

too long ignored at the hands of collective choices that we have too long refused to embrace as our own.⁵⁵

One small child dies of starvation every five seconds.⁵⁶ That child is one of nearly ten million people who die every year because of hunger.⁵⁷ It would be hard for us to imagine watching a child die. In fact, if it were happening in front of us, most of us would do everything in our power to stop it. We must understand and confront the powerful psychological forces that allow us to put the face of this child out of our minds when we interpret constitutional language that purports to bind us to thinking seriously about life and liberty. Yet we live with this world, and we live with this Amendment. And we violate it every five seconds.

D. Freedom of Speech and Expression

1. *Campaign Finance Regulation.* — Corporations influence our electoral process through contributions to and expenditures on behalf of candidates.¹ For a century, Congress has struggled to constrain this influence,² lest individual constituents be sidelined in the democratic process in favor of corporations with deep pockets. The Supreme Court has pushed back, limiting congressional prohibitions in the interest of protecting corporate speech rights.³ Five years ago, Con-

⁵⁵ This approach seems radical, complex, and infeasible. But we must remember the decades of work and the millions of people that labored in the evolution of our current approach, which only seems less complicated and more feasible because it has the air of familiarity.

⁵⁶ See World Food Programme, Facts & Figures, http://www.wfp.org/aboutwfp/facts/hunger_facts.asp (last visited Oct. 6, 2007).

⁵⁷ See *id.*

¹ See, e.g., Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 121 (2004) (“[R]epresentatives have been influenced by campaign contributions: money buys access and in some cases, may buy votes.”).

² In 1907, Congress passed the Tillman Act, prohibiting corporate contributions “in connection with any election to any political office.” Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864. The Act aimed to “prevent the subversion of the integrity of the electoral process” by corporations inclined to use their financial might for political purchase, and sought to “sustain the active, alert responsibility of the individual citizen . . .” *United States v. UAW*, 352 U.S. 567, 575 (1957). In the 1940s, Congress extended the prohibition to unions, see War Labor Disputes (Smith-Connally) Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167–68 (1943), and altered its scope to encompass expenditures as well as outright contributions, see Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159–60. In the 1970s, Congress passed the Federal Election Campaign Act (FECA), which created the Federal Election Commission (FEC), established disclosure rules, and set forth additional contribution limits. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.).

³ See, e.g., *FEC v. Mass. Citizens for Life (MCFL), Inc.*, 479 U.S. 238 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976). The *MCFL* Court limited FECA’s reach to “express advocacy,” defined as ads containing express terms that are “pointed exhortations to vote for particular persons,” as opposed to “discussion of issues and candidates.” *MCFL*, 479 U.S. at 249. These terms, some-

gress's Bipartisan Campaign Reform Act of 2002⁴ (BCRA) made it a crime for corporations or unions to use general treasury funds to pay for "electioneering communications."⁵ In 2003, the Court upheld BCRA against a facial First Amendment challenge,⁶ reasoning that Congress had a compelling interest in limiting such communications and that the Act was not substantially overbroad. Last Term, in *FEC v. Wisconsin Right to Life (WRTL), Inc.*,⁷ the Court held that BCRA was unconstitutional as applied to plaintiff WRTL's advertisements. Advancing an objective test for as-applied challenges, the *WRTL* Court sapped BCRA's efficacy by severely limiting the ads that the statute could prohibit, thereby advancing corporate political speech at the expense of democratic ideals.

