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FEC v. Wisconsin Right to . . . Petition? A Comment on *FEC v. Wisconsin Right to Life*

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COMMENT

FEC V. WISCONSIN RIGHT TO . . . PETITION?: A COMMENT ON *FEC V. WISCONSIN RIGHT TO LIFE*

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INTRODUCTION

FEC v. Wisconsin Right to Life, Inc. (*WRTL*)[1] is the Supreme Court's latest attempt to extricate grassroots advocacy by nonprofit corporations from the morass of political broadcast restrictions under the Bipartisan Campaign Finance Reform Act (BCRA).[2] As with the many cases preceding it, the standard pronounced by the Court in *WRTL* is deceptively straightforward: a political broadcast is an "electioneering communication" that may be proscribed "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[3] The Court held

* J.D., Stanford Law School, 2008.

1. 127 S. Ct. 2652 (2007).

2. Pub. L. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2, 18, 28, 36, and 47 U.S.C.).

3. *WRTL*, 127 S. Ct. at 2667 (2007). The Bipartisan Campaign Reform Act (BCRA) section 201 defines "electioneering communications" as:

> [A]ny broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to

this axiom true notwithstanding the identity of the advertisement's sponsor because "the corporate identity of a speaker does not strip corporations of all free speech rights [under the First Amendment]."[4] The question the Court should have addressed is whether the *nonprofit* corporate identity of a speaker entitles such corporations to speech rights under the Petition Clause rather than the Free Speech Clause of the First Amendment.

The Framers thought that nonprofit corporations were entitled to exemptions based upon their status as nonprofits. During the First Congress, a nonprofit Quaker corporation seeking to abolish slavery led Congress to consider whether the First Amendment of the United States Constitution permitted the group to rely upon mass media and public opinion to effect grassroots advocacy through electoral pressure.[5] Although Congress was deeply divided on the slavery question, Congress's failure to proscribe the Quakers' grassroots lobbying efforts suggests that they believed that the Petition Clause of the First Amendment protected the Quakers' actions because providing for nonprofit corporate political speech necessarily favored the general welfare of the United States.[6]

The importance of the Petition Clause in protecting for-profit corporate political speech is no stranger to the Court, which has historically held that the right to petition prohibits the nation's antitrust laws from abrogating for-profit corporate political speech aimed at lobbying the government unless it is a mere "sham" covering otherwise criminal actions.[7] But in the line of campaign

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> nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3) (Supp. IV 2004). Section 203 makes it a crime for any labor union or incorporated entity to use its general treasury funds to pay for any "electioneering communication." *Id.* § 441b(a). Section 203(b) of BCRA would have exempted electioneering communications by nonprofit advocacy groups incorporated under Internal Revenue Code §§ 501(c)(4) and 527(e)(1) so long as they were "paid for exclusively by funds provided directly by individuals." *Id.* § 441b(c)(2). But that exemption was negated by section 204 of BCRA, which withdraws the exception for § 501(c)(4) and 527(e)(1) corporations in the case of expenditures for "targeted communications"—which, by definition includes all "electioneering communications." *See id.* § 441b(c)(6)(A). Accordingly, the prohibition on electioneering communications applies the same to both nonprofit and for-profit corporations.

4. *WRTL*, 127 S. Ct. at 2673 (citation omitted).

5. *See generally* William C. diGiacomantonio, *"For the Gratification of a Volunteering Society": Antislavery and Pressure Group Politics in the First Federal Congress*, 15 J. EARLY REPUBLIC 169, 190 (1995) (describing the Quakers' antislavery campaign).

6. *See id.* at 197 (documenting the first case of corporate issue advocacy in 1790 and subsequent congressional response subsuming issue advocacy under the Petition Clause of First Amendment).

7. *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 144 (1961). Notably the Court has upheld the right to petition even in the face of anticompetitive effects resulting from its legitimate exercise. *See* United Mine Workers v. Pennington, 381 U.S. 657, 666 (1965) ("This Court has recognized that a legitimate aim of

finance cases culminating with *WRTL*, the Supreme Court has subsumed nonprofit corporate political speech rights under the Free Speech Clause, even though it has relied upon the language and standards of Petition Clause restraints in limiting the scope of antitrust laws.[8]

The next time the Court is faced with the issue of restrictions on nonprofit corporate political speech, the Court should consider adopting an originalist perspective by adjudicating these corporate political speech claims under the Petition Clause. To date, all for-profit corporate political speech claims are considered antitrust questions subject to Petition Clause restraints, while nonprofit corporate political speech questions are considered campaign finance questions subject to Free Speech Clause restraints. Coupling both types of corporate political speech under the Petition Clause would reunite the Court's for-profit and nonprofit corporate political speech doctrines. An originalist perspective also has the virtue of being a principled basis for decision making, which could help stabilize jurisprudence in this area of election law.

