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Exempt Organizations in the 2008 Election: Will Wisconsin Right to Life Bring Changes?

Frances R. Hill

University of Miami School of Law, fhill@law.miami.edu

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EXEMPT ORGANIZATIONS IN THE 2008 ELECTION: WILL WISCONSIN RIGHT TO LIFE BRING CHANGES?

*Frances R. Hill**

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I. INTRODUCTION

Exempt organizations have become players in election campaigns. The activities in which they engage, the structures through which they pursue these activities, and the sources of funding that support their campaign activities create a broad range of experiences that cannot be crisply summarized in either legal or operational terms.

Some politically active exempt entities are long-established organizations with substantial programs of exempt activities, and these entities that engage in campaign activities to promote their exempt agendas. These entities speak, often quite loudly, in their own voices and use their own funds to do so. In some cases, contributors are well aware of the organization's intention to devote resources to campaign activities, but in other cases, their intentions may be less clear. Some exempt entities may be special-purpose entities devoted to electing a particular candidate. These special-purpose entities are often created and operated by former staff members from either prior campaigns or from a public official's staff. Some special-purpose entities are alter egos of contributors seeking

* Professor, University of Miami School of Law. J.D., Yale Law School; Ph.D., Harvard University Department of Government. Professor Hill teaches courses in tax law, structural constitutional law, and election law.

vehicles through which they can direct more money than they could otherwise give to electing their preferred candidates.

Even if it were possible to assign every politically active exempt entity to one of these categories, this exercise would not permit observers to then describe—on this basis alone—the activities in which any particular exempt entity might engage. Some independent actors are willing to serve as conduits for contributors or politicians by dealing in veiled transactions that exchange money for later access and influence. Some special purpose entities that are alter egos for a small number of contributors may raise important issues of broad national interest. Some exempt entities, whether independent organizations or special-purpose entities, are alter egos for one or two contributors. Some exempt entities speak truth to power. Some exempt entities are willing tools of the powerful. Some will present earnest messages relating to their exempt purposes and these messages will be based on a defensible factual predicate. Some will lie without scruple. Some will engage in verbal drive-by shootings aimed at a particular candidate.¹

Neither the characteristics of the entity nor the activities in which it engages can accurately predict or be predicted by the sources of funds. Some organizations finance their activities, generally issue advocacy activities that are consistent with their exempt status, from the general treasury funds they raise from their usual contributor base. Some argue that attack ads constitute issue advocacy, and they fund them quite openly with their general treasury funds. Some otherwise independent organizations will take money from political parties or from core supporters of a particular candidate and run an ad or distribute a voter guide that serves the interest of the campaign. Attack ads are commonly outsourced to exempt entities to give candidates themselves deniability. Some powerful incumbents fund exempt entities with public money through appropriations over which they exercise disproportionate influence and then develop innovative methods to move at least some of this money from the exempt entity to their campaign coffers.

Based on past experience, this Article will make only one prediction: several types of exempt organizations will play very active roles of all types in the 2008 campaign, and this activity will be directed to supporting the presidential candidates and congressional candidates of both major

1. The 2004 election produced a shorthand reference that has entered the standard political lexicon—"to Swiftboat." "To Swiftboat" a candidate means to lie without restraint or scruple. The reference is to the attack ad ran by the Swift Boat Veterans for Truth that attacked the patriotism, character, and veracity of the Democratic Party Presidential candidate, Senator John Kerry, a highly decorated veteran of the Vietnam War who became a vocal critic of the war.

parties. This is a prediction of continuity, not a prediction of change. This has been the pattern since at least 1988, if not earlier.²

The most interesting factor in the 2008 campaign will be efforts to understand the operational impact, if any, of the Supreme Court's decision in *Wisconsin Right To Life (WRTL)*.³ Since the 2004 election, both the Internal Revenue Service (IRS) and the Federal Election Commission (FEC) have taken steps, albeit small ones, to clarify the law and impose some reasonable operational limits on the campaign roles of exempt entities. It is far from clear whether these efforts are consistent with the Court's decision in *WRTL*. This Article focuses on two issues that are not yet commonly discussed but which are likely to become increasingly important.

The first issue is the potential impact of *WRTL* on the relation between campaign activities and exempt status. This Article does not focus primarily on the state of current law in this area.⁴ Rather, it considers whether the decision in *WRTL* renders the limitations on campaign involvement, imposed as a condition of exemption under tax law, an impermissible burden on the organization's First Amendment right to political speech. The second issue is whether the enhanced First Amendment right of corporations to fund political speech, by using the organization's general treasury funds, impermissibly burdens the rights of members of the organization to exercise their First Amendment rights to associate.

This Article begins with a discussion of the mutual attraction between exempt entities and candidates for public office. Part III of this Article discusses *WRTL* and the ways in which *WRTL* may make exempt entities even more attractive to candidates by reducing the current risks to the exempt entities for engaging in campaign activities. Part IV considers the question of whether the limits imposed on the campaign activities of exempt entities have become impermissible burdens on the First Amendment political speech rights of exempt entities. If so, will section 501(c)(3) organizations be likely to play more direct roles in election

2. For a discussion of the use of exempt entities in the 1988 presidential primary season, see Frances R. Hill, *Charitable Contributions and Political Campaign Funding*, J. TAX'N EXEMPT ORGS. (Summer 1989).

3. *FEC v. Wis. Right To Life, Inc.*, 127 S. Ct. 2652 (2007). In the spirit of disclosure, the author discloses that she filed an amicus brief supporting the Federal Election Commission in the prior case. *Wis. Right To Life v. FEC*, 546 U.S. 410 (2006) (as-applied challenges to the electioneering communication provisions of federal election law are permissible).