On July 26, 2004, WRTL, a nonprofit corporation, began airing two radio ads that urged listeners to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster [of federal judicial nominations]."⁸ WRTL planned to air the ads within the 30-day period prior to the Wisconsin primary.⁹ Anticipating a BCRA violation, WRTL filed suit against the Federal Election Commission (FEC) on July 28, 2004, asserting a First Amendment right to air the ads and seeking declaratory and injunctive relief.¹⁰ WRTL argued that BCRA's prohibition was unconstitutional as applied to these ads and any "materially similar" future ads.¹¹ A three-judge district court denied the preliminary injunction, holding that *McConnell v. FEC*¹² foreclosed as-applied challenges.¹³ Consequently, WRTL did not air its ads during

times referred to as "magic words," include "vote for," "elect," "support," and their ilk. *Id.* In the wake of *MCFL*, sham "issue ads" became ubiquitous, condemning candidates while avoiding certain verboten words. See *McConnell v. FEC*, 540 U.S. 93, 129–31 (2003) (Stevens and O'Connor, JJ., delivering the opinion of the Court with respect to BCRA Titles I and II).

⁴ Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

⁵ "Electioneering communications" are "broadcast, cable, or satellite communications" referring to a "clearly identified candidate for Federal office" that are aired within thirty days of a federal primary or sixty days of a federal general election and that are "targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)–(C) (2000 & Supp. IV 2004).

⁶ *McConnell*, 540 U.S. 93.

⁷ 127 S. Ct. 2652 (2007).

⁸ *Id.* at 2660–61. The ads contained the following language in voice-over:

Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

Id. at 2660.

⁹ *Id.* at 2661.

¹⁰ *Id.*

¹¹ *Id.*

¹² 540 U.S. 93 (2003).

¹³ *WRTL*, 127 S. Ct. at 2661.

the proscribed period and the court dismissed its complaint.¹⁴ WRTL appealed directly to the Supreme Court.¹⁵

Finding that *McConnell* did not “resolve future as-applied challenges,” the Supreme Court vacated and remanded.¹⁶ On remand, the district court granted summary judgment for WRTL, holding that BCRA was unconstitutional as applied to the ads.¹⁷ First, the court found the dispute was not moot because it was “capable of repetition, yet evading review.”¹⁸ On the merits, the court concluded that the ads were not express advocacy or its “functional equivalent,” but “genuine issue ads,” which the government did not have a compelling interest in regulating.¹⁹ One judge dissented, suggesting that analyzing the ads contextually, rather than using a “plain facial analysis of the text,” would show that neither WRTL nor the FEC was entitled to summary judgment.²⁰ The FEC and intervenors appealed.

The Supreme Court affirmed the district court. A principal opinion by Chief Justice Roberts²¹ found that “the speech at issue in [WRTL’s] as-applied challenge is not the ‘functional equivalent’ of express campaign speech” and that “the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy.”²² Chief Justice Roberts noted that burdens on political speech were subject to strict scrutiny, requiring the government to prove that BCRA’s prohibition of WRTL’s ads advanced a compelling interest and was narrowly tailored to promote that interest.²³ The Chief Justice found that *McConnell* had not adopted a test for determining whether an ad is the functional equivalent of express advocacy, insofar as prospective as-applied challenges were concerned.²⁴ In order to protect the right “to discuss publicly and truthfully all matters of public concern without previous restraint or

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016, 1018 (2006).

¹⁷ *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 210 (D.D.C. 2006).

¹⁸ *Id.* at 202.

¹⁹ *Id.* at 208.

²⁰ *Id.* at 210 (Roberts, J., dissenting).

²¹ Justices Scalia, Kennedy, Thomas, and Alito joined Parts I and II, which described the facts and addressed jurisdictional issues. Justice Alito alone joined the remainder of Chief Justice Roberts’s opinion, though he also wrote a brief concurrence to indicate that he was not foreclosing the possibility of reconsidering *McConnell* in the future. *See id.* at 2674 (Alito, J., concurring).

²² *Id.* at 2659 (majority opinion).