I. MODERN COURTS AND THE RIGHT TO PETITION

The First Amendment provides that Congress shall make no law abridging the right of the people "to petition the Government for a redress of grievances."[9] The Supreme Court has declared that "[t]he very idea of government, republican in form, implies a right on the part of its citizens to . . . petition for a redress of grievances."[10] This right parallels the speech right codified in the First Amendment and thus has never been "limited to goals that are deemed worthy," just as "citizens' right to speak freely is not limited to fair comments."[11]

In contrast to the free speech right, however, the right to petition is and has always been structurally limited. As contemporary courts have recognized, it provides no absolute right to speak in person with public officials, provides no right to a hearing based on grievances communicated to officials, and imposes

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any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards.").

8. *See infra* Part IV (describing the similarities between the Court's for-profit corporate political speech (antitrust) jurisprudence and the nonprofit corporate political speech (campaign finance) standards).

9. U.S. CONST. amend. I; *see also* McDonald v. Smith, 472 U.S. 479, 482 (1985) (noting that the right of petition predates the Constitution, first appearing in the Bill of Rights enacted by William and Mary in 1689 and the Declaration of Rights and Grievances drafted by the colonial Stamp Act Congress of 1765).

10. United States v. Cruikshank, 92 U.S. 542, 552 (1875).

11. Eaton v. Newport Bd. of Educ., 975 F.2d 292, 298 (6th Cir. 1992) (holding that right of petition protected comments calling for dismissal of school principal in course of lobbying school board).

no corresponding duty on officials to act on such grievances.[12] In addition, the Court has made clear that the Petition Clause of the First Amendment does not protect the act of "petitioning," which under the modern definition means essentially engaging in political speech.[13] Thus, the right of petition only extends to situations where other First Amendment rights, such as speech or association, are also implicated.[14]

Unlike other First Amendment rights, courts have paid scant attention to the Petition Clause as a defense to litigation. For the first two centuries after the enactment of the First Amendment, for example, defendants almost never invoked the Petition Clause.[15] The Supreme Court did not even recognize immunity conferred by the Petition Clause until the 1960s.[16] When it did, the resulting doctrine (known as *Noerr-Pennington*) conferred an exemption from the antitrust laws to corporations whose activities involved the petitioning of governmental bodies.[17] Eventually, the applicability of *Noerr-Pennington*'s Petition Clause-based immunity spread beyond the antitrust arena and became a defense to a wide variety of suits.[18]

A. *The Supreme Court's Development of* Noerr-Pennington

The *Noerr-Pennington* doctrine holds that the Petition Clause protects efforts to influence the government through petitioning even if the petition has anticompetitive ends that would otherwise be in violation of the antitrust

12. Cronin v. Town of Amesbury, 895 F. Supp. 375, 390 (D. Mass. 1995).

13. *McDonald*, 472 U.S. at 482 ("The right to petition is cut from the same cloth as the other guarantees of the [First] Amendment . . . .").

14. *See, e.g.*, WMX Techs., Inc. v. Miller, 197 F.3d 367, 372 (9th Cir. 1999); *see also McDonald*, 472 U.S. at 479 (limiting the protections afforded by the Petition Clause to situations where an individual's associational or speech interests are also implicated); 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:3 (rev. ed. 2000) ("When rights of petition, assembly, or association are specifically relied upon, the doctrines devised usually mimic precisely the doctrines familiar from free speech cases generally.").

15. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 18 (1996); *see also, e.g.*, White v. Nicholls, 44 U.S. (3 How.) 266 (1845) (not invoking Petition Clause as defense for citizen sued on grounds of complaints to the U.S. President about malfeasance by a customs collector); Gray v. Pentland, 2 Serg. & Rawle 23 (Penn. 1815) (not invoking Petition Clause as defense to suit against citizen for complaints to governor charging a government official with frequent intoxication and unfitness for office); Larkin v. Noonan, 19 Wis. 82 (1865) (not invoking Petition Clause as defense to suit against citizen for reporting to the governor a sheriff's attempts to defraud the county).

16. Lori Potter, *Strategic Lawsuits Against Public Participation and the Petition Clause Immunity*, 31 ENVTL. L. REP. 10,852, 10,853 (2001).

17. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509-10 (1972); United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 136 (1961).

