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John A. Fortunato
Shannon E. Martin

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THE SUPREME COURT PERSPECTIVE OF MEDIA EFFECTS AS EXPRESSED IN CAMPAIGN FINANCE REFORM

John A. Fortunato† and Shannon E. Martin‡

ARTICLE ABSTRACT:

The Bipartisan Campaign Reform Act (BCRA) of 2002 amended campaign finance law by banning unlimited soft money contributions to political parties and reforming the financing of advertising close to an election. In this ruling the Court is clearly concerned with the amount of money being donated to political candidates, which leads to the appearance of impropriety in gaining access to elected officials that in turn may influence legislation. In ruling on the constitutionality of this legislation, the Supreme Court also provided insight into its view of mass media effects. In applying the principles of cultivation theory and the media framing paradigm, the groups that can fund more commercials have an advantage with voters who may believe these repeated advertisements and vote for that particular candidate. This Article posits what might be the Supreme Court’s view of the media effects debate by examining its ruling in McConnell v. FEC.

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I. INTRODUCTION

On December 10, 2003, the U.S. Supreme Court, in a five-to-four ruling, upheld the major provisions in The Bipartisan Campaign Re-

† John A. Fortunato, Ph.D., is an Associate Professor at Fordham University in the School of Business, Area of Communication and Media Management. Dr. Fortunato has published journal articles in Communications and the Law, Texas Review of Entertainment & Sports Law, Rutgers Law Record, and Journal of Sports Media.
‡ Shannon E. Martin is a Professor in the School of Journalism at Indiana University at Bloomington. Dr. Martin has published articles in Information & Communications Technology Law, South Carolina Law Review, Communication Law and Policy, and Communications and the Law.
form Act (BCRA) of 2002.\textsuperscript{1} The new law amended campaign finance by banning unlimited soft money contributions to political parties and reforming the financing of advertising close to an election. In ruling on the constitutionality of the legislation, the Supreme Court also provided insight into its view of mass media effects. The purpose of this Article is to use the most recent arguments that the Supreme Court presented in its ruling in the case, McConnell v. FEC,\textsuperscript{2} to provide an analysis and explanation of how it views the media effects debate about political campaign advertising. By placing regulations on advertising, the Supreme Court is in essence claiming that political advertising, especially close to an election, can have a significant influence on people’s voting behavior. It contends the number of times that a commercial will air and the fact that these advertisements are strategically framed to positively represent the candidates and their positions can influence the audience’s voting behavior. Because it is a costly endeavor to continuously fund advertising the Supreme Court is tying money and the practices of campaign finance directly to mass media effects.

There are two mass media effects perspectives whose principles can be applied to election funding of advertisements and the Supreme Court’s ruling in McConnell: (1) cultivation theory, as articulated by Gerbner;\textsuperscript{3} and (2) the media framing paradigm.\textsuperscript{4} Cultivation theory claims that people can be influenced by messages to which they are repeatedly exposed. The media framing paradigm focuses on the idea that messages that provide certain perspectives can have those perspectives become salient in the minds of the public. The combination of these two concepts produces a greater chance of a media effect. The groups that can fund more commercials have an advantage by increasing the likelihood that voters believe these repeated, framed advertisements and vote for that particular candidate. The need for repeated, framed advertising messages therefore creates an inequity in the election process, with those possessing more money having a distinct advantage. The Court also addressed another critical concern regarding election fund raising practices: people or groups donating to successful candidates and national parties would then have an opportunity for access to elected officials and for potentially influencing legislation.

\textsuperscript{1} McConnell v. FEC, 540 U.S. 93 (2003).
\textsuperscript{2} Id.
\textsuperscript{3} See George Gerbner, Cultivation Analysis: An Overview, 1 MASS COMM. & SOC’Y 175, 191 (1998); George Gerbner et al., Growing Up with Television: Cultivation Processes, in Media Effects: Advances in Theory and Research, 43 (Jennings Bryant & Dolf Zillman eds., 2d ed. 2002).
\textsuperscript{4} See generally Robert M. Entman, Framing: Toward Clarification of a Fractured Paradigm, 43 J. COMM. 51 (Autumn 1993); Framing Public Life: Perspectives on Media and Our Understanding of the Social World (Stephen Reese et al. eds., 2001) [hereinafter Framing Public Life].
II. Background

The issue of campaign finance reform has long been debated with little formidable change. However, on March 27, 2002, President George W. Bush signed into law The Bipartisan Campaign Reform Act of 2002 (BCRA), campaign finance reform legislation commonly referred to as McCain/Feingold. The BCRA amends the Federal Election Campaign Act of 1971 (FECA) and changes campaign finance laws by banning unlimited soft money contributions to political parties and reforming the financing of advertising close to elections. Immediately upon signing the BCRA into law there were a dozen legal challenges brought from groups all along the political spectrum, ranging from the American Civil Liberties Union (ACLU) to the National Rifle Association (NRA). These twelve cases were consolidated under McConnell v. Federal Election Commission (FEC) when the case eventually reached the U.S. Supreme Court. On December 10, 2003, the Supreme Court upheld the major provisions in a five-to-four ruling. The BCRA thus began a new era in campaign finance law.

Before examining the provisions of the BCRA and the rationale presented by the Supreme Court in its ruling, some discussion of First Amendment theory and an articulation of the marketplace of ideas concept, as well as a brief discussion of mass media effects theory, will help put the complexities of campaign finance law into its proper context. The cultivation theory as articulated by Gerbner and the media framing paradigm are highlighted as they relate to the Supreme Court’s opinion in McConnell because the Court expresses a fear that the funding of repeated, framed advertisements might affect an election. The repeated advertising that can produce a cultivation effect and the media framing paradigm focusing on messages that only contain one perspective are where the critical connections can be made between the First Amendment, marketplace of ideas, media effects theory, campaign finance reform, and election-oriented communications.

