CORPORATE POLITICAL SPEECH: A PAST, PRESENT, AND FUTURE ANALYSIS

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INTRODUCTION

When congress passed the Bipartisan Campaign Reform Act (BCRA)[1], it aimed to further restrict soft money contributions and issue advocacy by corporations and unions.[2] The BCRA added new provisions to the already restrictive Federal Elections Campaign Act (FECA)[3] that supposedly closed previously existing loopholes[4] not covered by FECA. With these additions, however, new questions arose as to whether or not some of these provisions were constitutional.

The first challenge to the BCRA was *FEC v. Beaumont*[5] where the Supreme Court found the complete ban on contributions to federal candidates by corporations was constitutional. The second, and to date the most famous, Supreme Court decision to address the constitutionality of the BCRA was *McConnell v. FEC*.[6] In *McConnell* the Court found the BCRA to facially constitutional.[7]

The most recent decision on the Supreme Court that addressed corporate political speech as it applied to the BCRA, was *FEC v. Wisconsin Right to Life (WRTL)*.[8] In *WRTL* the court found that the BCRA as it applied to the ads that were run by *WRTL* was unconstitutional.[9] The court, however, accepted the case as an as-applied challenge and

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1 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).
2 Yoav Dotan, Campaign Finance Reform and the Social Inequality Paradox, 37 U. MICH. J. L. REFORM 955, 965 (2004).
3 Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).
4 See, e.g., Dotan, supra note 2 at 965.
5 539 U.S. 146 (2003).
6 540 U.S. 93 (2003).
7 Id.
8 551 U.S. 449 (2007).
9 Id.
10 Id.

thus did not find any provisions of the BCRA facially unconstitutional.[10] More recently, the court heard arguments for, but has not do date decided on, *Citizens United v. FEC*.[11] In *Citizens United* the Court addressed whether or not § 203 of the BCRA was constitutional as it applied to *Citizens United's* film *Hillary: The Movie.*[12]

The main argument presented in this comment is that certain provisions of the BCRA are unconstitutional because they are directly at odds with the First amendment.[13] The comment takes a look at the legislative history preceding the BCRA, FECA and its amendments, and then it follows the legislation through the passing of the BCRA and beyond. It then examines Supreme Court decisions interpreting corporate political speech since the passing of FECA in 1972. Next the Comment examines the arguments and the possible outcomes of *Citizens United* that is currently being decided by the Supreme Court. Finally, it presents the argument that provisions of the BCRA are at odds with the First Amendment and discusses in depth previous Concurrences and Dissents of Supreme Court Justices supporting the argument.

[11] Citizens United v. FEC, 08-205 (Argued Sept. 9, 2009).
[12] *Id*.
[13] U.S. Const. amend. I.

I. FACTUAL BACKGROUND: THE SHAPING OF MODERN CORPORATE POLITICAL SPEECH THROUGH LEGISLATION AND SUPREME COURT DECISIONS

A. LEGISLATIVE HISTORY SHAPING MODERN CORPORATE POLITICAL SPEECH

1. Federal Elections Campaign Act (1971)

In 1971, due to the ever-increasing cost of federal elections, Congress passed the Federal Election Campaign Act (FECA).[14] Until that time there had not been any comprehensive effort to regulate federal campaigns.[15] One of FECA's main purposes was to limit corruption in the political process by aggregations of great wealth by corporations.[16] Since 1971, FECA has been amended on four occasions[17], most recently by the Bipartisan Campaign Reform Act (BCRA).[18] The relevant elements of FECA, and now the BCRA[19], that pertain to this comment are those codified in 2 U.S.C. § 434(f) and § 441b. Although FECA enacted a wide range of regulations into law[20], the §§ 434 and 441b pertain directly to corporate political speech of both for-profit and non-profit organizations.[21]

One of the provisions of FECA is that corporations are not permitted to make direct contributions to federal candidates or expenditures from their general fund in connection with any federal elections.[22] FECA requires any contribution or expenditure to

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[14] FECA, Pub. L. No. 92-225, 86 Stat. 3(codified as amended in 2 U.S.C. §§ 431-455).
[15] Jon Simon Stefanuca, *The Fall of the Federal Election Campaign Act of 1971: A Public Choice Explanation*, 19 U. Fla. J. L. & Pub. Pol'y 237 (2008)(Citing 1972 U.S.C.C.A.N. 1821, 1821-22).
[16] FEC v. Mass. Citizens For Life, Inc., 479 U.S. 238, 263(1986).
[17] Stefanuca, *supra* note 15, at 241-42.
[18] See infra I.A.2
[19] *Id*.
[20] See supra note 15.
[21] *Id*.
[22] 2 U.S.C. § 441b(a)

be paid for through a segregated fund, called a PAC.[23] The General Restriction of direct contributions by corporations to specific candidates, as regulated by FECA, has been determined to meet a compelling government interest[24], and to this day is still considered good law. The Court has repeatedly recognized this decision[25] and it is not disputed in this comment.

Other Supreme Court decisions have invalidated entire sections of FECA[26] or have found the application of FECA to certain organizations to be unconstitutional.[27] In *FEC v. Massachusetts Citizens for Life*, the court found that §441b was unconstitutional as applied to *MCFL*.[28] A similar decision was found in a later case in FEC v. Wisconsin Right to Life when the court found § 441b unconstitutional as it was applied to ads *WRTL* was running during a blackout period.[29] In neither case however was § 441b found to be facially unconstitutional.