18. *See, e.g.*, Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 59 (1993); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913-14 (1982).

laws.[19] The antitrust laws typically prohibit business practices that may create unfair competition, but the Petition Clause prevents parties from bringing lawsuits to enjoin such a business practice if it is also some sort of petitioning activity.[20] For example, a corporation would be immune from suit if it asked either a court or government official to enact a law that would harm its competitors, even if the corporation's primary motive for petitioning were to stifle competition.[21]

The Supreme Court first articulated a Petition Clause defense under the rubric of the *Noerr-Pennington* doctrine in a series of three related cases. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, a trucking company sued to stop a railroad's publicity campaign aimed at obtaining federal legislative action against the interest of trucking companies.[22] The complainants argued that the railroad-sponsored campaign constituted an illegal attempt to monopolize the freight industry under sections 1 and 2 of the Sherman Act.[23] The railroads filed a counterclaim charging that the truckers sought to establish a monopoly through similar political activities.[24] Dismissing the claims, the Supreme Court held that the railroads' actions did not violate the Sherman Antitrust Act, because the publicity campaign qualified as an attempt to petition the legislature, even though the campaign did not involve direct contact with legislators.[25] Although the *Noerr* decision was strictly a matter of statutory interpretation and not a declaration of standards by which First Amendment cases should be reviewed, the Court acknowledged that holding that the Sherman Act applied to political activity "would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[26] Four years later, in *United Mine Workers of America v. Pennington*, the Supreme Court extended the defense to include petitioning of the executive branch.[27] The Court reiterated that "*Noerr* shields . . . concerted effort[s] to influence public officials regardless of intent or purpose."[28]

Despite the statutory basis of the Court's decisions in *Noerr* and *Pennington*, commentators have described these opinions as constitutional

19. *Cal. Motor Transp.*, 404 U.S. at 509-10; *Pennington*, 381 U.S. at 669; *Noerr*, 365 U.S. at 136.

20. *Noerr*, 365 U.S. at 135-36.

21. *Id* at 136; *see also Cal. Motor Transp.*, 404 U.S. at 509-11; *Pennington*, 381 U.S. at 669.

22. 365 U.S. at 138-40.

23. Sherman Act §§ 1-2, 15 U.S.C. §§ 1-2 (1982).

24. *Noerr*, 365 U.S. at 132.

25. *Id.* at 136-38.

26. *Id.* at 138.

27. 381 U.S. 657, 660 (1965).

28. *Id.* at 670.

decisions that balanced antitrust policies against the First Amendment right of petition and found the latter more weighty.[29] The Supreme Court's opinion in *California Motor Transport Co. v. Trucking Unlimited*[30] makes clear the underlying constitutional foundations of its *Noerr-Pennington* doctrine. In *California Motor Transport*, a group of highway carriers sued another similar group, alleging that the defendants attempted to monopolize the industry in violation of the Clayton Act[31] by repeatedly challenging the plaintiffs' license applications before courts and regulatory agencies.[32] The Court held that the First Amendment immunizes from antitrust liability corporations filing lawsuits aimed at diminishing competition as long as they had some justifiable purpose.[33] Thus even if *Noerr* and *Pennington* could not be properly classified as constitutional decisions, *California Motor Transport* elevates the *Noerr-Pennington* doctrine "to the status of a constitutional principle."[34]

Although both *Noerr* and *Pennington* were decided in the context of antitrust actions, the Supreme Court extended the doctrine to confer immunity in other civil actions in *NAACP v. Claiborne Hardware Co.*[35] Federal and state courts now consistently apply the *Noerr-Pennington* doctrine to all types of claims, including state tort and statutory law claims implicating the right to petition.[36] In *First National Bank of Boston v. Bellotti*, the Supreme Court also applied *Noerr-Pennington* to a criminal law, striking down a statute prohibiting for-profit corporations from making contributions or expenditures to influence the outcome of a vote on a ballot measure in part because the right to petition protected the corporation's activities.[37] The common theme of all of these cases is that activities conducted as part of a genuine attempt to influence governmental action are immunized from civil liability by the First

29. *See, e.g.*, Joseph S. Faber, Note, City of Long Beach v. Bozek*: An Absolute Right to Sue the Government?*, 71 CAL. L. REV. 1258, 1266 (1983); Eric M. Jacobs, Comment, *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the* Noerr-Penington *Doctrine*, 31 AM. U. L. REV. 147, 168 (1981).

30. 404 U.S. 508 (1972).

31. Clayton Act § 4, 15 U.S.C. § 15 (1982).

32. 404 U.S. at 508.

33. *Id.*

34. Milton Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 435 (1973).

35. 458 U.S. 886 (1982).

36. *See, e.g.*, Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 128 (3d Cir. 1999) (holding that First Amendment principles reflected in *Noerr-Pennington* doctrine bar state common law tort claims); Eaton v. Newport Bd. of Educ., 975 F.2d 292, 298 (6th Cir. 1992) (applying *Noerr-Pennington* to prohibit claims for the tort of outrageous conduct); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1321 (E.D.N.Y. 1996) (holding that *Noerr-Pennington* immunity applies beyond the antitrust context).

37. 435 U.S. 765, 792 n.31 (1978) ("If the First Amendment protects the right of corporations to petition legislative and administrative bodies, see [*California Motor Transport* and *Noerr*], there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity.").