4. For thorough technical discussions of the tax issues, see FRANCES R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS* (2002 & cumulative Supp. 2008).

campaigns, and will this mean that a greater share of political money will be deductible by political contributors as section 170 charitable contributions? Part V of this Article considers the implications of *WRTL* for the First Amendment associational rights of the members of and contributors to politically active exempt entities. What alternatives are available to members who become involved with an exempt entity to support the entity's exempt activities but not its political activities as well? What does the First Amendment right of association mean for those members?

II. UNDERSTANDING THE MUTUAL ATTRACTION BETWEEN POLITICAL CANDIDATES AND EXEMPT ENTITIES

Exempt entities and candidates for public office initially seem like odd couples based more on the seductive quality of risk than on the prospect of mutual reward. Viewed from the outside, these liaisons seem to present the very real possibility of being more trouble than they are worth, particularly from the perspective of the exempt entity. What accounts for the mutual attraction? What does each party hope to achieve? What risks are each willing to run? What are the anticipated rewards? Will *WRTL* make a difference to the risk-reward calculus of either the candidates or the politically active exempt entities?

Exempt entities offer political candidates an alternative to the campaign finance regime established under the Federal Election Campaign Act (FECA).⁵ The two most important sources of attraction for political candidates are: (1) the absence of disclosure of either the sources or uses of political money; and (2) the absence of any limitations on the sources or amounts of political money. FECA requires candidates to report contributions and expenditures to the FEC; the FEC makes all of this information available to the public online in a searchable database.

In addition, FECA limits the amount that any one contributor may contribute to any one candidate, to a political party, to a political committee, and overall. While the individual limit may seem low, the aggregate limitation is equivalent to the median income for a family of four. Presidential candidates are now raising unprecedented amounts of money, including substantial amounts on the Internet from relatively small contributions. Is nondisclosure still considered desirable? The answer appears to be that nondisclosure is still selectively valuable for particular

5. Federal Election Campaign Act (FECA), Pub. L. 92-225, 86 Stat. 3 (1972), *as amended*, 2 U.S.C. § 431 (2006).

donors whose roles may seem controversial or which cannot contribute. For example, federal election law provides that corporate entities cannot use their corporate treasury funds for contributions to candidates and that same limitation applies to the use of general treasury funds by unions. While both corporate entities and unions may make contributions through a controlled political action committee (PAC), FECA limits the fundraising to persons with defined relationships to the controlling entity and limits the number of times per year that such solicitations may be made.⁶ Corporation or union general treasuries are not, of course, dependent on contributions or subject to any such limitations. *WRTL* has made the use of corporate and union general treasury funds a newly controversial issue.

Exempt entities, with some differences between section 501(c) organizations and section 527 organizations, offer alternatives to each of these requirements, limitations, or prohibitions in federal election law. While this Article, like campaign finance planning, focuses on the opportunities presented by the use of particular types of exempt entities as components of a political fundraising enterprise, it is useful to begin with a reminder that exempt entities are subject to an important limitation applicable to all corporate contributors. For federal election purposes, exempt entities organized in corporate form are subject to the same limitation on contributions to candidates that apply to unions or to taxable corporations.⁷ The Supreme Court upheld this interpretation in *Beaumont*.⁸ Under its new test in *WRTL*, the Court took a different position with respect to funding electioneering communications which could be characterized as issue advocacy. This Article suggests that the reasoning of *WRTL* signals broad and fundamental changes in the treatment of corporations and unions as sources of political money and participants in political campaigns.

A third source of attraction is the opportunity to offer the contributors a charitable contribution deduction for their donations of political money. This is the ultimate prize, the possibility of deductible political contributions. Newt Gingrich explored this and the House of Representatives levied a financial sanction for his actions.⁹ In the end, the

6. 2 U.S.C. § 441b(b)(4); 11 C.F.R. §§ 114.5(a) & (g).

7. 2 U.S.C. § 441b(a).

8. *FEC v. Beaumont*, 539 U.S. 146, 149 (2002) (section 501(c)(4) organization may not use its general treasury funds to make a contribution directly to a candidate).

9. Frances R. Hill, *Newt Gingrich and Oliver Twist: Charitable Contributions and Campaign Finance*, 66 TAX NOTES 237 (Jan. 9, 1995) & 11 EXEMPT ORGS. TAX REV. 43 (1995). See House Ethics Committee Report, Rep. 105-1, 105th Cong., 1st Sess. (1997). See also technical

IRS blinked. Why have relatively few political candidates taken this path? Will *WRTL* cause candidates to reconsider their risk-reward calculus?

The attraction of exempt organizations to candidates and their campaigns is less obvious and more troubling. Special purpose conduits and alter egos established and funded for the purposes of enhancing the electoral prospects of particular candidates or political parties offer no mystery about the reasons for their actions. The issue here is why these entities are treated as exempt and why they are not treated as political committees for purposes of federal election law. Exempt organizations that do have substantial exempt purposes and engage in exempt activities are an entirely different matter. Their attraction to campaigns can be explained largely by the preferences and ambitions of their managers and the failure of boards of directors to hold them accountable. The problems posed by unaccountable organization managers are discussed in Part V as part of the larger discussion of association.

III. EXEMPT ENTITIES AND POLITICAL CAMPAIGNS: WILL *WISCONSIN RIGHT TO LIFE* DEFINE A NEW CONSTITUTIONAL PREDICATE?

The possible impact of *WRTL* on the role of exempt entities can be seen most clearly if it is contrasted with the very different framework set forth in *McConnell*. The *McConnell*¹⁰ framework was grounded not only on a relationship between elections and the public policy process, but also on a conviction that campaign finance was integral to the integrity of both.¹¹ The goal of the law in this area was to ensure opportunities for participation by ordinary individuals, including the right of individuals to form organizations to amplify their voices in public policy debates and in election campaigns. The majority opinion interpreted the history of campaign finance law as a series of efforts to address innovative ways of using financial power to gain favored access to and disproportionate influence over public policy processes.¹² Within this framework, the majority in *McConnell* took the position that the Court should defer to reasoned congressional action, and found that Congress could take account

advise memorandum issued to the Progress and Freedom Foundation in February 1999 available on Tax Notes Today at 1999 TNT 24-25.