FECA and its four amendments have been challenged on multiple occasions since 1976.[30] As this comment will argue, FECA's restrictions on corporations, especially those classified as *MCFL's*[31], are unconstitutional as they restrict the very essence of the First Amendment. As stated by Justice Vinson, "the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies."[32]

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[23] *Id*. A PAC (political action committee) is a committee formed from segregated funds of a corporation for the express purpose of raising money for political advocacy.
[24] *See infra* Part I.B.1.
[25] *See* Buckley v. Valeo, 424 U.S. 1 (1976).
[26] *Id*.
[27] FEC v. Mass. Citizens for Life, Inc., 479 U.S. at 238.
[28] *Id.*
[29] FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).
[30] Beginning with *Buckley.*
[31] *See infra* Part I.B.3.
[32] Dennis v. United States, 341 U.S. 494, 503(1951).

2. The Bipartisan Campaign Reform Act

In 2002 congress passed the Bipartisan Campaign Reform Act (BCRA) which amended FECA for the fourth and final time to date.[33] The main purpose of the legislation was to close soft money and issue advocacy loopholes.[34] Because the Supreme Court has firmly expressed its opinion that any contributions to candidates, and political parties, is marginally restrictive, and does pass strict scrutiny review[35], this issue will not be challenged in this comment. The issue advocacy restrictions enacted by the BCRA, however, will strongly be challenged in this comment.

The BCRA incorporated a new term, "electioneering communication", into FECA.[36] Electioneering communication is defined as "any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for federal office . . . is made within 60 days before a general, special, or runoff election for the office sought by the candidate or . . . 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate."[37] This term effectively broadened the restriction on corporate political speech. Furthermore, this addition to FECA extended the segregated fund restrictions to non-profit corporations.[38] Although the court still acknowledged the *MCFL*[39] exception,

[33] BCRA, Pub. L No. 107-155, 116 Stat. 81.
[34] Dotan, *supra* note 2, at 965.
[35] *See Buckley,* 424 U.S. 1; *McConnell*, 540 U.S. 93.
[36] BCRA §203.
[37] 2 U.S.C. § 434(f)(3).
[38] *Buckley*, 540 U.S. at 209.
[39] *Id*. at 210.

and others, to this provision, the BCRA does restrict "targeted communications" regardless of the exceptions seen in § 441(b)(2).[40]

Prior to *BCRA*, only express advocacy ads would require corporations to use segregated funds to finance issue ads.[41] In *Buckley v. Valeo* the Court defined express advocacy as words deliberately advocating for a candidate.[42] An example would be "vote for", "support", or "elect" a specific individual.[43] By using the term electioneering communication, the BCRA was successful in expanding restricted speech by corporations.

In *FEC* v.*Wisconsin Right to Life* the Court effectively took steps toward explaining in depth what constituted "electioneering communications" by setting forth a test stating 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."[44] In the case the Court interpreted electioneering communication as having to be the "functional equivalent" of express advocacy.[45] Where does this interpretation leave the effect of the BCRA on corporate political speech?

Now a corporation, including non-profits with the exception of *MCFL's*[46], must use segregated funds for any electioneering communications. The segregated fund restriction is triggered if the ad is for the "express advocacy" of a federal candidate, or the "functional equivalent" thereof within the specified timeframes. If it is a "genuine" issue ad, and is not for the "express advocacy" of a federal candidate or the "functional

[40] 2 U.S.C. § 434(f)(3) & 441b(c)(6).
[41] See, e.g., Dotan, supra note 2 at 965.
[42] *Buckley*, 424 U.S. at 44 (note 52).
[43] *Id*.
[44] *WRTL*, 551 U.S. at 470.
[45] *Id.*
[46] *See MCFL, Supra* note 27.

equivalent" thereof, the corporation can use its general treasury to finance the advertisement regardless of the type of corporation.[47]

Regardless of the multitude of opinions on the BCRA and the restriction of corporate political speech, this is now the current interpretation. This section of the BCRA[48] will be challenged in this comment.

B. SUPREME COURT DECISIONS SHAPING MODERN CORPORATE POLITICAL SPEECH

1. Buckley v. Valeo

The first Supreme Court case dealing with the constitutionality of FECA was *Buckley v. Valeo*.[49] In *Buckley* the Court found the provisions of FECA that restricted financial contributions from both individuals and political committees to individual political campaigns were constitutionally valid.[50] In its decision, the Court reasoned that the limiting of financial contributions involved little restraint on political communication because the support by a contribution does not in any way "infringe the contributor's freedom to discuss candidates and issues."[51]

Although the Court found FECA's contribution restraints constitutional in *Buckley*, it did find that the expenditure limitations on campaigns were unconstitutional.[52] The Court reasoned that the First Amendment "denies the government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."[53] The Court added that in a "free society ordained by our Constitution it is not

[47] *McConnell*, 540 U.S. at 206.
[48] BCRA § 203.
[49] Buckley, 424 U.S. 1.
[50] *Id*. at 58.
[51] *Id*. at 21.
[52] *Id*. at 58.
[53] *Id*. at 57.

