

# Tulsa Law Review

---

Volume 43  
Issue 3 *Supreme Court Review*

---

Spring 2008

## Reading Tea Leaves in Federal Election Commission v. Wisconsin Right to Life: Hope for a Buckley Evolution

Michael Anthony Lawrence

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Michael A. Lawrence, *Reading Tea Leaves in Federal Election Commission v. Wisconsin Right to Life: Hope for a Buckley Evolution*, 43 Tulsa L. Rev. 697 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol43/iss3/5>

This Supreme Court Review Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# READING TEA LEAVES IN *FEDERAL ELECTION COMMISSION V. WISCONSIN RIGHT TO LIFE*: HOPE FOR A *BUCKLEY* EVOLUTION?

Michael Anthony Lawrence\*

During its 2006–2007 Term the United States Supreme Court decided yet another in a long line of cases sprouting from the seminal 1976 First Amendment campaign finance case, *Buckley v. Valeo*.<sup>1</sup> In *Federal Election Commission v. Wisconsin Right to Life, Inc.*,<sup>2</sup> the Court concluded that § 203 of the federal Bipartisan Campaign Reform Act of 2002 (BCRA or McCain-Feingold Act),<sup>3</sup> prohibiting the use of corporate funds to finance “electioneering communications” during a specified pre-election period,<sup>4</sup> constituted an as-applied violation of a non-profit corporation’s free speech rights.

*Wisconsin Right to Life* offers useful insights into the Roberts Court’s thinking on the lively question of the propriety of legislative efforts to regulate the financing of political campaigns.<sup>5</sup> On one hand the case demonstrates a Court properly skeptical of laws proscribing constitutionally-protected individual rights (here freedom of expression); on the other, a focused parsing of the principal, concurring, and dissenting opinions uncovers the potential for a coalition of Justices able to undertake the necessary work of evolving *Buckley* into a constitutional regime equipped to meaningfully address the especially invidious aspects of Big Money in modern politics.

This essay offers a few thoughts on both themes.

## I. THE CASE: A PROPERLY SKEPTICAL COURT

In following its time-honored principle that “[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor,”<sup>6</sup> the Supreme Court in *Wisconsin Right to Life* reaffirms once again a robust First Amendment jurisprudence which serves

---

\* Professor, Michigan State University College of Law. The author would like to thank MSU College of Law Research Librarian Kathy Prince for her able research assistance.

1. 424 U.S. 1 (1976) (per curiam).

2. 127 S. Ct. 2652 (2007) [hereinafter *Wis. Right to Life III*].

3. 2 U.S.C. § 441b(b)(2) (2000) (enacted under Pub. L. No. 107-155, § 203, 116 Stat. 91 (2002)).

4. “Electioneering communication” includes “any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running for office.” 127 S. Ct. at 2660 (citing 2 U.S.C. § 434(f)(3)(A) (2000)).

5. During the previous Term (2005–2006), the newly-constituted Roberts Court decided *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), striking down portions of a state law imposing strict limits on campaign spending and contributions for state office.

6. *Wis. Right to Life III*, 127 S. Ct. at 2669.

as a model for how the Constitution properly reconciles Government's interests with the protection of individual liberty.<sup>7</sup>

This case involved the non-profit ideological advocacy corporation Wisconsin Right to Life, Inc. (WRTL). During the months leading up to the 2004 federal primary election, Wisconsin allocated a portion of its general treasury funds to run three separate broadcast advertisements. These advertisements urged voters to contact Wisconsin Senators Russ Feingold and Herb Kohl (one of whom, Feingold, was up for reelection) to tell them not to support a Senate filibuster designed to block a number of President George W. Bush's federal judicial nominees.<sup>8</sup> Recognizing the broad applicability of § 203's "electioneering activities" definition to the three ads, as the 30-day pre-election blackout neared, WRTL sued in federal district court for preliminary injunctive and declaratory relief.<sup>9</sup> The federal district court denied WRTL's request, stating, "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us."<sup>10</sup>

The Supreme Court reversed the lower court, stating, "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges."<sup>11</sup> On remand, after first finding the case justiciable under the "capable of repetition, yet evading review" mootness exception,<sup>12</sup> the district court held on the merits that § 203 did in fact constitute an as-applied violation of WRTL's constitutionally-protected speech rights.<sup>13</sup> Reasoning that "the ads were not express advocacy or its functional equivalent, but instead genuine 'issue ads,'" <sup>14</sup> the district court "held that no compelling interest justified BCRA's regulation of genuine issue ads such as those WRTL sought to run."<sup>15</sup>

7. See *id.* Anytime government seeks to proscribe individual liberty it must have an extremely good ("compelling") reason for doing so; and, in those instances where such an extremely good reason exists, the means selected by the government must be as limited ("narrowly tailored") as possible. Under First Amendment doctrine it is exceedingly rare for speech to be prohibited outright; to the extent it may be regulated at all, speech may be subject only to "reasonable time, place and manner" limitations.

