

HILLARY: THE MOVIE CORPORATE FREE SPEECH OR CAMPAIGN FINANCE CORRUPTION?

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I. INTRODUCTION

“I like the smell of a dunged field, and the tumult of a popular election.”¹

Citizens United v. Federal Election Commission concerns a law designed to lessen what some congresspersons perceived to be the “dunged field” smell caused by the spate of political attack advertisements that typically precede popular elections.² To improve the electoral aroma, Congress passed the Bipartisan Campaign Reform Act (“BCRA”) of 2002,³ which broadly banned corporate-funded political advertising in certain periods leading up to a federal election.⁴ But in plowing under the field of corporate-funded political advertising, Congress unearthed the stronger stench of unconstitutional abridgement of the freedom of speech.

Citizens United (“Citizens”), a nonprofit advocacy corporation that produces political documentaries, filed suit in December 2007 against the Federal Election Commission (“FEC”) seeking a preliminary injunction to prevent the enforcement of certain

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1. AUGUSTUS WILLIAM HARE & JULIUS CHARLES HARE, GUESSES AT TRUTH 198 (New York, MacMillan 1889).

2. *See, e.g.*, 143 CONG. REC. S10208-02, S10209 (1997) (remarks of Sen. Boxer) (“These so-called issue[] ads are not regulated at all and mention candidates by name. They directly attack candidates without any accountability. It is brutal. . . . We have an opportunity in the McCain-Feingold bill to stop that . . .”).

3. McCain-Feingold Campaign-Finance Reform Act, Pub. L. No. 107-155, 116 Stat. 81.

4. 2 U.S.C.A. § 441b(b)(2) (West 2009).

provisions of the BCRA.⁵ Citizens was preparing to distribute its critical biography of then-presidential candidate Hillary Clinton, *Hillary: The Movie* (“*Hillary*”), via video on-demand (“VOD”) when it realized that doing so would violate BCRA section 203.⁶ Additionally, Citizens realized advertisements promoting *Hillary* would have to comply with the disclosure and disclaimer requirements of BCRA sections 201 and 311.⁷

To comply with the BCRA’s provisions, Citizens would have to restrict VOD access to *Hillary* in each state for thirty days prior to the state’s Democratic primary⁸ and place a disclaimer on all promotional advertisements explaining that Citizens was solely responsible for the advertisements’ content and that no candidate had approved the advertisements.⁹ Moreover, Citizens would have to file a report with the FEC disclosing the names of any donors who had contributed more than \$1,000 to fund *Hillary*’s production.¹⁰ Citizens filed suit in district court challenging the VOD-distribution ban and the disclosure and disclaimer requirements as unconstitutional speech restrictions.¹¹

The district court denied Citizens’s preliminary injunction request.¹² Approximately six months later, the court granted summary judgment to the FEC¹³ and held that the BCRA’s prohibition of the VOD distribution of *Hillary* and requirement of disclosure and disclaimers were constitutional.¹⁴

Under a special provision of the BCRA, Citizens appealed directly to the Supreme Court.¹⁵ On November 14, 2008, the Court

5. *Citizens United v. Fed. Election Comm’n* (*Citizens United I*), 530 F. Supp. 2d 274, 277 (D.D.C. 2008).

6. *Id.*

7. *Id.*

8. See 2 U.S.C.A. § 434(f)(3)(A) (West 2009) (defining cable communications that refer to a candidate for federal office as “electioneering communications” if they occur within 30 days of a primary election) and 2 U.S.C.A. § 441b (prohibiting corporations from funding “electioneering communications”).

9. 2 U.S.C.A. § 441d (West 2009).

10. 2 U.S.C.A. § 434(f)(2).

11. *Citizens United I*, 530 F. Supp. 2d 274, 277 (D.D.C. 2008).

12. *Id.* at 282.

13. *Citizens United v. Fed. Election Comm’n* (*Citizens United II*), No. 07-2240, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008).

14. See *id.* (granting summary judgment to the FEC based on the reasoning in *Citizens United I*, 530 F. Supp. 2d, in which the district court ruled that the BCRA provisions were constitutional).

15. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 81, 113–14 (giving the Supreme Court authority to hear direct appeals in disputes arising

noted it had probable jurisdiction to hear the case¹⁶ and scheduled oral argument for March 24, 2009.

Citizens and the FEC dispute two issues. First, can BCRA section 203 constitutionally prohibit the VOD distribution of a feature-length documentary about a candidate in an approaching federal election?¹⁷ Second, can the FEC constitutionally apply the disclaimer and disclosure requirements of BCRA sections 201 and 311 to such a documentary?¹⁸

This commentary will address the first issue—whether it is constitutional to proscribe VOD distribution of a film like *Hillary*. The second issue remains an important aspect of campaign finance law, but it is not explored here.