the government but the people - individually as citizens and candidates and collectively as associations and political committees -- who must retain control over the quantity and range of debate on public issues in a political campaign."[54]

Being the first case to challenge the constitutionality of FECA, *Buckley* determines that there is a compelling government interest in restricting contributions to individual political campaigns by both individuals and other organizations.[55] In fact, after the Courts decision in *Buckley*, Congress placed a complete ban on any corporate or labor union contributions to individual campaigns, with a few exceptions, and these restrictions are now deeply rooted in the BCRA.[56] Although the Court found contribution restrictions constitutional, it still decisively ruled that expenditure limitations were unconstitutional because it restricted an individual's First Amendment rights.[57] In *Buckley*, the Court began to balance the legislature's interest in regulating political campaigns with the First Amendment's protection of free speech.[58] It was the first of many cases to address both sides of the campaign financing argument.

2. First Nat'l Bank v. Bellotti

In *First National Bank v. Bellotti*, the Court held that a state statute, which forbade certain expenditures for the purpose of influencing the vote on referendums, was unjustified by a compelling government interest and was thus unconstitutional.[59] Although *Bellotti* did not address the boundaries of First Amendment protections for

[54] *Id*.
[55] *Id.* at 29.
[56] *See* BCRA § 441b. (Ban on all Corporations and Labor Organizations from making contributions to political campaigns).
[57] *Id*. at 58.
[58] *Id*. at 57.
[59] First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

corporations, it did determine that the corporate identity of the speaker did not deprive the corporation of its First Amendment protections in this case.[60]

In *Bellotti* the Court reasoned that "[t]he inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual."[61] The Court further ruled that a legislature may not dictate business corporations to "stick to business", as the statute required, because it may give one side of a debatable public view an advantage over the other.[62]

Bellotti, when combined with *Buckley*, further establishes that the Court will tolerate certain restrictions on financial contributions but it will not tolerate broad restrictions on corporate political speech.[63] In *Bellotti* the Court recognized that corporate political speech is protected by the First Amendment.[64] As will be discussed later in the comment, however, there are certain narrow restrictions on corporate political speech that are recognized by the Supreme Court as constitutional.

3. FEC v. Mass. Citizens For Life, Inc.

In *FEC v. Massachusetts Citizens For Life, Inc.* (*MCFL*) the Court distinguished for-profit corporations from particular non-profit organizations as well as the constitutionality of FECA's restrictions on express advocacy by corporations for candidates in federal elections.[65]

In a newsletter published by the non-profit corporation, *MCFL* was urging the public to vote for pro-life candidates.[66] The Court ruled that this "express advocacy" fell

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[60] *Id*. at 777-78.
[61] *Id*.
[62] *Id*. at 785.
[63] *See Bellotti*, 435 U.S. 765; *Buckley*, 424 U.S. 1.
[64] *Id*. at 777-78.
[65] FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).
[66] *Id*. at 243.

within the restrictions of 2 U.S.C. § 441(b).[67] The Court, however, ruled that the restrictions were unconstitutional as applied to *MCFL* because it is a corporation that was formed for the purpose of disseminating ideas and not for the purpose of making money.[68]

In its reasoning the Court acknowledged the legitimacy of Congressional concern that business corporations amassing great wealth can gain an unfair advantage in the political process.[69] In its opinion, the Court distinguished what are now considered "MCFL's" from corporations that are not exempt from § 441(b). The Court used three distinguishing features to establish the types of corporations exempt from the restrictions of FECA.[70] First, the business must be formed for the purpose of promoting "political ideas, and cannot engage in business activities."[71] Second, there "can be no shareholders or other persons affiliated so as to have a claim on its assets or earnings."[72] Third, the corporation cannot be "established by a business corporation or labor union and it cannot accept contributions from such organizations".[73] The Court reasoned that these requirements would prevent corporations from the type of spending that is a threat to the political process.[74]

Although the decision in *MCFL*, did not address the constitutionality of all corporate political speech, it concluded that there were differences in corporate structure that should afford some non-profits more freedom in the expression of ideas during

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[67] *Id*.
[68] *Id*. at 259.
[69] *Id*. at 263.
[70] *Id*. at 263-64.
[71] *Id.*
[72] *Id*. at 263.
[73] *Id*.
[74] *Id*.

elections.[75] *MCFL* concluded that a voluntary organizations meeting the three specifications are not restricted by section 441(b), one of the major sections of FECA.[76]

4. Austin v. Michigan State Chamber of Commerce

In *Austin v. Michigan State Chamber of Commerce,* the Supreme Court upheld the constitutionality of a Michigan statute. The statute prohibited the use of corporate treasury funds for independent expenditures in state elections, because it was narrowly tailored to serve the compelling state interest of preventing corporations using massive "war chests funneled through the corporate form" from corrupting the political process.[77] The Court ruled that the act, which was similar to the restrictions written into law by FECA, was not over inclusive because it required all corporations to use segregated funds from money solicited from certain members of the corporation.[78]

In *Austin* the state chamber of commerce wanted to use its general fund to finance "independent expenditures" in state elections.[79] The Court found that because the chamber of commerce was not an *MCFL* corporation, it was not exempt from the Statute requiring it to use separate funds for independent expenditures.[80] In *Austin* the Court applied the three prong test implemented in *MCFL* to determine that the chamber did not fit that classification.[81]