10. *McConnell v. FEC*, 540 U.S. 93 (2003).

11. Frances R. Hill, *McConnell and the Code: Exempt Organizations and Campaign Finance*, 45 EXEMPT ORGS. TAX REV. 71 (2004) (*McConnell* as a case about representative democracy).

12. See *McConnell*, 540 U.S. at 95-97.

of actual practices and abuses in campaign finance.¹³ This framework was the foundation for the *McConnell* Court's identification and interpretation of compelling state interests for upholding the major provisions of the Bipartisan Campaign Reform Act (BCRA).¹⁴

In *WRTL*, Chief Justice Roberts made it clear that he viewed the case as implicating the speech rights of all corporations and that he had no intention of considering distinctions among types of corporations. Chief Justice Roberts observed that:

BCRA significantly cut back on corporations' ability to engage in political speech. BCRA § 203, at issue in these cases, makes it a crime for any labor union or incorporated entity—whether the United Steelworkers, the American Civil Liberties Union, or General Motors—to use its general treasury funds to pay for any “electioneering communication”¹⁵

Chief Justice Roberts would make no distinctions among the speech rights of labor unions, advocacy organizations, and taxable business organizations based on their organizational characteristics.

Chief Justice Roberts then stated that resolving *WRTL*'s as-applied challenge “requires us first to determine whether the speech at issue is the ‘functional equivalent’ of speech expressly advocating the election or defeat of a candidate for federal office, or instead a ‘genuine issue a[d].’”¹⁶ He described this enterprise in the following terms:

We have long recognized that the distinction between campaign advocacy and issue advocacy “may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposal and governmental actions.” *Buckley v. Valeo*, 424 U.S. 1, 42 (1976) (*per curiam*). Our development of the law in this area requires us, however, to draw such a line, because we have recognized that the interests held to justify the regulation of campaign speech and its “functional

13. See, e.g., *id.* at 96-98.

14. See *id.* at 133-34.

15. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2660 (2007). Chief Justice Roberts emphasized the change represented by BCRA in this regard, observing that “[p]rior to BCRA, corporations were free under federal law to use independent expenditures to engage in political speech so long as that speech did not expressly advocate the election or defeat of [a] clearly identified federal candidate.” *Id.* at 2659 (citations omitted).

16. *Id.* at 2659 (quoting *McConnell*, 540 U.S. at 206 n.88).

equivalent” “might not apply” to the regulation of issue advocacy. *McConnell*, [540 U.S.] at 206 [&] n. 88.¹⁷

As the opinion shows, it is far easier to devise a method of avoiding characterization as the functional equivalent of express advocacy than to craft a definition of grassroots lobbying that distinguishes it from an electioneering communication.

This approach left the question: what constitutes express advocacy? This question has produced two answers, one based on the magic word test in *Buckley* which was rejected by *McConnell*, and one based on the facts and circumstances of particular cases. These two approaches are in the FEC regulations at 11 C.F.R. § 100.22. Chief Justice Roberts rejected the first test and ignored the existence of the second test. This left him with no test of express advocacy. This is scarcely an oversight. It is consistent with the entire approach of treating speech as an undifferentiated concept abstracted from its context.

Chief Justice Roberts focused not on a test for express advocacy, but on devising a test for determining whether the ads in question were the functional equivalent of express advocacy. The plurality opinion stated that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁸ The question of what constitutes an “appeal” for this purpose was never addressed. Similarly, the specificity of identification of a “specific candidate” was never addressed. The indicia of a “reasonable interpretation” are largely ignored, and difficult issues are dismissed with observations about avoiding censorship.

In crafting this test, Chief Justice Roberts rejected the relevance of context, including references to the intent or foreseeable consequences of the ads. He reasoned:

[T]he proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. See *Buckley*, [424 U.S.] at 43-44. It must entail minimal if any discovery to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). And it must eschew “the open-ended

17. *Id.*

18. *Id.* at 2655, 2667.

rough-and-tumble of factors,” which “invit[es] complex argument in a trial court and a virtually inevitable appeal.” *Jerome B. Grubard, Inc. v. Great Lakes Dredging & Dock Co.*, 513 U.S. 527, 547 (1995). In short, it must give the benefit of any doubt to protecting rather than stifling speech. See *New York Times Co. v. Sullivan*, [376 U.S.] at 269-70.¹⁹

Chief Justice Roberts took issue with Justice Scalia’s determination that the test is impermissibly vague, reasoning that:

As should be evident, we agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of “contextual” factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech. And keep in mind this test is only triggered if the speech meets the brightline requirements of BCRA § 203 in the first place.²⁰

Based on these principles and applying his test, Chief Justice Roberts found that:

WRTL’s three ads are plainly not the functional equivalent of express advocacy. 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.²¹

19. *Id.* at 2666-67.

20. *Wis. Right to Life*, 127 S. Ct. at 2669 n.7.

21. *Id.* at 2667.