II. FACTS

Citizens is a nonprofit membership corporation that, in addition to other forms of advocacy, produces feature-length documentaries that comport with its political ideology.¹⁹ In 2007, Citizens produced *Hillary*, a ninety-minute biography that examines Hillary Clinton's political background in a critical light.²⁰ The film focuses on five aspects of Hillary's political career: firing of certain White House staff during her husband's presidency, retaliation against a woman who accused her husband of sexual harassment, violations of finance restrictions during her Senate campaign, her husband's abuse of the presidential pardon power, and her record on various political issues.²¹ The documentary contains interviews with famous political commentators such as Dick Morris, Mark Levin, and Ann Coulter.²² None of these commentators expressly advocate for the defeat of Hillary Clinton in the interviews, but many express negative opinions about her character and ability to be an effective president.²³

under the BCRA). The Supreme Court's actual jurisdiction will likely be addressed at oral argument.

16. *Citizens United II*, 2008 WL 2788753, *prob. juris. noted*, 129 S. Ct. 594 (Nov. 14, 2008) (No. 08-205) (mem.).

17. Brief for Appellant at i, *Citizens United v. Fed. Election Comm'n*, No. 08-205 (U.S. filed Jan. 8, 2009) [hereinafter Brief for Appellant].

18. *Id.*

19. *Id.* at 5.

20. *Id.* at 6.

21. *Id.*

22. *Id.*

23. *Citizens United v. Fed. Election Comm'n (Citizens United I)*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008).

Hillary's production was financed with Citizens's general treasury funds.²⁴ Citizens alleged that ninety-nine percent of the \$1 million donated to fund *Hillary* came from individuals, with the remaining one percent coming from for-profit corporations.²⁵ The trial record does not indicate what percentage of Citizens's general funding comes from for-profit corporations.²⁶

In January 2008, Citizens released *Hillary*.²⁷ It was shown in select theatres in several cities and sold on DVD through Citizens's website and commercial retailers.²⁸ In addition, a large VOD provider offered to make *Hillary* available through its *Elections '08* VOD feature, an offer Citizens pursued until learning that such distribution would be prohibited by BCRA section 203.²⁹ Had *Hillary* been available on VOD, cable subscribers could have accessed it at any time.³⁰

Citizens considered BCRA section 203's prohibition of *Hillary's* VOD distribution to be an unconstitutional speech restriction but was unable to obtain a preliminary injunction against section 203's enforcement. Not wanting to risk criminal prosecution, Citizens abstained from showing *Hillary* through VOD during the Democratic primary season.³¹ By the time the district court granted the FEC's summary judgment motion six months later, Barack Obama had secured the Democratic nomination, so Citizens could distribute *Hillary* at will.³² Nevertheless, Citizens, likely to face the same BCRA restrictions on future productions, appealed the district court's ruling to the Supreme Court.³³ Though it had lost the battle in district court,

24. Brief for Appellant, *supra* note 16, at 7.

25. *Id.* at 32–33.

26. Brief for the Appellee at 30, Citizens United v. Fed. Election Comm'n, No. 08-205 (U.S. filed Feb. 17, 2009) [hereinafter Brief for the Appellee].

27. Brief for Appellant, *supra* note 16, at 7.

28. *Id.*

29. Citizens United v. Fed. Election Comm'n, 530 F. Supp. 2d 274, 276 (D.D.C. 2008); Brief for Appellant, *supra* note 17, at 8–9.

30. Brief for Appellant, *supra* note 17, at 25.

31. *See id.* at 37–38 (arguing that the BCRA required Citizens to either “risk felony prosecution” or “remain silent”).

32. After Barack Obama secured the Democratic nomination, Hillary Clinton was no longer a candidate in a federal election, so the BCRA would not have applied to *Hillary* at that point. *See* 2 U.S.C.A. § 434(f)(3)(A) *et seq.* (West 2009) (specifying that the BCRA only regulates electioneering communications, which, by definition, must refer to a candidate in a federal election).

33. *See* Brief for the Appellee, *supra* note 16, at 14 n.3 (noting that Citizens' future productions will likely be subject to the BCRA).

prevailing in the Supreme Court would win the war for future election periods.

