁴³ Justice Souter concluded that “political integrity” has a “value second to none in a free society.”⁴⁴ The majority in *McConnell* took the position that the Court should defer to reasoned congressional action and found that Congress could take account of

37. *McConnell*, 540 U.S. at 115, 122–32.

38. *WRTL II*, 127 S.Ct. at 2674 (Roberts, C.J.) (principal opinion).

39. *McConnell*, 540 U.S. at 115–32, 223–24 (Stevens, J. and O’Connor, J.); *see also WRTL II*, 127 S.Ct. at 2705 (noting “the understanding of the voters and Congress that this kind of corporate and union spending seriously jeopardizes the integrity of democratic government”) (Souter, J. dissenting).

40. *McConnell*, 540 U.S. at 115–32 (effects of political contributions on access and representation).

41. *Id.* at 122–32.

42. *Id.* at 122 (noting that this case is about organizations, while *Buckley* dealt with individuals).

43. *Id.* at 120–21.

44. *FEC v. Wis. Right To Life*, 127 S.Ct. 2652, 2689 (2007) (Souter, J., dissenting) (“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.”).

actual practices and abuses in campaign finance.⁴⁵ In his dissent in *WRTL II*, Justice Souter identified as the core issue, politicians' "demand for campaign money in huge amounts from large contributors" and then called attention to "the congressional recognition of the ensuing threat to democratic integrity as reflected in a century of legislation restricting the electoral leverage of concentrations of money in corporate and union treasuries."⁴⁶ Justice Souter's dissent in *WRTL II* is an argument for the continued validity of the *McConnell* framework despite his conclusion that *McConnell* "is effectively, and unjustifiably, overruled today."⁴⁷

The new majority's framework in *WRTL II* is based on political speech as the organizing principal. Chief Justice Roberts states "[t]hese cases are about political speech"⁴⁸ and concludes that in cases dealing with political speech "we give the benefit of the doubt to speech, not censorship."⁴⁹ Chief Justice Roberts grounds his conclusions in the language of the First Amendment.⁵⁰ He remarks toward the end of his opinion:

Yet as is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself: 'Congress shall make no law . . . abridging the freedom of speech. The Framers' actual words put these cases in proper perspective. Our jurisprudence over the past 216 years had rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech—between what is protected and what the Government may ban—it is worth recalling the language we are applying.⁵¹

The democratic value underlying the political speech framework is liberty, which is seen as the core protection for democracy. The political speech framework treats all speakers as the targets of campaign finance laws. While these laws may be directed at large donors and the politicians who demand them as the price of preferred access to the policy process, liberty values require that the size of the contribution or expenditure not become a basis for limiting liberty.⁵²

45. See generally *McConnell v. FEC*, 540 U.S. 93 (2007).

46. *WRTL II*, 127 S.Ct. at 2687 (Souter, J., dissenting).

47. *Id.*

48. *Id.* at 2673 (principal opinion).

49. *Id.* at 2674.

50. *WRTL II*, 127 S.Ct. at 2672–74 (Roberts, C.J.) (principal opinion); see Lillian R. BeVier, *First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life*, CATO SUPREME COURT REVIEW 77, 79 (2007) ("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.").

51. *WRTL II*, 127 S.Ct. at 2674 (Roberts, C.J.) (principal opinion).

52. *Id.* at 2672.

Liberty is inconsistent with distinctions among types of speech or types of speakers.⁵³ Such distinctions among types of speech or types of speakers find no basis in the words of the First Amendment. The intent of any speaker or the consequences of any speech are not considered.⁵⁴ There is no compelling state interest sufficient to limit political speech or to require that political speech rights be balanced against other rights.⁵⁵ Speech rights eclipse the remainder of the Constitution in campaign finance jurisprudence.⁵⁶

Chief Justice Roberts' political speech framework provides a foundation for rejecting the core elements of the *McConnell* framework. Corruption is not a compelling state interest.⁵⁷ It is either a criminal law matter or an impermissible rationale for limiting liberty. The appearance of corruption is not a compelling state interest but an impermissible burden on political speech rights.⁵⁸ Circumvention is not an issue because political speech rights are not subject to any meaningful limits that could be circumvented.⁵⁹ These are areas that no government can regulate. Chief Justice Roberts and the other members of the new majority want to limit the role of Congress in this area and to allocate the predominant role in this area to the courts.⁶⁰

The two frameworks for campaign finance jurisprudence have now been consolidated as majority positions in separate cases. Part of the consolidation and entrenchment of frameworks is their link to particular agendas. The *McConnell* majority anticipated future reforms in campaign finance law.⁶¹ The

53. As is discussed more fully below, the new majority seeks to remove barriers to political speech by corporate speakers, which it equates with removing barriers to the use of general treasury funds to finance such corporate political speech. See *infra* Part I.B. and Part IV.

54. *WRTL II*, 127 S.Ct. at 2665–70 (rejecting intent or effects tests). Although this analysis appears in the principal opinion which was joined only by Justice Alito, it has become the basis for FEC regulations. See FEC Notice 2007-27, 72 Fed. Reg. 72899 (December 26, 2007).

55. *Id.* at 2664, 2671–73 (rejecting both corruption and the effect of aggregated wealth as compelling state interest supporting regulation of speech is not express advocacy.).

56. The primacy and, indeed, the exclusivity of reliance on the First Amendment became clear in *McConnell*, where the dissents each began with a pointed reference to the First Amendment. *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting); 264 (Thomas, J. dissenting); 286 (Kennedy, J. dissenting).

57. *WRTL II*, 127 S.Ct. at 2672.

58. *Id.*

59. *Id.*

60. See *infra* Part V.

61. *McConnell*, 540 U.S. 223–24.

Many years ago we observed that '[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.' *Burroughs v. United States*, 290 U.S. at 545. We abide by that conviction in considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system. We are under no illusion that the BCRA will be the last

WRTL II majority anticipates curtailing the effects of *McConnell* and its predecessors and even overturning substantial elements of FECA.⁶²

B. Setting the Agenda: Political Speech by Corporate Speakers

The political speech framework is linked to a corporate political speech agenda with two interrelated objectives. One is to eliminate distinctions among types of political speech. The other is to eliminate distinctions among speakers who engage in political speech. If fully implemented in its most comprehensive form, the corporate speech agenda would result in the determination that most elements of FECA are impermissible burdens on First Amendment rights of political speech. All five members of the *WRTL II* majority agree on this agenda but not on how quickly or directly to implement it.⁶³ Understanding how such a broad result might follow from what appears initially to be a narrow issue in *WRTL II* requires consideration of the web of interrelated provisions in FECA.

II. DECIDING THE CASE

WRTL's as-applied challenge to BCRA § 203 served the Court's agenda-setting, framework defining purposes, but its specific claims in support of its position did not.⁶⁴ *WRTL*'s claims represented an incremental approach that would have left much of the *McConnell* framework intact. A 5-4 majority of the Roberts Court had no interest in any opinion that would have maintained, even as an interim step, the *McConnell* framework. For reasons best known to himself, Chief Justice Roberts chose to write an opinion creating an impression of minimalism. At the same time, the spirited concurrence written by Justice Scalia and joined by Justice Thomas and Justice Kennedy, reinforced a broader interpretation calling much of federal election law into question, especially when read in the context of their dissents in *McConnell*. This broader interpretation is not inconsistent with Chief Justice Roberts' opinion.

A. WRTL's Claims and Reasoning

WRTL is a nonprofit corporation organized under Wisconsin law. It is exempt from federal income tax as an entity described in section 501(c)(4) of

congressional statement on the matter. . . . What problems will arise, and how congress will respond, are concerns for another day.

Id.

62. *WRTL II*, 127 S.Ct. at 2672 (rejecting a circumvention analysis as a "prophylaxis-upon-prophylaxis approach" and concluding that "enough is enough") (Roberts, C.J., principal opinion).

63. See *infra* Part IV.

64. See *infra* Part II.B for *WRTL*'s claims. See *infra* Part II.C for an analysis of Chief Justice Roberts' response to *WRTL*'s claims.

the Internal Revenue Code (IRC).⁶⁵ The section 501(c)(4) entity is a component of a complex structure of related tax exempt entities including a section 501(c)(3) public charity, which is eligible to receive tax deductible contributions under section 170 of the IRC, and a Political Action Committee (PAC), which is a political committee for purposes of federal election law and is exempt from federal income tax under section 527 of the IRC.⁶⁶

This case arose when WRTL claimed that it was prohibited from running broadcast ads addressing the issue of filibusters in the United States Senate⁶⁷ due to the electioneering communications provisions of BCRA § 203.⁶⁸ WRTL freely admitted that its ads fell within the definition of an electioneering communication because they would be funded by a corporate entity⁶⁹ using its general treasury funds,⁷⁰ they were targeted to the relevant electorate,⁷¹ they would be aired during the statutory period prior to a federal election⁷² and they mentioned the name of a candidate for federal office.⁷³

65. *WRTL II*, 127 S.Ct. at 2660.

66. For a detailed analysis of the various types of tax exempt entities, see FRANCES R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS* (2002 with semi-annual supplements).

67. *WRTL II*, 127 S.Ct. at 2660, 2660-61 n.2, 2661 n.3 (quoting text of each of the ads).

68. *Wis. Right to Life v. FEC*, 546 U.S. 410, 410 (2006).

69. WRTL is a corporation organized under Wisconsin law. FECA § 441b(a) extends the prohibition on using general treasury funds for contributions or expenditures to “any corporation whatever, or any labor organization.” 2 U.S.C. § 441b(a). This prohibition is made applicable to financing of electioneering communications by 2 U.S.C. § 441b(c)(1), which prohibits funding by “any entity described in subsection (a) of this section.” For federal income tax purposes, WRTL may engage in unlimited legislative lobbying without jeopardizing its tax exempt status. See HILL & MANCINO, *supra* note 66, at ¶ 13.03.