The references to legislation and a legislative nexus are not central elements in the analysis. Chief Justice Roberts referred to a legislative nexus as “basic background information” that “[c]ourts need not ignore.”²² But, Chief Justice Roberts had previously indicated that his concept of a legislative nexus would not be precise or controlling. This is consistent with his treatment of the timing issue—the ads were run after the Senate had resolved the filibuster issue which had threatened to gridlock the Senate.²³ Chief Justice Roberts observed that “a group can certainly choose to run an issue ad to coincide with public interest rather than a floor vote.”²⁴ By labeling the ads *issue ads* rather than grassroots lobbying, Chief Justice Roberts avoided the legislative nexus problem.

He also avoided indeterminacy of his concept of “issues [that] might be relevant to an election.”²⁵ This statement allowed the Chief Justice to address the election without addressing the impact on one or more candidates. Such details as the timing of ads in relation to congressional action are simply another contextual factor that should be given only limited weight, if that.

Chief Justice Roberts concluded that “[g]iven the standard we have adopted for determining whether an ad is the ‘functional equivalent’ of express advocacy, contextual factors of the sort invoked by appellants should seldom play a significant role in the inquiry.”²⁶ At the same time, “the need to consider such background factors should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.”²⁷ Chief Justice Roberts then dismissed the relevance of the contextual factors relating to the legislative nexus, stating:

At best, appellants have shown what we have acknowledged at least since *Buckley*: that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” 424 U.S., at 42. Under the test set forth above, that is not enough to establish that the ads can only reasonably be viewed as advocating or opposing a candidate in a federal election. . . . Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election.

22. *Id.* at 2669.

23. *Id.* at 2668.

24. *Id.*

25. *Wis. Right to Life*, 127 S. Ct. at 2669 n.7.

26. *Id.* at 2669.

27. *Id.*

Where the First Amendment is implicated, the tie goes to the speaker, not the censor.²⁸

Using his test, Chief Justice Roberts concluded, “Because WRTL’s ad 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.”²⁹ It was crucial to Chief Justice Roberts’s purposes that his holding not be confined to a particular type of speech or to speech by a particular type of speaker. By describing the ads as “something other than as an appeal to vote for or against a specific candidate,”³⁰ he defined speech that could be regulated very narrowly.

Chief Justice Roberts rejected the argument that “an expansive definition of ‘functional equivalent’ is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions.”³¹

Noting that this reasoning had been established in “[r]ecent cases,”³² Chief Justice Roberts reasoned that “such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.”³³ He based this reasoning in part on the *Buckley* Court’s refusal to sustain expenditure limitations as a means of enforcing the contribution limitations.³⁴

Chief Justice Roberts eliminated any reference to either intent of the speaker or the effects of the communications.³⁵ He claimed that any such test had been rejected in *Buckley*³⁶ and that “*McConnell* did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject.”³⁷ Chief Justice Roberts found that reliance on an intent test would “chill core political speech” because “[n]o reasonable speaker would choose to run an ad covered by BCRA if its only defense to a

28. *Id.*

29. *Id.* at 2670.

30. *Wis. Right to Life*, 127 S. Ct. at 2670.

31. *Id.* at 2672.

32. *Id.* (quoting *McConnell*, 540 U.S. at 205). “Recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against circumvention of [valid] contribution limits (internal quotation marks omitted; brackets in original).” *Id.*

33. *Id.*

34. *See id.*

35. *Wis. Right to Life*, 127 S. Ct. at 2665.

36. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976)).

37. *Id.*

criminal prosecution would be that its motives were pure.”³⁸ An effects test would also chill political speech because it would put the speaker at the mercy of the listeners.³⁹

To these concerns, Chief Justice Roberts added a long discussion of the burdens imposed by the kind of litigation that would arise in cases involving an intent test, and in cases involving an effects test.⁴⁰

Chief Justice Roberts granted *WRTL*’s as-applied challenge without taking *WRTL*’s grassroots lobbying claim seriously. Indeed, he recast this grassroots lobbying claim based on a framework derived from *Massachusetts Citizens for Life (MCFL)*⁴¹ and *McConnell* as a corporate speech claim based on *Bellotti*.⁴² This enterprise was not merely a means of resolving a case before the Court. It was a means of reinterpreting the Court’s precedents to devise a new framework for campaign finance jurisprudence.

The new framework for campaign finance jurisprudence is based centrally on *Bellotti*, not because it dealt with a referendum (a form of lobbying), but because it dealt with corporations’ rights to fund political speech from their general treasuries.⁴³ Chief Justice Roberts made *Bellotti* central by ignoring distinctions between speech in the context of a referendum and speech in the context of a candidate election, which was at the core of the Court’s holding in *Bellotti*.⁴⁴ Recasting *Bellotti* as a political speech case equally applicable to all types of political speech would not have been possible if Chief Justice Roberts had taken *WRTL*’s grassroots lobbying claim seriously. *WRTL*’s claim distinguished lobbying from other forms of political speech, including, of course, electioneering communications.⁴⁵ Once he eliminated any reference to the distinctions among types of speech, Chief Justice Roberts could extend *Bellotti*’s holding—a corporation may use its general treasury funds to finance political speech in a state referendum—to a more general claim that a corporation may use its general treasury funds to finance political speech in a candidate election.⁴⁶

38. *Id.* at 2665–66.

39. *Id.* at 2666 (Effects test “puts the speaker . . . wholly at the mercy of the varied understanding of his hearers.” *Id.* (quoting *Buckley*, 424 U.S. at 43)).

40. *See Wis. Right to Life*, 127 S. Ct. at 2665–67.

41. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

42. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

43. *See id.*

44. *Id.*

45. *See Wis. Right to Life*, 127 S. Ct. at 2652.