I suggest elsewhere that the Court's "reasonable time, place, and manner" approach should be extended beyond the First Amendment to apply anytime government potentially limits individual liberty (broadly interpreted). See generally Michael Anthony Lawrence, *Government as Liberty's Servant: The "Reasonable Time, Place and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 La. L. Rev. 1, 35-60 (2007).

8. See *Wis. Right to Life III*, 127 S. Ct. at 2660-61.

9. *Id.* at 2661.

10. *Id.* (citation omitted). A bit of background is in order. A year after Congress enacted the BCRA, the Supreme Court in *McConnell v. Federal Election Commission*, 540 U.S. 93, 204-05 (2003), considered "whether § 203 was facially overbroad under the First Amendment because it captured within its reach not only campaign speech, or 'express advocacy,' but also speech about public issues more generally, or 'issue advocacy,' that mentions a candidate for federal office." *Wis. Right to Life III*, 127 S. Ct. at 2659 (citing *McConnell*, 540 U.S. at 204-05). In *McConnell*, the Court rejected a facial challenge to § 203, concluding, "there was no overbreadth concern to the extent the speech in question was the 'functional equivalent' of express campaign speech." *Id.* (citing *McConnell*, 540 U.S. at 206).

11. *Wis. Right to Life, Inc. v. Fed. Election Commn.*, 546 U.S. 410, 411-12 (2006) (per curiam) [hereinafter *Wis. Right to Life I*]. This decision arose from the same litigation as *Wisconsin Right to Life III*.

12. *Wis. Right to Life, Inc. v. Fed. Election Commn.*, 466 F. Supp. 2d 195, 203 (D.D.C. 2006) [hereinafter *Wis. Right to Life II*].

13. *Id.* at 210.

14. *Wis. Right to Life III*, 127 S. Ct. at 2662 (emphasis omitted) (citing *Wis. Right to Life II*, 466 F. Supp. 2d at 205-08).

15. *Id.*

In the instant case, *Wisconsin Right to Life*, the Supreme Court affirmed with a majority on the justiciability question, but only a plurality on the merits. Chief Justice Roberts announced the judgment of the Court and delivered an opinion joined in all four parts by Justice Alito, who also filed a short concurring opinion. Justices Scalia, Kennedy, and Thomas joined parts I and II, which dealt with factual/procedural background and the justiciability question, but declined to join parts III and IV on the merits, instead writing a concurring opinion in which they recommended overruling *McConnell*. Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. Accordingly, while five Justices agreed on the merits that § 203 was unconstitutional, at least as-applied, they were split two and three on the rationale for that conclusion. Six Justices, the four dissenters together with the Chief Justice and Justice Alito, voted to uphold *McConnell*.<sup>16</sup>

In the principal opinion, Chief Justice Roberts, joined by Justice Alito,<sup>17</sup> lays out the following rigorous test: “[A]n ad is the functional equivalent of express advocacy [and may thus be restricted] only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>18</sup> Explaining that “[t]his Court has never recognized a compelling interest in regulating ads . . . that are neither express advocacy nor its functional equivalent,”<sup>19</sup> the principal opinion concludes, “[b]ecause WRTL’s ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell*’s holding.”<sup>20</sup> Moreover, “[b]ecause [the government] . . . identif[ies] no interest sufficiently compelling to justify burdening WRTL’s speech, we hold that BCRA § 203 is unconstitutional as applied to WRTL’s [three] ads.”<sup>21</sup> Further, “[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.”<sup>22</sup>

The concurrence by Justice Scalia, joined by Justices Kennedy and Thomas, first

16. It should be noted that Justice Alito is tenuous on this point, stating in his one-paragraph concurrence:

I join the principal opinion because I conclude . . . it is unnecessary to go further and decide whether § 203 is unconstitutional on its face. If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked to reconsider the holding in *McConnell v. Federal Election Commn.* that § 203 is facially constitutional.