Amendment's Petition Clause, regardless of whether the opposing parties are harmed by the resulting governmental action or suffer injury as an incidental effect of the petitioning activities.

II. THE FRAMERS' UNDERSTANDING OF THE RIGHT TO PETITION

The Framers never specifically spoke of for-profit corporate speech, and therefore never distinguished between for-profit corporate speech and nonprofit corporate speech. Recently discovered archival records indicate, however, that the Supreme Court's explication of the right of petition in the *Noerr-Pennington* line of cases is consistent with the Framers' understanding of petitioning as including a derivative right to corporate issue advocacy as expressed through publicity campaigns that are aimed at indirectly lobbying the government.[38]

The First Congress seems to have subsumed nonprofit corporate issue advocacy under the right to petition.[39] The clearest evidence of this is the First Congress's response to a Quaker campaign seeking to abolish slavery, a response that included an informal inquiry into the scope of the Petition Clause.[40] Though the First Congress ultimately concluded that the Petition Clause did not include a right to "commitment" of the Quakers' petitions, it nevertheless proffered that individuals and corporations, since the Quakers were a nonprofit corporation, had a right to present their grievances to Congress as guaranteed by the Petition—and not Free Speech—Clause of the First Amendment.[41]

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38. *See generally* DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA (Kenneth R. Bowling et al. eds., 1998) [hereinafter DOCUMENTARY HISTORY]. This collection was produced as part of a project founded by George Washington University. *See* About the First Federal Congress Project, http://www.gwu.edu/~ffcp/aboutffcp.html (last visited Mar. 10, 2008). It has been heralded as "the most complete record imaginable of the early interpretation and implementation of the U.S. Constitution." Jeffrey L. Pasley, Book Review, 15 J. EARLY REPUBLIC 131, 131 (1995) (reviewing DOCUMENTARY HISTORY, vols. X & XI). Once completed, this series will replace the first two editions of the *Annals of Congress*, which currently serves as the authoritative historical record of congressional activity. Noble E. Cunningham, Jr., Book Review, 60 J. S. HIST. 124 (1994).

39. *See, e.g.*, BE & K Constr. Co. v. NLRB, 536 U.S. 516, 524 (2002) (declaring the right to petition "one of the most precious of the liberties safeguarded by the Bill of Rights"); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 n.31 (1978) ("[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies . . . ."); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("[T]he right to petition extends to all departments of the Government."); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.").

40. *See generally* diGiacomantonio, *supra* note 5.

41. *See* LLOYD'S NOTES, FEB. 11, 1790, *reprinted in* 12 DOCUMENTARY HISTORY, *supra* note 38, at 270, 272 (statement of Boudinot) (providing "any person who feels any grievance

This group of Quakers was better known as "The Pennsylvania Society for Promoting the Abolition of Slavery, for the Relief of Negroes Unlawfully Held in Bondage, & for Improving the Condition of the African Race."[42] Led by Benjamin Franklin, it was the first organization to rely upon its constitutional right to present Congress with a petition in which its membership held no "private interest," and to do so using the equivalent of a modern-day public relations campaign.

The Quakers' complaint was both audacious and unequivocal: they believed that the General Welfare Clause of the United States Constitution provided grounds for the necessary elimination of slavery.[43] The Quakers followed their petition with weeks of advocacy evocative of contemporary lobbying practices—they hosted dinners for elected officials, visited them when they were sick, engaged in large-scale mass media outreach through local newspapers, testified before congressional committees, and even drafted model reports for congressional members.[44]

Despite the novelty of the Quakers' techniques, the First Congress was silent on the question of whether the Quakers' means were protected by the right to petition and on the issue of the use of mass media to arouse popular support for their petition. The silence of Congress, however, implies that the Framers' conception of the Petition Clause contemplated that some appeals to Congress would take place indirectly through mass media, rendering the Quakers' reliance upon newspapers new but unremarkable.[45]

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has [a] right to address [Congress]"); *cf. id.* (documenting the first case of corporate issue advocacy in 1790 and subsequent congressional response subsuming issue advocacy under the Petition Clause of the First Amendment).

42. Petition to Congress from the Pa. Soc'y for Promoting the Abolition of Slavery, *available at* http://www.archives.gov/legislative/features/franklin/ (last visited Oct. 25, 2008) (click document images in right column to view scans of both sides of the original petition).

43. *Id.* ("[M]any important & salutary Powers are vested in you for 'promoting the Welfare & *securing the blessings of liberty to the People of the United States.*' . . . [T]hese blessings ought rightfully be administered, *without distinction of Colour*, to all descriptions of People . . . .").

44. *See* diGiacomantonio, *supra* note 5, at 188-90.