46. *See id.*

The corporation is the speaker in this new framework. Distinctions among types of corporate entities are irrelevant. *WRTL* was a useful case for a statement of this new framework because it involved a corporate entity. *WRTL*'s corporate form was analytically central, its nonprofit status provided helpful atmospherics, and its tax exempt status was ignored. Chief Justice Roberts repeatedly referred to corporations without any distinctions among types of corporate entities. In so doing, the new framework is inconsistent with *MCFL*, which is based on the organization's nonprofit status, its clear statement of a policy position, and its policy against accepting corporate contributions.⁴⁷ Under the new framework, *MCFL* would have First Amendment rights because it is a corporation, not because it is a particular type of corporation.⁴⁸ Chief Justice Roberts did not confront this conflict with *MCFL* directly. Instead, he deftly cited *MCFL* as authority for the right of corporations to use general treasury funds to finance independent expenditures that do not involve express advocacy.⁴⁹

The corporation as the speaker cannot be required to speak through some other entity, even one that it controls, like a PAC. If the First Amendment right to speak is a right of the corporation as a speaker, then requiring that a corporate speaker use a PAC to engage in particular types of speech represents a burden on the corporate speaker's First Amendment rights.

Chief Justice Roberts found no compelling state interest for such burdens.⁵⁰ Indeed, he found few compelling state interests for any limitation on political speech. He dismissed the relevance of preventing corruption or the appearance of corruption and the implications of aggregated wealth.⁵¹

Chief Justice Roberts did not create this framework from whole cloth. This framework is found in the dissents and concurrences of *McConnell* and its predecessors. Justice Kennedy's dissent in *McConnell* is a template for the new framework set forth by Chief Justice Roberts in this case.⁵² Justice Kennedy relied centrally on *Bellotti* in claiming that *Austin v.*

47. See *Mass. Citizens for Life*, 479 U.S. at 238.

48. *Id.*

49. *Wis. Right to Life*, 127 S. Ct. at 2692.

50. *Id.* at 2673.

51. *Id.* at 2672.

52. See *McConnell v. FEC*, 540 U.S. 93, 322-41 (2003) (Kennedy, J., concurring in part and dissenting in part). See also Justice Thomas's dissent in *McConnell*, 540 U.S. 93 at 264-86, which bears an uncanny resemblance to the structure, language, and reasoning in Chief Justice Roberts's subsequent opinion in *WRTL*.

Michigan Chamber of Commerce should be overruled.⁵³ He asserts that “the majority’s ready willingness to equate corruption with all organizations adopting the corporate form is a grave insult to nonprofit and for-profit corporations alike, entities that have long enriched our civic dialogue.”⁵⁴ Justice Kennedy rejected reliance on aggregation of wealth or concerns about the shareholders and members of corporations and unions as adequate justifications for burdens on the First Amendment rights of corporations and unions.⁵⁵ Justice Kennedy adopted a framework based on the speech rights of corporate speakers.⁵⁶ The themes in Chief Justice Roberts’s opinion and the themes in the dissents by Justices Scalia, Kennedy, and Thomas strongly suggest that there is a majority position on the Court with respect to the political speech rights of corporate speakers, which will be articulated in a variety of factual contexts going forward. The 2008 campaign may well provide the factual predicates for future claims.

IV. EXEMPTION AND CAMPAIGN ACTIVITY: STATUTORY LIMITATIONS AND CONSTITUTIONAL PREDICATES

WRTL creates a constitutional predicate for the First Amendment political speech rights of corporate entities, including section 501(c) organizations structured as corporations. It does not address the question of whether exercising political speech rights will jeopardize the exempt status of section 501(c) organizations.

Section 501(c)(3) requires that organizations described in this section not “participate . . . or intervene” in election campaigns.⁵⁷ What is prohibited and what test applies to making that determination remain a topic of controversy. While section 501(c)(4) does not contain the same prohibition,⁵⁸ the IRS applies the same analysis to determining whether a section 501(c)(4) entity has engaged in campaign activity.

Tax law is based on the facts and circumstances of each particular case. In the case of election activities by exempt entities, tax law looks to evidence relating to the exempt entities’ purposes and evidence relating to the reasonably foreseeable consequences of particular activities. In sum,

53. *Id.* at 323-25. Justice Kennedy also dissented in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

54. *McConnell*, 540 U.S. at 325-26.

55. *Id.* at 327.

56. *Id.* at 286-341.

57. 26 U.S.C. § 501(c)(3) (2006).

58. 26 U.S.C. § 501(c)(4) (2006).

determinations of whether exempt entities have jeopardized their exempt status turn on contextual analyses.⁵⁹ The most recent guidance issued by the IRS presents twenty-one examples rather than one test.⁶⁰

This kind of contextual analysis is precisely the kind of analysis that Chief Justice Roberts decried throughout his *WRTL* opinion as an impermissible burden on the First Amendment right of corporate entities to engage in political speech.⁶¹ In determining whether the broadcast ads at issue were properly characterized as express advocacy, which can be regulated under FECA, or issue advocacy, which falls outside the reach of FECA, Chief Justice Roberts took the position 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.”⁶² In applying this test, Chief Justice Roberts categorically rejected tests based on either intent or effects.⁶³ Instead, he found that any test “must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.”⁶⁴ In addition, the test must not involve multiple factors because that would lead to complex arguments and protracted appeals.⁶⁵ Indeed, Chief Justice Roberts took the position that the test “must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation.”⁶⁶ It is particularly noteworthy that Chief Justice Roberts found even the “threat of burdensome litigation” an impermissible burden on the First Amendment political speech rights of corporate entities.⁶⁷

Consistent with this analysis, Chief Justice Roberts rejected arguments that circumvention of federal election law by operating indirectly through a tax-exempt organization constituted a compelling state interest that would permit regulation of the broadcast ads in question. The Chief Justice noted that “[a]ppellants argue that an expansive definition of ‘functional equivalent’ is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against

59. For a discussion and analysis of the applicable precedents, see HILL & MANCINO, *supra* note 4.

60. Rev. Rul. 2007-41, 2007-1 C.B. 1421 (2007).

61. See *supra* Part III.

62. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007).