*Wis. Right to Life III*, 127 S. Ct. at 2674 (Alito, J., concurring) (internal citations omitted).

17. As for the “jurisprudential mystery why the two newest Justices [Chief Justice Roberts and Justice Alito,] did not simply sign on to Justice Scalia’s opinion, which would have overturned *McConnell*,” since, “[t]hey likely predicted that their test would lead to the end of effective limits on corporate and union election-related spending from general treasuries,” one commentator suggests “[t]he answer to the mystery is political, not jurisprudential. 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.” Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 Minn. L. Rev. \_\_\_\_ (forthcoming 2008) (available on SSRN). See *infra* nn. 63–64 and accompanying text for an alternative suggestion that there may indeed be important jurisprudential bases for the different opinion.

18. *Wis. Right to Life III*, 127 S. Ct. at 2667.

19. *Id.* at 2671.

20. *Id.* at 2670.

21. *Id.* at 2673.

22. *Id.* at 2672.

recalls the *Buckley* Court's consideration of the relevant issues:

The [*Buckley*] Court began with the recognition that contributing money to, and spending money on behalf of, political candidates implicates core First Amendment protections, and that restrictions on such contributions and expenditures "operate in an area of the most fundamental First Amendment activities." The Court also recognized, however, that the Government has a compelling interest in "prevention of corruption and the appearance of corruption." The "corruption" to which the Court repeatedly referred was of the "*quid quo pro*" variety, whereby an individual or entity makes a contribution or expenditure in exchange for some action by an official.<sup>23</sup>

Justice Scalia suggests the Court later took a wrong turn in *Austin v. Michigan State Chamber of Commerce*<sup>24</sup> in recognizing an entirely *new* class of corruption beyond that of *quid quo pro* variety—i.e., "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."<sup>25</sup> In addition, *McConnell* used "*Austin's* flawed rationale . . . [in concluding] the compelling governmental interest that supported restrictions on corporate expenditures for express advocacy also justified the extension of those restrictions to 'electioneering communications,' the 'vast majority' of which were intended to influence elections."<sup>26</sup> Justice Scalia thus asserts that *McConnell* was incorrectly decided, at least with respect to § 203, and that *McConnell* should be reversed and § 203 struck down on its face, perhaps to reinstate the prior-existing law covering "only expenditures . . . that expressly advocated the election or defeat of a candidate (in campaign-finance speak, so-called 'express advocacy')."<sup>27</sup>

In dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, focuses on three areas in objecting to the plurality's holding:

[T]he demand for campaign money in huge amounts from large contributors, whose power has produced a cynical electorate; 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; and *McConnell v. Federal Election Commission*, declaring the facial validity of the most recent Act of Congress in that tradition, a decision that is effectively, and unjustifiably, overruled today.<sup>28</sup>

Regarding the first, the dissent suggests the staggering increases in amounts spent on campaigns in recent years—where in the 2005–2006 election cycle, for example, "the expenditure of more than \$2 billion on television shattered the previous record, even

23. *Wis. Right to Life III*, 127 S. Ct. at 2676 (Scalia, Kennedy & Thomas, JJ., concurring) (quoting *Buckley*, 424 U.S. at 14, 25, 26, 27, 45, 47).

24. 494 U.S. 652 (1990).

25. *Wis. Right to Life III*, 127 S. Ct. at 2678 (Scalia, Kennedy & Thomas, JJ., concurring) (quoting *Austin*, 494 U.S. at 660).

26. *Id.* at 2679 (quoting *McConnell*, 540 U.S. at 206).

27. *Id.* at 2675 (quoting *McConnell*, 540 U.S. at 204) (and adding, "*McConnell* was mistaken in its belief," moreover, "that as-applied challenges could eliminate the unconstitutional applications of § 203. . . . The promise of an administrable as-applied rule that is both effective in the vindication of First Amendment rights and consistent with *McConnell's* holding is illusory." *Id.* at 2684; *id.* at 2685).