In applying the *MCFL* test, the Court first found that the Chamber of Commerce was not formed for the purpose of promoting political ideas because their bylaws set forth

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[75] *Id*. at 263-64.
[76] *Id.*
[77] Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990).
[78] *Austin*, 494 U.S. at 658; Mich. Comp. Laws § 169.254(1)(1979).
[79] *See* 2 U.S.C. 441b(2).
[80] *Austin*, 494 U.S. at 662.
[81] *See supra* Part I.B.3.

a more varied purpose.[82] Second, the Court found that the members of the Chamber of Commerce were much more like shareholders of a company than they were members of an *MCFL*.[83] Third, the court found that the Chamber of Commerce was not free from the influence of business corporations because the majority of the contributions to the organization were from business organizations themselves.[84]

Austin was successful in applying the *MCFL* test to determine the constitutionality of laws restricting corporate political speech. The Court showed deference towards earlier decisions in ruling that corporate political speech is marginally restricted by contribution limits and segregated fund requirements while at the same time recognizing the importance of lighter restrictions for political organizations fitting the *MCFL* mold.[85] Because *Austin* addressed a state statute restricting corporate expenditures in state elections only, its decision set a standard for regulating corporate political speech nationwide.

5. FEC v. Beaumont

In *FEC v. Beaumont,* the Supreme Court ruled that a complete ban on direct contributions under the BCRA was constitutional.[86] Even though the Court recognized the distinguishing features of *MCFL* corporations, it did not address whether or not the respondent was an *MCFL* corporation.[87] The Court ruled only on the constitutionality on the complete ban on direct contributions.[88] The Court reasoned that Advocacy Corporations like the one in question, NCRL, still may amass substantial war chests and

[82] *Id*. at 662.
[83] Id. at 663.
[84] *Id*. at 664.
[85] *See Buckley* 424 U.S. 1; *MCFL* 479 U.S. 238
[86] FEC v. Beaumont, 539 U.S. 146 (2003).
[87] *Id*.
[88] *Id*. at 151.

are "no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals."[89] Here, the Court once again stands firm by its prior holdings that laws regulating corporate contributions of any kind are constitutional because they meet the legitimate concerns of congress to prevent corporate corruption in the political process.[90]

The Court rejected respondent's argument that the ban on corporate contributions should be subject to strict scrutiny review because "restrictions on political contributions have been treated as merely marginal speech restrictions" and are thus subject to the lesser demand of being "closely drawn" to match a "sufficiently important interest."[91] Furthermore the Court denied respondent's argument that there was a complete ban on contributions because § 441(b) still allows for contributions through PAC's.[92]

Although the Court in *Beaumont* held firm to its prior decisions in holding restrictions on corporate contributions constitutional, the Court did lay the groundwork for an argument challenging the constitutionality of advocacy corporation contributions.[93] The Court stated that an advocacy corporation would have to demonstrate that the law violated the First Amendment because it was burdened by only being able to make contributions through a PAC.[94] The Court did not think it was a strong argument, but it did leave the door open slightly for the possibility of a challenge on those grounds.[95] Because the holding in *Beaumont* did not address *MCFL's,* the *MCFL* exception was not

[89] *Id*. at 160.
[90] *See Buckley* 424 U.S. 1 (holding that bans on direct corporate political contributions are constitutional).
[91] *Id*. at 162 (quoting *Buckley*, 424 U.S. 1).
[92] *Id*. at 162-63; *See* 2 U.S.C. § 441b.
[93] *Id*. at 163.
[94] *Id*.
[95] *Id*.

changed by this decision as far as it applied to independent expenditures. It only applied to direct contributions by any corporation in connection with certain federal elections.[96]

6. McConnell v. FEC

In *McConnell v. FEC* the Supreme Court held that the Bipartisan Campaign Reform Act (BCRA), which amended FECA, was facially constitutional.[97] In *McConnell* various sections of the BCRA were challenged. The relevant sections of the Act that were challenged pertaining to this comment were sections 203 and 204 of the BCRA.[98]

Section 203 added that "electioneering communications"[99] were now included to expenditures that must be paid for through segregated funds. Prior to the BCRA, a corporation could fund general issue ads from its general treasury funds as long as there was no "Express Advocacy."[100] As a result of the Court holding the BCRA constitutional, a corporation must use a segregated fund for any electioneering communications made within the time limits set forth in the BCRA.[101] The Court did recognize that a "genuine issue ad" can still be funded by a corporation's general fund, but that there can be no "specific reference to a federal candidate."[102]

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[96] *Id.*
[97] McConnell v. FEC, 540 U.S. 93 (2003).
[98] See Pub. L. No. 107-155, §§ 203 & 204, 116 Stat. 81 (2003).
[99] "Election Engineering" communication is defined as "any broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office . . . and is made within 60 days before a general, special, or runoff election by the office sought by the candidate, or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate for the office sought; and in the case of a communication which refers to a candidate for an office other than president or Vice President, is targeted to the relevant electorate." 2 U.S.C. § 434(f)(c).
[100] *See Buckley*, 424 U.S. 1.
[101] 2 U.S.C. § 434(f)(3).
[102] *McConnell*, 540 U.S. at 206.