III. LEGAL BACKGROUND

The BCRA regulates the area of speech defined as “electioneering communications.”³⁴ An electioneering communication is “any broadcast, cable, or satellite communication” that refers to a candidate for the federal office contested in a primary or general election and is made within thirty days before a primary election or sixty days before a general election.³⁵

More specifically, section 203 of the BCRA, which amended the Federal Election Campaign Act (“FECA”) of 1971,³⁶ prohibits corporations from funding electioneering communications with general treasury funds.³⁷ Congress enacted FECA to lessen the actual and apparent corruption of elected officials by large campaign contributions by imposing limits on direct contributions to a federal candidate’s campaign.³⁸

FECA’s supporters also saw risk of *quid pro quo* corruption³⁹ in independent expenditures (i.e., expenditures made independent of, and not in coordination with, a campaign).⁴⁰ Thus, FECA also imposed limits on the independent expenditures that could be made “relative to a clearly identified candidate.”⁴¹

The constitutionality of FECA’s contribution and independent expenditure limitations was first challenged in *Buckley v. Valeo*.⁴² In that case, the Court held that the government had a compelling interest in preventing actual and apparent *quid pro quo* corruption in federal elections.⁴³ It then held that FECA’s contribution limitations were constitutional because they furthered that interest without

34. 2 U.S.C.A. § 434(f)(3)(A) (West 2009).

35. *Id.* Because the theatre and DVD distributions of *Hillary* did not meet the definition of electioneering communication, the FEC could not criminalize their distribution.

36. Pub. L. No. 92-225, 86 Stat. 3 (codified at 2 U.S.C. § 431 *et seq.* (West 2009)).

37. 2 U.S.C.A. § 441b(b)(2) (West 2009).

38. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

39. *Quid pro quo* refers to politicians inappropriately rewarding significant political supporters with political favors.

40. *See Buckley*, 424 U.S. at 45 (addressing Congress’s contention that independent expenditures pose a *quid pro quo* corruption threat).

41. *Id.* at 39 (discussing FECA § 608(e)(1), amended by 2 U.S.C.A. § 441b(b)(2) (West 2009)).

42. *Buckley*, 424 U.S.

43. *Id.* at 26–27.

unnecessarily abridging the associational freedoms of contributors or otherwise limiting their speech.⁴⁴

In contrast, the *Buckley* Court held FECA's independent expenditure restrictions unconstitutional.⁴⁵ Applying strict scrutiny, the Court first noted that the language in FECA's independent expenditure provision—"relative to a clearly identified candidate"—was impermissibly vague.⁴⁶ To make the language clear, the Court construed it narrowly to cover only expenditures that funded express advocacy (i.e., advocacy employing words that specifically advocate the election or defeat of a candidate, such as "vote for," "support," "defeat," etc.).⁴⁷ But even after narrowing the language, the Court struck down FECA's independent expenditure provisions based on its reasoning that independent expenditures, unlike direct contributions, did not pose a threat of *quid pro quo* corruption.⁴⁸ Thus, FECA's independent expenditure limitations failed to advance the government's compelling interest in avoiding actual or apparent *quid pro quo* corruption in elections.⁴⁹

Two years after *Buckley*, the Court confirmed that independent expenditures could not be constitutionally restricted, even if those expenditures were made by corporations rather than individuals. In *First National Bank of Boston v. Bellotti*,⁵⁰ the Court held that First Amendment protections remain in force even if the speaker is a corporation.⁵¹ Further, it held that the threat of wealthy corporations "drown[ing] out other points of view" could not justify suppressing corporate speech.⁵² The Court held that corporate speech was no less valuable to the democratic process than speech from other sources,

44. *Id.* at 28. The Court did not subject FECA's direct contribution limitations to a strict scrutiny standard because they imposed only "marginal restriction[s]" on donors' abilities to engage in political speech; though limiting what a donor could give to a particular candidate, they otherwise left donors free to engage in unlimited, independent political advocacy. *Id.* at 20–21. The court applied a lower level of scrutiny to FECA's direct contribution limitations without identifying the level of scrutiny used. *Id.* at 25.

45. *Id.* at 41. The Court held that FECA's independent expenditure restrictions were subject to strict scrutiny, because they limited the amount of expression individuals and organizations could engage in relative to a given candidate. *Id.* at 44–45.

46. *Id.* at 43–44.

47. *Id.* at 44.

48. *Id.* at 46–47.

49. *Id.* at 47–48.

50. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

51. *Id.* at 776–77.