28. *Wis. Right to Life III*, 127 S. Ct. at 2687 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (citation omitted). The dissent agreed with the majority that the case was justiciable. *Id.* at n. 1.

without a presidential contest”<sup>29</sup>—has led to alarmingly widespread cynicism among ordinary Americans who recognize that “[t]he indispensable ingredient of a political candidacy” is not so much good ideas as, rather, lots of “money for advertising.”<sup>30</sup>

On the second point, the dissent suggests the Court fails to give proper deference to Congress’s century-long efforts to address the problems in campaign finance. Spurred initially in 1904 by President Theodore Roosevelt, who “invoked the power ‘to protect the integrity of the elections of its own officials [as] inherent’ in government, and called for ‘vigorous measures to eradicate’ perceived political corruption, for he found ‘no enemy of free government more dangerous and none so insidious.’”<sup>31</sup> Congress thereafter passed numerous pieces of legislation over the years in “a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries.”<sup>32</sup> Moreover, the dissent continues,

[n]either Congress’s decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions. From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.<sup>33</sup>

Third, the dissent argues the principal opinion’s “‘susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate’” standard effectively (and inappropriately) overrules *McConnell*.<sup>34</sup> Justice Souter suggests,

[t]he price of *McConnell*’s demise as authority on § 203 seems to me to be a high one. The Court (and, I think, the country) loses when important precedent is overruled without good reason, and there is no justification for departing from our usual rule of *stare decisis* here. . . . Nothing in the related law surrounding § 203 has changed in any way, let alone in any way that undermines *McConnell*’s rationale.

Finally, it goes without saying that nothing has changed about the facts. In Justice Frankfurter’s words, they demonstrate a threat to “the integrity of our electoral process,” which for a century now Congress has repeatedly found to be imperiled by corporate, and later union, money. . . . *McConnell* was our latest decision vindicating clear and reasonable boundaries that Congress has drawn to limit “the corrosive and distorting effects of immense aggregations of wealth,” and the decision could claim the justification of ongoing fact as well as decisional history in recognizing Congress’s authority to protect the

29. *Id.* at 2688.

30. *Id.* at 2687.

31. *Id.* at 2689 (citing 39 Cong. Rec. 17 (1904)).

32. *Wis. Right to Life III*, 127 S. Ct. at 2697.

33. *Id.*

34. *Id.* at 2699 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (quoting *id.* at 2655 (majority)).

integrity of elections from the distortion of corporate and union funds.<sup>35</sup>

The effect of the plurality's holding, the dissent concludes, will be to undermine other legitimate limits on campaign contributions, "now that companies and unions can save candidates the expense of advertising directly, simply by running 'issue ads' without express advocacy, or by funneling the money through an independent corporation like WRTL."<sup>36</sup>

## II. *BUCKLEY* EVOLUTION: SAVING OUR DEMOCRACY FROM THE FIRST AMENDMENT<sup>37</sup>

While Justice Roberts' and Alito's primary opinion in *Wisconsin Right to Life* is laudable in imposing an appropriately highly-speech-protective standard for reviewing as-applied challenges to BCRA § 203,<sup>38</sup> it is instead the dissenting opinion of Justices Souter, Stevens, Ginsburg, and Breyer that captures the case's potentially more lasting message—that *Buckley* needs to evolve in order to reflect the realities of campaign finance in the twenty-first century:

[T]he understanding of the voters and the Congress that this kind of . . . [campaign] spending seriously jeopardizes the integrity of democratic government will remain. The facts are too powerful to be ignored, and further efforts at campaign finance reform will come. It is only the legal landscape that now is altered, and it may be that today's departure from precedent will drive further reexamination of the constitutional analysis: of the distinction between contributions and expenditures, or the relation between spending and speech, which have given structure to our thinking since *Buckley* itself was decided.<sup>39</sup>

This section suggests the Supreme Court should recognize a compelling government interest in protecting our democratic institutions from the "corrosive and distorting effects of immense aggregations of wealth" on the electoral process.<sup>40</sup>

### A. *The Scope of the Problem*

As one critic has described the situation:

*Buckley* . . . leaves us in the worst of all possible worlds. A world where candidates are constantly clamoring for, and willing to compromise for, the next dollar. A world where candidates spend more time raising money than attending to government business or constituent needs. A world where monied interests are entitled to drown out everyone else's speech. A world where the wealthy—or their friends—have a special claim to public office. A world where a politician's cash constituency claims more of his attention

35. *Id.* at 2704–05 (citations omitted).

36. *Id.* at 2705.