In its holding the Court reasoned that any issue ads run within the 30 and 60 day time periods were the "functional equivalent" of express advocacy.[103] The Court further recognized that the restrictions were not a complete ban on expression but rather a regulation that met a compelling interest of the government in restricting corporate political speech.[104]

The Constitutionality of Section 204 was also upheld as it applied to Not-for-profit corporations.[105] The Court did, however, maintain that the exception for *MCFL*'s did apply to this section as far as "electioneering communications", but it also ruled that the addition of a clause restricting *MCFL* corporations from "targeted communications" was constitutional.[106]

McConnell's decision at first glance seemed like a setback for both for-profit and non-profit corporate political speech. Although allowing for greater restrictions of the BCRA, the Court did leave some room for future challenges. In his dissent, Justice Scalia stresses that Title I of the BCRA is overbroad and should thus be ruled unconstitutional.[107] This argument begins to lay the groundwork for future challenges to the BCRA.[108]

7. FEC v. Wisconsin Right to Life

In *FEC v. Wisconsin Right to Life* (WRTL) the Supreme Court found that the BCRA unconstitutionally prohibited ads from being run by an organization encouraging voters to contact their senators and urge them to block a filibuster aimed at preventing the

[103] *Id*.
[104] *Id*. at 204-05.
[105] *Id*. at 211.
[106] *Id*. at 210.
[107] *Id*. at 351.
[108] *See supra* Part I.A.2.

nomination of judicial nominees.[109] The case specifically addressed § 203 of the BCRA. In its opinion, the Court specifically stated that it would not revisit the *McConnell* decision, which found the Act facially constitutional, but it did find that the ads in question were not "express advocacy" ads or their "functional equivalent."[110]

The issue the Court addressed was whether or not the ads were express advocacy ads or their functional equivalent.[111] In doing so the Court set forth a test to be applied when deciding similar as-applied challenges to Section 203 of the BCRA. The Court stated 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."[112] In applying this test the Court found that the ads in question were consistent with that of genuine issue ads and, furthermore, the ads "lacked the indicia of express advocacy."[113]

The Court concluded that § 203 can be constitutionally applied to similar ads only if it is narrowly tailored to further a compelling interest.[114] In applying strict scrutiny review the Court recognized that it has never found a compelling interest in regulating ads like those of WRTL.[115] In its conclusion the Court cited the First Amendment, and although it continues to recognize the importance of eliminating corporate corruption, it emphasized that the Court must give the "benefit of the doubt to speech and not censorship."[116]

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[109] FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007).
[110] *Id*.
[111] *Id*. at 482.
[112] *Id*. at 469-70.
[113] *Id*. at 470.
[114] *Id*.
[115] *Id*. at 476.
[116] *Id*.

It is important to note that even though the Court found the application of § 203 on WRTL unconstitutional, they did not find it facially unconstitutional and thus the *McConnell* decision was still in the rule of law.

In a concurring opinion, Justices Scalia, Kennedy and Thomas stated the § 203 should be held to be facially unconstitutional because it is overbroad.[117] Scalia concludes that the extension of the BCRA to include anything more than express advocacy was" adventurous"[118] In his reasoning Scalia concludes that any test used to determine the unconstitutional application of the BCRA would be "incompatible with McConnell's holding that section 203 is facially constitutional."[119] The Dissenting opinion in *WRTL* presents a strong argument for the overruling of *McConnell*. The Dissent is clear that the restriction of speech in the manner that § 203 requires is unconstitutional and that it should be found to be facially unconstitutional.

C. ANALYZING THE APPLICATION OF THE BCRA

In summarizing how the BCRA is currently applied to corporate political speech, it is important to acknowledge that the BCRA is considered by the Court to be facially constitutional.[120]

Although the Court can now accept as applied challenges to § 203 of the BCRA[121] as seen in *WRTL*, the Court has a clear test that will be used in deciding any challenges to § 203.[122] As decided in *WRTL*, if there is no other way but to interpret an ad as the

[117] *Id*. at 482.
[118] *Id*. at 500.
[119] *Id*. at 499.
[120] *Id*. at 498.
[121] *See supra* Part I.B.6.
[122] See supra Part I.B.7.

functional equivalent of express advocacy, a corporation, both for-profit and non-profit, must use segregated funds to pay for the advertisement.[123] If, however, the ad in question is a "genuine issue ad" the corporation may use its general funds to pay for the ad.[124]

As if it is not confusing enough to this point, there is an exception[125] carved out for qualifying non-profit corporations that are not subject to the "electioneering communication" restrictions.[126] Under this exception the qualified non-profit can use their general funds to fund electioneering communications.[127]

Despite the Courts ruling in *WRTL*, the concurring opinion in the case urged that § 203 should be held to be unconstitutional and not just open to as-applied challenges.[128] Justice Scalia lays out the argument that § 203 is unconstitutional because all of the tests proposed by courts to define what "functional equivalent" means are "vague and thus ineffective to vindicate the fundamental First Amendment rights of the large segment of society to which § 203 applies."[129]

Although Scalia concurred with the ruling in *MCFL*[130], he felt the Court should not have just ruled that § 203 was unconstitutional as it applied to *WRTL*[131], but that it was facially unconstitutional as a whole.[132] This reasoning has set the stage for a current case being decided by the Supreme Court, *Citizens United v. FEC*.