²³ *Id.* at 2664 (opinion of Roberts, C.J.). Chief Justice Roberts acknowledged that if the FEC demonstrated that WRTL’s ads were express advocacy or its functional equivalent, then its burden would not be “onerous,” because the *McConnell* Court had held that BCRA survived strict scrutiny to this extent. *Id.*

²⁴ *Id.* at 2664–67.

fear of subsequent punishment,”²⁵ the principal opinion introduced an objective standard for as-applied challenges, rather than one focused on intent and effect: “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.”²⁶ Chief Justice Roberts argued that contextual factors should rarely “play a significant role in the inquiry.”²⁷

Based on this new test, Chief Justice Roberts held that WRTL’s ads were not functionally equivalent to express advocacy: first, the ads focused on a legislative issue (filibustering), urging the audience to contact officials regarding the issue; and second, they “[did] not mention an election, candidacy, political party, or challenger” or “take a position on a candidate’s character, qualifications, or fitness for office.”²⁸ The Chief Justice stated that the governmental interest in preventing corruption was insufficient to justify regulation of ads that were not express advocacy or its functional equivalent.²⁹ Further, he argued that the interest in remedying the “distorting effects of immense aggregations of [corporate] wealth . . . that [lack] correlation to the public’s support for the corporation’s political ideas” could not be stretched so far without stripping corporations of their free speech rights entirely.³⁰

Justice Scalia concurred in the judgment,³¹ but, departing from the principal opinion, he argued that no test for distinguishing express advocacy from issue ads could offer the clarity that “unchilled freedom of political speech demands” while comporting with the facial validity of BCRA as pronounced by *McConnell*.³² Evaluating the various tests articulated by the *McConnell* Court, the *WRTL* district court, the *WRTL* intervenors, and the principal opinion, Justice Scalia found all of the tests so vague as to lead many persons “to abstain from protected speech — harming . . . society as a whole, which is deprived of an uninhibited marketplace of ideas.”³³ Justice Scalia argued that

²⁵ *Id.* at 2666 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)) (internal quotation mark omitted).

²⁶ *Id.* at 2667. This objective standard purported to mitigate the “threat of burdensome litigation,” curbing discovery by “focusing on the substance of the communication rather than amorphous considerations of intent and effect.” *Id.* at 2666.

²⁷ *Id.* at 2669.

²⁸ *Id.* at 2667.

²⁹ *Id.* at 2671–72.

³⁰ *Id.* at 2672–73 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)) (internal quotation mark omitted).

³¹ Justices Kennedy and Thomas joined Justice Scalia’s opinion.

³² *WRTL*, 127 S. Ct. at 2675 (Scalia, J., concurring in part and concurring in the judgment).

³³ *Id.* at 2681 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)) (internal quotation mark omitted).

vague tests were foreclosed under *Buckley v. Valeo*³⁴ and that clear tests that protected all genuine issue ads would necessarily “cover such a substantial number of ads prohibited by § 203 [of BCRA] that § 203 would be rendered substantially overbroad.”³⁵ He found that the only way to separate political advocacy from issue advocacy consistent with the First Amendment would be to overrule *McConnell* and reinstitute the line drawn in *Buckley*.³⁶ To the extent that freedom of speech and “healthy campaigns in a healthy democracy” are at odds, Justice Scalia concluded that the Court must side with the former.³⁷

Justice Souter dissented,³⁸ arguing that the principal opinion effectively overruled *McConnell* and thereby created the potential for “corrosive spending” by corporations and unions.³⁹ He emphasized the great political influence bestowed on deep pockets due to the demand for large campaign contributions — an influence that compromises the representation of individual constituents and precipitates “pervasive public cynicism” toward the democratic process.⁴⁰ Justice Souter then evaluated WRTL’s ads based on prior press releases and magazine articles⁴¹ paid for by its political action committee (PAC);⁴² WRTL’s website condemning the Senators’ records, to which viewers and listeners were directed by the ads;⁴³ and the timing of the ads, which lacked any relation to a Senate filibuster vote.⁴⁴ Justice Souter averred that “it is beyond all reasonable debate that the ads are constitutionally subject to regulation under *McConnell*,” given that the ads were analogous to ads specifically prohibited by *McConnell*, namely, those

³⁴ 424 U.S. 1, 77 (1976); see *WRTL*, 127 S. Ct. at 2682 (Scalia, J., concurring in part and concurring in the judgment).