37. With a nod to my Michigan State College of Law colleague Kevin Saunders, who makes a convincing case for the need to protect an especially vulnerable segment of our population—children—from unfettered speech in his book *Saving our Children from the First Amendment*, we similarly need to protect another vulnerable body—our very democracy—from the negative effects resulting from overzealous enforcement of the First Amendment. See Kevin W. Saunders, *Saving our Children from the First Amendment* (N.Y. U. Press 2003).

38. "[A]n ad is the functional equivalent of express advocacy [and may thus be restricted] only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667.

39. *Id.* at 2705 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

40. *Austin*, 494 U.S. at 660.

and allegiance than his voting constituency. A world where superb candidates do not run, whether because they are sick to their stomachs about the money chase or because they are dismissed as not viable without mega-wealth or a Midas touch. A world in which every reform worth adopting is weakened from the start by constitutionally mandated loopholes.<sup>41</sup>

This passage expresses well the depth of the pervasive cynicism of many Americans. The dissenters in *Wisconsin Right to Life* discuss the problem at some length as well:

[The need for political candidates to raise massive sums of money] has two significant consequences for American Government . . . . The enormous demands [for money], first, assign power to deep pockets. . . . What the high-dollar . . . [donors] get is special access to the officials they help elect, and with it a disproportionate influence on those in power. As the erstwhile officer of a large American corporation put it, “[b]usiness leaders believe—based on experience and with good reason—that . . . access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties.” At a critical level, contributions that underwrite elections are leverage for enormous political influence.

Voters know this. Hence, the second important consequence of the demand for big money to finance publicity: pervasive public cynicism. A 2002 poll found that 71 percent of Americans think Members of Congress cast votes based on the views of their big contributors, even when those views differ from the Member’s own beliefs about what is best for the country. (“In public opinion research it is uncommon to have 70 percent or more of the public see an issue the same way. When they do, it indicates an unusually strong agreement on that issue[.]”). . . . [O]nly a quarter think Members often base their votes on perceptions of what is best for the country or their constituents.

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.<sup>42</sup>

41. *If Buckley Fell 3* (E. Joshua Rosenkranz ed., Century Found. Press 1999). See also Blasi, *How Campaign Spending Limits Can Be Reconciled with the First Amendment*, 7 *Responsive Community* 1, 5–6 (1996–1997) (stating, more than ever before, “challengers and incumbents alike must beat the bushes—day after day, week after week, year after year. . . . This is a terrible way for representatives and would-be representatives to be spending their time”); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 *Colum. L. Rev.* 1204 (1994) (suggesting the Court’s *Buckley* approach gives inadequate consideration to the skewing effects of money in political campaigns in allowing the wealthy to have more influence).

42. *Wis. Right to Life III*, 127 S. Ct. at 2688–89 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (citations omitted) (emphasis added). Further,

[w]ith respect to judicial elections, a context in which the influence of campaign contributions is most troubling, a recent poll of business leaders revealed that about four in five thought that campaign contributions have at least “some influence” on judges’ decisions, while 90 percent are at least “somewhat concerned” that “[c]ampaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution.”

*Id.* at 2688 n. 2 (citations omitted).

What can be done? Within our current First Amendment framework, how might we address these deep concerns without gutting the amendment's vital protections of speech? As noted previously, the Court's First Amendment doctrine is properly highly protective of speech.<sup>43</sup> Even within the most highly-protected realm of speech—political speech—the right to speak is not absolute, however. The First Amendment does not protect the right to drive through neighborhoods in a sound truck broadcasting loudly-amplified political messages, for example;<sup>44</sup> or to engage in political protest of government policy by sleeping in tents near the White House;<sup>45</sup> or to hold large political gatherings when, for example, “the intended use would present an unreasonable danger to the health or safety of park users.”<sup>46</sup>

Similarly, the right to engage in political speech by spending money on political campaigns need not be as absolute as *Buckley* seems to suggest. If there are compelling reasons for regulating (but never silencing outright) campaign finance speech, First Amendment doctrine comfortably allows narrowly-tailored rules. We can uphold *Buckley*'s central premise that spending money in campaigns is constitutionally-protected political speech, yet recognize also a compelling interest in eliminating the “corruption” of the process caused by “the corrosive and distorting effects of immense aggregations of wealth that are accumulated . . . [from a variety of sources] that have little or no correlation to the public's support for . . . [those sources'] political ideas.”<sup>47</sup>

