JUSTICE SOUTER: CAMPAIGN FINANCE LAW'S EMERGING EGALITARIAN

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INTRODUCTION

As Supreme Court Justices David Souter and Stephen Breyer voted repeatedly to uphold campaign finance laws over the years, they developed an interesting division of labor: Justice Breyer advanced egalitarian campaign finance theories in concurring opinions and scholarly writings,[1] while Justice Souter would write majority opinions purporting to harmonize the Court's ever more deferential approach in the area with the Court's older precedents.[2] I had suspected for some time that Justice Souter took this latter approach (rather than joining in Justice Breyer's views) in order to keep Justice O'Connor's crucial fifth vote in these cases.[3]

Justice O'Connor's retirement and replacement with Justice Alito has brought a shift in the Supreme Court's campaign finance jurisprudence toward deregulation, relegating Justices Souter and Breyer (along with Justices Ginsburg and Stevens) to the minority.[4] This shift to the minority has freed Justice Souter to some degree to express his own views of the appropriate balance between the First Amendment and other interests in the campaign finance cases (though he still may be tempering his own views somewhat to remain consistent with his earlier opinions). His recent dissenting opinion in *Federal Election Commission v. Wisconsin Right to Life, Inc.* (*WRTL II*) is the clearest exposition yet of Justice Souter's jurisprudence in the area, unencumbered by the need to capture a fifth vote.[5] It is a

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[1] *See*, *e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 399-406 (2000) (Breyer, J., concurring); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 43-50 (2005).

[2] *See infra* Part I (discussing Justice Souter's jurisprudence prior to *WRTL II*); *see also, e.g., Shrink Mo.*, 528 U.S. at 381-97 (majority opinion authored by Justice Souter).

[3] *See* Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 32 & n.7 (2004) [hereinafter Hasen, Buckley *is Dead*] (arguing that Justice Souter has not "explicitly endorsed" Justice Breyer's views because Justice Souter found deference to precedent necessary to hold onto Justice O'Connor's often-changing position).

[4] *See* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. (forthcoming Apr. 2008) (manuscript at 1), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003922 [hereinafter Hasen, *Beyond Incoherence*].

[5] *WRTL II*, 127 S. Ct. at 2687-2705 (Souter, J., dissenting); *see also infra* Part

glimpse into what the Court's jurisprudence might have looked like had the President appointed someone in Justice Souter's mold rather than a more conservative Justice to replace Justice O'Connor.

As this Essay argues, Justice Souter's jurisprudence, as expressed in *WRTL II*, demonstrates an emerging egalitarian view of campaign finance law. It is a view that is broadly consistent with Justice Breyer's "participatory self-government" rationale for campaign finance regulation but more deferential to legislative branches about the means of achieving political equality.[6] Though there were elements of egalitarianism in Justice Souter's earlier opinions, *WRTL II* goes further. But the Justice's egalitarian ideas are not yet fully formed and there is room for questioning some of his implicit arguments and assumptions.

Part I of this Essay describes Justice Souter's campaign finance views expressed in cases while Justice O'Connor remained on the Court. Part II turns to Justice Souter's freer approach in *WRTL II*. It first gives relevant background about the *WRTL II* case. It then describes Justice Souter's views in dissent, which set forth a view of the government's compelling interest in promoting "democratic integrity."[7] It next argues that the "democratic integrity" interest, though couched in some anticorruption language, actually expresses a nascent egalitarian approach to campaign finance regulation. The Part concludes by noting that, unlike Justice Breyer, Justice Souter has been insufficiently attentive to the problem of incumbency protection in campaign finance regulation. In addition, Justice Souter has yet to fully explore three issues in his emergent egalitarian approach related to (1) his critique of total campaign spending; (2) his views on the connection between campaign spending and public cynicism about the political process; and, most importantly, (3) his treatment of labor unions.

I. JUSTICE SOUTER'S PRE-*WRTL II* CAMPAIGN FINANCE JURISPRUDENCE

Without going through all the jurisprudential twists and

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[6] *See* Hasen, Buckley *is Dead*, *supra* note 3, at 44 (describing the "participatory self-government" rationale put forward by Justice Breyer).

[7] *See WRTL II*, 127 S. Ct. at 2687, 2697.

turns,[8] it is enough to note that the Supreme Court's modern campaign finance jurisprudence traces to the Court's 1976 opinion in *Buckley v. Valeo*.[9] In *Buckley*, the Court

> established that the amounts of campaign *contributions* could be limited to prevent corruption or the appearance of corruption, but that limits on *spending* money could not be justified by an anticorruption interest (because of the lack of evidence that independent spending could corrupt candidates) or on equality grounds (because doing so would be "wholly foreign" to the First Amendment). The Court declared that limits on the amount of contributions only "marginally" restricted First Amendment rights and were therefore subject to lower congressional scrutiny, while spending limits more directly limited speech and were therefore subject to strict scrutiny.[10]

Since *Buckley*, the Court's jurisprudence has swung like a pendulum between periods of Court skepticism of campaign finance regulation and Court deference to congressional and state judgments about the need for such regulation.[11] The period before Justice O'Connor's retirement was marked by the greatest Court deference, as demonstrated by four cases I have dubbed the "New Deference Quartet."[12]

Though it may be tempting to consider the Supreme Court's 2003 opinion in *McConnell v. Federal Election Commission* as the most important of the New Deference cases,[13] that honor more properly belongs to *Nixon v. Shrink Missouri Government PAC*, a case whose majority opinion was authored by Justice Souter.[14] True, *McConnell* was the longest opinion in Supreme Court history,[15] and concerned the most important piece of federal

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[8] *See generally* Hasen, Buckley *is Dead*, *supra* note 3, at 35-46 (discussing campaign finance cases from 1976 to 2004); Richard L. Hasen, *The Newer Incoherence: Competition, Social Science and Balancing in Campaign Finance Law after* Randall v. Sorrell, 68 OHIO ST. L.J. 849 (2007) [hereinafter Hasen, *Newer Incoherence*] (discussing Randall v. Sorrell, 126 S. Ct. 2479 (2006)); Hasen, *Beyond Incoherence*, *supra* note 4 (manuscript at 3) (discussing *WRTL II*).