³⁵ *WRTL*, 127 S. Ct. at 2683 (Scalia, J., concurring in part and concurring in the judgment).

³⁶ *Id.* at 2684. Finding as-applied challenges incapable of eliminating unconstitutional applications of section 203, Justice Scalia eschewed the stare decisis concerns attendant to overruling *McConnell*: “*Stare decisis* considerations carry little weight when an erroneous ‘governing decision’ has created an ‘unworkable’ legal regime.” *Id.* at 2685 (alteration in original) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

³⁷ *Id.* at 2686.

³⁸ Justices Stevens, Ginsburg, and Breyer joined Justice Souter’s dissent.

³⁹ *Id.* at 2704–05 (Souter, J., dissenting).

⁴⁰ *Id.* at 2688. Justice Souter’s dissent traced a century of congressional responses to corporate and union treasuries’ influence over campaigns and the political marketplace — from the Tillman Act of 1907 through BCRA in 2002. *Id.* at 2689–95.

⁴¹ The press releases stated “Send Feingold packing!” and the magazine article was entitled “Radically Pro-Abortion Feingold Must Go!” *Id.* at 2697.

⁴² PACs, which may spend money on electioneering from a separate fund raised by members for that purpose, were formalized in FECA. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 302, 86 Stat. 3, 12–13 (1972).

⁴³ *WRTL*, 127 S. Ct. at 2698 (Souter, J., dissenting) (“[The website] displayed a document that criticized the two Senators for voting to filibuster ‘16 out of 16 times’ and accused them of ‘putting politics into the court system . . .’”).

⁴⁴ Rather, the ads began airing during the lead-up to the senatorial election. *Id.*

condemning a politician's record on an issue before urging viewers to call the politician.⁴⁵

The dissent criticized the principal opinion's new objective test, claiming that ripping an ad from its context before evaluating whether a reasonable person would see it as an appeal to vote for or against a candidate reinstated *Buckley*'s "toothless 'magic words'" test,⁴⁶ and that even some ads containing "magic words" could escape regulation under the new standard.⁴⁷ The dissent further addressed the principal opinion's misconception of § 203 as a speech ban rather than a limitation: corporations were permitted to speak through their PACs, and WRTL would have been free to advocate expressly had it not funneled "hundreds of thousands of dollars from other corporations" into its ads.⁴⁸ Justice Souter predicted future efforts at campaign finance reform, fueled by Congress's and voters' fears that corporate and union spending endangers democracy.⁴⁹

It would appear that after a quiet first Term — one that proved correct those commentators who doubted that "the newly constituted Court would make a dramatic move in a highly visible and politically controversial area"⁵⁰ — the Roberts Court is now acting.⁵¹ While Justice Scalia's concurring opinion would have overruled *McConnell* outright — rather than narrowing to the point of extinction the class of ads subject to BCRA regulation — the principal opinion presents itself as minimalist. It is anything but. Although the principal opinion did not expressly overrule *McConnell* to find § 203 of BCRA unconstitutional, its misguided objective test for as-applied challenges leaves the statute ineffective at preventing the very "electioneering communications" it was enacted to prevent.

The oral argument transcript in *WRTL* reveals Chief Justice Roberts's skepticism about the *McConnell* holding: his remarks and questions can be seen as queuing up ways in which the Court might wriggle out of *McConnell* without overruling it.⁵² Chief Justice Roberts

⁴⁵ *Id.* at 2698–99 (citing *McConnell v. FEC*, 540 U.S. 93, 126–27 (2003) (Stevens and O'Connor, JJ., delivering the opinion of the Court with respect to BCRA Titles I and II)).

⁴⁶ *Id.* at 2702.