70. WRTL may, consistent with its exempt status under section 501(c)(4) accept contributions from any person, individual or corporate, domestic or foreign and may use these funds solely for legislative lobbying if it so chooses. See HILL & MANCINO, *supra* note 67, at ¶ 13.03; see also Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 91 TAX NOTES 477 (April 16, 2001).

71. The ads were targeted to Wisconsin voters. Targeting is defined in BCRA § 201(c), which is codified at 2 U.S.C. § 434(f)(3)(C). *WRTL II*, 127 S.Ct. at 2663 (principal opinion) (finding the ads were or would have been targeted).

72. WRTL stated that “[d]uring the summer of 2004, the filibustering of nominees to the federal bench reached its peak and WRTL launched a grass-roots lobbying campaign to encourage its two United States Senators to oppose filibusters in upcoming votes.” Jurisdictional Statement of Appellant at 4, *Wis. Right to Life v. FEC*, 546 U.S. 410 (2005). WRTL aired only one of its ads and did not run the others to avoid the penalties under BCRA. *WRTL II*, 127 S.Ct. at 2660-61. The statutory period is defined as thirty days before a primary election and sixty days before a general election. BCRA § 201(a), codified at 2 U.S.C. § 434(f)(3)(a)(i)(III).

73. An electioneering communication “refers to a clearly identified candidate for federal office. BCRA § 201(a), codified at 2 U.S.C. § 434(f)(3)(A)(i)(I). The ads mentioned the name of Senator Feingold, who was a candidate in the Democratic Party primary, and the name of Senator

WRTL claimed that the electioneering communication provision of federal election law was unconstitutional as applied to the three ads it wished to finance using its general treasury funds.⁷⁴

WRTL based its claim on its characterization of the three ads as grassroots lobbying and limited its as-applied challenge to communications that could be so characterized. It then claimed that BCRA § 203 violated its First Amendment rights of expression, association, and petition when applied to grassroots lobbying ads because “[a]uthentic grass-roots lobbying is inherent in our constitutional system of *representative* government and is so essential to the people’s self government that it requires an exception.”⁷⁵

While it acknowledged that it could have funded its broadcast ads from its general treasury if it had not been organized in corporate form, WRTL rejected any idea of operating in a non-corporate form, reasoning:

The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through citizen watchdog groups created by the people. The most effective form for these groups is the nonprofit corporate form, not to amass business income, which nonprofits do not do, but to facilitate capable leadership by protecting directors and officers from individual liability for acts of the group. Conditioning one’s right to do grassroots lobbying on not incorporating imposes a significant obstacle to the group’s speech, association and petition activities.⁷⁶

WRTL also acknowledged that it could have funded its broadcast ads by using its controlled PAC, the WRTL-PAC,⁷⁷ but rejected this alternative as well. WRTL described the PAC option as “a serious burden” that is “inadequate, constitutionally and factually” as a means of funding grassroots lobbying communications.⁷⁸ WRTL asserted that it did not have enough

Kohl, who was not a candidate. Each of the ads urged Wisconsin voters to “contact Senator Feingold and Senator Kohl.” Jurisdictional Statement of Appellant, *supra* note 72, at 13a-17a.

74. Jurisdictional Statement for Appellant, *supra* note 72 at i. WRTL also claimed that the electioneering communications provision was unconstitutional as applied to “grass-roots lobbying communications generally, as carefully defined.” *Id.* With respect to its facial challenge, WRTL urged that “[t]his Court should go beyond the three broadcast ads, derive the constitutional principle, and state a bright-line rule recognizing an exception to the prohibition on corporate electioneering communication for authentic grass-roots lobbying.” *Id.* at 25.

75. *Id.* at 24. (emphasis in original).

76. Brief for Appellee at 44-45, *FEC v. Wis. Right to Life*, 127 S.Ct. 2652 (2006) (Nos. 06-969 & 06-970) (internal citations omitted). *See also* Brief for Appellant at 43, *Wis. Right To Life v. FEC*, 546 U.S. 410 (2005) (No. 04-1581).

77. WRTL is a component of a complex structure of related tax exempt entities including a section 501(c)(3) public charity that engages in campaign activity and a PAC, which is exempt from federal income tax under section 527. Brief of Professor Frances R. Hill, *supra* note 1, at 5-6.

78. Brief for Appellee, *supra* note 76, at 33.

money in its PAC to run the ads at issue⁷⁹ and that it needed the money it did have in the PAC to fund independent expenditures and contributions to candidates.⁸⁰ WRTL also claimed that the PAC option imposed constitutionally impermissible burdens on fundraising for grassroots lobbying.⁸¹ WRTL complained specifically about the requirement that it raise PAC funds only from WRTL members,⁸² about the restrictions on the definition of a member,⁸³ and about the annual limitation on contributions to a PAC.⁸⁴ In light of these concerns, WRTL argued that “[t]he PAC alternative in such situations is effectively a complete ban.”⁸⁵

WRTL further acknowledged that it would not have been subject to the electioneering communication provision if it had accepted contributions only from individual contributors.⁸⁶ WRTL did not develop arguments relating to the burdens this would place on its fundraising, but it agreed that it was not a “qualified nonprofit corporation” because it accepted contributions from corporations as well as from individuals.⁸⁷

To the extent that WRTL made claims based on its corporate form, these claims played a role in Chief Justice Roberts’ reasoning. WRTL’s assertion of a First Amendment right to operate in corporate form and its claim that being required to fund electioneering communications by using its controlled PAC imposed an impermissible burden on its First Amendment rights were consistent with the majority’s agenda-setting objectives. To the extent that WRTL made corporate claims dependent on its nonprofit tax exempt status, Chief Justice Roberts ignored the special characteristics and treated them as general corporate claims.⁸⁸ These claims were inconsistent with the larger

79. *Id.* at 9 n.17 (claiming that the ads would have cost \$100,000 but that the PAC has only \$14,000). *See also* Brief for Appellant, *supra* note 76, at 5–6.

80. Brief for Appellee, *supra* note 76, at 9 n.17 (citing 2 U.S.C. §§ 431(8) and (17) (2007). (“If these funds were used for the grassroots lobbying ads, they would not have been available for the contributions and independent expenditures that WRTL-PAC intended to make”))

81. Brief for Appellee, *supra* note 76, at 33–34.

82. Brief for Appellant, *supra* note 76, at 41 (complaining about the time-consuming process of raising money from FECA-compliant “members”); *Id.* at 41 n.29 (discusses the regulations applicable to PACs controlled by “membership corporations” like WRTL); 11 C.F.R. § 114.1(e)(1) (2007).

83. Brief for Appellant, *supra* note 76, at 41.

84. *Id.* at 32.

85. *Id.* at 42.

86. If WRTL had accepted contributions only from individuals, it would have qualified as the kind of I.R.C. § 501(c)(4) advocacy organization described in *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) and would have been treated as a “qualified nonprofit corporation” for federal election law purposes consistent with 11 C.F.R. 114.10. For a more detailed discussion of the concept of a “qualified nonprofit corporation” in federal election law, see *infra* Part II.C.

87. Brief for Appellant, *supra* note 76, at 31.

88. *FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2671–73 (2007) (principal opinion).

agenda and thus were not relied upon to decide the case before the Court. To the extent, however, that WRTL advanced claims based on characterizing its ads as a particular type of speech, as “grassroots lobbying,” the Chief Justice completely ignored these claims because they were inconsistent with the corporate political speech agenda. This meant that little of WRTL’s reasoning appeared in either Chief Justice Roberts’ opinion or in Justice Scalia’s opinion or, indeed, in Justice Souter’s dissent.⁸⁹ None of the Justices expressed any interest in crafting a test for characterizing speech as legislative lobbying. The majority was interested only in removing barriers under existing statutes and judicial precedents to political speech by corporate speakers.

B. Chief Justice Roberts’ Opinion

For purposes of setting the larger agenda and consolidating the framework, the most important fact in the case was WRTL’s organization as a corporate entity and its most important claim was that it had a First Amendment right to fund electioneering communications with its general treasury funds rather than with funds from its controlled PAC.

The Court decided that BCRA § 203 is unconstitutional as applied to the WRTL ads before the Court.⁹⁰ The majority opinion raised two questions. The first was whether the ads involved issue advocacy or the functional equivalent of speech that expressly advocated the election or defeat of a candidate for federal office.⁹¹ The second was whether the state interests that justify regulating express advocacy extend to speech that is not express advocacy or its functional equivalent.⁹² It answered these questions as follows:

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.⁹³

Chief Justice Roberts’ opinion explaining these holdings is divided into four parts. The first recited the history of the case,⁹⁴ the second found that the

89. The Court is not bound to decide cases based on the arguments advanced in the briefs in the case. However, it is ironic to find that in the same term Chief Justice Roberts, in his dissent in *Massachusetts v. EPA*, 127 S.Ct. 1438, 1466 (2007), observed that “it is ironic that the Court today adopts a new theory of Article III standing for States without the benefit of briefing or argument on the point.”

90. *WRTL II*, 127 S.Ct. at 2659.

91. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 206 (2003) (referring to “the functional equivalent of express advocacy”)).

92. *Id.*

93. *Id.*

94. *Id.* at 2659–62.

Court had jurisdiction,⁹⁵ the third held that strict scrutiny was the required standard of review,⁹⁶ and the fourth considered whether the electioneering communications provisions could be applied to the ads at issue because BCRA § 203 was narrowly tailored to further a compelling state interest.⁹⁷

In determining whether the ads were the functional equivalent of express advocacy or whether they were issue advocacy, Chief Justice Roberts concluded that “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.”⁹⁸ He categorically rejected tests based on either intent or effects.⁹⁹ He advanced four criteria for an appropriate test. The first is that the test “must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.”¹⁰⁰ The second criterion is a response to the protracted litigation and expansive record, not to mention the lower court opinion in *McConnell*, namely, that the test “must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation.”¹⁰¹ The test must not involve multiple factors, which will lead to complex arguments and protracted appeals.¹⁰² Whether Chief Justice Roberts can prune the political thicket by chilling access to courts and limiting the kinds of arguments that parties may make and that courts may hear raises balance of powers issues discussed below.¹⁰³ The final section of Chief Justice Roberts’ principal opinion addresses the question of whether BCRA § 203 is narrowly tailored to further a compelling state interest.¹⁰⁴ Chief Justice Roberts considered and rejected two governmental interests that have been applied to various types of campaign

95. *Id.* at 2662–63.