[9] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

[10] Hasen*, Beyond Incoherence, supra* note 4 (manuscript at 4) (citing *Buckley*, 424 U.S. at 26, 46-49).

[11] *Id.*

[12] Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 891 (2005) [hereinafter Hasen, *Rethinking*].

[13] *Id.*; *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

[14] Hasen, *Rethinking*, *supra* note 12, at 891; *see* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

[15] DANIEL H. LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND

campaign finance legislation in a generation, the Bipartisan Campaign Reform Act of 2002 (BCRA, or "McCain-Feingold" for its two primary Senate sponsors).[16] But in *McConnell*, whose key majority opinion was co-authored by Justices O'Connor and Stevens, the Court merely applied the New Deference approach of Justice Souter from *Shrink Missouri* and two other cases he authored, to uphold the key portions of BCRA against a facial constitutional challenge.[17] Doctrinally and conceptually, *McConnell* broke little new ground.

Shrink Missouri, however, changed the tone and jurisprudence of the Court's campaign finance cases. In *Shrink Missouri*, the Court

> (1) ratcheted down the level of scrutiny applicable to contribution limit challenges; (2) expanded the definition of "corruption" and "the appearance of corruption" necessary to sustain contribution limits; (3) lowered the evidentiary burden for a government defending [campaign] contribution limits; and (4) created a very difficult test for those challenging a contribution limit amount as unconstitutionally low.[18]

Justice Souter's majority opinion in *Shrink Missouri* concomitantly moved strongly toward deference while professing fidelity to *Buckley* and its anticorruption rationale.[19] The opinion mentions *Buckley* fifty-three times and purports to be a mere "application" of *Buckley*'s principles.[20] But, whether one agrees with the result in *Shrink Missouri* or not, it is hard to argue with

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MATERIALS 892 (3d ed. 2004) (noting that the decision in *McConnell* "had the largest U.S. Reports page count (279, excluding the heading and syllabus) and second largest word count (89,694) in Supreme Court history.").

[16] Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.); *McConnell,* 540 U.S. 93.

[17] *McConnell*, 540 U.S. at 94. Chief Justice Rehnquist and Justice Breyer each wrote majority opinions for the Court on other aspects of the BCRA challenged in *McConnell*. *Id.* at 107, 109; Hasen, *Newer Incoherence*, *supra* note 8, at 850 n.3 (categorizing four cases as "The New Deference Quartet"); Hasen, *Rethinking*, *supra* note 12, at 886 (discussing the "New Deference Quartet"); *see McConnell*, 540 U.S. 93; Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003); Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm. (*Colo. Republican II*), 533 U.S. 431 (2001); *Shrink Mo.*, 528 U.S. 377.

[18] Richard L. Hasen, Shrink Missouri*, Campaign Finance, and "The Thing That Wouldn't Leave,"* 17 CONST. COMMENT. 483, 484 (2000).

[19] *See Shrink Mo.*, 528 U.S. at 381-98.

[20] *Id.* at 397-98 (discussing the dissenters' view that the majority was "'hiding behind' *Buckley*" and seeing the case as "a routine application of our analysis" and finally holding the *Buckley* ruling to be sufficient to decide the present case).

Justice Thomas's view in his dissent that *Shrink Missouri* greatly expanded Court deference well beyond the *Buckley* standard.[21] It was left to Justice Breyer in a concurring opinion (joined only by Justice Ginsburg) to advance an egalitarian rationale for the Court's deference, and to profess that *Buckley*'s statement rejecting equality as a compelling interest to justify campaign finance regulation could not be taken seriously.[22]

In two post-*Shrink Missouri* cases decided before *McConnell*, Justice Souter took the same approach as he had in *Shrink Missouri*, professing adherence to precedent while expanding the scope of Court deference to legislative action. In *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado Republican II)*, Justice Souter wrote an opinion for the Court upholding a limit on the amounts that political parties may spend in coordination with their candidates for federal office.[23] Federal law treats such coordinated spending as equivalent to a contribution.[24] The opinion, relying on *Buckley* and *Shrink Missouri*, upheld the measure on anticorruption grounds and as necessary to prevent circumvention of individual campaign contribution limits.[25]

In *Federal Election Commission v. Beaumont*, a 2003 case, Justice Souter considered for the first time the constitutional question of limitations on corporate election-related spending.[26] The Court had addressed corporate limits in candidate elections many times before Justice Souter joined the Court. In 1986, the Court had held, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*MCFL*), that ideological corporations that take no corporate or union funds must be exempted on First

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[21] *Id*. at 420-21 (Thomas, J., dissenting). *Shrink Missouri* is significant for Justice Thomas's dissent, where he first set forth his strong deregulatory view of the campaign finance cases. *See id.* at 410-30 (Thomas, J., dissenting).

[22] *Id*. at 399-405 (Breyer, J., concurring).

[23] *Colo. Republican II*, 533 U.S. 431, 437 (2001).

[24] BCRA § 202, 2 U.S.C. 441a(a)(7)(C) (2000) ("[S]uch disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, part or committee; such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party.").

[25] *See Colo. Republican II*, 533 U.S. at 456, 465 (discussing the fight against corruption as a "sufficiently important" government interest and then stating that coordinated expenditures "may be restricted to minimize circumvention of contribution limits.").

[26] Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003).

Amendment grounds from laws limiting corporate independent spending in elections.[27] But in a 1990 case, *Austin v. Michigan Chamber of Commerce*, the Court held that Congress could limit spending by *for profit* corporations because of the "corrosive and distorting" effects of corporate wealth on the political process.[28] Corporations could use a separate segregated fund (or political action committee, more commonly known as a PAC) to advance their election-related goals.[29]

In *Beaumont*, Justice Souter wrote an opinion for the Court holding that even ideological corporations entitled to the *MCFL* exemption for corporate *spending* could be barred from making any campaign *contributions* to candidates.[30] The ruling in *Beaumont* was in tension not only with *MCFL* but with the 1978 *First National Bank of Boston v. Bellotti* case, which held that the government may not limit corporate spending in relation to ballot measure campaigns.[31] *Bellotti* strongly suggested corporate free speech rights are as strong as an individual's rights, a point *Beaumont* appears to reject.[32] Justice Souter wrote in *Beaumont* that:

> corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, and of the public in receiving information. A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information.[33]

In the last of the New Deference cases, *McConnell*, the Court applied these New Deference precedents and the revisionist reading of *Buckley* to uphold the "soft money" and "issue advocacy" provisions of BCRA.[34] In upholding BCRA's issue

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[27] Fed. Election Comm'n v. Mass. Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 239 (1986).