⁴⁷ *Id.* at 2699.

⁴⁸ *Id.* at 2703.

⁴⁹ *Id.* at 2705.

⁵⁰ *The Supreme Court, 2006 Term—Leading Cases*, 120 HARV. L. REV. 125, 287 n.54 (2006) (analyzing *Randall v. Sorrell*, 126 S. Ct. 2479 (2006)).

⁵¹ Indeed, several days after *WRTL* was decided, Justice Breyer, speaking from the bench, proclaimed of the Term, "It is not often in the law that so few have so quickly changed so much." Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, June 30, 2007, at A1.

⁵² Chief Justice Roberts expressly articulated his desire to "approach[] this as-applied challenge in a way that doesn't require [the Court] to revisit that prior" decision. Transcript of Oral Argu-

pushed Solicitor General Paul Clement on his use of the language “vast majority” to describe the percentage of ads constitutionally prohibited by BCRA. Although the *McConnell* Court had used an identical characterization in holding that the statute was not substantially overbroad, at oral argument the Chief Justice chafed at its vagueness: “Is 70 percent a vast majority, so that 30 percent of the ads are going to be outside of that and would be candidates for this as-applied challenge?”⁵³ It is telling that Justice Scalia, who would have overruled *McConnell* outright, also downplayed the “vast majority” language.⁵⁴ But the Chief Justice’s hesitancy to accept the “vast majority” language is peculiar to the extent that he maintained *McConnell*’s no-overbreadth holding: as Clement argued, “for any as-applied challenge to be consistent with [*McConnell*’s] overbreadth determination, it can’t have the effect of opening up the statute wide open such that on a going forward basis [a substantial percentage] of the ads . . . would qualify for the exception.”⁵⁵ An end-run, hinging on quantifying “vast majority,” would necessarily render BCRA overbroad and almost certainly require the Court to overrule *McConnell* outright.

In order to avoid this result, the principal opinion attempted to distinguish *McConnell*, stating that *McConnell* “did not find that a ‘vast majority’ of the issue ads considered were the functional equivalent of direct advocacy. Rather, it found that such ads had an ‘electioneering purpose.’ . . . ‘[P]urpose’ is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express advocacy.”⁵⁶ Instead of accepting that *McConnell* (perhaps inadvisably) had used “electioneering purpose” to categorize those ads constitutionally prohibited by the statute, the principal opinion seized on the imprecision of the word “purpose” and read it as “intent.” In this manner, the opinion was able to sidestep *McConnell*, since its new test did not consider intent. Chief Justice Roberts also took Justice Scalia’s position from oral argument that *McConnell*’s “vast majority” language was dicta.⁵⁷ By relegating *McConnell*’s offending language to dicta, the Chief Justice no longer needed to overrule it.

Wordsmithing and judicial legerdemain permitted the Chief Justice to advance a test for as-applied challenges that might otherwise have

ment at 11, *WRTL*, 127 S. Ct. 2652 (No. 06-969), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-969.pdf.

⁵³ *Id.* at 7.

⁵⁴ *Id.* at 22–23 (“That vast majority thing . . . was that the holding of the case? I mean . . . every word that we . . . uttered in that prior case is law? . . . [I]s the lower court free to think that maybe it is really not the vast majority? But just because we said vast majority, it is like writing it into the statute?”).

⁵⁵ *Id.* at 8.

⁵⁶ *WRTL*, 127 S. Ct. at 2670 n.8 (opinion of Roberts, C.J.).