63. See *id.* at 2665.

64. *Id.* at 2666.

65. *Id.* at 2666-67.

66. *Id.* at 2666.

67. See *Wis. Right to Life*, 127 S. Ct. at 2666.

circumvention of the rule against contributions.”⁶⁸ He rejected this argument, which he characterized as a “prophylaxis-upon-prophylaxis approach,”⁶⁹ as “not consistent with strict scrutiny.”⁷⁰

Because *WRTL* is a constitutional opinion based on the First Amendment and is not a statutory interpretation of FECA, Chief Justice Roberts’s reasoning seems to mean that the contextual facts and circumstances analysis that pervades tax law should be rejected as an impermissible burden on an entity’s First Amendment political speech rights. This would mean that the entire approach of tax law would have to be reconceptualized in a manner consistent with Chief Justice Roberts’s analysis of the protection available under the First Amendment to corporate speakers engaged in political speech. Because it is difficult to imagine a communication short of an explicit endorsement of a candidate for public office that would not qualify as issue advocacy under Chief Justice Roberts’s test and because interdicting circumvention of federal election law is no longer a compelling state interest, all exempt organizations would be free of any meaningful limitation on their campaign activities.

Whether *WRTL* has this result will depend on whether the exemption is treated as a subsidy permissibly subject to conditions⁷¹ or whether the limitations on political speech are treated as an unconstitutional condition.⁷² Subsidy theory analysis can be traced to Judge Learned Hand’s opinion in a case involving expenditures for lobbying and election campaign activities by Margaret Sanger’s American Birth Control League.⁷³ Judge Learned Hand wrote for a unanimous court, “[c]ontroversies of that sort must be conducted without public subvention; the Treasury stands aside from them.”⁷⁴

The Supreme Court has never applied subsidy theory to an exempt entity engaged in election campaign activities, but it has held that limitations on legislative lobbying do not violate the First Amendment

68. *Id.* at 2672.

69. *Id.*

70. *Id.*

71. See generally *Cammarano v. United States*, 358 U.S. 498 (1959) (denying a taxable corporation a deduction for expenses incurred in opposing a state ballot measure that would have restricted sales of alcohol).

72. See generally *Speiser v. Randall*, 357 U.S. 513 (1958) (exemption from California property tax could not be conditioned on taking an oath not to overthrow the government). For an analysis of unconstitutional conditions doctrine, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1421 (1989).

73. See *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930).

74. *Id.* at 185.

based on subsidy theory.⁷⁵ The Court treated both entity-level exemption and the charitable contribution deduction for contributions to section 501(c)(3) organizations as subsidies based on the following reasoning:

Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.⁷⁶

Using the same reasoning based on a subsidy analysis in a case involving a taxable entity seeking to deduct expenditures for ads relating to a ballot measure, in his concurring opinion in *Cammarano v. United States*, Justice Douglas reasoned:

Deductions are a matter of grace, not of right. . . . To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions . . . and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights.⁷⁷

Based on his demonstrated preference for indirection, Chief Justice Roberts is unlikely to confront subsidy theory directly. Indeed, he may have already made the case for indirection in *WRTL*. This would result in applying the test for issue advocacy crafted in *WRTL* to tax law. Under this

75. See *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548-51 (1983).

76. *Id.* at 544.

77. *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring) (citations omitted).

test, virtually all of the campaign activities of exempt entities would be treated as issue advocacy, which would make them exempt activities. Applied most expansively to section 170 as well as to section 501(c)(3), campaign contributions made to section 501(c)(3) entities would be treated as deductible charitable contributions. Public charities would be particularly attractive as alter egos and conduits, and organization managers who wish to use their positions to curry favor with particular candidates would be unrestrained by concerns that they would jeopardize the organization's exempt status. The only remaining issue would be what this would mean for members who support another candidate or who want the organization's general treasury funds to be used for purposes other than enhancing the electoral prospects of a particular candidate.

V. ASSOCIATIONAL RIGHTS

The new campaign finance jurisprudence based on corporate speech rights⁷⁸ highlights a fundamental tension between the right of natural persons to associate and the right of associations to be accorded the same First Amendment rights as natural persons. How this tension is addressed is important for giving the democratic values of participation and representation operational meaning. The roles and rights of associations are essential in permitting persons to join together to express their views and press their claims in a large-scale society with a federal government, state governments, and even local governments that are becoming ever-more central to everyday life. Without effective organizations, individuals are left to confront government authority alone as isolated and atomized individuals. This kind of centralization of government power and atomization of the population is the structure condemned by Alexis de Tocqueville in his analysis of pre-revolutionary France.⁷⁹ Individuals not only have a right to associate, they also have a need to associate. In light of his analysis of the nature of tyranny and oppression in his own country, it is scarcely surprising that Tocqueville found the proliferation of interest groups in the new United States an intriguing and hopeful indicium of the strength of democracy in the new country.⁸⁰ It should not be overlooked that Tocqueville was writing about the propensity of Americans to form

78. *See supra* Part II.

79. *See* ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION* (1856).

80. *See* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1840). This analysis has come to be something of a talisman for some in the exempt organization community. Too often it is invoked to excuse lapses of organization managers. Only rarely is the central point—how citizen organizations relate to democracy—considered thoughtfully.

and join organizations, in short participatory organizations. He was not writing about organizations controlled by unaccountable managers and self-perpetuating boards.⁸¹ This more contemporary structure is both a sign of growth and a challenge to a meaningful link between association and empowerment.⁸² What does association mean today? A comprehensive consideration of this issue is beyond the scope of this Article. Any comprehensive treatment will begin by directing attention to the issue in the operational context of a national election. The 2008 general election offers an excellent place to begin. The following discussion provides a guide to observation and analysis.