[28] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659-60 (1990).

[29] *Id.* at 660.

[30] *Beaumont*, 539 U.S. at 149.

[31] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767 (1978) (reversing the lower court decision which had "sustain[ed] a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals.").

[32] *Id.* at 776-77 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

[33] *Beaumont*, 539 U.S. at 162 n.8 (citations omitted).

[34] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 94 (2003) (explaining that this Court upheld BCRA's closing of the "soft-money loophole" and the

advocacy provisions, discussed more fully in the next section, *McConnell* reaffirmed and strengthened *Austin*'s holding and extended it to labor unions.[35]

Though Chief Justice Rehnquist joined the majority opinion in *Shrink Missouri* and *Beaumont*,[36] the Chief's views changed in his last years on the Court, and at oral argument in *McConnell* he suggested his earlier vote in *Austin* in favor of the government a mistake.[37] Thus, keeping Justice O'Connor's vote, a justice whose positions on the constitutionality of campaign finance regulation have vacillated over the years,[38] became crucial. I suspected that the growing disconnect and incoherence of the Court's New Deference cases resulted from Justice Souter (and then later Justice Stevens, co-author of the *McConnell* opinion with Justice O'Connor) trying to keep Justice O'Connor's vote by purporting to apply existing precedent rather than expand it.[39] As we shall see, Justice Souter's dissenting opinion in *WRTL II* provides some support for this theory.

"regulation of electioneering communications").

[35] *See id.* at 322-23 (Kennedy, J., dissenting in part) ("The majority compounds the error made in *Austin* and silences political speech central to the civic discourse that sustains and informs our democratic processes.").

[36] *Beaumont*, 539 U.S. at 148; Nixon v. Shrink Mo. Gov't PAC*,* 528 U.S. 377, 380 (2000).

[37] Transcript of Oral Argument at 66, *McConnell*, 540 U.S. at 93 (No. 02-1674), *available at* http://www.oyez.org/cases/2000-2009/2003/2003_02_1674/argument/ ("I think one of the—one of the dubious things about Austin is one of the things it relied on was the fact that the corporation's members or did not—or owners did not necessarily represent a large amount of public opinion, and it seemed to me, I voted in the majority, but it seemed to me since then that that's the whole purpose of the First Amendment is to allow people who perhaps don't have much in the way of public opinion try to change public opinion.").

[38] LOWENSTEIN & HASEN, *supra* note 15, at 952.

[39] *See generally* Hasen, Buckley *is Dead, supra* note 3 (discussing the "new incoherence" of *McConnell*); Hasen, *Newer Incoherence, supra* note 8 (discussing the "newer incoherence" of *Randall*); Hasen, *Beyond Incoherence, supra* note 4 (discussing how the Court in *WRTL II* goes "beyond incoherence").

II. JUSTICE SOUTER'S "DEMOCRATIC INTEGRITY" AS NASCENT EGALITARIANISM

A. Background on WRTL II[40]

To understand the dispute in *WRTL II* we must begin with the 1974 Amendments to the Federal Election Campaign Act (FECA).[41] In FECA, Congress sought to impose limits on any spending "relative to a clearly identified candidate [in federal elections]" and to require "'[e]very person [above a certain dollar threshold] . . . who makes contributions or expenditures' . . . 'for the purpose of . . . influencing' the nomination or election of candidates for federal office" to disclose the source of such contributions and expenditures.[42] The Supreme Court in *Buckley* viewed both of these statutes as presenting problems of vagueness; people engaging in political speech might well not know if the statutes cover their conduct.[43] Vague statutes violate the Due Process Clause,[44] and are a special concern when the danger of chilling First Amendment rights of free speech and freedom of association come into play.

In order to save both statutes from unconstitutional vagueness, the Court construed them as reaching only "communications that in express terms advocate the election or defeat of a clearly identified candidate."[45] The Court explained that such *express advocacy* required explicit words "of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'"[46] So

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[40] See Hasen, *Beyond Incoherence, supra* note 4, from which the next few paragraphs draw; *see also* Richard Briffault, WRTL II*: The Sharpest Turn in Campaign Finance's Long and Winding Road*, 1 ALB. GOV'T L. REV. 101 (2008).

[41] Federal Election Campaign Act (FECA) Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 (2000 & Supp. V 2005)).

[42] Buckley v. Valeo, 424 U.S. 1, 41, 77 (1976) (per curiam) (citing FECA §§ 608(e)(1), 434(e)); *see also* FECA § 434(f).

[43] *Buckley,* 424 U.S. at 42-44, 76-78 (discussing the "problems of vagueness" with FECA §§ 608(e)(1), 434(e)).

[44] *See id*. at 77 ("Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.").

[45] *Id*. at 44, 80 (construing the term "expenditure" to have the same meaning in § 434(e) as the Court earlier construed it in § 608(e) of FECA).

[46] *See id*. at 44 n.52.

construed, the Court still struck down the spending limits as violating the First Amendment,[47] but it upheld the disclosure requirements.[48]

Buckley left unregulated advertisements intended to or likely to influence the outcome of an election but lacking words of express advocacy.[49] Such advertisements became known as "issue advocacy," even though the prime issue at stake in many of these advertisements was the election or defeat of a candidate.[50] Thus, an advertisement lacking express advocacy, but criticizing Senator Smith in the weeks before the election was not subject to disclosure under FECA. Therefore, the advertisement could be paid for with corporate or union funds and is not subject to contribution limits. The conduct escapes FECA because the advertisement ends with something like, "Call Smith and tell her what you think of her Medicare plan" rather than "Defeat Smith."