52. *Id.* at 789.

stating that “[t]he inherent worth of the speech . . . does not depend upon the identity of its source.”⁵³

Ten years later, in *Austin v. Michigan Chamber of Commerce*,⁵⁴ the Court effectively reversed the position it took in *Bellotti*. In *Austin* the Court *permitted* the regulation of independent corporate expenditures, without overruling *Bellotti*, based on a newly-identified form of corruption that, according to the Court, the government had a compelling interest in reducing.⁵⁵ The *Austin* Court described this newly-identified form of corruption as “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.”⁵⁶ Essentially, the *Austin* Court believed that corporate resources raised through business operations, selling shares, and borrowing are otherwise much larger than if raised through donations seeking to advance a particular political message and that this gives an unfair political advantage to corporate ideas.⁵⁷ The Court ruled this way despite its holding in *Bellotti* that corporate speech enjoyed the same First Amendment protections as individual speech.⁵⁸

Importantly, in *Austin* and every campaign-finance case before it, the Court only addressed laws that restricted independent corporate expenditures made for *express advocacy*.⁵⁹ After *Austin*, corporations continued to make large independent expenditures simply by avoiding the “magic words” of express advocacy.⁶⁰ Corporate ads would refer to federal candidates by name without expressly calling for their election or defeat.⁶¹ Most of these ads were scripted as “issue ads” that raised a political issue and then referred to a candidate’s position on that issue.⁶²

53. *Id.* at 776–77.

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

55. *Id.* at 660.

56. *Id.*

57. *Id.* at 658–59.

58. *Bellotti*, 435 U.S. at 776–77.

59. *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2679 (2007) (Scalia, J., concurring in part and concurring in the judgment) (noting that speech regulation from *Buckley to Austin* was limited to express advocacy).

60. *McConnell v. Fed. Election Comm’n (McConnell I)*, 251 F.Supp.2d 176, 527 (D.D.C. 2003).

61. *Id.*

62. *Id.*

By 2002, the number of independent corporate issue ads had risen substantially.⁶³ Congress considered this problematic, and accordingly enacted the BCRA—with its definition of “electioneering communications”—to “stanch” the “flow of [corporate] money” funding the issue ads appearing before federal elections.⁶⁴ In its definition of “electioneering communications,” the BCRA disposed of the distinctions between express advocacy ads and issue ads and simply prohibited any corporate-funded ads that referred to a federal candidate within thirty days of a primary election or sixty days of a general election.⁶⁵

Immediately after the BCRA was enacted it was challenged. In *McConnell v. Federal Election Commission*,⁶⁶ multiple plaintiffs asserted that section 203 was an unconstitutional speech restriction because the “electioneering communications” that section 203 prohibited extended beyond express advocacy.⁶⁷ But the Court upheld section 203 as facially constitutional, reasoning that the justifications for regulating independent corporate expenditures constituting express advocacy “apply equally” to ads that are “*the functional equivalent of express advocacy*.”⁶⁸ The Court believed that the regulation of such expenditures was acceptable because they could have the kind of “corrosive and distorting effect” on the electorate recognized in *Austin* and because the government had a compelling interest in countering those effects.⁶⁹

Though the Supreme Court did not elaborate on the point, the district court in *McConnell* had found that the BCRA targeted only broadcast ads because those ads are the most effective form of communicating an electioneering message and therefore posed the greatest risk of corruption.⁷⁰ The district court noted that forms of

63. *Wis. Right to Life, Inc.*, 127 S. Ct. at 2694–95 (Souter, J., dissenting).

64. *McConnell v. Fed. Election Comm’n (McConnell II)*, 540 U.S. 93, 207 (2003).

65. 2 U.S.C.A. § 434(f)(3)(A). Also, the BCRA applies to nearly all corporations, including non-profit advocacy corporations that receive any portion of their funding from for-profit corporations. See 11 C.F.R. § 114.10 (exempting only ideological, nonprofit, membership corporations that do not accept funding from for-profit corporations from the BCRA). Congress apparently designed the BCRA in this way to ensure that for-profit corporations could not avoid the law by simply funneling money through a nonprofit advocacy corporation.

66. *McConnell II*, 540 U.S.

67. *Id.* at 205–06.

68. *Id.* at 206 (emphasis added).

69. *Id.* at 205.

70. *McConnell v. Fed. Election Comm’n (McConnell I)*, 251 F. Supp. 2d 176, 569–71 (D.D.C. 2003).

media that required viewers to “opt-in” or “make a choice to . . . watch the program”⁷¹ would mostly reach voters already predisposed to those views and would reach far fewer undecided voters than a broadcast ad.⁷² For the *McConnell* district court, this was a “critical distinction” that separated communications that posed a great risk of corruption (broadcast ads) from those that did not (viewer choice media).⁷³

Though finding section 203 facially constitutional, the Supreme Court noted that future as-applied challenges to section 203 may nonetheless succeed.⁷⁴ The first as-applied challenge came four years later in *Federal Election Commission v. Wisconsin Right to Life, Inc.* (“*WRTL*”).⁷⁵ In *WRTL*, the Court fragmented into three lines of reasoning. Each of the three fragments must be considered because each is important to an analysis and prediction of what may happen in *Citizens United v. Federal Election Commission*.