⁵⁷ *Id.*

forced him to find BCRA overbroad. Chief Justice Roberts's new test set forth an objective standard "focusing on the substance of the communication rather than amorphous consideration of intent and effect"; avoiding discovery if at all possible, so as to resolve "disputes quickly without chilling speech"; and sidestepping an "open-ended rough-and-tumble of factors."⁵⁸ Yet the new test is misguided for several reasons. First and foremost, its "no reasonable interpretation" standard necessitates an analysis of the effect of the ad, even though Chief Justice Roberts eschews "effects" tests. How is a court to assess whether an advertisement is "susceptible of no reasonable interpretation other than as an appeal to vote for or against" Candidate X, unless the decisionmaker takes into consideration the effect the ad has on audiences?⁵⁹

Part and parcel to the first point, the test rips ads from their context, evaluating them on their face, and thereby robs the "no reasonable interpretation" test of any efficacy it might otherwise have had. This exercise is necessarily theoretical, since these ads by definition reference the goings-on of the larger world, and the effectiveness of their message depends on their audience's exogenous knowledge. Only by means of the decontextualized analysis required by Chief Justice Roberts's new definition could a decisionmaker truly embrace her inner creativity and come up with an understanding of the ad other than the most obvious one, thereby finding the ad not to be the functional equivalent of express advocacy.⁶⁰ It is in this way that the test "stands *McConnell* on its head": whereas *McConnell* barred all ads "reasonably understood as going beyond a discussion of issues (that is, [ads that] can be understood as electoral advocacy)," the principal opinion *allows* all ads so long as they can be interpreted (even if only by a stretch of the imagination) as something other than an electoral appeal.⁶¹ Thus, the new test in effect dredges up *Buckley*'s "magic words" approach: in order for there to be no understanding on the face of the ad other than an exhortation to vote for or against a candidate, the ad must use ex-

⁵⁸ *Id.* at 2666.

⁵⁹ See Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. (forthcoming April 2008) (arguing that the principal opinion rejected "effects" tests for separating prohibited electioneering communications from permissible ads, but introduced a de facto effects test).

⁶⁰ In an attempt to align WRTL's ads with the hypothetical Jane Doe ad prohibited by the *McConnell* Court, appellants stated at oral argument that "[t]he only thing that distinguishes [WRTL's] statement from Jane Doe is knowing that Senator Feingold was part of [the group of Senators who had filibustered judicial nominees], and reasonable listeners in the context of the ad itself and the web site would certainly have known that." Transcript of Oral Argument, *supra* note 52, at 28 (statement of Seth P. Waxman, counsel for appellants Senator John McCain, et al.). Perhaps Chief Justice Roberts's test was designed as a response to this point, requiring the ad itself to contain information such that it cannot be interpreted in any other way except as advocating for or against a candidate.

⁶¹ *WRTL*, 127 S. Ct. at 2699 (Souter, J., dissenting).

PLICIT language. It is difficult to conceive of a prohibited ad under this test that would not use “magic words.”⁶²

An additional problem inherent in decontextualization is that it runs afoul of the essence of an as-applied challenge. It allows courts to obviate their duty to review fully the specific facts surrounding those ads that claim an entitlement to statutory exemption, thus creating a de facto “facial exemption from a facially valid statute”⁶³ — a point that Chief Justice Roberts implicitly conceded and marshalled to his advantage when he stated that his test would cut down on discovery, litigation, and complex argument.

In his concurrence, Justice Scalia criticized the Chief Justice’s obliqueness: “[T]he principal opinion’s attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court . . . agree that the opinion effectively overrules *McConnell* without saying so. This faux judicial restraint is judicial obfuscation.”⁶⁴ Why did the Chief Justice take this approach, particularly when the Court’s as-applied jurisprudence has underscored that courts should not review statutory schemes using as-applied challenges?⁶⁵ One likely answer involves the Court’s reluctance, in light of stare decisis concerns, to admit that past precedents are being overruled.⁶⁶ But, as Justice Scalia noted in his

⁶² See, e.g., Jack Beatty, *A Sisyphean History of Campaign Finance Reform*, ATLANTIC.COM, July 3, 2007, <http://www.theatlantic.com/doc/200707u/campaign-finance> (“Thus the Chief Justice has effectively overruled *McConnell* and reinstated the ‘magic words’ test that, in Souter’s words, ‘led Congress to enact [McCain-Feingold] in the first place.’” (alteration in original) (quoting *WRTL*, 127 S. Ct. at 2702 (Souter, J., dissenting))). Perhaps such an ad would employ images or music to convey its electioneering message, but images and music are not literal — meaning that, devoid of context, such ads would be susceptible to multiple interpretations and thus escape prohibition.