The central issue is what the idea of membership means in exempt entities and what membership means in terms of defining the use of an organization's treasury funds for political activities.⁸³ This question immediately becomes enmeshed in paradoxes and complexities. Special-purpose entities that serve as alter egos for contributors certainly mirror their members' preferences.⁸⁴ Their infirmity is not a matter of association, but a matter of whether they should be regarded as a legal person separate from their contributors and whether such an entity should be exempt.

Section 501(c) exempt entities can be divided into two groups depending on whether they have members with rights to participate in organization governance.⁸⁵ Section 501(c)(5)⁸⁶ labor organizations have members who elect their leaders. Section 501(c)(6)⁸⁷ trade associations often have complex membership structures that define various levels of dues linked to various levels of membership rights. Most section 501(c)(3)⁸⁸ public charities and section 501(c)(4)⁸⁹ social welfare organizations have no members with rights to elect the board of directors or to participate in organization governance in any other manner. Instead, they are governed by self-perpetuating boards often composed of inattentive members who leave the entire operation of the organization to

81. *See id.*

82. The role of managers in exempt entities has been addressed in tax law by multiple private benefit doctrines. For a discussion of these doctrines, see HILL & MANCINO, *supra* note 4.

83. This is a core question with respect to all the activities of exempt entities. The new Form 990, the annual information return for exempt organizations includes questions about the organization's governance, which should give the question of managerial unaccountability and board members' failures to ensure accountability greater scrutiny.

84. *See supra* Part I.

85. *See* 26 U.S.C. § 501(c) (2006).

86. 26 U.S.C. § 501(c)(5) (2006).

87. 26 U.S.C. § 501(c)(6) (2006).

88. 26 U.S.C. § 501(c)(3) (2006).

89. 26 U.S.C. § 501(c)(4) (2006).

professional managers.⁹⁰ It should not surprise anyone that some of these professional managers become impermissibly self-interested.⁹¹ What has been surprising has been the range of distinguished, indeed, venerable, organizations that have suffered from an inattentive board enabling the impermissible self-interest, sometimes linked with outright incompetence, of managers.⁹² The kind of section 501(c) exempt organizations that are at the center of controversies over campaign participation are virtually all section 501(c)(4) or section 501(c)(3) organizations without members. The supports are generally referred to as members as a kind of honorific shorthand for contributors, largely because it sounds more consistent with the theme of civic engagement that politically active exempt entities strive to claim.

If the organization managers decide to use the organization's general treasury funds for campaign-related activities, the members have no recourse. They have no role in governance. They have no legal right to demand that their contributions be returned.⁹³ The Supreme Court has held that fundraising solicitations that are incomplete and even misleading are protected by the First Amendment provided that the fundraising message falls short of fraud under the state law applicable to determining fraud.⁹⁴

The Supreme Court has rarely addressed the rights of members or contributors to exempt entities, and the existing precedents can be interpreted as contradictory. In *Bellotti*, the Court rejected arguments related to the rights of shareholders,⁹⁵ and held that corporate shareholders

90. The reasons for this structure are the transaction costs of soliciting member votes on corporate matters.

91. There are a panoply of private benefit doctrines designed to prevent such behavior. See HILL & MANCINO, *supra* note 4.

92. During the past year, the Smithsonian serves as an example. The Smithsonian's board consists of national leaders, including several senators and the Chief Justice of the United States.

93. Even contributors who make very large contributions encounter great difficulty when seeking the return of their contributions. This is the case, even though large contributions are generally made through agreements defining how the contribution will be used. The current litigation involving Princeton University's Woodrow Wilson School of Government is a case in point. See generally *Robertson v. Princeton Univ.*, No. C-99-02 (Nov. Super. Ct. Ch. Div., filed July 17, 2002).

94. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 624 (2003). The specific issue in this case was whether nondisclosure of the high percentage, in this case 85%, of the money contributed that went to fundraising costs of professional fundraisers, provided evidence of fraud. *Id.* at 605. The Court held that it did not. *Id.* at 624. Shortly before the Court issued its opinion in this case, the Federal Trade Commission launched a law enforcement and public education initiative relating to fundraising practices of exempt entities. See Federal Trade Commission Web Site, <http://www.ftc.gov>.

95. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792-95 (1978).

have remedies based on their rights to elect the board of directors or to file derivative suits.⁹⁶ Justice White dissented,⁹⁷ arguing that shareholders should not be “compelled to support and financially further beliefs with which they disagree where, as is the case here, the issue involved does not materially affect the business, property, or other affairs of the corporation.”⁹⁸ Justice White stated in a footnote that this analysis “would not justify limitations upon the activities of associations, corporate or otherwise, formed for the express purpose of advancing a political or social cause.”⁹⁹ In support of his position, Justice White cited cases in which the Court held that union members could not be compelled to contribute to the union’s political fund.¹⁰⁰

WRTL’s new corporate political speech framework for campaign finance jurisprudence undermines the First Amendment associational claims of members, the treatment of these claims as implicating compelling state interests, and the organizational structures through which these claims are made operational under current law. One would never know that organizations have members or that the First Amendment protects the right of ordinary people to associate. This cannot be explained as an oversight. Much of Chief Justice Roberts’s opinion in *WRTL* focuses on whether the organization’s constitutional rights as a political speaker are protected by the right of a corporate entity to engage in political speech through a controlled PAC. The concurrence takes contention with Chief Justice Roberts for not overruling *Austin*.¹⁰¹ The debate over *Austin* encompassed a debate over the rights of members within their organizations.¹⁰² The PAC alternative was upheld, in part, because it protected the members of the Michigan State Chamber of Commerce from having their dues diverted from the core purpose of the organization to support of a particular candidate for public office by using general treasury funds for independent expenditures.¹⁰³ In rejecting the PAC alternative to the use of general treasury funds in *WRTL*, neither Chief Justice Roberts nor the concurring Justices considered this issue. They focused instead on the concept that the PAC alternative impermissibly burdened the First Amendment political speech rights of corporate speakers.