96. *WRTL II*, 127 S.Ct. at 2663–64 (principal opinion).

97. *Id.* at 2664–66.

98. *Id.* at 2667.

99. *Id.* at 2665.

100. *Id.* at 2666.

101. *Id.* It is far from clear that the Supreme Court can constrain the right—or the duty—of a lower federal court, which is a trier of facts, to determine those facts even if discovery is required in this effort. What the Supreme Court may do is to declare that facts are irrelevant under the only permissible constitutional test. This approach would be more coherent in a determination that BCRA § 203 is facially unconstitutional than in an as-applied challenge. This factor is one of the reasons that at least seven of the Justices agree that Chief Justice Roberts has held that BCRA § 203 is facially unconstitutional.

102. *WRTL II*, 127 S.Ct. at 2666–67 (principal opinion) (rejecting the “open-ended rough-and-tumble of factors” that invites “complex argument in a trial court and a virtually inevitable appeal” (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock, Co.*, 513 U.S. 527, 547 (1995))).

103. See *infra* Part V.

104. *WRTL II*, 127 S. Ct. at 2671 (principal opinion).

speech: the interest in preventing corruption and the interest in regulating the effects of wealth differentials on elections.¹⁰⁵ The Chief Justice limited the first, based on *Buckley*, and dismissed the second, based on *Austin*, and linked them more directly to the limitations imposed on corporate speech.¹⁰⁶

Chief Justice Roberts traced the expansion of the corruption interest applied in *Buckley* to uphold contribution limits. He did not challenge the corruption interest, but he clearly regarded its expansion as impermissible.¹⁰⁷ He noted *Buckley* contemplated that the same rationale might also apply to independent expenditures but minimized the significance of this element of *Buckley* by observing 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.’¹⁰⁸ Chief Justice Roberts also rejected *McConnell*’s extension of the anti-corruption rationale to ads that were the functional equivalent of express advocacy.¹⁰⁹ In an aside that may prove particularly revealing, the Chief Justice referred to the government interest in preventing corruption as an interest “which this Court had only assumed could justify regulation of express advocacy.”¹¹⁰ According to Chief Justice Roberts, reliance on corruption as a compelling government interest in *WRTL II* means “this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy.”¹¹¹ This is the step Chief Justice Roberts refused to take, declaring flatly that

“[e]nough 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.”¹¹²

The Chief Justice rejected arguments based on the danger of circumvention of express advocacy limitations and the contribution provisions. Noting that while the “[a]ppellants 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 . . . such a prophylaxis-upon-

105. *Id.* at 2672–73.

106. *Id.*

107. *Id.* at 2672 (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)).

108. *Id.* (citing *Buckley*, 424 U.S. at 25).

109. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 204–06 (2003)).

110. *WRTL II*, 127 S.Ct. at 2672 (principal opinion). Whether the Chief Justice meant to signal a willingness to question the anti-corruption rationale as a compelling interest upholding contribution limitations at some future date remains unclear but should not be summarily dismissed.

111. *Id.*

112. *Id.*

prophylaxis approach to regulating expression is not consistent with strict scrutiny.”¹¹³

The Chief Justice also found that “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” did not provide a compelling government interest for regulating the ads in this case.¹¹⁴ Noting that both *Austin* and *McConnell* invoked this interest in support of the regulation of express advocacy, referred to here as “campaign speech,” the Chief Justice noted “[a]ccepting 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.”¹¹⁵ He reasoned that

[i]t 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.¹¹⁶

Chief Justice Roberts made no reference to the use of a controlled PAC to avoid this problem.

This is a nuanced but not a minimal opinion. As is discussed below, Chief Justice Roberts had ample opportunity to write a minimal opinion within the *McConnell* framework and carefully avoided all of these opportunities.¹¹⁷

Only Justice Alito joined the “principal opinion” in its entirety.¹¹⁸ He gave three reasons for doing so and one reason for writing a short concurring opinion.¹¹⁹ Justice Alito joined the principal opinion because BCRA § 203 “cannot constitutionally ban any advertisement that may reasonably be interpreted as anything other than an appeal to vote for or against a candidate.”¹²⁰ He added, “the ads at issue here “may reasonably be interpreted as something other than such an appeal,” and it is unnecessary to decide

113. *Id.* In support of this position Chief Justice Roberts quoted *Buckley's* determination that expenditure limitations “cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations.” *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 44 (1976)).

114. *Id.* (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

115. *Id.* at 2673.

116. *WRTL II*, 127 S. Ct. at 2673 (principal opinion)..

117. *See infra* Part II.C.

118. *WRTL II*, 127 S. Ct. at 2674 (Alito, J., concurring).

119. *Id.*

120. *Id.*

whether BCRA § 203 is facially unconstitutional.¹²¹ Justice Alito also set forth one reason for writing a separate concurring opinion. He served notice that he would find a facial challenge to BCRA § 203 appropriate “[i]f it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech.”¹²²

Justice Scalia, joined by Justices Kennedy and Thomas, joined in Parts I and II of Chief Justice Roberts’ opinion and in the result, but took issue with Chief Justice Roberts’ reasoning.¹²³ Justice Scalia described the result as holding that applying BCRA § 203 to WRTL’s ad is not consistent with the First Amendment.¹²⁴ He stated his difference with the principal opinion succinctly, concluding that he “would overrule that part of the Court’s decision in *McConnell* upholding § 203(a) of BCRA.”¹²⁵ Indeed, he asserts that the principal opinion does find BCRA § 203 facially unconstitutional and expressed his annoyance that Chief Justice Roberts refused to admit what he has done.¹²⁶ This annoyance is based on Justice Scalia’s conclusion that First Amendment rights cannot be protected through as-applied challenges.¹²⁷ Justice Scalia based this conclusion on his determination that “the *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.”¹²⁸

Focusing on the differences among Chief Justice Roberts, Justice Alito, and Justice Scalia, joined by Justices Kennedy and Thomas, provides one important perspective on what the Court decided and the implications of that decision. Examining only the differences provides, at best, a very partial and ultimately misleading perspective on *WRTL II*. It ignores at least two important features of the opinion. The first is that there is a majority on the Court for many of the underlying propositions that define a jurisprudential framework for overturning *McConnell* and finding not just BCRA but also FECA unconstitutional in substantial part, and perhaps in their entirety. Second, there is a majority for simply ignoring certain of the central issues that have never been addressed directly, must less resolved, while asserting implicitly that these issues are settled as constitutional matters.¹²⁹ This

121. *Id.*

122. *Id.*

123. *Id.* at 2674–87 (Scalia, J., concurring).

124. *WRTL II*, 127 S. Ct. at 2676 (Scalia, J., concurring).

125. *Id.* at 2687

126. *Id.* at 2683–84 n.7. Justice Souter agrees with this assessment in his dissent. *Id.* at 2699–700 (Souter, J., dissenting).

127. *Id.* at 2685 (Scalia, J., concurring).

128. *Id.*

129. *See infra* Part III.

majority opinion is as important, and probably more important, than the differences among the Justices in the majority.

In the end, the differences among the Justices are questions of timing. Justice Alito thinks that a facial challenge can be heard in the future.¹³⁰ Justice Scalia would not disagree but sees no reason to delay what he regards as the constitutionally required outcome as set forth in his prior dissents.¹³¹

C. *Rejecting the Minimalist Alternatives*

For reasons best known to himself, Chief Justice Roberts chose not to overrule *McConnell*. As is discussed below, Justice Scalia found this approach incoherent.¹³² While this may be correct in some respects, it does not diminish the force of *WRTL II* as an agenda-setting, framework-defining case. The approach that Chief Justice Roberts took is far bolder than at least four other approaches, which would have produced a minimal opinion and left the *McConnell* framework substantially intact.¹³³ The opinion he did write can be understood more fully in light of the opinions he chose not to write and the reasons for not writing them. Each of these alternative bases for minimal opinions would have constrained the corporate political speech agenda and narrowed the political speech framework that emerges from the majority opinion in *WRTL II*.

First, he could have followed the structure of BCRA and applied the backup definition of an electioneering communication.¹³⁴ As Justice Scalia noted, Chief Justice Roberts' test tracks the language of the backup definition, but the Chief Justice never mentions the backup definition.¹³⁵ This is not an oversight and no one could believe that the Chief Justice is less than thorough. Two reasons seem plausible: Either the Chief Justice did not want to indicate in any way that BCRA has any continuing validity, or relying on the backup definition would not have permitted Chief Justice Roberts to focus as directly on the political speech framework and the corporate political speech agenda.

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

131. *WRTL II*, 127 S.Ct. at 2685–86 (Scalia, J. concurring).

132. *See id.* at 2684 (Scalia, J., concurring).

133. *See infra* Part II.C.

134. The backup definition in BCRA § 201(a) reads as follows:

If clause (i) is held to be constitutionally insufficient by final judicial decision to support the Regulations provided herein, then the term 'electioneering communication' means any broadcast Cable or satellite communication which promotes or supports a candidate for that office, or attacks Or opposes a candidate for that office (regardless of whether the communication expressly Advocates a vote for or against a specific candidate) and which also is suggestive of no plausible Meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a), codified at 2 U.S.C. § 434(f)(3)(A)(ii).

135. *See WRTL II*, 127 S. Ct. at 2680 (Scalia, J., concurring).