Sham issue advocacy became a major electioneering force in the 1990s.[51] BCRA sought to regulate sham issue advocacy through a new "electioneering communications" test.[52] Under BCRA, corporations and labor unions may not spend general treasury funds (but may spend PAC funds) on "electioneering communications," just like corporations may not spend general

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[47] *See id*. at 48-49, 51 ("[FECA] § 608(e)(1)'s independent expenditure limitation is unconstitutional under the First Amendment.").

[48] *See id.* at 80-82 ("[T]he burden imposed by § 434(e) is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.").

[49] *See Buckley*, 424 U.S. at 44 n.52.

[50] Ruth Marcus, *'Issue Advocacy' Ads Less of an Issue*, WASH. POST, Oct. 23, 1998, at A1, *available at* http://www.washingtonpost.com/wp-srv/politics/campaigns/keyraces98/stories/issues102398.htm.

[51] *See* DEBORAH BECK ET AL., ANNENBERG PUB. POLICY CTR., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN: A CATALOG 3 (2007), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Political_Communication/Advertising_Research_1997/REP16.PDF (noting that individuals, political parties, interest groups, labor unions, and corporations spent as much as $150 million in 1996 on such advertisements); JEFFREY D. STANGER & DOUGLAS G. RIVLIN, ANNENBERG PUB. POLICY CTR., ISSUE ADVOCACY ADVERTISING DURING THE 1997-1998 ELECTION CYCLE (1998) (noting that the figure climbed to at least $275 million during the 1998 election), *available at* http://library.law.columbia.edu/urlmirror/CLR/100CLR620/report.htm; *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 127-28 n.20 (finding that the number reached over $500 million for the 2000 election cycle).

[52] 2 U.S.C. § 434(f)(3)(A) (2000 & Supp. IV 2004).

treasury funds on express advocacy under *Austin*.[53] An electioneering communication "encompasses any broadcast, cable, or satellite communication that refers to a candidate for federal office and that is aired within [thirty] days of a federal primary election or [sixty] days of a federal general election in the jurisdiction in which that candidate is running for office."[54] Thus, under § 203 of BCRA, a corporation or union could not use treasury funds to pay for a television advertisement broadcast shortly before the election criticizing Senator Smith by name for her lousy Medicare plan.[55]

BCRA's electioneering communications test solved the vagueness problem, but it introduced a potential problem of overbreadth. An advertisement might not be intended or likely to affect the outcome of the election, and still the advertisement would fall within the bright line electioneering communications test of BCRA § 203.[56] For example, a television advertisement that a corporation would like to run shortly before the election urging the President running for reelection to intervene in a labor dispute could not be paid for with general treasury funds.

In *McConnell*, plaintiffs argued that § 203 was unconstitutionally overbroad because it captured too much so-called "genuine issue advocacy."[57] The three lower court judges hearing *McConnell* devoted many pages and considerable effort to the overbreadth question.[58] The Supreme Court majority opinion in *McConnell* nonetheless devoted only a single paragraph to this issue, rejecting the argument that the statute was overbroad.[59] *McConnell* left open the question whether a corporation or union could bring an "as applied" challenge to BCRA § 203 by proving that a broadcast advertisement the entity wished to pay for from its general treasury funds was a "genuine issue advertisement" and therefore not subject to BCRA's restrictions. The "as applied" question returned to the Court in

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[53] *See id.*

[54] *WRTL II*, 127 S. Ct. 2652, 2660 (2007) (citing 2 U.S.C. § 434(f)(3)(A)).

[55] 2 U.S.C. § 441b(b)(2).

[56] *See* Hasen, Buckley *is Dead*, *supra* note 3.

[57] The following few paragraphs are drawn from Hasen, Buckley *is Dead*, *supra* note 3, at 53-56; *see also McConnell*, 540 U.S. at 204.

[58] McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 367-73 (D.D.C. 2003) (Henderson, J., concurring in part and dissenting in part), *aff'd in part* and *rev'd in part*, 124 S. Ct. 619 (2003); *id.* at 610-39, 719-52 (Kollar-Kotelly, J., concurring); *id.* at 792-99, 890-918 (Leon, J., concurring).

[59] *McConnell*, 540 U.S. at 204-07.

the *WRTL II* case.

Wisconsin Right to Life, Inc. (WRTL) "is a nonprofit, nonstock, ideological advocacy corporation" recognized as tax exempt by the Internal Revenue Service.[60] In late July 2004, WRTL began running a few television advertisements in Wisconsin opposing the Senate filibuster of some federal judicial nominations and urging voters to "Contact Senators Feingold and Kohl and tell them to oppose the filibuster."[61] Two days later, WRTL filed suit in federal court seeking a declaration and an injunction that it could run the ads and pay for them from its general treasury funds as "genuine issue ads," despite the fact that Senator Feingold was running unopposed in a primary in mid-September.[62] WRTL did not want to use its PAC funds to pay for the ads, and it could not take advantage of the *MCFL* exemption for ideological corporations because the organization took over $315,000 in donations from for-profit corporations to pay for the ads.[63]

The case went to the Supreme Court twice. First, the Court unanimously held that the issue whether there could be as applied challenges to BCRA § 203 was not decided in *McConnell*.[64] On remand, the three-judge district court split 2-1, holding that WRTL was entitled to an as applied exemption because, looking only at the face of the ad and not the political context, the ad was not necessarily an election-related ad (but instead about the "issue" of filibustering judicial nominees).[65]

The Federal Election Commission (FEC) and congressional interveners appealed, giving the Supreme Court a second chance to hear the case.[66] The Court split three ways. Three Justices (Justice Scalia, joined by Justices Kennedy and Thomas) took the position that *Austin* and *McConnell* were wrongly decided and should be overturned, meaning that WRTL could not only pay for *these* ads from its treasury funds, but that corporations and unions could pay from such funds for *any election-related*

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60 *WRTL II*, 127 S. Ct. 2652, 2660 (2007).

61 *Id*.

62 *See id.* at 2661, 2663.