45. More specifically, the Quakers continually distributed literature to the entire congressional membership, including both the House and Senate. They liaised with the committee hearing their petition by preparing testimony, offering recommendations, and submitting "Queries." *See id.* at 180-81 (noting that Pemberton routinely distributed tracts to the Speaker of the House and the Vice President for distribution to their respective bodies). Additionally, they engaged in a large-scale letter writing campaign, including arguments for the Quakers' petition and strategic suggestions to Congress regarding the timing of the relevant committee presentations. *See id.* at 182 (citing a letter from Warner Mifflin to Abiel Foster); *cf.* N.Y. DAILY GAZETTE, Mar. 26, 1790, *reprinted in* 12 DOCUMENTARY HISTORY, *supra* note 38, at 819, 830 ("This will prove the truth of what I advance, however it may be censured by the author quoted by the gentleman, or the Quakers, who have sent me frequent letters, one of which, a tolerable large sermon, I have in my hand."). They even went so far as to obtain an advance copy of a report from the committee charged with considering the merits of their petition, in order to comment on it and return it to a committee member before

What did reach the floor of the First Congress was the potential impact of the Quakers' campaign on members' prospects for reelection. As early as 1790, some congressmen argued against a constitutional right backing Quaker action, in part because they worried about their prospects for reelection if the Quaker campaign continued.[46] In particular, the Southern Delegation became increasingly convinced that the Quaker "presence in the gallery 'had a manifest influence on those members who apprehended the loss of their election if they displeased the Quakers who vote by System.'"[47] These members of Congress argued that, because the Quaker campaign could result in the members' defeat during a subsequent election, the Quakers exerted an improper influence over the electoral process by virtue of their petition. The right to petition guaranteed by the First Amendment surely could not protect such activity, as the Quakers sought to rouse popular sentiment and not simply to redress a private grievance.

Such objections would not carry the day, and a clear consensus ultimately emerged identifying the Quakers' actions with the constitutional right to present a petition to Congress, through whatever media the Quakers deemed most appropriate, regardless of its potential impact on incumbent office holders and future elections.[48] The implications of this response are profound. The First Congress anticipated that grassroots advocacy by corporations might constitute de facto intervention into political campaigns and might affect electoral outcomes. In spite of the risk of electoral defeats, the First Congress protected the right of nonprofit corporations to engage in such grassroots advocacy incorporating mass media.

III. CONTEMPORARY SPEECH CLAIMS AND THE PETITION CLAUSE

The Framers exercised a principled conception of the Petition Clause with respect to grassroots advocacy by nonprofit corporations despite the potential negative impact on incumbent office holders. Modern courts, however, have shied away from anything approximating this protection afforded by the right to petition and have sought out the more flexible standards of the Free Speech Clause. Unlike the Framers, these courts have been very concerned about the detrimental effects of negative ads attacking candidates for office.[49] As Justice Scalia has pointed out, however, judicial decisions upholding campaign finance

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its official presentation on the floor. *See Diary of William Maclay and Other Notes on Senate Debates* (July 8, 1789), *in* 9 DOCUMENTARY HISTORY, *supra* note 38, at 103-04.

46. *See* diGiacomantonio, *supra* note 5, at 183.

47. *Id.*; *see also id.* at 182 (noting that although no copies of their comments survived, "[t]he Quakers' influence over the broader positions conveyed in the report was more subtle but apparent.").

48. *See, e.g.*, THE ANTI-SLAVERY EXAMINER 86 (1845) (statement of Boudinot) ("That petition [was] for redress of grievances. The duty of the house [was] to redress grievances if possible.").

49. *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003).

laws seeking to prohibit so-called "attack ads" have done little more than allow incumbents to limit criticism of their job performance.[50]

A return to an originalist interpretation of the Petition Clause could help increase merit-based turnover in federal elections, and it would certainly provide a clear framework for judicial decision making.[51] The Court's current holding counsels that speech may not be proscribed unless it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[52] While this standard could be construed broadly to prohibit essentially very little speech, it also fails to provide courts with any sense of what constitutes an appeal to vote for or against a specific candidate. If the "no reasonable interpretation" standard is understood broadly, then locating nonprofit political speech under the Petition Clause would narrow the Court's current holding by providing a speaker-based exemption from laws regulating political speech. At the same time, because the Court's *WRTL* "reasonableness" standard is at best an evolving standard that is likely to devolve into a battle of the experts regarding voter interpretation of the advertisement, application of an originalist perspective would extricate courts from what is effectively high-end fact finding when it comes to classifying political broadcasts.[53] Petition Clause-based jurisprudence would therefore have the primary benefit of clarifying the standard governing speech by nonprofits by replacing a fact-specific inquiry with a formalistic rule; nonprofit corporations would be exempted from other limitations on political speech by virtue of their identity as ideological groups. Additionally, an originalist perspective has the added virtue of being a principled basis for decision making, which from the Court's perspective, could help stabilize jurisprudence in this area of election law.