In our democracy, maintaining openness and fairness of the electoral process by protecting against the skewing effects of Big Money can certainly qualify as a compelling interest, as can similar measures taken to guarantee the effective functioning of other democratic institutions: “[C]andidates enter campaigns the way trial participants enter a courtroom, officials enter a legislative hall, or witnesses appear before an agency hearing.”<sup>48</sup> One commentator suggests, “Their speech can be legally restricted . . . by rules that further the proper functioning of the particular institution.”<sup>49</sup>

### B. *Reading Tea Leaves in Wisconsin Right to Life*

A parsing of the three opinions in *Wisconsin Right to Life* suggests there may be

43. See *supra* n. 7.

44. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

45. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

46. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002).

47. *Austin*, 494 U.S. at 660. See also *supra* n. 25 and accompanying text.

48. C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Har. Civ. Rights-Civ. Libs. L. Rev. 1, 46 (1998).

49. *Id.* See also Jack Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375, 414 (stating, “[I]t is not only wrong but also incoherent for opponents of campaign finance reform to contend that the government should not regulate access to the political process. Government already regulates access to the political process—the first amendment simply demands that it do so fairly.”); Jamin Raskin & John Bonfay, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 Colum. L. Rev. 1160 (1994) (advocating public funding of political campaigns as an alternative to private contributions and spending); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369, 1383 (1994) (stating that *Reynolds v. Sims*’ “one person, one vote” principle contradicts the suggestion in *Buckley* that equalizing campaign spending speech “is foreign to the First Amendment”); Cass Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255, 291 (1992) (unfavorably comparing *Buckley* to *Lochner* as “a decision to take the market status quo as just and prepolitical, and to use that decision to invalidate democratic efforts at reform”).

room for some agreement among a majority of Justices on the Roberts Court (especially with the addition of the two newest Justices, whose judicial philosophies regarding campaign finance reform have not yet been fully formed) that would allow *Buckley* to evolve into a constitutional regime equipped to address meaningfully the especially invidious aspects of Big Money in modern politics.

The principal opinion (Chief Justice Roberts, Justice Alito) in *Wisconsin Right to Life* provides, “*Buckley’s* intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test. The *Buckley* Court’s ‘express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law.’”<sup>50</sup> Moreover, Roberts and Alito further acknowledge

[a] second compelling interest recognized by this Court [in addition to *quid pro quo* corruption] lies in addressing a “different type of corruption in the political arena: 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.”<sup>51</sup>

Justice Scalia wonders in his concurring opinion about Chief Justice Roberts’ favorable quotation from *McConnell* that “[t]he *Buckley* Court’s ‘express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law,’”<sup>52</sup> stating, “I am not sure why this cryptic statement is at all relevant, since we are discussing here the principle of constitutional law that *underlay Buckley’s* express-advocacy restriction.”<sup>53</sup>

Perhaps Chief Justice Roberts’ statement is more relevant than Justice Scalia would care to imagine. Might it provide a glimmer of insight into Justice Roberts’s and perhaps Justice Alito’s willingness to recognize in a more global sense that *Buckley* “[*is not [itself expressive of] . . . first principle[s] of constitutional law*”?<sup>54</sup> Might not *Buckley* be allowed to evolve in order to recognize the very real and corrupting effects of massive money in politics—to address, in other words (borrowing from *Austin*), “the corrosive and distorting effects of immense aggregations of wealth that are accumulated . . . [from a variety of sources] that have little or no correlation to the public’s support for . . . [those sources’] political ideas”?<sup>55</sup>

In the final paragraph of the concurring opinion, Justice Scalia comments:

50. *Wis. Right to Life III*, 127 S. Ct. at 2669 (quoting *McConnell*, 540 U.S. at 190). Also,

[t]his court has long recognized “the [compelling] governmental interest in preventing corruption and the appearance of corruption” in election campaigns. . . . As *Buckley* explained, “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.” We have suggested that this interest might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, “large independent *expenditures* pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.”

*Id.* at 2672 (first emphasis in original, second emphasis added) (citations omitted).

51. *Id.* at 2672 (quoting *Austin*, 494 U.S. at 660).

52. *Id.* at 2682 (Scalia, Kennedy & Thomas, JJ., concurring) (quoting *Wis. Right to Life III*, 127 S. Ct. at 2669 n. 7).