Second, he could have treated the ads in question as grassroots lobbying and defined an exception for grassroots ads. WRTL made a claim that its electioneering communications should be characterized as grassroots legislative lobbying.¹³⁶ WRTL recognized that its claim that the ads constituted grassroots lobbying required it both to provide a definition of grassroots lobbying and to develop a claim that this definition identified a category of constitutionally protected activity.¹³⁷ Throughout the course of the litigation, WRTL set forth various formulations of such a definition and admitted that its definition was derived from the definition of grassroots lobbying in federal tax law.¹³⁸ The common factor was the concept of a nexus with current legislative activity, not past votes or positions of candidates.¹³⁹ In another formulation based on sixteen enumerated factors, WRTL referred to “particular or specific, pending legislative action as opposed to a general issue”

136. See Brief for Appellant, *supra* note 76, at 33–39.

137. See *id.* at 9–10, 15–19.

138. See *id.* at 20–21. Tax law provide two distinct approaches to defining legislative lobbying. First is the substantial part test of I.R.C. § 501(c)(3), and the second is the expenditure test set forth in I.R.C. § 501(h), as defined in I.R.C. § 4911 and the regulations there under. For a detailed analysis of the substantial part test and the expenditure test of the legislative lobbying, see HILL & MANCINO, *supra* note 67, at Chapter 5 and ¶ 13.03. For the Internal Revenue Service’s most recent guidance on distinguishing impermissible participation or intervention in a political campaign from other forms of advocacy, including issue advocacy and grassroots lobbying, see Rev. Rul. 2007-41, 2007-1 C.B. 1421.

139. In its Brief in *WRTL II*, it defined grassroots lobbying in the following terms:

First, based on the text of the communication, it focuses on a current legislative branch matter, takes a position on the matter, and urges the public to ask a legislator to take a particular position or action with respect to the matter in his or her official capacity. *Second*, the ad does not mention any election, candidacy, political party, or challenger, or the official’s character, qualifications, or fitness for office. *Third*, as long as the ad follows this pattern, the fact that the ad states the position of the candidate on the matter, which is objectively accurate and based on publicly available means of verification, and praises or criticizes the candidate for that position, does not effect [sic] it genuineness. Analytically, the first part makes the ad a grassroots lobbying ad and, by its “focus,” eliminates cognizable electoral effect. The second part further assures a lack of such cognizable effect, by not mentioning anything about the election or “the official’s character, qualifications, or fitness for office.” And the third part allows a forceful discussion of the merits of the matter, which merely say that the public official is wrong or right on the issue, not wrong for office.

Brief for Appellee, *supra* note 76, at 56–57 (footnotes omitted). WRTL emphasized the importance of the legislative nexus in a footnote explaining the concept of a current legislative matter for this purpose, stating that “[c]urrent requires that the ad not talk about a past issue, but one under current consideration.” *Id.* at 56 n. 66 (citing *McConnell v. FEC*, 251 F. Supp. 2d 176, 577 (D.D.C. 2003) (Kollar-Kotelly, J.)); *Id.* at 918 (Leon, J.). Comparisons of candidates’ past votes or campaign position have been the characteristic of voter scorecards and other forms of candidate ranking that are generally treated as impermissible participation and intervention in a political campaign for federal tax purposes.

and to the organization's "clear and long-held interest" in the issue.¹⁴⁰ WRTL described the focus of its own ads as "imminently pending, specific legislative activity while Congress was in session, the timing of which was beyond the control of WRTL."¹⁴¹ It distinguished its ads from "'sham issue ads' that ask hearers to call candidates, even non-incumbents, about something vague, abstract, unfocused, and/or possibly in the past."¹⁴² WRTL claimed that its proposed rule was "narrowly tailored"¹⁴³ with the result that the rules could be administered by the courts and the Federal Election Commission without undue burdens.¹⁴⁴ WRTL sought to underscore this point by identifying communications that would not be treated as grassroots lobbying but would remain subject to the financing requirements of BCRA § 203.¹⁴⁵

140. Jurisdictional Statement, *supra* note 72, at 5–6, which identified the following sixteen factors that:

indicate that the broadcast ads are authentic grass-roots lobbying and not electioneering: (1) they concern only a legislative matter; (2) the only reference to a clearly-identified federal candidate is a statement urging the public to contact the candidate and ask that he take a particular position on the legislative matter; (3) the ads contain no reference to any political party; (4) they contain no reference to the candidate's record or position on any issue; (5) they contain no reference to the candidate's character, qualifications or fitness for office; (6) they contain no reference to the candidate's election or candidacy; (7) they focus on particular or specific, pending legislative action as opposed to a general issue; (8) they contain no words that promote, support, attack, or oppose a candidate; (9) they contain information for the person whom the communication urges the audience to contact (by reference to a website); (10) the federal candidate referenced is an incumbent; (11) the ads identify two incumbent Senators; (12) they refer to a candidate and non-candidate and deal with them equally; (13) they deal with currently ongoing legislative action that was reported to be coming to a head during the prohibition period and the timing of the legislative action was beyond the control of the communicator; (14) they dealt with an issue in which the communicator had a clear and long-held interest; (15) they were run outside the prohibition period as well as within them (had injunctive relief been permitted); (16) they could have been run only with money from a "segregated bank account" under 2 U.S.C. § 434(f)(2)(E) (only donations from qualified individuals) if necessary to obtain injunctive relief.

Id.

141. Brief for Appellee, *supra* note 76, at 58.

142. *Id.*

143. Jurisdictional Statement, *supra* note 72, at 29.

144. *Id.*

145. Reply Brief for Appellant at 19 n.21, *Wis. Right To Life v. FEC*, 546 U.S. 410 (2005), (No. 04-1581) (citing Jurisdictional Statement, *supra* note 70, at 29) ("What would be excluded by these facts and definition? There could be no ads naming candidates that were not incumbents. There could be no ads about a candidate's past votes, or general voting pattern, or possible vote on legislation that might later be introduced. There could be no ads about a candidate's perceived misconduct toward his wife or intern, or whether taxes were withheld and paid for a nanny decades ago. Candidates could not be branded liberal or right-wing, pro- or anti-gun, pro- or anti-abortion, pro- or anti-environment, pro- or anti-globalism, pro- or anti-education, pro- or anti-gay, or even Democrat, Republican, Libertarian, or independent. Nor

By devoting this degree of effort to defining grassroots lobbying, WRTL accepted its burden to characterize the speech represented by its ads and thus, by implication, the existence of more than one constitutionally significant form of political speech. Chief Justice Roberts ignored this approach because he articulated an agenda based on “political speech,” not on types of political speech.¹⁴⁶ Although he restored the concept of express advocacy to a central role in the analysis of electioneering communications and set forth a definition of the functional equivalent of express advocacy that will exclude from its coverage anything short of a direct endorsement or, possibly attacks on a person’s character, the larger corporate political speech agenda is aimed at political speech without differentiation.

How narrow or broad an as-applied challenge decided under the grassroots lobbying claim might have been would have depended on how the Court specified the concept of a legislative nexus. If the Court had required that the legislative action be imminent, for example, rather than simply pending or likely or possible, the ruling would have been very narrow. If the Court had required that the text of the ad specifically identify the pending legislation, this would have also narrowed the scope of the decision.¹⁴⁷

Third, the Court could have relaxed the strict requirements for the *Massachusetts Citizens for Life* exception, allowing WRTL to be treated as a “qualified nonprofit organization.” While it rejected the alternative of using its PAC, WRTL claimed that it should be treated as a “qualified nonprofit organization” based on the reasoning but not the specific requirements of *FEC v. Massachusetts Citizens for Life (MCFL)*.¹⁴⁸ *MCFL* dealt with the question of whether funding of a voter guide was a permissible independent expenditure for federal election law purposes.¹⁴⁹ The Court held that the corporate expenditure ban did not apply because *MCFL* was a nonprofit advocacy organization funded solely by contributions from individuals who shared the organization’s purposes and wished to support its activities.¹⁵⁰ The holding in the case became the basis for a regulation under federal election law.¹⁵¹

could they be scrutinized as to the sufficiency or conduct of their military service. Elections and candidacy could not be mentioned.”)).

146. See *infra* Part IV.

147. Whether either of these approaches would have been consistent with WRTL’s as-applied challenge is not the main focus here. It is worth noting, however, that the controversy over the timing of the ad in relation to Senate action on filibusters raises at least some questions about the outcome.

148. See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986).

149. *Id.* at 251–52.

150. *Id.* at 263–64.

151. See 11 C.F.R. § 114.10 (2005).

WRTL agreed that it was not a “qualified nonprofit corporation” because it accepted contributions from corporations as well as from individuals.¹⁵² Nevertheless, it claimed that “WRTL is in fact quite like an *MCFL*-type corporation because it is an ideological, nonstock, nonprofit (§ 501(c)(4)) corporation.”¹⁵³ WRTL argued that “[t]he fact that a corporation does not meet ‘qualified nonprofit corporation’ status, because of some minimal business activity or receipts from corporations, should not matter for present purposes, however, because corporate money may be used for grassroots lobbying anyway.”¹⁵⁴ Indeed, WRTL claimed that “[t]here is also no compelling interest in regulation of corporations even as to candidate elections with respect to *MCFL*-type corporations.”¹⁵⁵ WRTL further noted that the Court in *McConnell* held that the electioneering communication provision could not be applied to *MCFL*-type corporations.¹⁵⁶ This alternative based on a modification of the *MCFL* requirements was also inconsistent with both the corporate speech agenda and the political speech framework.

Fourth, in light of its desire to accept corporate contributions to its general treasury and in light of its objections to using its existing PAC, WRTL proposed financing its grassroots lobbying ads through “a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E).”¹⁵⁷ This would be a segregated fund within its general treasury that was not subject to the solicitation and disclosure limitation applicable to PACs but accepted contributions only from individuals.¹⁵⁸

Pursuing these alternatives would have left the PAC alternative in place for broadcast communications that are electioneering communications but not grassroots lobbying communications. Defining a narrow exception would have left the prohibitions on the use of corporate treasury funds in place and, to that extent, would have been inconsistent with the corporate political speech agenda and with the larger political speech framework. It would also have been inconsistent with the majority’s insistence that strict scrutiny does not permit contextual analysis of intent or purpose or most other factors outside of the four corners of the text of the broadcast communication.¹⁵⁹ In sum, basing the outcome on characterization of the speech would have undermined the

152. Brief for Appellant, *supra* note 76, at 31 (citing 11 C.F.R. § 114.10 (2005)).

153. *Id.*

154. *Id.*

155. *Id.*

156. Reply Brief for Appellant, *supra* note 145, at 15 (citing *McConnell v. FEC*, 540 U.S. 93, 211 (2003)).

157. Brief for Appellee, *supra* note 76, at i.

158. It is possible that WRTL did not elaborate on its claims relating to restricting fundraising to individuals in part because it wanted to propose this alternative which embraces precisely this restriction on its fundraising.