One explanation for courts' continued adjudication of campaign finance laws exclusively under the Free Speech Clause of the First Amendment is that modern cases such as *WRTL* do not literally involve a petition presented to Congress. Though this difference from the days of the First Congress may seem crucial, the historical obsolescence of the petition actually renders it inconsequential. Wisconsin Right to Life is a nonprofit, nonstock, ideological advocacy corporation just as the Quaker organization had been. And just as the Quakers launched a media campaign through newspapers, Wisconsin Right to Life broadcast a series of advertisements as part of a "grassroots lobbying

50. *Id.* at 261 (Scalia, J., concurring in part and dissenting in part) (arguing that "it is not the proper role of those who govern us to judge which campaign speech has 'substance' and 'depth' (do you think it might be that which is least damaging to incumbents?) and to abridge the rest").

51. *See id.* (noting that negative "ads *do persuade* voters, or else they would not be so routinely used by sophisticated politicians of all parties").

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

53. *See generally* Richard Briffault, WRTL *and* Randall: *The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807 (2007) (highlighting the uncertainty produced by the *WRTL* decision).

campaign."[54] The fact that Wisconsin Right to Life did not deliver a petition to Congress as the Quakers had done is not a particularly meaningful distinction between the groups, and it is certainly insufficient to warrant disparate constitutional treatment.

Wisconsin Right to Life and the Quakers were almost identical in their respective uses of their preferred mass media. Even though the Quakers had presented Congress with copies of their petitions, they nevertheless reprinted the petitions in area papers. For example, *The Daily Advertiser*, a New York paper, printed all three petitions that the Quakers had submitted to Congress.[55] Wisconsin Right to Life communicated its views through television, its chosen means for airing its grievances to the public at large. The advertisements produced by Wisconsin Right to Life—three in total—criticized a group of senators for filibustering judicial nominations and called on Wisconsinites to contact their elected representatives.[56] Similarly, the Quakers had relied in part upon the newspapers to coordinate a letter-writing campaign by constituents urging elected officials to support the Quakers' petition.[57] Both the Quakers and Wisconsin Right to Life relied upon hyperbole to communicate their underlying messages. The Quakers penned, for example, a parody of one of Andrew Jackson's speeches supporting slavery, while Wisconsin Right to Life satirized the filibuster of judicial nominees by portraying situations in which delays would be equally ludicrous.[58] Wisconsin Right to Life's advertisements

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54. *WRTL*, 127 S. Ct. at 2660. Specifically, Wisconsin Right to Life is a § 501(c)(4) corporation. *See* I.R.C. § 501(c)(4) (2000) (providing the section under which Wisconsin Right to Life is incorporated); Brief of Appellee at 7-8, *WRTL*, 127 S. Ct. 2652 (No. 06-969), 2007 WL 106518.

55. diGiacomantonio, *supra* note 5, at 190.

56. Wis. Right to Life, Inc. v. FEC, 466 F. Supp. 2d 195, 198 n.3 (D.D.C. 2006). The transcript of the first ad entitled "Wedding" read as follows:

> PASTOR: And who gives this woman to be married to this man?
> BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up . . .
> VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org. Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Id. The other two ads, entitled "Loan" and "Waiting," were substantially similar except that "Waiting" was designed as a television advertisement, while the other two were formatted only for radio. *See WRTL*, 127 S. Ct. at 2660-61 nn.2-3 (noting that the ads differed only in their lead-ins and the fact that "Waiting" was a television advertisement).

57. diGiacomantonio, *supra* note 5, at 183 (citing a letter from Warner Mifflin to Abiel Foster); *cf.* N.Y. DAILY GAZETTE, Mar. 26, 1790, *reprinted in* 12 DOCUMENTARY HISTORY, *supra* note 38, at 830 ("This will provide the truth of what I advance, however, it may be censured by the author quoted by the gentleman, or the Quakers, who have sent me frequent letters, one of which, a tolerable large sermon, I have in my hand.").

58. 8 DOCUMENTARY HISTORY, *supra* note 38, at 318 n.34 (Benjamin Franklin

may seem superficially dissimilar from the Quakers' messages, but the organization's use of television and radio parallels the Quakers' use of the newspapers of the eighteenth century. This places Wisconsin Right to Life's advertisements firmly within the ambit of the Framers' understanding of the Petition Clause, since the Framers had considered the Petition Clause applicable to the Quakers' actions.

This interpretation is supported by precedent, since the Court has held that the lack of a direct appeal to Congress does not render activities unprotected by the Petition Clause. Rather, as evinced by the Court's several cases expanding the right to petition to include issue and legislative advocacy campaigns, the Court has continually construed the right broadly. Specifically, the Court has held that corporations have a First Amendment right to advocacy through "channels and procedures of state and federal agencies and courts," and a right to launch a publicity campaign designed to sway public opinion.[59] The Court reified these corporate speech rights under the purview of the Petition Clause, suggesting that the right to petition could be adapted to include indirect petitioning like the political broadcasts at issue in *WRTL*.