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[123] *Id*.
[124] *WRTL*, 551 U.S. at 470.
[125] *McConnell*, 540 U.S. at 206.
[126] 11 C.F.R. 114.10.
[127] *Id*; *See MCFL*, 479 U.S. 238.
[128] *See MCFL*, 479 U.S. 238.
[129] *WRTL*, 551 U.S. at 492 (Scalia, J., concurring).
[130] *Id*. at 492.
[131] *Id*. at 504.
[132] *Id*.

II. CITIZENS UNITED V. FEC

A. HISTORY OF THE CASE

On September 9, 2009, the Supreme Court heard the Arguments for *Citizens United v. FEC*.[133] *Citizens United* was heard to decide whether the prohibition on corporate electioneering communications in the BCRA can constitutionally be applied to a documentary film about Hillary Clinton that could be purchased through par-per-view.[134] The case was heard on appeal from a district court ruling denying Appellant *Citizens United's* request for a preliminary injunction to enjoin the FEC from enforcing portions of the BCRA, especially §§ 203, 201, and 311.[135] The only section that will be analyzed is § 203 because it is the only section that applies to the argument.

In *Citizens United* the district court was given no other option but to deny the preliminary injunction because the district cannot overrule the Supreme Court.[136] *Citizens United* challenged the facial validity of § 203 on the grounds that *McConnell* left the door open to this sort of challenge if the proper circumstances had risen.[137] Because the Supreme Court, however, found the BCRA to be facially constitutional, the district court had no choice but to deny the injunction.[138]

Furthermore, the district court found that since the documentary in question was the functional equivalent of express advocacy, Citizens United's claim could not win on the merits because of the way it was funded.[139]

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[133] Citizens United v. FEC, No. 08-205 (argued Sept, 9, 2009).
[134] Brief of Appellant, Citizens United v. FEC, No. 08-203 (2009).
[135] Citizens United v. FEC, 530 F. Supp. 2d 274 (2008).
[123] *Id*. at 278.
[124] *Id*.
[125] *Id*.
[126] *Id*. at 279.

On appeal *Citizens United* argued § 203 is unconstitutional as applied to *Hillary: The Movie* (*The Movie*) because the only identifiable compelling government interest[140] is inapplicable to *The Movie*.[141] Although *Citizens United* acknowledged that a compelling interest may be served by restricting commercials aimed at the functional equivalent of express advocacy[142], it reasoned that "feature-length movies directed at a self-selected audience willing to invest 90 minutes of their time to watch a movie" do not pose a threat to that interest.[143] It further reasons that viewers must request the movie through pay-per-view and thus the movie very unlikely to persuade voters not to vote for Hillary Clinton.[144]

In its defense, the FEC argued that there is a compelling interest in restricting corporations from using their general treasury for "express advocacy or its functional equivalent"[145] It reasoned that dating back to *Buckley* the Court has repeatedly recognized the interest in preventing the appearance of corruption in the political process by corporations.[146] The FEC also argued that corporations are given special advantages through their corporate structure that allow them to pay for electoral advocacy in ways that the individual cannot.[147] In general, the FEC urged the Supreme Court to affirm its holding in *McConnell* that there was an interest in regulating electioneering communications even if the message was "less explicit than express advocacy."[148]

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[140] FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).
[141] Brief of Appellant at 13, Citizens United v. FEC, No. 08-205 (2009).
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] Brief for Appellee at 14, Citizens United v. FEC, NO. 08-205 (2009).
[146] *Id*. at 15.
[147] *Id*.
[148] *Id*. at 16.

The FEC believed firmly that *The Movie* was the functional equivalent of express advocacy.[149] In citing to *WRTL*, the FEC urged that "a broadcast should be treated as electioneering if the only reasonable interpretation of its content is an appeal to vote for or against a specific candidate."[150] The FEC then continues to argue that *The Movie* cannot be interpreted as anything other than the functional equivalent of express advocacy.[151]

In its appeal, *Citizens United* also claims that *Austin*[152] should be overruled and that they should fall under the same exemption as *MCFL* corporations.[153] Appellant's argued that *Austin's* broad holding that distorting effects of corporate wealth was at odds with *Bellotti*.[154] Furthermore, *Citizens United* argued that non-profit advocacy groups do not pose a threat, regardless of the amount of money they spend, because they were formed to promote political ideas, and not to amass capital.[155]

The FEC rejected this argument by *Citizens United* that they were funded "overwhelmingly" by donations from individuals.[156] The argument was based on the fact that the issue was not properly brought to the court and that it lacks merit because *Citizens United* clearly does not fit within the *MCFL* exception because they do accept corporate donations and participate in business activities.[157]

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[149] *Id*.
[150] *Id*. (citing *WRTL*, 551 U.S. at 470).
[151] Brief of Appellee at 17.
[152] *Austin*, 494 U.S. 652.
[153] *See* 11 C.F.R. § 114.1(c)(1)-(5).
[154] *Bellotti*, 435 U.S. 765.
[155] Brief of Appellant at 31.
[156] Brief of Appellee at 30.
[157] *Id*. at 30-31.