159. See *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) (principal opinion).

claims relating to corporate speakers and would have supported a narrow result. It would have left BCRA and *McConnell* largely intact.

III. IMPLICATIONS OF *WRTL II* FOR THE POLITICAL SPEECH FRAMEWORK

The principal opinion and the concurring opinions all embrace a political speech framework. This is the central jurisprudential point going forward. However, in articulating this framework, as useful as it has been for defining the corporate political speech agenda, the Court has also now come face-to-face with certain larger issues that it has been artfully sidestepping since it entered the campaign finance wing of the political thicket.

WRTL II was a case about financing political speech. Chief Justice Roberts referred to BCRA in terms of bans and prohibitions on speech. Yet, one of the central facts of the case, largely unremarked upon in the principal or the concurring opinions, was that *WRTL* could have run its ads throughout the primary and general election periods in perfect conformity with BCRA § 203 had it used funds from its controlled PAC. *WRTL* admitted this.¹⁶⁰ No one challenged this, but only the dissent mentioned it.¹⁶¹

Three fundamental questions emerge from this fact. The first question is whether money is speech. The second issue is whether a corporation is a person for purposes of particular types of speech in the context of an election for public office. The third question is whose speech rights are at issue: an individual's rights to speak and associate, the rights of the associations as entities, or both. Implementing the corporate political speech agenda on a principled basis will require the current majority to confront these issues. Implementing the democratic integrity agenda will require that the dissent develop principled arguments for putting these questions back at the core of campaign finance jurisprudence. The way to begin is to recognize that campaign finance is about money, and questions about money are always questions about transactions.

The question of whether money is speech has simmered in the background of campaign finance jurisprudence without resolution.¹⁶² No one disagrees that money is needed to facilitate speech, but this is not the same question as whether money itself constitutes speech.

160. Brief for Appellee, *supra* note 76, at 25.

161. *FEC v. Wis. Right to Life*, 127 S.Ct. 2652, 2697–98, 2700 n.17, 2702–03 (2007) (Ginsberg, J., dissenting).

162. See generally J. Skelly Wright, Comment, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1004–05 (1976) (arguing that the view that money is speech “misconceives the First Amendment”); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 631–32 (1982) (equating political spending with speech led to perverse results).

The most recent consideration of whether money is speech came in *Buckley*. The per curiam opinion rejected placing campaign finance in a framework distinguishing conduct from speech.¹⁶³ The Court of Appeals had relied on *United States v. O'Brien*, a case upholding a conviction for burning a draft card.¹⁶⁴ In *O'Brien*, the Court found that burning a draft card involved both “symbolic speech” protected by the First Amendment, and a “nonspeech element” that was “unrelated to the suppression of free expression.”¹⁶⁵ The Court upheld O’Brien’s conviction because it found “a sufficiently important governmental interest in regulating that nonspeech element” and found further that this governmental interest was “unrelated to the suppression of free expression” and had an “incidental restriction on alleged First Amendment freedoms . . . no greater than [was] essential to the furtherance of that interest.”¹⁶⁶

The *Buckley* Court rejected the circuit court’s reliance on *O'Brien*, concluding that “[t]he expenditure of money simply cannot be equated with such conduct as destruction of a draft card.”¹⁶⁷ The Court found not only a complex relationship between speech and money but also a relationship that would differ based the facts of particular cases. The Court observed that “[s]ome forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two.”¹⁶⁸ The Court nevertheless served notice that it would disregard these fact-based distinctions, observing, “this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”¹⁶⁹ The Court then noted that money is important to all forms of communication and to “effective political speech.”¹⁷⁰ It concluded that “[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience

163. *Buckley v. Valeo*, 424 U.S. 1, 15–16 (1976).

164. *Id.* at 16.

165. *See e.g.*, *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (sustaining conviction for burning draft card even though it involved “symbolic speech” because the government had a sufficiently important interest in regulating the “nonspeech element” that was “unrelated to the suppression of free expression”).

166. *Id.* at 376–77.

167. *Buckley*, 424 U.S. at 16.

168. *Id.*

169. *Id.*

170. *Id.* at 19.

reached.”¹⁷¹ Having based its analysis on “political communication,” the Court then had to retrofit its analysis to take account of its decision to uphold contribution limitations but to strike down expenditure limitation except when those expenditures involve express advocacy.

The Court has not directly addressed the issue of whether or in what ways money is speech since *Buckley*. The Court has addressed this issue obliquely in cases dealing with contribution limitations. Under what circumstances might contribution limits be so restrictive that they constitute a burden on the speech rights protected under the First Amendment?¹⁷² Justice Stevens, who did not take part in *Buckley*, wrote a concurring opinion in *Nixon v. Shrink to Emphasize* that “[m]oney is property; it is not speech.”¹⁷³ These questions are not the same as the fundamental question of whether money itself, without regard to amount, is speech. The question that the Court has not addressed is whether there can be too much money from a single source for a particular type of speech in the context of a federal election. This is not a question of equalizing amounts contributed or expended. The Court in *Buckley* focused on the quantity of speech but never considered diversity of speech. It never considered the case of whether permitting one corporate entity to purchase all of the available air time in a particular media market for the purpose of repeating the same broadcast communication throughout the campaign enhanced the kind of quantity of political speech that the Court has come to conflate with enhancing public discussion consistent with the First Amendment.

The second question is whether a corporation has the same speech rights as an individual in the context of a candidate election. The Supreme Court sidestepped this question in *Bellotti*, which involved corporate expenditures in connection with a ballot measure, not corporate contributions in a candidate election.¹⁷⁴ The Supreme Judicial Court of Massachusetts noted the *Buckley* Court’s rejection of the distinction between speech and conduct in the political speech context¹⁷⁵ and then directed attention to “a more basic question here involved, namely, whether business corporation, such as the plaintiffs, have

171. *Id.* This observation raises an important issue, not further addressed here, about the Court’s reliance on hypothesized facts. The current limits on contributions and on certain independent expenditures do not appear to have had any of these results. The Court’s hypothesis does not appear to take account of saturation advertising based on repetition of the same ad or the rise of the ubiquitous thirty second ads that seem to convey little information.

172. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000); see also *Randall v. Sorrell*, 548 U.S. 230 (2006).

173. *Nixon*, 528 U.S. at 398 (Stevens, J., concurring).

174. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777–79 (1978).

175. *The First National Bank of Boston v. Attorney General*, 371 Mass. 773, 783 (Mass. 1977). For a discussion of the distinction between speech and conduct in *Buckley*, see *supra* Part II.B.

First Amendment rights coextensive with those of natural persons or associations of natural persons.”¹⁷⁶ The Massachusetts Court held that “[i]t seems clear to us that a corporation does not have the same First Amendment rights to free speech as those of a natural person, but, whether its rights are designated ‘liberty’ rights or ‘property’ rights, a corporation’s property and business interests are entitled to Fourteenth Amendment protection. . . . It is also clear that, as an incident of such protection, corporations possess certain rights of speech and expression under the First Amendment.”¹⁷⁷ Based on this analysis, the Massachusetts Court held that “only when a general political issue materially affects a corporation’s business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public.”¹⁷⁸

The United State Supreme Court reversed the Massachusetts Court and went to considerable length to reject its reasoning.¹⁷⁹ The Supreme Court recast the issue from a question of the rights of corporate speakers to a question of what rights the First Amendment protects, reasoning as follows:

The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The constitution often protects interests broader than those of the parting seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations “have” First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether § 8 [in the Massachusetts statute at issue in the case] abridges expression that the First Amendment was meant to protect.¹⁸⁰

The Court found that the speech at issue, support for or opposition to a referendum measure on a proposed state constitutional amendment that would authorize a graduated personal income tax, “is at the heart of the First Amendment’s protections.”¹⁸¹ The Court then concluded that “[t]he question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection.”¹⁸² The Court held that “[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”¹⁸³

176. *First National Bank of Boston*, 371 Mass. at 783.

177. *Id.* at 784.

178. *Id.* at 785.

179. *Bellotti*, 435 U.S. at 775–88.

180. *Id.* at 776.

181. *Id.*

182. *Id.* at 778.

183. *Id.* at 784–85.

The court found no compelling government interest in limiting the speech at issue based on the identity of the speakers. It rejected both the idea of protecting the role of the individual citizens and protecting the rights of shareholders.¹⁸⁴ In language that is now commonly overlooked, the Court observed “[h]owever weighty these interests may be in the context of partisan candidate elections, they are not implicated in this case, or are not served at all, or in other than a random manner by the prohibition in § 8.”¹⁸⁵ In a footnote relating to this reasoning, the Court makes its distinction between ballot measure referenda and candidate elections quite clear.¹⁸⁶ Noting that prohibitions on a corporate contributions to candidates or candidate committees or “other means of influencing candidate elections” were not at issue in this case, the Court observed that “[t]he overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political ads” and stated that “[t]he importance of governmental interest in preventing this occurrence has never been doubted.”¹⁸⁷ The Court then state explicitly that “our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.”¹⁸⁸

These two approaches to the role of corporations in public discourse might well provide the foundation for a much-needed consideration of the issue in light of contemporary experience. The Roberts Court appears unlikely to undertake this task, which might well make its efforts to implement the corporate political speech agenda more difficult. Instead, the new majority on campaign finance jurisprudence in *WRTL II* embraced the reasoning of Justice Kennedy’s dissent in *Austen*, which castigated the majority in that case for its “hostility to the corporate form” and claimed that such hostility makes the Court itself the censor rather than the protector of the speech rights protected under the First Amendment.¹⁸⁹

The third question is closely related to the second but not coextensive with it. While the second question focused directly on speech, the third question addresses the relationship between speech and association. Even if a corporate entity has the same First Amendment rights as an individual, this does not resolve the question of the relationship between the entity and its members or contributors. If a corporate entity does not have the same First Amendment rights as an individual, then the corporate entity derives its rights from its

184. *Id.* at 786–87.