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

54. *Wis. Right to Life III*, 127 S. Ct. at 2669 (majority) (emphasis added).

55. *Id.* at 2678 (Scalia, Kennedy & Thomas, JJ., concurring) (quoting *Austin*, 494 U.S. at 660).

There is wondrous irony . . . [i]n the fact that the effect of BCRA has been to concentrate more political power in the hands of the country's wealthiest individuals and their so-called 527 organization, unregulated by § 203. (In the 2004 election cycle, a mere 24 individuals contributed an astounding total of \$142 million to 527s.) And in the fact that *while these wealthy individuals dominate political discourse, it is this small, grass-roots organization of Wisconsin Right to Life that is muzzled.*<sup>56</sup>

Is there a hint of a disparaging tone in Justice Scalia's comment that certain "wealthy individuals" are allowed to "dominate political discourse"?<sup>57</sup> Perhaps it is too much to imagine that Justice Scalia would agree that measures should be taken to lessen the ability of "wealthy individuals [to] dominate political discourse,"<sup>58</sup> but the point to be taken is that *all nine* of the current Justices on the Supreme Court at least implicitly recognize that the infusion of massive sums of wealth into the political process by relatively few persons is *not ideal*. It is a start.

Finally, the four dissenting Justices fully see the threat, and recognize something must be done: "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.*"<sup>59</sup>

### C. Preserving Judicial Legitimacy

One final thought about *Wisconsin Right to Life* and other post-*Buckley* campaign finance cases in general. Regardless of the Supreme Court's conclusion in this or any other constitutional matter, there is a separate question of what happens when the Court's decisions continually fly in the face of repeated efforts by democratically-elected branches of government, both federal and state, to enact contrary policy. To be sure, the very principle of judicial review contemplates and accepts the Court stepping in to enforce the Constitution against noncompliant legislative and executive acts,<sup>60</sup> despite the "[c]ounter-[m]ajoritarian [d]ifficulty"<sup>61</sup> this presents. But at a certain point, when the Court "boldly str[ikes] down the preferred policies of a coordinate branch of the

56. *Id.* at 2686–87 (emphasis added) (citation omitted).

57. *Id.* at 2687.

58. *Id.*

59. *Wis. Right to Life III*, 127 S. Ct. at 2688–89 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting) (emphasis added).

60. See e.g. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. Dayton L. Rev. 565, 572–73 (1996). The author states,

courts will be a great deal firmer and wiser than legislatures in interpreting constitutional guarantees which protect essential liberty. First, judicial interpretation gives better protection to unpopular individuals and minorities shut out of or inadequately represented in the political process. It was the Supreme Court that spoke for the national conscience in *Brown v. Board of Education*, when Congress and the President remained silent. Similarly, judicial review provides better protection over time for enduring values which politicians too often neglect and of which the people too often lose sight in the emotional intensity and maneuvering of political conflict. Individual liberties such as freedom of speech and guarantees of privacy are often in this character.

*Id.*

61. Alexander M. Bickel, *The Least Dangerous Branch* 16 (2d ed., Yale U. Press 1986) (coining the phrase "[c]ounter-[m]ajoritarian [d]ifficulty" for the problem of unelected judges replacing the values of the elected legislature with those of their own).

national government,” and stands as “a countermajoritarian obstacle to progressive reform” as did the *Lochner* Court during the New Deal era, then we certainly “want to know how and why it behaved as such an ‘extremely anomalous institution from a democratic point of view.’”<sup>62</sup>

Professor Barry Friedman suggests “the work of constitutional judges must have both ‘legal’ and ‘social’ legitimacy. . . . [E]ven where it is possible to identify a jurisprudential [legal] basis for judicial decisions, if those familiar with the Court’s decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate.”<sup>63</sup> Friedman explains:

Social legitimacy, as distinguished from legal legitimacy, looks beyond jurisprudential antecedents of constitutional decisions and asks whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered.

[L]egal legitimacy, at least under ordinary circumstances and with regard to constitutional litigation, is a relatively easy test to meet. Cases rarely are litigated through the hierarchy of trial and appellate courts with no plausible doctrinal and jurisprudential argument on the other side. Legal legitimacy demands no more.

Standing alone, however, legal legitimacy may not suffice in the eyes of the public to legitimate the work of constitutional judges. Judges rendering decisions that are legally legitimate but socially unacceptable will be attacked. Moreover, the attack may well take the form that judges are acting lawlessly.