While *Citizens United* is arguing that § 203 is unconstitutional because it unjustifiably restricts corporate speech as stated in *Bellotti*,[158] the FEC is urging the Court to affirm its decision in *McConnell* that only a carefully defined group of corporations can be exempt under *MCFL*.[159]

B. THE *CITIZENS UNITED* RULING

There were essentially only two possible outcomes in *Citizens United.* The first possibility was that the Court could affirm *McConnell.* Thus, the § 203 restrictions on electioneering communications would not only be found to be constitutional as to *Citizens United,* but would once again be found to be facially constitutional.

The other possible outcome was that the Court found that § 203 was unconstitutional as applied to *Citizens United* which would effectively invalidate the entire section as unconstitutional. If it is determined that corporations, other than *MCFL's*, were not subject to the restrictions of § 203, the decision would invalidate the entire section as it would allow all corporations to pay for electioneering communications through their general treasuries.[160]

Justice Kennedy made an argument that § 203 was facially invalid in his *McConnell* dissent when he stated that the majority in *McConnell* compounded the error made in *Austin* and "silence[d] political speech central to the civil discourse that sustains the political processes."[161] Kennedy further argued that *Austin* was "unfaithful" to the First Amendment and that "if protected speech is being suppressed that should end the

[158] Brief for Appellant at 31.
[159] Brief for Appellee at 31.
[160] See 2 U.S.C. 441b(2).
[161] *McConnell*, 540 U.S. at 323.

inquiry."[162] So in order for the court to find § 203 to be unconstitutional, the court would, in effect, have to overrule *Austin*.

In addition to Kennedy's argument that *Austin* and *McConnell* were flawed, he made an argument that regardless of those holdings, § 203 cannot pass Strict Scrutiny because it is not narrowly tailored.[163] This opinion will be the main one presented in this comment supporting the unconstitutionality of § 203.

If Kennedy's opinion in *McConnell* were to be the majority decision, *Citizens United's* request to overrule *Austin* would be granted and § 203 would thus be interpreted as being facially invalid, turning the BCRA on its head.

On January 21, 2010, the Supreme Court found § 203 of the BCRA to be facially unconstitutional.[164] As a result of its ruling, the Court overruled *Austin* and the part of *McConnell* that upheld § 203's extension of restrictions on corporate independent expenditures.[165] In doing so the Court had to address the conflicting rulings of pre-*Austin*[166] precedent with the post-*Austin* rulings.[167]

In addressing the post-*Austin* line of cases, the court the struck down the "antidistortion" rational that was the deciding factor in *Austin*.[168] This rational found a compelling government interest in preventing "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

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[162] *Id*. at 324.
[163] *Id*. at 330.
[164] Citizens United v. FEC, 130 S. Ct. 876 (U.S. 2010).
[165] *Id*. at 913.
[166] *Id*. at 903(that corporate identity cannot be basis for restrictions on political speech).
[167] *Id*. (permitted restrictions on corporate political speech).
[168] *Id*; *See also, Austin*, 494 U.S. 652

ideas."[169] In overcoming this argument, the Court noted the idea behind the holding in *Bellotti*, that political speech is "indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[170]

In its reasoning for overruling *Austin*, the court simply stated that "*Austin* interferes with the open marketplace of ideas protected by the First Amendment."[171] The Court further reasoned that *Austin* allowed the government to "restrict the political speech of millions of associations of citizens" as a result of its holding.[172]

Citizens United simply enforced the First Amendment. The case found that § 203's prohibition on independent expenditures is a ban on speech.[173] There is no doubt that a similar restriction on individual speech would be struck down as unconstitutional.[174] Therefore, because the purpose of the restrictions in § 203 is to "silence entities whose voices the government deems to be suspect,"[175] the Court properly stuck down § 203 as unconstitutional.

III. ANY RESTRICTION ON CORPORATE POLITICAL SPEECH IS FACIALLY UNCONSTITUTIONAL

The argument that this comment presents in not that the entire BCRA is facially unconstitutional, but that the provisions, especially § 203[176], that restrict corporate political speech were facially unconstitutional. The argument presented supports the disclosure requirements as well as the contribution limitations that the BCRA

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[169] *Austin*, 494 U.S. at 660.
[170] *Citizens United,* 130 S.Ct. at 904 (citing *Bellotti,* 435 U.S. at 777).
[171] *Id*. at 906.
[172] *Id*. at 906-07. (Noting that 5.8 million for-profit corporations filed income tax returns in 2006).
[173] *Id*. at 898.
[174] *Id*.
[175] *Id*.
[176] See 2 U.S.C. § 434.

regulates.[177] These regulations require disclosure of electioneering communication but do not themselves restrict political speech, and even if one interprets that it does, it does so evenhandedly. On the other hand the implementation of § 203 clearly restricted the political speech of corporations and was thus at odds with the First Amendment.[178]

The First Amendment is clear in what it protects and there is little interpretation required into what its intent was. It states "Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."[179] Simply put, the argument should end there. The Supreme Court has stated that the requirement of corporations to use PAC's was not a "complete ban" on speech, and thus the provision of the BCRA that required the use of PAC's was constitutional.[180] This reasoning was flawed and completely at odds with the First Amendment. The First Amendment has no clause that prevents only the "complete ban" of speech. The First Amendment only refers to the "abridgement" of speech.[181]

For an understanding of the term "abridgement" one need look no further than the dictionary. "Abridge" means to "reduce in scope",[182] and that is exactly what the BCRA did. It "reduced in scope" the ability of a corporation to speak out politically by regulating that the corporation only pay for electioneering communications through PAC's during specific time periods.[183]

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[177] *See generally* Pub. L. No. 107-155, 116 Stat. 81 (2003).
[178] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.
[179] *Id*.
[180] *Beaumont*, 539 U.S. at 161.
[181] U.S. Const. amend. I.
[182] Webster's Online Dictionary, http://www.websters-online-dictionary.com/definition/abridge (last visited Jan. 17, 2010).
[183] *See* 2 U.S.C. § 434(f).