But despite these gestures toward identifying a right to corporate political speech under the Petition Clause, the Court has never gone so far as to decide BCRA challenges on the basis of the right to petition. Thus in *WRTL* the Court ultimately held that the advertisements at issue fell within the penumbra of the First Amendment's Free Speech Clause.[60]

IV. THE UNACKNOWLEDGED ORIGIN OF THE *WRTL* STANDARD

A particularly significant aspect of the Court's holding in *WRTL* was that the Court purported to adapt a rule it had pronounced in *McConnell v. Federal Election Commission*[61]—that genuine issue advertisements are protected while "sham" advertisements are not.[62] However, the *WRTL* Court actually expounded upon a distinction derived from its application of the Petition

published this piece—a parody defense of enslavement of the Christians by the Moors—under the name of "Historicus.").

59. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972) (right to advocacy through courts); *see also* E. R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) (right to launch a publicity campaign).

60. *WRTL*, 127 S. Ct. at 2674 ("[A]s is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself: 'Congress shall make no law . . . abridging the freedom of speech.' The Framers' actual words put these cases in proper perspective.").

61. 540 U.S. 93 (2003).

62. *Id.* Technically, the Court in *McConnell* distinguished between "issue" ads and "express advocacy," with the latter being synonymous with "sham issue ads." *Id.* at 126 ("While the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words.").

Clause to antitrust laws. Although both the free speech-based *McConnell* ruling and the Petition Clause-based antitrust jurisprudence apply the term "sham" to describe their standards, until *WRTL* these standards were fundamentally distinct. Despite being cloaked in the mantle of free speech, the language of the *WRTL* standard actually bears a stronger resemblance to the description of a "sham" standard under the Petition Clause.[63]

The Court first enunciated the "sham" exception in the context of *Noerr-Pennington* immunity, the antitrust doctrine holding that under the First Amendment's Petition Clause, it is not a violation of federal antitrust laws for competitors to lobby the government to change the law in a way that would reduce competition.[64] Specifically, the Court held that corporations could lobby the government because "the right of petition [was] one of the freedoms protected by the Bill of Rights."[65] Relying on the right to petition the government for redress of grievances, as well as the right of free association contained in the First Amendment, the Court has subsequently applied the *Noerr-Pennington* doctrine to other contexts, such as petitioning a legislature for the passage of laws with anticompetitive intent, petitioning the executive for the enforcement of laws, and petitioning a court or administrative agency for relief.[66]

In a complementary holding, the Court has held that the petitioning of governmental bodies, whether legislative, executive, administrative, or judicial, does not qualify for *Noerr-Pennington* immunity if the petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor."[67] Thus the Court distinguished between a legitimate exercise of the Petition Clause right and an invocation of the right to petition to obfuscate violations of the antitrust laws.

The Court has sought to operationalize the "sham" distinction in the context of corporate political speech by extrapolating from restrictions on the right to petition as applied in the context of antitrust law. The Court first used "sham" as a moniker under the campaign finance laws in *Buckley v. Valeo*.[68]

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63. *Compare* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993) (defining a "sham lawsuit" as one in which "no reasonable litigant could realistically expect success on the merits"), *with WRTL*, 127 S. Ct. at 2667 (defining a "sham issue ad" as one that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate").

64. *See Noerr*, 365 U.S. at 144 ("There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.").

65. *Id.* at 138.

66. *See* BE & K Constr. Co. v. NLRB, 536 U.S. 516, 525-28 (2002) (discussing the "sham litigation standard").

67. *Prof'l Real Estate Investors*, 508 U.S. at 56 (internal quotation marks omitted).

68. 424 U.S. 1 (1976) (per curiam).

There the Court adopted a bright-line test—the use of "magic words" like "vote for" or "vote against"—to determine whether an advertisement was genuine or sham.[69] Recognizing the failure of the *Buckley* bright-line test in eradicating sham advertisements because the magic words were rarely employed, the Court in *McConnell* upheld an outright ban on the mention of candidates for federal office within "blackout" periods preceding primary and general elections.[70] However, the Court has now moved away from its *McConnell* stringency. The Court in *WRTL* ruled that a flat ban on the mention of candidates for federal election in advertisements might sometimes impede the First Amendment free speech rights of corporations, at least in as-applied challenges such as those brought by Wisconsin Right to Life.[71]