A. *Fragment 1*

The lead opinion in *WRTL* was authored by Chief Justice Roberts and joined by Justice Alito. Justice Roberts accepted *McConnell*’s holding that section 203 could constitutionally prohibit ads that were the functional equivalent of express advocacy.⁷⁶ In addition, Justice Roberts held 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.”⁷⁷ Justice Roberts reasoned that this must be an objective test that focuses on the ad’s substance and not on contextual factors that might illustrate the corporation’s reasons for running the ad.⁷⁸ Applying this test, Justice Roberts reasoned that Wisconsin Right to Life’s ads were not the functional equivalent of express advocacy because they took a position on a legislative issue

71. *Id.* at 571.

72. *Id.* at 646; *see also* Brief for Appellant, *supra* note 17, at 24–25.

73. Brief for Appellant, *supra* note 17, at 24–25.

74. *Wis. Right to Life, Inc. v. Fed. Election Comm’n*, 546 U.S. 410, 411–12 (2006). The Supreme Court confirmed in this case that in holding section 203 facially constitutional *McConnell* still permitted future as-applied challenges to section 203.

75. *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

76. *Id.* at 2664 (Roberts, C.J., plurality opinion).

77. *Id.* at 2667.

78. *Id.* at 2666.

and urged the public to contact their representatives about it.⁷⁹ Moreover, they neither “mention[ed] an election, candidacy, political party, or challenger” nor “[took] a position on a candidate’s character, qualifications, or fitness for office.”⁸⁰

Justices Scalia, Thomas, and Kennedy disagreed with Justice Roberts’s functional equivalency test but concurred in the judgment that section 203 was unconstitutional as applied to Wisconsin Right to Life’s ads. This gave authoritative weight to Justice Roberts’s test based on the principle that “when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”⁸¹ After *WRTL*, the FEC promulgated federal regulations that implemented Justice Roberts’s formulation.⁸²

There is one other important aspect of Justice Roberts’s opinion. *WRTL* had argued that even if the for-profit, corporate-funded advertisements in *Austin* threatened to corrupt the electoral process because the advertisements might not reflect the actual views of shareholders, nonprofit advocacy-group-funded advertisements did not pose such a threat because those advertisements wholly-reflect the views of the nonprofit’s members.⁸³ Justice Roberts declined to address this argument because Wisconsin Right to Life had received some of its funding from for-profit corporations.⁸⁴

B. *Fragment 2*

Justice Scalia wrote a concurring opinion joined by Justices Thomas and Kennedy. Justice Scalia argued that *McConnell* was incorrect insofar as it had held that section 203 could constitutionally prohibit the functional equivalent of express advocacy.⁸⁵ He believed that any test to determine what constitutes the functional equivalent of express advocacy would be too vague in application to justify

79. *Id.*

80. *Id.* at 2667.

81. *Citizens United v. Fed. Election Comm’n*, 530 F. Supp. 2d 274, 278 n.10 (D.D.C. 2008) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). *Citizens United* and the FEC agreed in district court that Justice Roberts’s formulation was the “governing test for the functional equivalent of express advocacy.” *Id.*

82. 11 C.F.R. § 114.15 (2007).

83. *Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2673 n.10 (2007).

84. *Id.*

85. *Id.* at 2684 (Scalia, J., concurring in part and concurring in the judgment).

McConnell's holding that section 203 is facially constitutional, but that section 203 could be challenged, without vagueness concerns, on an as-applied basis.⁸⁶ He argued the necessary uncertainty of any functional equivalency test would fail to distinguish between issue ads and campaign ads disguised as issue ads, thereby improperly restricting many genuine issue ads.⁸⁷ Justice Scalia believed the express advocacy test of *Buckley* should define the limits of section 203 because it is the only test that provides certainty without unconstitutionally chilling political speech, even if it allows many advocacy ads disguised as issue ads to be broadcast.⁸⁸

Justice Scalia also believed that *Austin* was an indefensible departure from *Buckley* and *Bellotti* and that it should be overruled.⁸⁹ He would return the law to the point where speech bans were not permitted in the independent expenditure arena at all, even if they are corporate expenditures paying for express advocacy ads.⁹⁰