Stated differently, strong disagreement over social legitimacy puts pressure on perceptions of legal legitimacy. When decisions are seen as contrary to the needs of society, observers are unlikely to concede legal legitimacy, and rest entirely upon a claim about social propriety. Critics of the judicial decisions will attack the law as itself the problem. And, decisions that are understood as socially illegitimate may ultimately cause the law to change.<sup>64</sup>

*Buckley* and its progeny certainly are legally legitimate. But then even those most justifiably-vilified (*Dred Scott*, *Plessy v. Ferguson*, *Korematsu*) and unjustifiably-vilified (*Lochner*)<sup>65</sup> cases (as well as those most unjustifiably unvilified (*Slaughter-House*)<sup>66</sup>

62. Keith E. Whittington, *Congress before the Lochner Court*, 85 B.U. L. Rev. 821, 829 (2005) (quoting Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 291 (1957)). See also Ronald Dworkin, *Taking Rights Seriously* (Harvard U. Press 1977) (basing objections to the *Lochner* Court on “distinctions between matters of policy, to be resolved by the legislature, and matters of principle, to be resolved by the courts”); David A. Strauss, *Why Was Lochner Wrong?* 70 U. Chi. L. Rev. 373, 375–76 (2003) (stating that its consistent nullification of the preferred policies of the elected branches was “[t]he influential and ultimately decisive criticism of the [*Lochner*] Court”); Cass R. Sunstein, *Lochner’s Legacy*, 87 Colum. L. Rev. 873, 874 (1987) (citing e.g. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 11 (1971)) (basing objection to the *Lochner* Court on “conceptions of democracy”).

63. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383, 1387 (2001).

64. *Id.* at 1387, 1455.

65. See generally, Lawrence, *supra* n. 7, at 8–35.

66. See generally Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth*

are decided on constitutionally-plausible grounds (however thin), and are thus technically “legal.”<sup>67</sup> But each of them sooner or later (with the exception of *Slaughter-House*—yet) were widely viewed as socially unacceptable, which led to attacks on their legal legitimacy and ultimately to changes in the law itself as the Court repudiated its earlier decisions.

It remains to be seen if a continued hard-adherence by the Supreme Court to *Buckley* will be seen as socially unacceptable. On one hand, the fact that Congress and the Executive have engaged in a “century-long tradition” of campaign finance reform rarely disturbed (until recently) by the Court<sup>68</sup> may suggest the Court has participated in a proper “constitutional dialogue[ ] . . . [within the interstices of national politics] on crosscutting issues that internally divide the existing lawmaking majority.”<sup>69</sup> On the other, if the Court’s more recent post-*Buckley* practice of actively striking down popularly-supported legislative campaign finance reform efforts to rein-in what is widely perceived to be the corrupting effects of Big Money on our democratic institutions, then the Supreme Court places its prestige and legitimacy at risk.

### III. CONCLUSION

In *Wisconsin Right to Life* the Supreme Court laudably preserves its robust First Amendment doctrine in finding BCRA § 203 unconstitutional as-applied to WRTL’s pre-election advertisements. At the same time, the case highlights yet again the pervasive conundrum posed by legislative campaign finance reform efforts: How to reconcile the desire to protect a form of constitutionally-protected political speech while at the same time protecting our democratic institutions from the corrosive and distorting effects of Big Money in campaign finance. How the Court will resolve this tension remains to be seen, but the various opinions in *Wisconsin Right to Life* seem to suggest there may be some analytical room for the emergence of a coalition of Justices that will be able to undertake the work of evolving *Buckley* into a socially legitimate doctrine for the twenty-first century.

---

*Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 27–35 (2007).

67. Friedman, *supra* n. 63, at 1453–54 (discussing *Lochner*):

Is it imaginable that numerous judges around the country simply began to decide cases in a lawless fashion? They were, after all, lawyers brought up in a common law system. It is difficult to picture them (all of them, some quite independently) deciding cases out of the blue, without reliance on existing doctrine and jurisprudential ideas. . . . Common law judges are unlikely, under relatively ordinary circumstances and across a range of many cases, to cast the law aside in a way that we would be willing to say the decisions were legally illegitimate.

*Id.*

68. 127 S. Ct. at 2697 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting). See *supra* nn. 32–33 and accompanying text.

69. Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Political Dev. 35, 36 (1993).