63 *See id.* at 2697 (Souter, J., dissenting) ("WRTL accepted over $315,000 in corporate donations.").

64 Wis. Right to Life, Inc. v. Fed. Election Comm'n (*WRTL I*), 546 U.S. 410, 412 (2006).

65 Wis. Right to Life, Inc. v. Fed. Election Comm'n, 466 F. Supp. 2d 195, 208 (D.D.C. 2006); *WRTL II*, 127 S. Ct. at 2661.

66 *WRTL II*, 127 S. Ct. at 2662.

advertisements, including those containing express advocacy.[67] Chief Justice Roberts and Justice Alito cast the controlling votes in what the Court referred to as the "principal opinion."[68] They declined to reach the same facial constitutional questions as Justice Scalia, holding instead that WRTL was entitled to an "as applied" exemption for its ads.[69] The principal opinion set forth a very generous test for future as applied challenges to BCRA § 203—an ad gets the exemption unless a court concludes, without looking at the political context, that it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[70]

Four Justices (Justice Souter, joined by Justices Breyer, Ginsburg, and Stevens) dissented, believing that WRTL's ads, viewed in context, were indistinguishable from the kinds of advertising the Court in *McConnell* held it was permissible to regulate through a corporate PAC requirement in BCRA § 203.[71]

B. Justice Souter on Campaign Finance Regulation and "Democratic Integrity"

The first three parts of Justice Souter's dissent in *WRTL* lay out in detail Justice Souter's general views about the constitutionality of campaign finance regulation.[72] In these parts, Justice Souter sets forth the interests that campaign finance law is meant to protect and the problems with the current system.[73] This discussion reveals the less adulterated views of Justice Souter, unencumbered by the need to keep Justice O'Connor happy.

Justice Souter begins his dissent by stating that the "significance and effect" of the Court's judgment

> turn on three things: the demand for campaign money in huge amounts from large contributors, whose power has produced a cynical electorate; the congressional recognition of the ensuing threat to democratic integrity as reflected in a century of

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[67] *See id.* at 2674-87 (Scalia, J., concurring in part and concurring in the judgment) (stating several times that the holdings in *Austin* and *McConnell* were incorrect).

[68] *Id.* at 2674 (Alito, J., concurring).

[69] *Id.*

[70] *Id*. at 2667.

[71] *Id*. at 2698-99 (Souter, J., dissenting).

[72] *WRTL II*, 127 S. Ct. at 2687-97.

[73] *Id.*

> legislation restricting the electoral leverage of concentrations of money in corporate and union treasuries; and *McConnell* . . . , declaring the facial validity of the most recent Act of Congress in that tradition, a decision that is effectively, and unjustifiably, overruled today.[74]

The Justice follows this introduction with a litany of facts to show the important role that money for campaign advertising plays in modern campaigns.[75] Among the facts he recites are that in the 2004 campaign, more than half of the two principal candidate's expenditures went to pay for advertising;[76] that more than $2 billion was spent in the 2005-06 election cycle on television advertising, a record for a non-presidential contest;[77] that 2008 presidential candidates had already raised over $150 million eighteen months before the general election;[78] that the eventual presidential nominees are expected to raise $500 million each, "about $680,000 per day over a [two]-year election cycle;"[79] and that over $4 billion was spent on state and federal elections during the 2004 election cycle.[80] A footnote to this section describes issues related to increased fundraising pressures in state "*judicial* elections," not directly at issue in *WRTL*.[81] It describes a poll of business leaders, 90% of whom were at least "somewhat concerned" that campaign contributions and political pressure could affect judicial decisionmaking.[82]

Justice Souter sees two problems with this spending: first, the wealthy who spend or contribute more obtain more access to elected officials than others, and second, the public knows about the unequal access, and this knowledge undermines voter confidence in the electoral process.[83] On the first point, Justice Souter writes that the large demands of fundraising "assign power to the deep pockets."[84] "What the high-dollar pragmatists . . . get is special access to the officials they help elect, and with it a *disproportionate influence* on those in

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[74] *Id.* at 2687.
[75] *See generally id.* at 2687-88 (discussing recent campaigns and their expenditures).
[76] *Id*. at 2687.
[77] *Id*. at 2688.
[78] *WRTL II*, 127 S. Ct. at 2688.
[79] *Id*.
[80] *Id*. at 2688 n.2.
[81] *Id.* (emphasis added).
[82] *Id*.
[83] *Id.* at 2688.
[84] *See WRTL II*, 127 S. Ct. at 2688.

power."[85] On the second point, Justice Souter concludes that the candidates' "demand for big money" leads to "pervasive public cynicism,"[86] citing pre-BCRA public opinion polls showing Court distrust of politicians who take large campaign contributions. Together, Justice Souter refers to these two interests as one in preserving "political integrity,"[87] "democratic integrity,"[88] and "electoral integrity"[89] (terms he apparently uses interchangeably).

Justice Souter then singles out corporations as posing a special danger to democratic integrity: "[T]he same characteristics that have made them engines of the Nation's extraordinary prosperity have given them the financial muscle to gain 'advantage in the political marketplace' when they turn from core corporate activity to electioneering."[90] He adds that it was "'Congress' judgment'" that "the same concern extends to labor unions as to corporations."[91] Justice Souter then includes a lengthy recitation of the history of federal regulation of campaign financing, with an emphasis on the problems Congress saw with corporate and union election-related activity throughout the decades.[92] Among the facts Justice Souter notes in this lengthy recitation is that the American Federation of Labor and the Congress of Industrial Organization (AFL-CIO) funded pre-BCRA issue advocacy against first-term Republican House members through a fifteen-cent per member, per month assessment of union members.[93] Congress could permissibly stop these practices in BCRA § 203, Justice Souter explains, to further the *Austin* rationale by curbing 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."[94]

He concluded his lengthy discussion of the historical context as follows:

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[85] *Id*. (emphasis added).
[86] *Id.*
[87] *Id*. at 2689.
[88] *Id.* at 2697.
[89] *Id*.
[90] *WRTL II*, 127 S. Ct. at 2689 (quoting *MCFL*, 479 U.S. 238, 258 (1986)).
[91] *Id.* (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982)).
[92] *See id.* at 2689- 96.
[93] *Id*. at 2694.
[94] *Id*. at 2696 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