185. *Id.* at 787–88.

186. *Id.* at 788 n.26.

187. *Id.*

188. *Id.*

189. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 713 (1990).

members or contributors. If the corporate entity's rights are derivative, then the rights of the members or contributors within the corporate entity are central issues for a political speech framework. If the corporate entity is treated as having its own independent rights of political speech, then questions of association and of the rights of members or contributors are at best, secondary in a political speech framework but would remain primary in a democratic integrity framework.

The core issue is whether a corporate entity has its own First Amendment rights or whether it derives these rights from its members and what difference the possible answers to this question make. There are three broad patterns for analyzing the relationship between an organization and its members, or, if one prefers, between members and their organization: (I) both the members and the corporate entity might be treated as having independent rights under the First Amendment; (ii) corporate entities might be treated as deriving First Amendment rights from their members; or (iii) members might be treated as having waived certain of their First Amendment rights once they join or transfer funds to a corporate entity. It is entirely possible that each of these patterns might be constitutionally permissible in particular circumstances depending on the nature of the corporate entity and its relationship with its members or contributors. For example, business corporations might be treated differently than membership organizations established for purposes of policy advocacy or political committees organized for explicit purposes of contesting candidate elections. These questions far exceed the scope of this article. The point here is that campaign finance jurisprudence cannot credibly rest on invocation of First Amendment rights unless it grapples with the thorny issues of whose rights are being protected.

IV. IMPLEMENTING THE CORPORATE SPEECH AGENDA AFTER *WRTL II*

Implementing the corporate political speech agenda does not follow seamlessly from *WRTL II*. This is certainly the case with respect to the longer term agenda of rolling back, or even overturning, FECA, but it is also true with respect to the more proximate corporate political speech agenda. To implement the corporate political speech agenda, the Court must overcome the following three challenges: (1) clarifying the tenuous premises embedded in the political speech framework, (2) overturning the campaign finance precedents that are inconsistent with the agenda, and (3) limiting congressional authority over campaign finance and, more broadly, the conduct of elections. *WRTL II* ignores the first challenge, begins with the process of addressing the second, and accords the third a more prominent place in the campaign finance agenda than it has previously received. Ignoring the tenuous premises of the political speech framework will prove effective unless and until the proponents of the democratic integrity framework more effectively address these premises within their own framework. The Court will necessarily focus on the second

obstacle, which has been created by its own precedents. As is discussed more fully below, the Court's continued interest in confining the role of Congress in campaign finance matters encounters the inevitable continuation of Article I of the Constitution and the difficulty of imposing a rigid separation of powers interpretation on the constitutional structure that would leave the Court in exclusive control of the First Amendment.¹⁹⁰

Implementing the corporate political speech agenda depends on reinterpreting or overruling precedents that distinguish corporate speakers from individual speakers and that distinguish among types of political speech. Fully implementing the corporate speech agenda is inconsistent with the central elements of FECA.¹⁹¹ The first step on this path is to overrule *Austin, MCFL, Buckley and McConnell*. The second step is to entrench *Bellotti* at the center of campaign finance jurisprudence.

The members of the new majority in *WRTL II* do not agree on how this is to be done. Justices Scalia, Thomas, and Kennedy have written dissents that provide templates for recasting campaign finance jurisprudence. Justice Scalia's concurring opinion in *WRTL II* provides a quick reference and, in some instances, even detailed citations to these opinions.¹⁹²

Chief Justice Roberts' approach in *WRTL II* suggests that this enterprise will not be accomplished in one seminal opinion or by the directly overruling prior cases. His opinion offers no indication that he is seeking to probe the limits of *stare decisis* in any direct sense. Justice Scalia's breezy effort to minimize the significance of *stare decisis*, relying on the mother of all string cites,¹⁹³ is unlikely to persuade Chief Justice Roberts or others in the new majority as they ponder the likely life of their opinions.¹⁹⁴ As the dissent observes in *WRTL II*, rejecting this approach will not make the direction and magnitude of the change begun in *WRTL II* any less important.¹⁹⁵ On this point, the concurrence seems less certain than the dissent. It seems likely that Justice Scalia's concurrence was written to signal as strongly as possible that three Justices have doubts about the usefulness of Chief Justice Roberts' reasoning as a predicate for implementing the corporate speech agenda.

The problems posed by Chief Justice Roberts approach are apparent in his principal opinion, particularly in Parts III and IV, which Justices Scalia, Thomas and Kennedy pointedly did not join. Chief Justice Roberts carefully and cannily cited the majority opinions of the very cases that the *WRTL II* majority agree must be overturned. While the reasoning and the results are

190. See *infra* Part V.

191. See *supra* Part I.B.

192. See *FEC v. Wis. Right to Life*, 127 S.Ct. 2652, 2676–84 (2007) (Scalia, J., concurring).

193. *Id.* at 2685 n.9.

194. See *id.* at 2685.

195. *Id.* at 2702 (Souter, J., dissenting).

derived from the dissents in these cases, Chief Justice Roberts' citation of the majority opinions represents a gamble that he can effectively reinterpret these cases so that they can be separated from the democratic integrity framework and recast as elements of the political speech framework. This carries the risk that the reinterpretation cannot be made sufficiently persuasive to overcome, at least in the long run and perhaps with a different Court, the continued precedential value of these cases when interpreted in a manner consistent with their own facts and their holdings.

Containing this risk involves an understanding of how the principal opinion used these precedents. Indeed, it is a picture of referencing phrases for purposes at variance with the facts and holdings of the precedents. The fundamental cleverness of his approach was to cite the cases that Justice Scalia wishes to overturn in support of a more central role for *Bellotti*. This exercise is apparent in the Chief Justice's use of *Austin* and *MCFL* to support his position by detaching phrases from the facts and the holding in each case. Chief Justice Roberts proved beyond a doubt that he is a master of the "lawyer's game" that he decried so passionately in his dissent in *Massachusetts v. Environmental Protection Agency*.¹⁹⁶

The logic of the principal opinion in *WRTL II* comes from *Bellotti*, where the Court found that the central question is not the character of the speaker but the nature of the First Amendment right.¹⁹⁷ But, the principal opinion in *WRTL II* does not cite *Bellotti* for this proposition or for any other proposition relating to the rights of corporate speakers. Instead, it cites *Bellotti* for propositions relating to mootness¹⁹⁸ and strict scrutiny as the appropriate standard of review.¹⁹⁹ The principal opinion cites *Bellotti* to the effect that the PAC option would justify regulation of all corporate speech, which the Court rejected in *Bellotti*.²⁰⁰ Extending a ban on corporate speech to issue advocacy would be inconsistent with *Bellotti*, which held that corporate identity did not strip a corporation of all free speech rights.²⁰¹

The most important element of Chief Justice Roberts' use of *Bellotti* is what he did not say about the case, namely, that *Bellotti* involved a

196. *Mass. v. EPA*, 127 S.Ct. 1438, 1471 (2007) (Roberts, C.J., dissenting). In his unvarnished condemnation of the what the Chief Justice regarded as the Court's imprudent dilution of the Article III standing requirement, he accused the Court of making the standing requirements "utterly manipulable" and of making standing "a lawyer's game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches." *Id.*

197. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

198. *WRTL II*, 127 S.Ct. at 2662-63, (citing *Bellotti*, 435 U.S. at 774).

199. *Id.* at 2664 (citing *Bellotti*, 435 U.S. at 786).

200. *Id.* at 2671 n.9, (citing *Bellotti*, 435 U.S. at 777-78).

201. *Id.* at 2673 (citing *Bellotti*, 435 U.S. at 778).

referendum, which is a form of legislation, not a candidate election.²⁰² By simply ignoring this fact, Chief Justice Roberts claimed that the rights of corporate speakers existed without regard to the context of the speech. In light of his emphasis on the distinctions among express advocacy, functional equivalents of express advocacy, and issue advocacy, which he blurred into the generic category of political speech. Chief Justice Roberts took the position that these distinctions have constitutional significance but that the distinction between referenda and candidate elections does not. This approach, whatever its ultimate constitutional merit, saved Chief Justice Roberts from having to account for the *Bellotti* Court's own position that the distinction between referenda and candidate elections may matter. Dealing with this issue would have eroded the force using *Bellotti*, oblique as it was, and would have raised questions about the Chief Justice's insistence that his test for determining whether a broadcast ad was the functional equivalent of express advocacy should not be based on contextual factors. Presumably, he dismissed the distinction between a referendum and a candidate election as constitutionally irrelevant, and indeed, an inappropriate contextual factor. Simply ignoring these nettlesome issues makes an opinion more elegant and more persuasive as long as one has a majority, but it may not serve as a solid long term foundation for implementing and maintaining the corporate speech agenda.

The more proximate agenda item is to eliminate the PAC alternative to the use of a corporation's general treasury funds. This means that *Austin* must be overturned, which has long been a goal of the Justices who are now in the *WRTL II* majority. Justice Scalia's concurrence denounced *Austin* as a "significant departure from ancient First Amendment Principles"²⁰³ and declared flatly that the case was "wrongly decided."²⁰⁴ Justice Scalia took some pains to trace the history of opposition to *Austin*, in part because the *McConnell* majority based its reasoning on claims of an unbroken history of reform during the past century. Justice Scalia did not explain what particular ancient principles supported his position on corporate political speech. Instead, he cited a series of dissents relating to the requirement that corporate entities participate in candidate elections through their controlled PACs.²⁰⁵

Justice Kennedy's dissent in *McConnell* is a template for the new framework set forth by Chief Justice Roberts in *WRTL II*.²⁰⁶ Justice Kennedy

202. *Bellotti*, 435 U.S. at 769.