⁶³ Brief Amici Curiae of Norman Dorsen et al. in Support of Appellants at 8, *WRTL*, 127 S. Ct. 2652 (No. 09-969) [hereinafter Brief Amici Curiae]; see also *id.* at 10. Challenging the district court’s noncontextual test, amici curiae noted:

[O]ften, the literal words a speaker utters, considered alone, do not adequately capture the relevant First Amendment consideration [T]he literal text of Marc Antony’s oration at Caesar’s funeral said one thing, while the context said another. [The court’s] refusal to consider context would strip the regulatory process of adequate tools to protect federal electoral campaigns from sophisticated corporate-funded communications

Id. at 14–16. The same holds true of the Supreme Court’s different but equally noncontextual test.

⁶⁴ *WRTL*, 127 S. Ct. at 2683 n.7 (Scalia, J., concurring in part and concurring in the judgment) (citation omitted).

⁶⁵ See Brief Amici Curiae, *supra* note 63, at 20–21 (collecting cases to support the proposition that the “Court’s cases make clear that while an as-applied challenge is an appropriate way to trim the unconstitutional fat from a statute[,] it may not . . . be used to vitiate an otherwise constitutional statutory scheme”).

⁶⁶ See, e.g., Editorial, *Three Bad Rulings*, N.Y. TIMES, June 26, 2007, at A20 (“[T]he reconfigured court extended its noxious habit of casting aside precedents without acknowledging it”); Vikram David Amar, *The Supreme Court’s Problematic Use of Precedent over the Past Term: Why Overruling or Refashioning May, in Some Cases, Be Better Than Selective Interpretation*,

concurrence, when stare decisis would lead to unconstitutional results, the Court can overrule precedent.⁶⁷ A deeper reason must undergird the Chief Justice's restraint. That his restraint is political rather than jurisprudential seems likely: "Having promised moderation and incrementalism, Chief Justice Roberts apparently did not want to pay a political cost for appearing to move too quickly to overturn precedent."⁶⁸ While providing a veritable "roadmap for future challenges"⁶⁹ might be stylistically different from Justice Scalia's head-on approach, it is a different means to the same end.

More broadly, the Roberts Court in but its second Term probably did not want to make headlines by striking down a statutory scheme and overruling a Court opinion, both less than five years old.⁷⁰ To do so would have called attention to the difficulties of creating "coherent, workable, and stable doctrines in these hotly contested areas,"⁷¹ and diminished the legitimacy of the Court's campaign finance decisions. Campaign finance regulation is a murky area, allowing judges to "emphasize or de-emphasize abstract phrases like 'the free marketplace of ideas' or 'democratic integrity' to support or reject a challenge to a campaign regulation."⁷² A radical departure from *McConnell* could have spelled disaster for the integrity of campaign finance law, as lower courts would have been even more emboldened to decide cases based more on their policy preferences than on doctrine.

But Chief Justice Roberts managed to have his cake and eat it, too — shifting the balance of competing interests from safeguarding democracy to safeguarding corporate political speech, breaking the "tie" in favor of the speaker rather than the censor, all the while purporting to stay in line with precedent so as to mask possible political motiva-

FINDLAW'S WRIT, July 20, 2007, <http://writ.news.findlaw.com/amar/20070720.html> ("If the Court wants to reduce charges of judicial manipulation — and the dreaded 'activism' label — it might do well to concentrate on reading past cases less selectively, by admitting when it is overruling past cases, and by being more willing to reconsider past cases that just aren't working.").