> This century-long tradition of legislation and judicial precedent rests on facing undeniable facts and testifies to an equally undeniable value. Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries, with no redolence of "grassroots" about them. Neither Congress's decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the *more pervasive distortion of electoral institutions by concentrated wealth*, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions. From early in the 20th century through the decision in *McConnell*, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor unions commit the concentrated moneys in their treasuries to electioneering.[95]

The final part of Justice Souter's dissent is predictable given the Justice's earlier opinions and votes. There, the Justice argues that the *WRTL II* principal opinion's new "as applied" test is inconsistent with *McConnell* and effectively overrules *McConnell*'s facial upholding of BCRA § 203.[96] He believes the WRTL ads are the prototypical type of ad that BCRA was meant to regulate.[97] Justice Souter also predicts that the principal opinion will lead to the reemergence of sham issue advocacy, as corporations and unions pay for ads that are likely to affect the outcome of elections but that meet the new "no reasonable interpretation" test.[98]

C. Justice Souter as an Emerging Egalitarian

To be sure, one can read Justice Souter's dissent as simply an extension of the anti-corruption rationale of *Buckley*: Congress may permissibly limit contributions to prevent the corruption of elected officials and the appearance of corruption caused when

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[95] *Id*. at 2697 (second emphasis added).

[96] *See WRTL II*, 127 S. Ct. at 2704 ("There is neither a theoretical nor a practical basis to claim that *McConnell*'s treatment of § 203 survives.").

[97] *See id*. at 2698 (stating that the ads are subject to regulation under *McConnell).*

[98] *See id*. at 2705 (explaining that after this decision, the corporate and union PAC requirement is open to easy circumvention and that the possibilities for regulation are unclear).

the public believes that large donors "call the tune."[99] For a few reasons, I believe Justice Souter's dissent is more consistent with an *egalitarian* rationale for campaign finance regulation.

First, BCRA § 203 concerns *independent spending* by corporations and unions on election-related broadcast advertisements.[100] Since *Buckley*, the Court has viewed such independent spending as not presenting the same danger of corruption as contributions *to* candidates.[101] Though Justice Souter suggests in a footnote to his dissent that corporate spending limits in candidate elections may be justified on anticorruption grounds,[102] he offers no sustained argument to back it up, a point not lost on Justice Scalia.[103] Simply put, Justice Souter in his lengthy dissent provides no evidence supporting the claim that independent spending serves *anticorruption* goals.[104] His problem with such spending must be elsewhere.

Justice Souter's dissent is full of talk of "distortion"—even "pervasive distortion"—of the political process by corporate and union spending.[105] This is *Austin* "corrosion," which occurs when corporations use their great wealth to spend disproportionately to the views they represent in society–an egalitarian notion.[106] Indeed, Justice Souter does not argue that the "special access" large donors (and presumably large independent spenders) purchase is a *corrupt* transaction in a quid-pro-quo/"dollars for

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[99] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000).

[100] BCRA, Pub. L. No. 107-155, § 203, 116 Stat. 81 (codified as 2 U.S.C. §441(b) (2000)).

[101] *See, e.g., Shrink Mo.*, 528 U.S. at 387-90 (upholding contribution limits for candidates on the grounds that the limits diminish the risk of corruption).

[102] *See WRTL II*, 127 S. Ct. at 2692 n.7 (Souter, J., dissenting).

[103] *Id*. at 2678 n.4 (Scalia, J., concurring in part and concurring in the judgment).

> "The dissent asserts that *Austin* was faithful to *Bellotti*'s principles, to prove which it quotes a footnote in *Bellotti* leaving open the possibility that independent expenditures by corporations might someday be demonstrated to beget *quid-pro-quo* corruption. That someday has never come. No one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures."

Id. (citations omitted) (emphasis in original).

[104] *See id*. at 2687-705 (Souter, J., dissenting).

[105] *Id*. at 2697, 2705.

[106] *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 111-14 (2003) (arguing that *Austin* embraces a political equality rationale for campaign finance regulation).

political favors" sense.[107] Instead, he claims that these donors (and spenders) have "*disproportionate*" influence over the electoral process.[108] It is this *inequality of access* (which ostensibly creates an appearance of inequality), rather than the sale of special favors, which Justice Souter says drives public cynicism about the electoral process.[109]

Justice Souter's focus on *total* campaign spending also suggests there is more going on here than simple concern about corruption. After all, if a candidate spent $10 million on an election having raised one million $10 contributions, the potential for corruption by donors appears minimal. But Justice Souter's view that the total amount of campaign spending is obscene and dangerous to the "integrity" of American democracy shows an egalitarian impulse to make campaigns less about money and more about ideas.

Justice Souter's focus on total wealth highlights the point that many of the arguments apply equally to large corporate and union spending in elections and to large spending by wealthy *individuals*.[110] Justice Souter therefore might support spending limits applied to individuals because such spending could cause the same "pervasive distortion" of the political process if wealthy spenders' views would not proportionally represent the views of many voters. While Justice Souter might respond that it is appropriate to limit this idea only to corporations because of the special way in which they can accumulate wealth, it is too late for him to make that argument: labor unions do not accumulate wealth the way corporations do (a point I return to in the next section); yet Justice Souter is perfectly content with congressional action extending corporate limits to labor unions. Moreover, some wealthy individuals no doubt gained much of their wealth with the assistance of corporations, and therefore, they too enjoy the benefits of the corporate form and can

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[107] *Cf.* Fed. Election Comm'n v. Nat'l Conservative Political Action Comm. 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.").

[108] *WRTL II*, 127 S. Ct. at 2688 (emphasis added).

[109] Hasen, *Rethinking*, *supra* note 12, at 909 (arguing that concerns about voter confidence may best be thought of as raising an "appearance of inequality" concern).