203. *WRTL II*, 127 S.Ct. at 2679 (Scalia, J., concurring).

204. *Id.*

205. *Id.* (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 695–713 (1989) (Kennedy J., dissenting); *id.* at 679–95 (Scalia, J., dissenting); *McConnell v. FEC*, 540 U.S. 93, 257–59 (Scalia J., dissenting); *id.* at 325–30 (Kennedy J., dissenting); *id.* at 273–75 (Thomas, J., dissenting)).

206. *McConnell*, 540 U.S. at 322–41 (Kennedy, J., dissenting).

relied centrally on *Bellotti* when claiming that *Austin* should be overruled.²⁰⁷ He asserted that “the majority’s ready willingness to equate corruption with all organizations adopting the corporate form is a grave insult to nonprofit and for-profit corporations alike, entities that have long enriched our civic dialogue.”²⁰⁸ He rejected reliance on justifications based on aggregation of wealth or concerns about the shareholders and members of corporations and unions as adequate justifications for burdens on the First Amendment rights of those institutions.²⁰⁹ Like Chief Justice Roberts, Justice Kennedy adopted a framework based on the speech rights of corporate speakers.

While Chief Justice Roberts’ views certainly reflect and incorporate these prior dissents, he solved the central conceptual problem posed by *Bellotti* as a precedent, namely, the *Bellotti* Court’s distinction between corporate speech in the context of a referendum and corporate speech in the context of a candidate election. The *Bellotti* Court, noting that “[a]ppellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committee, or other means of influencing candidate elections,” stated clearly that its “consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.”²¹⁰

The question of overturning *Buckley* was considered again in *Nixon v. Shrink*, which involved state limits on contributions to state political candidates.²¹¹ Justice Souter grounded his opinion upholding the State of Missouri’s contribution limits in a democratic integrity framework and found in *Buckley* ample precedent for doing so.²¹²

Justice Kennedy wrote a sharply worded dissent in *Nixon*.²¹³ He called upon the Court to overturn *Buckley* because it had created “covert speech” for the purpose of evading the contribution limits.²¹⁴ Examples of covert speech, such as soft money contributions to political parties and “so-called issue advocacy advertisements that promote or attack a candidate’s positions without specifically urging his or her election or defeat,” were a more serious problem than the ills *Buckley* purported to address.²¹⁵ This result, according to Justice Kennedy, “mocks the First Amendment.”²¹⁶ He would have overturned

207. *Id.* at 324–28; *see also Austin*, 494 U.S. at 695–713 (Kennedy J., dissenting).

208. *McConnell*, 540 U.S. at 325–26.

209. *Id.* at 327.

210. *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

211. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 381–82 (2000).

212. *Id.* at 391–95 (citing *Buckley v. Valeo*, 424 U.S. 1 (1975)).

213. *Id.* at 405–10 (Kennedy, J., dissenting).

214. *Id.* at 406–07.

215. *Id.* at 406.

216. *Id.* at 407.

Buckley and “then free[d] Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it [was] possible to do so.”²¹⁷ As of 1997, Justice Kennedy had not abandoned the theory that Congress was entitled to its own view of the First Amendment in this matter.

Justice Thomas has also consistently argued in his dissents that *Buckley* should be overturned. He argued that political speech is at the core of the First Amendment and thus outside the reach of any government entity. Indeed, he believes many of the errors in campaign finance have been inflicted on the public by the courts. He has reserved his most stinging criticism for what he describes as the Court’s willingness to “balance away First Amendment freedoms.”²¹⁸ This observation was based on his insistent application of strict scrutiny, as opposed to claims that Congress had no authority in this area.

The new majority is currently engaged in an internal debate over whether to overrule the Court’s campaign finance precedents explicitly or indirectly. The outcome is by no means certain, and this article makes no predictions. It has focused instead on the implications of these precedents for implementing the corporate political speech agenda, which, if fully implemented, would leave little if any of the provisions of FECA and the Court’s precedents in place.

The Court’s emerging balance of powers concerns in the campaign finance area serves notice that the Court’s overruling of these precedents does not mean that the Court regards campaign finance as an area of congressional initiative.

V. POLITICAL SPEECH AND THE BALANCE OF POWERS

The *McConnell* majority referred repeatedly to the Court’s deference to Congress in the areas of political speech and the broad scope of Congress’s authority to legislate in this area.²¹⁹ This is not a new concept and is found in *Buckley* and other cases. In *Buckley*, the Court did not question congressional authority even as it struck down the limitation on expenditures.²²⁰

In *WRTL II*, the new majority challenged Congressional authority to legislate on matters involving campaign finance. This development follows from the consolidation of the political speech framework and enhances its entrenchment. Balance of powers concerns are linked to the language of the First Amendment, which begins, “Congress shall make no law. . . .”²²¹ As

217. *Shrink Mo. Gov’t PAC*, 528 U.S. at 409–10 (Kennedy, J., dissenting).

218. *Id.* at 410 (Thomas, J., dissenting).

219. *McConnell v. FEC*, 540 U.S. 93, 117, 137 (2003).

220. *Buckley v. Valeo*, 424 U.S. 1, 131–32 (1975) (per curiam).

221. U.S. CONST. amend. I. Chief Justice Roberts emphasized the importance of this language, stating:

campaign finance is viewed solely as a First Amendment matter, this language is being given a more literal interpretation by the new majority.

This trend is controversial. It is one thing for the Court to hold that Congress has taken a constitutionally impermissible approach in campaign finance legislation. It is quite another thing for the Court, or some on the Court, to suggest that Congress has no authority, or only very limited authority, to address these issues at all. This is a claim of a judicial pre-clearance authority, a claim that the Court may define the scope of congressional authority. It is reminiscent of the claim in *City of Boerne v. Flores*, where the Court held that Congress can enact legislation only after the Court had declared that a constitutional right exists, and then only if the legislation is narrowly tailored remedial legislation.²²² If anything, the concurring opinion in *WRTL II* makes even greater claims to the effect that Congress should not be permitted any role in campaign finance matters.

The beginning of the more explicit debate over the scope of congressional authority appeared in *Nixon v. Missouri Shrink PAC*, particularly in Justice Breyer's concurrence and Justice Kennedy's dissent.²²³ *Nixon* was decided three years after *City of Boerne* and two years after another important balance of powers case, *Clinton v. City of New York*, in which the Court held that Congress lacked constitutional authority to enact the Line Item Veto Act.²²⁴ Justice Kennedy wrote the majority opinion in *City of Boerne* and a concurring opinion dealing with the balance of powers in *Clinton*. Both provide insight into his subsequent dissents in *Shrink Mo. Gov't PAC* and *McConnell* based in part on quite different concepts of the balance of powers.

In *Shrink Mo. Gov't PAC*, Justice Breyer observed that "the legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we."²²⁵ That being the case, Justice Breyer

as is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself: "Congress shall make no law . . . abridging the freedom of speech." The Framers' actual words put these cases in proper perspective. Our jurisprudence over the past 216 years has rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech—between what is protected and what the Government may ban—it is worth recalling the language we are applying.

FEC v. Wis. Right to Life 127 S.Ct. 2652, 2674 (2007) (principal opinion) (quoting U.S. CONST. amend. I).

222. *City of Boerne v. Flores*, 521 U.S. 507, 518–20 (1997). *But see* *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

223. *Shrink Mo. Gov't PAC*, 528 U.S. at 400 (Breyer, J., concurring); *id.* at 406 (Kennedy, J., dissenting).

224. *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1997).

225. *Shrink Mo. Gov't PAC* 528 U.S. at 403 (Breyer, J., concurring) (referring to the legislature of the State of Missouri); *see also* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING

concluded, referring to the legislature, that “[w]e should defer to its political judgment that unlimited spending threatens the integrity of the electoral process.”²²⁶ But Justice Breyer was not arguing for unbounded deference to the legislature, concluding that “we should not defer in respect to whether its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge.”²²⁷ He concluded that *Buckley* “might be interpreted as embodying sufficient flexibility for the problem at hand.”²²⁸ At the same time, Justice Breyer made it clear that he was willing to reconsider *Buckley*:

What if I am wrong about *Buckley*? Suppose *Buckley* denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance. If so, like Justice Kennedy, I believe the Constitution would require us to reconsider *Buckley*.²²⁹

Justice Kennedy’s dissent in *Shrink Mo. Gov’t PAC* was written from a perspective rooted solely in the First Amendment. At this stage, Justice Kennedy concluded that he “would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising.”²³⁰ Justice Kennedy wanted to overrule *Buckley* “and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so.”²³¹ Three years later when the Court decided *McConnell*, both Justice Breyer and Justice Kennedy had moved beyond this kind of flexibility.

The *McConnell* majority made the long legislative history of campaign finance reforms the centerpiece of its opinion. To the *McConnell* majority, this was a narrative on the role of the people’s elected representatives protecting the institutions and processes of democracy from special interests.²³² This history of congressional engagement was cited repeatedly to support the majority’s interpretation of BCRA.²³³

OUR DEMOCRATIC CONSTITUTION, 46-9 (2005) (where the themes in his concurring opinion also appear).

226. *Shrink Mo. Gov’t PAC*, 528 U.S. at 403–04 (Breyer, J., concurring).

227. *Id.* at 404.

228. *Id.* At the same time, Justice Breyer observed that “it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience stressed by Justice Kennedy.” *Id.* at 405.

229. *Id.* at 405.

230. *Id.* at 409 (Kennedy, J., dissenting).

231. *Id.* at 409–10.

232. *McConnell v. FEC*, 540 U.S. 93, 189–210 (2003).