⁶⁷ See *WRTL*, 127 S. Ct. at 2684–85 (Scalia, J., concurring in part and concurring in the judgment).

⁶⁸ Hasen, *supra* note 59 (footnote omitted); see also Editorial, *Justice Denied*, N.Y. TIMES, July 5, 2007, at A12 ("When Chief Justice Roberts was nominated, his supporters insisted that he believed in 'judicial modesty,' and that he could not be put into a simple ideological box.").

⁶⁹ Greenhouse, *supra* note 51.

⁷⁰ Election Law, <http://www.electionlawblog.org/archives/008766.html> (June 25, 2007, 09:18) ("Chief Justice Roberts will . . . eventually [entertain a full facial challenge to BCRA]. But today he is able to achieve almost as good a result for the deregulationist side, without making headlines that the Court, by a 5–4 vote, has overruled one of its precedents from only a few years ago, thanks to the departure of Justice O'Connor.").

⁷¹ Richard Briffault, *A Changing Supreme Court Considers Major Campaign Finance Questions*, 5 ELECTION L.J. 74, 86 (2006).

⁷² Spencer Overton, Commentary, *Judicial Modesty and the Lessons of McConnell v. FEC*, 3 ELECTION L.J. 305, 308 (2004).

tions. This veritable “constitutional sea change”⁷³ — hiding inside of a new test for as-applied challenges — arrives on the eve of the 2008 presidential election, as Americans brace for an onslaught of campaign advertisements. The fallout of the *WRTL* decision will be more money spent on corporate election-related speech,⁷⁴ and that speech will likely consist of “ads that contain a fig-leaf of reference to issues that is just enough to give them constitutional protection.”⁷⁵ Although the principal opinion and the concurrence espoused high-principled First Amendment rhetoric, they did so, ironically, to the benefit of wealthy corporations and unions without regard for the fact that ordinary citizens may cease to be heard in the resultant flood of corporate-sponsored speech. Invalidating Congress’s attempt to clean up its own campaigns and handing elections to wealthy special interests is quite a radical result from a supposedly modest Chief Justice.

2. *Student Speech*. — In 1969, the Supreme Court held in *Tinker v. Des Moines Independent Community School District*¹ that a public school district could not constitutionally ban students from wearing black armbands to class in protest of the Vietnam War.² The Court ruled that such student speech could be prohibited only if it threatened “substantial disruption of or material interference with school activities,”³ and Justice Fortas famously pronounced that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴ In the 1980s, the Court decided two cases that have been read as creating significant exceptions to *Tinker*’s First Amendment protections,⁵ holding that schools may prohibit “offensively lewd and indecent speech”⁶ and that schools may regulate the student-produced content of a school-sponsored newspaper in “any

⁷³ Posting of Richard Pildes to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2007/06/wrtl_blockbust.html (June 25, 2007, 12:27).

⁷⁴ See Editorial, *supra* note 66 (“Chief Justice Roberts and the four others in his ascendant bloc used the next-to-last decision day of this term to reopen the political system to a new flood of special-interest money. . . . [The Roberts Court] opened a big new loophole in time to do mischief in the 2008 elections.”).

⁷⁵ Posting of Richard Pildes to SCOTUSblog, *supra* note 73.

¹ 393 U.S. 503 (1969).

² *Id.* at 508–10.

³ *Id.* at 514.

⁴ *Id.* at 505.

⁵ See, e.g., Erwin Chemerinsky, *Students Do Leave First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 *DRAKE L. REV.* 527, 535–38, 541–42 (2000) (arguing that the subsequent decisions stripped *Tinker* of most of its force); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 *BAYLOR L. REV.* 623, 662 (2002) (arguing that the subsequent decisions “created narrow exceptions” to the rule expressed in *Tinker*, although lower courts have broadened these exceptions “in trying to circumvent the rule”).

⁶ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).