C. *Fragment 3*

Justice Souter dissented and was joined by Justices Ginsberg, Stevens, and Breyer. Justice Souter agreed that section 203 could prohibit issue ads that are the functional equivalent of express advocacy but disagreed with Justice Roberts about the proper test for functional equivalency.⁹¹ Justice Souter argued that the test should be the converse of Justice Roberts's test: anything that could conceivably be construed as a call to vote for or against a candidate should be deemed the functional equivalent of express advocacy.⁹² He believed that Justice Roberts's test effectively overruled *McConnell* by returning the law to a state that proscribes only express advocacy ads, because most ads without the "magic words" could be reasonably construed as something other than the functional equivalent of express advocacy.⁹³

The Court did not consider the application of section 203 to a feature-length political documentary such as *Hillary*, nor has it done

86. *Id.* at 2683–84.

87. *Id.* at 2684.

88. *Id.*

89. *Id.* at 2679.

90. *Id.* at 2686.

91. *Id.* at 2698 (Souter, J., dissenting).

92. *Id.* at 2699.

93. *Id.*

so in any case to date. The broadcast advertising considered by the Court in *WRTL* and other cases has been traditional ten-second to thirty-second ads run during regular programming.

IV. HOLDING

In *Citizens United v. Federal Election Commission*, the district court first held that the VOD distribution of *Hillary* qualified as an electioneering communication under the BCRA because it would be communicated via a cable system within thirty days of several Democratic presidential primaries and plainly referred to then-presidential candidate Hillary Clinton.⁹⁴ Next, the district court recognized that BCRA section 203 prohibited corporations from funding electioneering communications out of their general treasury funds.⁹⁵ Because *Hillary* was so funded, section 203 prohibited its VOD distribution during the thirty-day period before any Democratic primary.⁹⁶

Turning to the constitutionality of section 203, the district court recognized that the *McConnell* decision upheld section 203 as facially constitutional insofar as it prohibited ads that constituted express advocacy or the functional equivalent thereof, something to be decided on an as-applied basis.⁹⁷ The district court, however, did not consider *Hillary* to be express advocacy.⁹⁸ As a result, whether Citizens's as-applied challenge would prevail depended on whether *Hillary* was the functional equivalent of express advocacy.⁹⁹ The parties agreed that the "governing law" for the functional equivalent of express advocacy was Justice Roberts's test in *WRTL*.¹⁰⁰

Applying Justice Roberts's *WRTL* test, the district court ruled that *Hillary* was the functional equivalent of express advocacy because it could not be interpreted as anything other than an appeal to defeat Hillary Clinton.¹⁰¹ In making this conclusion, the district

94. *Citizens United v. Fed. Election Comm'n (Citizens United I)*, 530 F. Supp. 2d 274, 277 n.6 (D.D.C. 2008).

95. *Id.* at 277.

96. *Id.* at 280.

97. *Id.* at 278.

98. *See id.* at 278–80 (the district court's analysis focused solely on whether *Hillary* was the functional equivalent of express advocacy, which would have been unnecessary had the court considered *Hillary* express advocacy).

99. *Id.* at 278–79.

100. *Id.* at 277 n.6.

101. *Id.* at 279–80.

court observed that *Hillary* focuses very little on current legislative issues; makes repeated references to the presidential election and Hillary Clinton’s candidacy; and takes a position on her character, qualifications, and fitness for the office of president.¹⁰² The district court cited many of the film’s negative comments about Hillary Clinton to demonstrate that, on the whole, the film is an appeal to defeat her.¹⁰³ Accordingly, the district court ruled that *Hillary* could be constitutionally prohibited by BCRA section 203.¹⁰⁴

V. ANALYSIS

“The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech.”¹⁰⁵

The text of the First Amendment is worth remembering, even though it has played a minor role in the Supreme Court’s analysis of the cases that have influenced the interpretation of BCRA section 203: “Congress shall make *no law* . . . abridging the freedom of speech.”¹⁰⁶ Even if one concedes that the Supreme Court cannot always interpret the First Amendment in an absolute sense, any speech restrictions the Court upholds must be supported by a compelling interest.¹⁰⁷ A statutory ban on ads that criticize incumbent or would-be elected officials hardly seems compelling. In fact, the founders likely had a mind to prevent such laws when they inscribed the words “no law” on parchment in the Bill of Rights.¹⁰⁸ The district

102. *Id.*

103. *Id.* at 280 n.12. For example, here are two of approximately twelve quotes cited by the district court: (1) “She is steeped in controversy, steeped in sleaze, that’s why they don’t want us to look at her record.” (2) “I mean think of what it says about Hillary Clinton that she was willing to put up with his open philandering, with anything in a skirt who wanders before his eyesight all for the power—at least with Bill Clinton he was just good time Charlie. Hillary’s got an agenda and she’s willing to put up with that to be [P]resident of the [U]nited [S]tates, she’s got a to do list when she gets to the White House.”