Unlike past cases, *WRTL* is especially evocative of Petition Clause jurisprudence. In defining "sham issue ads," the Court reverted to language that parallels a portion of the Court's articulation of the sham exception to *Noerr-Pennington*. In *Professional Real Estate Investors v. Columbia Pictures*,[72] the Court had adopted a two-part definition of "sham litigation," a specific subsection of the "sham" exception to immunity from the antitrust laws.[73] First, the Court held that in order for a lawsuit to be considered a "sham," and thus not entitled to *Noerr-Pennington* immunity, the lawsuit "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[74] Second, the Court instructed that if the lawsuit is found to be "objectively baseless," then the litigant's subjective motivation becomes relevant, and courts should focus on whether the "lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor'" regardless of the lawsuit's outcome.[75] Likewise, the litmus test of "genuine advocacy" offered by the Court in *WRTL* dictates that an advertisement is considered a "sham issue ad" and thus prohibited where "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[76]

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69. *See id.* at 44 n.52 (restricting the prohibition on political broadcasts "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

70. McConnell v. FEC, 540 U.S. 93, 193 (2003). The *McConnell* Court stated the following:

> Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.

Id.

71. FEC v. Wis. Right to Life, Inc. (*WRTL*), 127 S. Ct. 2652, 2659 (2007).

72. 508 U.S. 49 (1993).

73. *Id.* at 60.

74. *Id.*

75. *Id.* at 60-61.

76. *WRTL*, 127 S. Ct. at 2667.

Although the right to petition makes no appearance in *WRTL*, its definitional language strongly suggests the Court borrowed from earlier antitrust pronouncements. Nowhere is this clearer than in the Court's clarification of the role of context in assessing the reasonable interpretation of an advertisement. The "reasonable interpretation" step in *WRTL* is analogous to the second, subjective intent prong of the sham litigation standard.[77] Even though the Court explicitly stated in the majority opinion that the intent of those who broadcast the advertisements is irrelevant to the determination of whether an advertisement is genuine or sham, this disclaimer is at odds with the Court's earlier case law.[78] In *McConnell*, for example, the Court focused almost myopically on the underlying intent of the advertisements, holding, inter alia, that "the conclusion that [certain issue ads] were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."[79] The Court inferred a subjective intent to electioneer based on the timing of the advertisements.

The Court in *WRTL*, however, stopped short of holding that intent was never important. In particular, the Court held that "[c]ourts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future."[80] Although subjective intent is not a separate, subsequent prong of the broadcast analysis in the same way as under *Noerr-Pennington*, the Court nevertheless afforded judicial decision makers significant discretion in their analysis of a broadcast by explicitly providing for the consideration of context.[81] This discretion will provide courts with the opportunity to incorporate subjective intent into their determinations, thus completing the alignment of the *WRTL* "sham issue ad" standard under the Free Speech Clause with its "sham lawsuit" counterpart under the Petition Clause.

CONCLUSION

The Court's revival of Petition Clause standards in all but name suggests that the time has come to return nonprofit political speech to the Framers' intent. Justice Alito's concurring opinion in *WRTL* contemplates that the "no reasonable interpretation" standard pronounced by the Court could become untenable in practice, thus necessitating a reconsideration of the

77. *See id.* at 2665 (noting that *Buckley v. Valeo* rejected an intent-and-effect test for distinguishing between discussions of issues and candidates, and *McConnell* did not purport to overrule *Buckley* on this point "or even address what *Buckley* had to say on the subject").

78. *Id.*

79. McConnell v. FEC, 540 U.S. 93, 127 (2003).

80. *See WRTL*, 127 S. Ct. at 2669 (internal quotation marks omitted).

81. *See id.*

constitutionality of the political broadcast portions of BCRA.[82] When the Court reaches that juncture, the Justices should formally reinstitutionalize nonprofit corporate political speech under the Petition Clause, thus clarifying the doctrine in a way that draws on the Framers' support for an absolute right to petition.

If the Court were to abandon its "sham issue ad" standard as Justice Alito opined it might, the Framers' Petition Clause would allow the Court to keep the political broadcast portions of BCRA intact while exempting a broad range of speakers from its regulatory grasp. A speaker-based exemption would thus offer nonprofit corporations discretion to engage in issue advocacy in whatever way they perceive to be most effective—just as nonprofit corporations did during the First Congress. The Court in *WRTL* explicitly declined to rule on such narrow grounds, noting that some of Wisconsin Right to Life's amici curiae "assert that '[s]peech by nonprofit advocacy groups on behalf of their members does not "corrupt" candidates or "distort" the political marketplace,'" and that "'[n]onprofit advocacy groups funded by individuals are readily distinguished from for-profit corporations funded by general treasuries.'"[83] However, should the Court again be faced with a constitutional challenge to BCRA, this is precisely the argument that it will have to address. The Court should seize the opportunity to recenter its political speech jurisprudence in an originalist framework. It is crucial that the Court's decisions comport with historical understanding and give those whose speech will be regulated an accessible and objectively understandable standard. The Framers' Petition Clause provides the most principled path to this end.

82. *Id.* at 2674 (Alito, J., concurring).

83. *Id.* at 2673 n.10.