

**Brennan Center for Justice at NYU School of Law**  
**Summary of Supreme Court Decision**  
***FEC v. Wisconsin Right to Life, Inc. (2007)***

**Background**

Before passage of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), an ad was subject to campaign finance regulation only if it was “express advocacy” – an ad for or against a candidate that used “magic words,” such as “vote for” or “vote against.” So-called “sham issue ads” (campaign ads that simply avoided “magic words”) were funded the same way as genuine issue ads (ads taking a position on a public issue). There were no limits on who could buy the ads, no limits on how they were financed, and no disclosure was required. Hundreds of millions of dollars of corporate and union treasury funds, which could not legally be used to influence elections, poured into federal campaign advertising through the “sham issue ad” loophole. BCRA closed this loophole by banning the use of corporate and union treasury funds for “electioneering communications”– broadcast ads aired during the pre-election period, referring to a candidate and targeting the candidate’s constituents. In December 2003, the U.S. Supreme Court upheld the constitutionality of this provision in *McConnell v. FEC*.

During Senator Russ Feingold’s 2004 campaign, Wisconsin Right to Life (“WRTL”) ran ads urging viewers to tell him to oppose the filibuster of President Bush’s judicial nominees. The ads, which were part of a long campaign by WRTL to oust Senator Feingold, ran while the Senate was in recess and could not vote on judicial nominees, but ceased once Senator Feingold won re-election, even though the filibuster again became an issue. Although WRTL raised substantial corporate treasury funds for its operations, it argued that BCRA could not constitutionally be applied to its ads, because they were issue advocacy. On June 25, 2007, the U.S. Supreme Court agreed (5-4).

**The Decision**

- BCRA could not be applied to WRTL’s ads, because they were not “the functional equivalent of express advocacy” for or against a candidate.
- An ad is “the functional equivalent of express advocacy” only if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”
- WRTL’s ads were not the “functional equivalent of express advocacy” for two reasons:
  - “First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter.”
  - “Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.”
- In applying the test, courts are generally barred from considering contextual evidence and may allow only “minimal if any discovery.”
- The intent of the advertiser and the effect of an ad are irrelevant to whether it is “the functional equivalent of express advocacy.” *McConnell* should not have considered the purpose of electioneering communications in holding that they could be treated as express advocacy.

## Legal Implications

- BCRA is still good law. The Court did not overrule *McConnell*, and it did not invalidate BCRA. Corporations and unions may not use treasury funds for electioneering communications, unless a court rules that BCRA does not apply to ads they are running.
- State laws regulating electioneering communications are still valid.
- The decision does not affect the law's requirement for *disclosure* of electioneering communications. *WRTL* did not challenge the obligation to disclose the amount it spent on its ads, and the Court did not address that issue.
- The new test is *not* the same as the “magic words” test. The test is similar to the “reasonable person” standard that has been in effect in the Ninth Circuit since 1987. Even after passage of BCRA, that standard applied to ads that did not qualify as “electioneering communications” because they were run before the statutory pre-election period.

## Practical Implications

- The opinion described above was written by Chief Justice Roberts and joined only by Justice Alito, although Justices Kennedy, Scalia, and Thomas concurred in the result. Seven justices (the three who endorsed the outcome of the opinion, but not its reasoning, and four who dissented completely) agreed that the Chief Justice effectively overturned a key portion of *McConnell*, even though he denied doing so and technically did not do so.
- The Court has in effect invited a new facial challenge to BCRA's restrictions on the use of corporate and treasury funds for electioneering communications. In other words, it is likely that someone will bring a new lawsuit asking the Court explicitly to overturn *McConnell* and to extend the reasoning of *WRTL* to *all* ads that qualify as issue advocacy under *WRTL*'s new test. There appear to be five justices who would be prepared to do so.
- Practically, it is all but certain that corporations and unions will pour hundreds of millions of dollars in treasury funds into electioneering communications. We can expect a flood of ads aired immediately before federal elections that take care to take a position on an issue and exhort the public to contact elected officials. The shadings between attacks on candidates' views on the issues and attacks on their character may be difficult to discern. If the FEC tries to enforce BCRA, the corporations and unions will claim that their ads are issue advocacy and assert as-applied challenges to BCRA in their defense.