104. *Id.*

105. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in the judgment in part and dissenting in part).

106. U.S. CONST. amend. I (emphasis added).

107. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (“[T]he [judicial] presumption of constitutionality [is narrow] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first Ten Amendments . . .”).

108. *See, e.g., JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800* 28 (Richmond, J.W. Randolph 1850) (“The right of freely examining public characters and measures, and of free communication among the people thereon . . . has ever been justly deemed the only effectual guardian of every other right.”); *JOHN ADAMS, THE WORKS OF JOHN ADAMS* 456 (Boston, Little, Brown, and Co. 1865) (“[L]iberty cannot be preserved without a general knowledge

court, however, was not at liberty to consider such first principles because precedent had long papered over the First Amendment's foundational text.

According to the district court, precedent required consideration of a single issue to determine the constitutionality of section 203 as applied to *Hillary*: whether the film is the functional equivalent of express advocacy under Justice Roberts's *Federal Election Commission v. Wisconsin Right to Life, Inc.* test.¹⁰⁹ The district court held that it was because the film clearly mentions Hillary's presidential candidacy, takes a position on her character and qualifications to be president, and does not focus primarily on legislative issues.¹¹⁰

Though the district court was correct about much of *Hillary*'s content, it may have been incorrect that *Hillary* was the functional equivalent of express advocacy because Justice Roberts's *WRTL* factors were used to analyze thirty-second advertisements, not feature-length films. A thirty-second advertisement that mentioned Clinton's presidential candidacy and then attacked her presidential character and qualifications would leave little time for much else. Such an ad could only be interpreted as an appeal not to vote for Hillary Clinton. But *Hillary* is a ninety-minute film that, in addition to the content recognized by the district court, also contains a great deal of biographical information about Clinton's political career and discusses the positions she takes on current political issues.¹¹¹ The film could be interpreted as something other than the functional equivalent of express advocacy. For example, it could be viewed as a critical biography of a prominent politician or as an entertainment piece for political aficionados.¹¹²

Under Justice Roberts's test, Citizens's desire to broadcast the film during an election cycle is irrelevant because this desire is a contextual factor that focuses on Citizens's intent in producing the film.¹¹³

among the people, who have a right . . . and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers.").

109. *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d at 278–79.

110. *Id.* at 12.

111. *Id.* at 40.

112. *Id.*

113. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2666 (2007).

This case might illustrate that Justice Scalia was right to believe that any test for the functional equivalent of express advocacy would often be too difficult to apply in practice.¹¹⁴ Conversely, this case might illustrate that Justice Souter was correct to believe that very few non-express advocacy communications will be prohibited by section 203 because most applications of Justice Roberts's test will find other reasonable interpretations of a given communication.¹¹⁵ But the case is most likely to demonstrate that while short, political advertisements should be deemed the functional equivalent of express advocacy when the factors of Justice Roberts's *WRTL* test are present, similar functional equivalency concerns are not necessarily present with feature-length films. Feature-length films that contain the *WRTL* factors have plenty of room for other substantive material that could lead a reasonable viewer to interpret the film as something other than the functional equivalent of express advocacy.

The *WRTL* functional equivalency test ultimately assesses whether a given communication poses a risk of corruption to the election process so great that Congress is compelled to regulate it.¹¹⁶ Accordingly, when applying the *WRTL* test to *Hillary*, the district court should have considered whether *Hillary* posed any risk of corruption to federal elections.

The fact that accessing *Hillary* required viewer choice is vital to this inquiry.¹¹⁷ Viewers had to affirmatively elect to watch *Hillary* by ordering it on a VOD service.¹¹⁸ Even if the government has a compelling interest in regulating short campaign ads thrust upon the masses during prime-time programming, it does not follow that the government has an interest in prohibiting people from voluntarily deciding to invest ninety minutes to see what a political advocacy group has to say about a candidate.¹¹⁹ The threat of amassed corporate wealth distorting the views of the electorate is not as great when the segment of the electorate that views the communication is self-selecting.

114. *Id.* at 2683–84 (Scalia, J., concurring in part and concurring in the judgment).

115. *Id.* at 2699 (Souter, J., dissenting).

116. *Id.* at 2672.