[110] *Cf. WRTL II*, 127 S. Ct. at 2686-87 (Scalia, J., concurring) (noting the "wondrous irony" that BCRA has led to the concentration of "more political power in the hands of the country's wealthiest individuals and their so-called 527 organizations, unregulated by § 203.").

translate their economic wealth into political influence.

Together, I believe it is fair to characterize Justice Souter as an "emerging egalitarian," someone inclined to use campaign finance regulation to provide some measure of equality to the American political system, though he is still struggling to use it fully to this end. We will have to see how Justice Souter hashes these issues out in future cases. In the next section, I note some issues that need further development in his egalitarian jurisprudence.

D. The Next Iterations of Souter Egalitarianism

Labeling someone a "campaign finance egalitarian" is not sufficiently precise, as there are a great variety of equality approaches in the area.[111] Justice Breyer, for example, is a more firmly committed campaign finance egalitarian than Justice Souter, having set forth his ideas on promoting political equality in his *Shrink Missouri* concurrence and in academic writings.[112] In addition, there are some important jurisprudential differences between the two.

Justice Breyer's "participatory self-government" objective argues that there are important First Amendment interests on "both sides" of the political equation and that a careful balancing of rights is necessary.[113] He is willing to defer somewhat to legislators, who have greater expertise in the area of campaign finance than judges.[114] But he is wary that such laws might be means of incumbent self-protection, and for this reason he urges closer scrutiny of campaign finance laws.[115]

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[111] For example, Professor Foley is concerned about unequal spending in the political process because it is likely to have an unfair effect on *electoral* outcomes. *See* Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994). My own work is concerned about unequal spending in the political process because it is likely to have an unfair effect on *legislative* outcomes. *See* Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996).

[112] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 399-405 (2000) (Breyer, J., concurring).

[113] *See* BREYER, *supra* note 1, at 48-50.

[114] *See id.* at 49 ("Courts can defer to the legislature's own judgment insofar as that judgment concerns matters (particularly empirical matters) about which the legislature is comparatively expert, such as the extent of the campaign finance problem.").

[115] *See id*. (arguing that a risk is present "when laws set contribution limits so low that they elevate the reputation-related or media-related advantages of

In contrast, Justice Souter believes more in deference to the legislature, and seems relatively unconcerned about incumbent protection. In the New Deference cases he authored, he brushes aside any concern about incumbency protection.[116] Justice Souter also seems less worried about striking the right balance with the First Amendment.

The Supreme Court's opinion in *Randall v. Sorrell* illustrates the difference in the approaches of the two Justices.[117] *Randall* principally concerned the question whether Vermont's campaign contribution limits were too low.[118] Justice Breyer, writing for himself and Chief Justice Roberts and Justice Alito, concluded that the amounts were too low, because there were "danger signs" that the law was aimed at protecting incumbents and because the measure was too restrictive, given the anticorruption goals it was purportedly trying to accomplish.[119] Justice Souter, in dissent, would have applied a much more deferential test for determining when a campaign contribution limit is too low, holding that because the Vermont limits were not "laughabl[y]"[120] low, they were constitutional. As I have argued, it is very difficult to justify the Vermont limits on anticorruption grounds; the better reading of the Vermont Legislature's intent—and Justice Souter's intent to uphold the limits—is a commitment to equality in campaign finance fundraising and spending.[121]

The two Justices also split on the expenditure limit question: Justice Breyer wrote that Vermont's candidate spending limits were unconstitutional under *Buckley*;[122] while Justice Souter would not have reached the question.[123] Though Justice Breyer may well have tempered his opinions to keep the votes of Chief Justice Roberts and Justice Alito,[124] looking at the *Randall*

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incumbency to the point of insulating incumbent officeholders from effective challenge.").

116 Hasen, *Newer Incoherence*, *supra* note 8, at 850 n.3.

117 Randall v. Sorrell, 126 S. Ct. 2479 (2006).

118 *Id.* at 2485.

119 *Id*. at 2492 (plurality opinion).

120 *Id*. at 2514 (Souter, J., dissenting).

121 Hasen, *Newer Incoherence*, *supra* note 8, at 887 ("It seems quite obvious that the real goal of the Vermont measure, hidden from debate in order to comply with *Buckley*'s rejection of the equality rationale, was the promotion of political equality.").

122 *Randall*, 126 S. Ct. at 2491 (plurality opinion).

123 *Id*. at 2511 (Souter, J., dissenting).

124 Hasen, *Newer Incoherence, supra* note 8, at 852 ("Competition arose in *Randall* to test the constitutionality of low contribution limits as a rear-guard action by Justice Breyer to cling to the framework of *Buckley v. Valeo*.").

opinions on their face, Justice Souter seems more committed to egalitarianism than Justice Breyer.

Justice Souter, even if he becomes a committed egalitarian, should consider adopting some of Justice Breyer's skepticism about legislatively-enacted campaign finance law. After all, not all campaign finance measures will be passed with the good government intentions of the prototypical New England town meeting. A committed egalitarian should be wary of self-dealing disguised as political reform. In addition, Justice Souter should devote some attention to three other issues under the "democratic integrity" approach.[125]

1. What's Wrong with Large Total Spending?

Return to the example I gave in the last section of a candidate raising $10 million in one million $10 donations. Not only does this scenario not raise serious concerns about corruption, it could well be something to celebrate from an egalitarian perspective. Rather than going to a "fat cat" who can give $10 million to a candidate, the candidate is able to raise a great deal from a large number of modest contributions. It is this impetus toward the democratizing effect of small donations that makes the rise of Internet fundraising so exciting from an egalitarian perspective.

For this reason, Justice Souter's concerns about total spending are somewhat misplaced. In today's busy world, in which many rational voters do not devote much time to considering whom to vote for, candidates need to use media such as television, radio, newspapers, direct mail, and the Internet, to reach voters. Many of these means are going to be expensive, and an egalitarian perspective that would decrease total spending runs the risk of not giving enough resources for many voices to be heard in a vibrant debate over candidacies and ballot measures. Seeking to limit total spending, in other words, does not hit the target that egalitarians should aim for.