In his Dissent in *WRTL*, Justice Souter expressed his displeasure with the majority ruling that the BCRA was unconstitutional as applied to the ads run by *WRTL*.[184] He reasoned that "under that rule, *WRTL* would have been free to attack Senator Feingold by name at any time with ads funded from its corporate treasury, if it had not also chosen to serve as a funnel for hundreds of thousands of dollars from other corporations."[185] By simply reading the First Amendment, then applying it to the statement, this argument is directly in contrast with the First Amendment. By allowing a corporation to run the ads only if they did not accept donations from corporations, absolutely "reduced in scope" the corporation's ability to "petition the Government for a redress of their grievances."[186] Because the ads were within the specified time period[187], the BCRA precluded *WRTL* from running ads urging senator Feingold to block a filibuster preventing judicial nominees from being approved.[188] This provision of the BCRA undoubtedly "abridged" *WRTL's* freedom of speech. Although the Court found for *WRTL*,[189] the Dissent as well as the majority in *McConnell*[190] would have, and did, uphold the provision of the BCRA.

In *McConnell* the Court cited to *Austin* as finding that the Government is not willing to consider § 203 as a complete ban.[191] *Austin* found that because corporations have "special advantages" granted to them and that the can "amass great aggregations of wealth" that protecting the political process from potential corruption is a compelling government interest.[192] This resonating was at odds with *Bellotti*[193] which found that the

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[184] *WRTL*, 551 U.S. at 449 (Souter, J., dissenting).
[185] *Id*.
[186] U.S. Const. amend. I.
[187] See §434(f)(3).
[188] *WRTL*, 551 U.S. U.S. 449.
[189] *Id*.
[190] *See McConnell*, 540 U.S. 93.
[191] *Id*.
[192] *Austin*, 494 U.S. 652.

identity of a corporation does not in itself deny it the privileges of the First Amendment.[194]

The restricting of corporations' donations directly to candidates[195] is an example of a restriction that does not restrict speech. There a compelling Government interest is met by a narrowly tailored law[196] that does not restrict speech. As recognized in *Buckley* there is a compelling Government interest in preventing "quid pro quo" corruption that could arise by favors given to corporations by candidates for large contributions to their campaign.[197] Furthermore, a corporation's speech is not limited in any way because it would still be free to advocate for the candidate on its own or to speak on an issue that pertains to its own interests.[198]

On the other hand regulations that require a corporation to use separate funds to fund electioneering communications because some shareholders may disagree with the content of the ads[199] greatly "reduce in scope" the speech that a corporation may participate in.

Justice Scalia, in his Dissent in *McConnell*, most dramatically summarized the decision in *McConnell* that upheld the BCRA as facially constitutional.[200] He stated that "this is a sad day for the freedom of speech. Who could have imagined that [the Court] . . . would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government."[201]

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[193] *Bellotti*, 435 U.S. 765.
[194] *Id*.
[195] *See* § 441b(2).
[196] *Id*.
[197] *Buckley*, 424 U.S. at 26.
[198] *McConnell*, 540 U,S, at 248.
[199] *Austin*, 494 U.S. at 663.
[200] *McConnell*, 540 U.S. 258
[201] *Id.*

Scalia further argued that "The premise of the First Amendment is that the American people are neither sheep nor fools and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source."[202]

It isn't debated in this argument that there isn't an interest in preventing any form of corruption in the political process. That interest can be served, however, by drafting anti-bribery and anti-corruption laws at the political forum rather than in restricting speech. The main idea behind the First Amendment is that "speech can rebut speech, propaganda will answer propaganda, and free debate of ideas will result in the wisest governmental policies."[203] All views should be placed before the voting public and they alone should decide what is appropriate in the political arena because "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[204] That is the intent of the First Amendment.

CONCLUSION

Since 1972, with the passing of FECA, the government has attempted to curb corporate political speech in the hopes of preventing the appearance of corruption in the political process. With the passing of the BCRA in 2002, the government further expanded the restrictions on corporate political speech. Although there is a compelling interest in preventing "quid pro quo" corruption by limiting direct contributions to candidates, the provisions of the BCRA restricting corporate political speech are in direct contrast to the most fundamental rights granted by the Constitution. The interests of preventing political corruption can be served in other ways. Certain provisions of the

[202] *Id*.
[203] *Davis*, 341 U.S. at 503.
[204] Abrams v. United States, 250 U.S. 616, 630 (1919).

BCRA, especially § 203, should be, and were[205], held to be facially unconstitutional because they were not narrowly tailored to serve a compelling government interest. Any law or regulation that "Abridges the freedom of speech" in any way should be held to be, without a doubt, unconstitutional.

[205] *See Citizens United*, 130 S. Ct. at 875.