117. *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 569–71 (D.D.C. 2003); Brief for Appellant, *supra* note 17, at 25–26.

118. Brief for Appellant, *supra* note 17, at 25–26.

119. *McConnell*, 251 F. Supp. 2d at 571.

Admittedly, the BCRA does not distinguish between full-length feature films and thirty-second ads in its definition of “electioneering communications.” Nor does it recognize an exception to “electioneering communications” based on viewer choice. But neither lack of distinction nor lack of an exception in the statute should matter because *every application* of a statute that restricts speech must further a compelling interest.¹²⁰ The government does not have a compelling interest in suppressing a film like *Hillary*. And even if it did, the BCRA is underinclusive because it only prohibits the VOD distribution of *Hillary* and does not prohibit the internet download of *Hillary* or the selling of *Hillary* DVDs.¹²¹ How this selective restriction of speech furthers a government interest is unclear.

Citizens makes two additional arguments on appeal that the Court will likely address. First, Citizens argues that the reasoning in *Austin v. Michigan Chamber of Commerce* does not apply because the funding for *Hillary* came predominantly from individual donors and therefore reflects the level of popular support for the views expressed in *Hillary*.¹²² This argument will likely be dismissed by the Court, as it was in *WRTL*, because there are insufficient facts on the record to know what percentage of general funding came from for-profit corporations.¹²³

Citizens also argues that *Austin* is inconsistent with *Buckley v. Valeo* and *First National Bank of Boston v. Bellotti* and should be overruled.¹²⁴ This argument is unlikely to be successful because only three of the justices agree.¹²⁵ In addition, overruling *Austin* would invalidate *McConnell v. Federal Election Commission* and much of the BCRA because it would prohibit Congress from regulating independent corporate expenditures altogether.¹²⁶ Though this outcome would be more in harmony with the First Amendment’s “no law” injunction than existing precedent, there simply are not enough votes on the Court to overrule *Austin*.

120. *Wis. Right to Life, Inc.*, 127 S. Ct. at 2671.

121. Brief for Appellant, *supra* note 17, at 27–28.

122. *Id.* at 29–30.

123. Brief for the Appellee, *supra* note 26, at 30.

124. Brief for Appellant, *supra* note 17, at 30–31.

125. *See Wis. Right to Life, Inc.*, 127 S. Ct. at 2679 (Scalia, J., concurring in the judgment) (“*Austin* . . . was wrongly decided.”). Justice Scalia was joined in this opinion by Justices Kennedy and Thomas.

126. Brief for the Appellee, *supra* note 26, at 34–35.

VI. DISPOSITION/CONCLUSION

Chief Justice Roberts and Justice Alito will likely apply the *Federal Election Commission v. Wisconsin Right to Life, Inc.* to feature-length films, but make it clear that feature-length films containing the *WRTL* factors (mentioning an election, taking a position on a candidate's character, etc.) may nevertheless be interpreted as something other than the functional equivalent of express advocacy depending on the film's substantive content. They may even develop additional factors to consider when applying the *WRTL* test to feature-length films. The *Austin v. Michigan Chamber of Commerce* concern that corporate wealth could corrupt the electoral process will be tantamount to their analysis. They will likely hold that where there is a self-selecting audience, corruption of the electoral process is less of a risk and therefore the government would not further a compelling interest by banning the film.

Justices Scalia, Thomas, and Kennedy will probably concur in the judgment but continue to maintain that *McConnell v. Federal Election Commission* and *Austin* should be overruled, which would free all independent corporate expenditures from speech restrictions and make the VOD broadcast of *Hillary prima facie* acceptable.

If a 5-4 majority results, Justices Roberts and Alito will be the authors of the leading opinion and their judgment will be the law for applying BCRA section 203 to films like *Hillary*. It is hard to predict how Justices Souter, Ginsberg, Stevens, and Breyer will vote. They are generally favorable to the restrictions imposed by BCRA section 203,¹²⁷ but they may be persuaded that the element of viewer choice changes the calculus by eliminating or reducing the interest the government has in restricting such speech.

In any event, Citizens will likely prevail in the Supreme Court, freeing it and similar groups—on both sides of the political spectrum—to produce and distribute films like *Hillary* to self-selecting audiences during future pre-election periods. This would be a desirable result because there are plenty of biographical targets in Washington whose political merit and professional credentials, or lack thereof, should not be shielded by campaign finance laws that derogate the First Amendment.

127. All four justices voted to uphold section 203 in *WRTL*. See *Wis. Right to Life, Inc.*, 127 S. Ct. at 2687 (Souter, J., dissenting).