233. *See id.*

The dissents in *McConnell* rejected this reliance on the history of congressional action, which they tended to see as a narrative of incumbent politicians' use of public office to limit the First Amendment rights of the people.²³⁴ Justice Kennedy's dissent in *McConnell* took direct aim at Congress. He pointedly observed that

Buckley did not authorize Congress to decide what shapes and forms the national political dialogue is to take. To reach today's decision, the Court surpasses *Buckley's* limits and expands Congress' regulatory power. In so doing, it replaces discrete and respected First Amendment principles with new, amorphous, and unsound rules, rules which dismantle basic protections for speech.²³⁵

Justice Kennedy did not hesitate to charge that Congress cannot be trusted with the First Amendment, describing BCRA as "an effort by Congress to ensure that civic discourse takes place only through the modes of its choosing."²³⁶ The electioneering communication provisions were, in Justice Kennedy's view, no exception to this general assessment but instead "demonstrate Congress' fundamental misunderstanding of the First Amendment."²³⁷ Indeed, he charges that Congress enacted BCRA § 204 knowing that it is unconstitutional.²³⁸ In light of this track record, Justice Kennedy concludes that "we cannot cede authority to the Legislature to do with the First Amendment as it pleases."²³⁹

Consistent with this conclusion, Justice Kennedy would require evidence that "the Legislature has established that the regulated conduct has inherent corruption potential, thus justifying the inference that regulating the conduct will stem from the appearance of real corruption."²⁴⁰ In other words, Congress cannot make this judgment based on its own experience but must satisfy the Court that it has established an empirical predicate based on the "inherent" qualities of the conduct. As a result, according to Justice Kennedy, "the Court today should not ask, as it does, whether some persons, even Members of Congress, conclusorily assert that the regulated conduct appears corrupt to them."²⁴¹ The Court instead must ask "whether the conduct now prohibited inherently poses a real or substantive *quid pro quo* danger, so that its regulation will stem the appearance of *quid pro quo* corruption."²⁴² In

234. *Id.* at 249–50 (Scalia, J., concurring in part and dissenting in part).

235. *Id.* at 286–87 (Kennedy, J., concurring in the judgment and dissenting in part).

236. *Id.* at 287.

237. *Id.* at 339.

238. *McConnell*, 540 U.S. at 339 (Kennedy, J., concurring in the judgment and dissenting in part).

239. *Id.* at 330.

240. *Id.* at 297–98.

241. *Id.* at 298.

242. *Id.*

requiring that Congress set forth the evidence on which it based its legislation and strongly suggesting that this evidence will be reviewed by the Court, Justice Kennedy is applying the standard he set forth in *City of Boerne* in the First Amendment context.

In *WRTL II* Justice Scalia, joined by Justices Kennedy and Thomas, made even more muscular claims about the exclusive authority of the Court to interpret and protect the First Amendment. Justice Scalia cited a remark of former House Minority Leader Richard Gephardt to the effect that freedom of speech could not be reconciled with “healthy campaigns in a healthy democracy” and that it was impossible to have both.²⁴³ This would mean that the two competing frameworks for campaign finance jurisprudence could never be reconciled. Justice Scalia did not discount this possibility. He did, however, consider what the Court’s role would be if it were possible to have both, observing:

[i]f 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.²⁴⁴

The ideal that the court has particular responsibility for selected parts of the Constitution and that this judicial responsibility supports limitation or exclusion of other branches of government from these areas is beyond novel. A judicial monopoly protects liberty no more than would efforts to strip courts of jurisdiction over particular areas of the Constitution. Balance of powers does not mean bartering among the branches for interpretive monopolies.

Chief Justice Roberts added an explicit concern with limited government to the balance of powers analysis in the campaign finance jurisprudence.²⁴⁵ He focused explicitly on restraining the judicial branch rather than on excluding the legislative branch.²⁴⁶ The Chief Justice found time-consuming discovery an impermissible burden on First Amendment rights.²⁴⁷ He concluded that a test based on “the actual effect of speech” would “typically lead to a burdensome, expert-driven inquiry” that “will unquestionably chill a substantial amount of political speech.”²⁴⁸ Chief Justice Roberts concluded that is precisely what happened in the *WRTL* litigation, which he described as follows:

243. *FEC v. Wis. Right to Life*, 127 S.Ct. 2652, 2686 (2007) (Scalia, J., concurring).

244. *Id.* (emphasis in original).

245. *Id.* at 2672.

246. *Id.* at 2669.

247. *WRTL II*, 127 S.Ct. at 2666-67 (principal opinion).

248. *Id.* at 2666.

Consider what happened in these cases. The District Court permitted extensive discovery on the assumption that WRTL's intent was relevant. As a result, the defendants deposed WRTL's executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many documents related to its operations, plans, and finances. Such litigation constitutes a severe burden on political speech.²⁴⁹

He concluded that the proper test "must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation."²⁵⁰

VI. FRAMEWORKS FOR DEMOCRACY

The current tension between two frameworks for campaign finance jurisprudence can obscure a central commonality—the shared conviction that the frameworks are about competing visions of democracy. This is a long-deferred discussion in the political life of the United States. It is not a discussion that can be or should be confined to the Court.²⁵¹ What role the Court plays and on what terms it plays this role is one of the ongoing elements of this larger conversation. The continuing controversy over campaign finance reform is part of this larger discussion. In this discussion, the contested elements of the frameworks developed by the Court in its campaign finance cases will be tested and perhaps revised.

The *WRTL II* framework equates democracy with the marketplace of ideas and wants that marketplace freed of intrusive regulation. The threat to democracy is seen as interference with individual and corporate rights to speak about issues and candidates in a vigorous exchange of ideas. The government is the problem and should not be allowed to present regulation as a solution.²⁵² The *McConnell* framework equates democracy with an active role in elections and equal access to the policy process. The threat to democracy is seen as a covert process accessed through hidden influence unrelated to the formal and ostensibly public policy process. Because these issues arise from the operating of the public policy process, the government, and notably Congress, must play a central role in resolving them.²⁵³

Will these two frameworks define the larger discourse about democracy? If they do, what will be gained and lost? If they do not, what elements are missing and how will these missing elements shape the debate over campaign

249. *Id.* at 2666 n.5.

250. *Id.* at 2666.

251. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, x-xi, (1999).

252. *WRTL II*, 127 S.Ct. at 2666 (principal opinion).

253. See *McConnell*, 540 U.S. at 181-85.

finance jurisprudence? It may well seem perverse to direct attention to large themes at the end of an article on a topic that seems large enough in itself. But, how else is one to understand law and how else is one to understand the Constitution? The Constitution is about the process of a people governing themselves. Just as the Chief Justice thought it important at the end of his principal opinion in *WRTL II* to cite the language of the First Amendment, so, too, this article thinks it important and appropriate to cite the language of the first sentence of the Constitution:

We the people of the United States, in Order to form a more perfect Union, to establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.²⁵⁴

This is a process that continues today. “We the people” are still attempting to form “a more perfect Union.” How do the two frameworks for campaign finance jurisprudence contribute to this process, and how does the role assigned to the people under the Constitution aid in understanding the two frameworks?

The political speech framework of *WRTL II* is foundational, but the effort by the Court to use political speech in an acontextual and mechanically textual manner flies in the face of the very idea of a constitution. Political speech is not an end in itself. Political speech is inextricably bound up in the institutional structures of government, the processes of seeking access and influence, the contested elections that choose agendas and the persons who will implement them. Speech cannot be abstracted from democracy and the business of forming a more perfect union is not simply a debating society. One of the many things that our history has taught us is that some rules are required if freedom is to be not only protected but also enlarged. Campaign finance is part of this larger effort. The proponents of the political speech framework are going to have to address the issues raised in the political integrity framework with a seriousness that their approaches have heretofore lacked. Doctrine does not exist as an end in itself. Even the marketplace of ideas cannot escape, and has never escaped, debates over the ground rules for its operation. Campaign finance is no exception.

The political integrity framework of *McConnell* is also foundational. It is much more grounded in processes and institutional arrangements. At the same time, it seems to take the political speech rights for granted and to assume that political speech rights are so unassailable that the Court and the country can move on to other concerns. This is not necessarily the case.

254. U.S. CONST. pmb1.

The Court could make a useful contribution by facing three issues that both sides have been avoiding.²⁵⁵ The first is whether money is speech. If money is speech, are all forms of money from all sources directed to any entity from any source to be treated the same? Can foreign funds finance political speech? What kinds of political speech? Issue advocacy? Contributions to candidates?

The second issue is whether corporations are persons for purposes of political speech under the First Amendment. Are there any constitutionally relevant distinctions among types of corporations? Are there any permissible limitations on the types of political speech consistent with the First Amendment rights of particular types of corporations? These questions will take the Court far beyond the limits of the two frameworks and far beyond the limits of the current doctrines.

The third issue is the operational meaning of association. In its zeal to establish a constitutional predicate for the corporate political speech agenda, the majority in *WRTL II* focuses on the speech rights of associations but disregards the associational rights of members and contributors. One of the truly deplorable elements of *WRTL II* is the majority's refusal to recognize the right of individuals to associate. The majority was content to treat this denial of people's rights within associations as constitutionally acceptable collateral damage.

How can "we the people" perform our continuing constitutional duty to form a more perfect union if we have no rights within our associations? Associations do not exist simply to amplify our voices; associations are not simply about speech. They are also about power and access and influence. The *McConnell* political integrity framework stopped well short of recognizing these issues as well, but it at least provided a framework for taking them seriously.

These problems become even more serious in light of the Court's efforts to exclude Congress from a role in determining the policies applicable to campaign finance. These efforts are counterproductive and inconsistent with the Constitution. Campaign finance issues go to the foundations of democratic theory and are not the exclusive preserve of any one branch of government. Judicial review provides no basis for a judicial monopoly in this or any other area of the law. Such claims by the Court are particularly ill-advised if one remembers that elections are the only means for the people to give operational meaning to their sovereign role under the Constitution. Claims of judicial monopoly are inconsistent with the role accorded to sovereign people in the Constitution.

255. *See supra* Part III.