Justice Souter might respond that it is not the total amount of spending that is itself objectionable; rather it is the demands that the high costs of campaigns put on candidates to raise ever larger amounts of money. That is a fair point, but it is not one that is attacked by going after total spending. Campaign financing can

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125 *WRTL II*, 127 S. Ct. 2652, 2687 (2007) (Souter, J., dissenting) (examining the "congressional recognition of the . . . threat to democratic integrity.").

promote egalitarianism in ways that do not decrease public spending but decrease a candidate's need to raise ever large funds. For example, public subsidies for campaigns (perhaps tied to matching small donations) or free air time for candidates required of broadcasters as part of their broadcast obligations could help meet such needs. Indeed, I have argued that low contribution and spending limits in Vermont could well be unconstitutional even accepting the political equality rationale for regulation unless the state also provides subsidies for vibrant political speech.[126]

2. Is There Any Evidence to Support the Idea that Campaign Finance Regulation Can Decrease Public Cynicism or Increase Voter Confidence in the Electoral Process?

Justice Souter's argument for "democratic integrity" is premised not only on the "disproportionate" or "special" access afforded to large campaign donors and spenders.[127] He also believes that this disproportionate spending leads to increased public cynicism and a decline in voter confidence in democratic government.[128]

Though Justice Souter provides ample support for the proposition that voters are cynical that large donors have disproportionate influence in Washington, he provides no support for the proposition that campaign finance laws such as BCRA decrease public cynicism about the political process (or at least prevent a further slide in public confidence in the electoral process).[129] The social science evidence to date does not support the latter implied assertion in Justice Souter's work.[130] Nathaniel Persily and Kelli Lammie found an *increase* in public cynicism after Congress passed BCRA.[131] These authors believe that outside factors, and not campaign finance regulation, drives

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126 Hasen, *Newer Incoherence, supra* note 8, at 887.

127 *WRTL II*, 127 S. Ct. at 2688 (Souter, J., dissenting) ("What the high-dollar pragmatists of either variety get is special access to the officials they help elect, and with it a disproportionate influence on those in power.").

128 *Id.* ("[T]he second important consequence of the demand for big money to finance publicity . . . [is] pervasive public cynicism.").

129 *See id*.

130 *See, e.g.,* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004).

131 *Id.* at 123.

public cynicism about government.[132]

The lack of evidence of a connection between public attitudes and campaign finance regulation is not fatal to Justice Souter's position. It simply suggests that the Justice should place more emphasis on the issue of "disproportionate influence" and less on the appearance of inequality in crafting his arguments in favor of regulation.

3. What's Wrong with Large Union Spending?

Perhaps the least satisfying portion of Justice Souter's opinion is his treatment of the regulation of labor unions. Labor unions amass funds by collecting dues from their members, not through the use of a corporate form to engage in a for-profit enterprise.[133] Yet Justice Souter's dissenting opinion in *WRTL II* elides over the difference when he cites the *Austin* distortion rationale in explaining the reason for regulating corporations and then simply notes that it was "Congress' judgment" that "the same concern extends to labor unions as to corporations."[134] He also noted congressional fears of "accumulated wealth" in the hands of labor unions as prompting Congress to pass the Taft-Hartley Act, limiting union campaign spending.[135]

To the extent that Justice Souter believes labor union spending is objectionable because some unions are wealthy, he has an argument for limiting spending by *all* wealthy individuals and entities, not just corporations and labor unions.[136] But the opinion zeroes in on corporations and unions (condemning their "corrosive spending"),[137] and not all wealthy groups, without adequate explanation about the dangers of labor unions.

Among the parade of pre-BCRA horribles chronicled by Justice Souter is that,

> the President of the AFL-CIO stated that the bulk of its ads were targeted for broadcast in districts represented by first-term

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[132] *Id.* at 121.

[133] *See generally* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 665-67 (1990) ("Whereas unincorporated unions . . . may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure.").

[134] *WRTL II,* 127 S. Ct. at 2689 (Souter, J., dissenting) (citing Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982)).

[135] *See id*. at 2690-91.

[136] *See id*. at 2687.

[137] *Id*. at 2705.

> freshman Republicans who . . . may be defeatable, and the Senate committee found that the union used a $.15 per member, per month assessment to finance issue ads that were clearly designed to influence the outcome of the election.[138]

Again, putting aside the great *total* wealth of unions, it is difficult to see what is objectionable from an egalitarian (or, for that matter, an anticorruption) perspective about this spending. Here is collective action that should be celebrated: a large number of people have made miniscule contributions collectively for political action. Political power is not being driven by a few rich spenders: it is being driven by many people of modest means banding together in an effective way. Justice Souter needs to provide a much better explanation for what is objectionable about this spending.

Aside from an argument that spending by *all* wealthy individuals and entities should be limited, the best argument an egalitarian might make for regulating union spending is political expediency. For more than fifty years, congressional limits on corporate and union spending have gone hand-in-hand.[139] A ruling striking down limits on union (but not corporate) election-related spending could well lead Congress to lift the limits on corporate spending as well, a result that may be worse than the status quo from an egalitarian perspective. It is not clear if Justice Souter had this *realpolitik* in mind in crafting his *WRTL II* dissent, but the final product offers an unsatisfying explanation of the constitutional basis for the regulation of union election-related spending.

CONCLUSION

Justice Souter may never again have an opportunity to write a majority opinion in a campaign finance case in his tenure on the Court. But the Court's experience in this area shows that its decisions have swung like a pendulum, and the views of Justice Souter could well be picked up by a future Supreme Court majority that either explicitly or implicitly accepts political equality arguments for campaign finance regulation.

For this reason, Justice Souter should devote care to the further development of his "democratic integrity" arguments for

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[138] *Id*. at 2694 (citation and internal quotations omitted).

[139] *See id*. at 2689-97 (describing the history of congressional limits on spending).

campaign finance regulation. Justice Souter, more than any other Justice on the current Supreme Court, has freed those who would craft campaign finance regulation in the name of political equality from Supreme Court interference. Now, as his position becomes the minority position on the Supreme Court, he can leave future generations with a more coherent and compelling egalitarian rationale for sensible campaign finance laws yet to be written.