96. *Id.* at 795 (“shareholders normally are presumed competent to protect their own interests”).

97. *Id.* at 802-22 (White, J., dissenting).

98. *Id.* at 812.

99. *Id.* at 812 n.12.

100. *Bellotti*, 435 U.S. at 812.

101. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2678-79 (2007) (Scalia, J., concurring).

102. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654-55 (1990).

103. *See id.* at 660-61.

Chief Justice Roberts's corporate speech framework rejects the idea that different entities, including different types of corporate entities, can have different rights and different roles in campaign finance. His reinterpretation of *Bellotti* to avoid any reference to the distinction between ads relating to a ballot measure issue and ads relating to a candidate election, lays the groundwork for more expansive claims that corporate general treasuries can be used at the discretion of corporate executives for an unlimited range of speech. Under this framework, members can leave organizations (the exit option) if that organization takes lobbying or campaign positions that the member does not support.¹⁰⁴ The price of the exit option is that the members can no longer participate in the organization's other activities. It does not give them the choice of remaining in the organization without contributing to the PAC and without funding political activities with which they disagree.

In some cases, the Court has recognized that the rights of members with respect to their organizations is one element of the First Amendment right of association. In *National Right to Work Committee (NWRC)*,¹⁰⁵ the Court upheld the limitation on PAC solicitation to "members" as an established relationship with the organization that controls the PAC.¹⁰⁶ In so holding, the Court pointed to the interests of persons who want to participate in the core activity of the organization, but do not share the organization managers' electoral or legislative choices.¹⁰⁷

The most recent of these cases is *FEC v. Beaumont*.¹⁰⁸ *Beaumont* involved a claim by a section 501(c)(4) organization that it had a First Amendment right to make direct contributions to political candidates even though it accepted contributions from corporations as well as individuals.¹⁰⁹ In rejecting this claim, the Court considered the burden on the associational rights of members, observing that "corporations' First Amendment speech and association interests are derived largely from those of their members."¹¹⁰ The Court held that concern for the association rights of members did not impermissibly burden the speech rights of the organization because the organization could make contributions through

104. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

105. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982).

106. *Id.* at 206.

107. *See id.* at 207-08.

108. *FEC v. Beaumont*, 539 U.S. 146 (2003).

109. *Id.* at 149-50.

110. *Id.* at 161 n.8.

its controlled PAC.¹¹¹ The Court observed that “[t]he PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.”¹¹²

The Court took the same position with respect to the PAC option for funding independent expenditures in *Austin*, reasoning that “[b]ecause persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors’ support for the corporation’s political views.”¹¹³ The Court in *McConnell* cited these concerns in holding that the electioneering communication provision did not burden the First Amendment rights of corporations and unions.¹¹⁴ In addition, the Court in *McConnell* held that *MCFL*-type organizations were not subject to the financing limitations applicable to other corporations, in part, because members and prospective members joined such organizations voluntarily with full knowledge of the positions such advocacy organizations would take in political debates.¹¹⁵

In *WRTL*, Chief Justice Roberts simply ignored this issue. Despite the efforts he made to reject the other claims relating to compelling state interests, he did not address the question of the associational rights of members. This approach is consistent with his reliance on *Bellotti* as the centerpiece of his new framework for campaign finance jurisprudence. In *Bellotti*, the Court rejected claims that permitting corporate entities to use its general treasury funds to finance communications with respect to a referendum issue infringed on the rights of shareholders who took a different position on the issue.¹¹⁶ The Court found that shareholders had ample remedies through election of the board of directors, through amendment of the corporate charter, or through a derivative suit.¹¹⁷

WRTL protected corporate speakers from having to choose between not funding certain speech that would otherwise fall within the definition of an electioneering communication or financing such speech by using funds in their controlled PACs. In the case of section 501(c)(4) organizations, *WRTL* protected such organizations from the choice between not speaking or choosing to forego contributions for corporate or union contributors. In sum, *WRTL* rejected the constitutional sufficiency of using alternative

111. *See id.* at 162-63.

112. *Id.* at 163.

113. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660-61 (1990).

114. *McConnell v. FEC*, 540 U.S. 93, 204-05 (2003).

115. *Id.* at 209-11.

116. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792-95 (1978).

117. *See id.* at 794-95.

entities to pursue various types of speech. The framework set forth in Chief Justice Roberts's opinion would generalize this rejection of choice of entity planning.

The dilemma going forward is that absolutist protection for corporate speakers leaves little, if any, protection for the associational rights of members. Dissidents can, under this framework, form their own organizations, but that would also be a choice forced by a legal regime. Why should individuals who want to support WRTL's core mission, be forced to allow their contributions be used to support or oppose the candidate designated by the organization's executives? These questions become particularly compelling as the candidate choices or the lobbying positions are less directly related to the organization's core mission.

These are difficult questions under the First Amendment rights of association and petition, "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹¹⁸ To paraphrase Justice Scalia, it is a "sad day"¹¹⁹ for the First Amendment when the Court shifts the framework for campaign finance jurisprudence away from even the possibility that the right of association will encompass the rights of members in their organizations.

118. U.S. CONST. amend. I.

119. *McConnell*, 540 U.S. at 248 ("This is a sad day for the freedom of speech.").