III. Literature Review

A. The Marketplace of Ideas and Democracy

The larger debate of how election messages are disseminated and how elections are funded occurs within the context of The First Amendment and the marketplace of ideas concept. John Milton promoted the marketplace of ideas concept, suggesting that freedom of

7. See Gerbner et al., supra note 3.
8. See Entman, supra note 4; Framing Public Life, supra note 4.
expression and debate would lead to the discovery of truth.\textsuperscript{9} John Stuart Mill later stressed the need for debate and an open exchange of ideas so that faulty opinions would be exposed.\textsuperscript{10} The marketplace of ideas concept is that democracy is best served by an open exchange of many ideas so that the citizenry has the best possible information with which to make a decision.\textsuperscript{11} Without all of the various perspectives being offered, potentially valuable information cannot be learned, and therefore the best possible decisions on the part of the citizenry cannot be made. Without a system where all opinions and information are exposed, perhaps the most vital information that is necessary to make a decision may be what is concealed. It is this exchange of ideas that becomes a necessary, core component of an effectively functioning democracy.

While idealistic, the practicality of achieving the utopian marketplace of ideas concept where there is an open exchange of all ideas is extraordinarily difficult, if not impossible. There are some basic characteristics of a marketplace that even appear in the evaluation of the mass media industry. These characteristics illuminate both the strengths and the flaws of the marketplace of ideas concept. Marketplaces have vehicles for distribution and retrieval of products or services. The marketplace of ideas concept needs the characteristics of opportunity for dissemination of messages by all people and groups and the opportunity for the audience to access all of these messages. The marketplace of ideas concept falters in that a characteristic of a marketplace is that inevitably an inequity is created based on economics as groups or people have an advantage because of their ability to continuously fund the placing of messages—advertisements—into the marketplace.

The level of regulation that balances the economics of a marketplace and tries to keep the marketplace fair and equitable while maintaining The First Amendment principle that no law may abridge the freedom of speech is thus precarious. Whether to take the marketplace of ideas as a purely democratic expression of intellectual social exchange or to consider it a metaphor with economic implications was carefully explored by several authors of the Twentieth Century.\textsuperscript{12} Na-


\textsuperscript{12} See Paul H. Brietzke, How and Why the Marketplace of Ideas Fails, 31 Val. U. L. Rev. 951 (1997); Benjamin S. DuVal, Jr., Free Communication of Ideas and the
poli summarizes these discussions by observing that economic-centered interpretations of the metaphor are often used to bolster arguments against regulation, while democracy-centered interpretations of the metaphor are often used to support regulation of the media.\textsuperscript{13}

\section*{B. Mass Media Effects}

Another characteristic of a marketplace is that the public makes determinations about which products—ideas—remain in the marketplace. Some of these determinations are made through experiencing the product or idea. These determinations, however, can also be formulated based on information that is received from the mass media. The power of the mass media to influence audience thinking and behavior is often debated.\textsuperscript{14} The core of mass media effect studies remains the same—evaluating the effect of the independent variable of exposure to media messages influencing the dependent variable of audience behavior. Gerbner, Gross, Morgan, Signorielli, and Shanahan explain that "[t]raditional-effects research is based on evaluating specific informational, educational, political, or marketing efforts in terms of selective exposure and measurable before/after differences between those exposed to some message and others not exposed."\textsuperscript{15}

There are dichotomous perspectives of mass media effects. A more direct effects perspective contends that mass media messages are very powerful in influencing the audience. Those with this perspective also tend to view the audience in a more monolithic nature. The indirect or limited effects perspective contends that mass media messages are not an overwhelming influence and are only one potential factor in influencing behavior because the message is interpreted by the individual audience member as to its meaning. Those with this perspective contend that causality of behavior is due to a multitude of factors,


\textsuperscript{13} See Napoli, supra note 12.

\textsuperscript{14} See generally Elizabeth M. Perse, \textit{Media Effects and Society} (2000) (discussing current research attempts to improve understanding of media effects); see Lee B. Becker & Gerald M. Kosicki, \textit{Understanding the Message-Producer/Message Receiver Transaction, in Research in Political Sociology} 33 (1995); Gerbner et al., supra note 3.

\textsuperscript{15} Gerbner et al., supra note 3, at 47.
not merely media exposure. The indirect effects perspective focuses on the interpretive ability of a diverse audience of individuals that is active in interpreting the content they are receiving.\textsuperscript{17} Kline, Miller, and Morrison claim that "individual uses for media content act as an intervening variable: mitigating or enhancing the ultimate effects of a media message."\textsuperscript{18} Willnat points out that "different people can be exposed to the same message and yet perceive it quite differently, depending on their prior knowledge about the issue under consideration."\textsuperscript{19}

Through an indirect effects perspective there would not be any fear that funding and airing an advertisement repeatedly would influence the audience. In studying the potential effect of advertising, however, there is an assumption that these advertising messages, both in terms of repeated exposure and specific content, can have an effect on voters. Therefore, an argument for a more direct effects perspective, or a strong indirect effects perspective\textsuperscript{20} as it has been phrased by some scholars, is being made. Two theories from a more direct effects perspective can be applied to the process of electing candidates and the funding of election communications: (1) cultivation; and (2) the media framing paradigm.

\section*{C. Cultivation}

The concept of "cultivation" reported by Gerbner examines exposure to messages over long periods of time. It is described by Gerbner et al. as "the independent contributions television viewing makes to viewer conceptions of social reality. The most general hypothesis of cultivation analysis is that those who spend more time 'living' in the world of television are more likely to see the 'real world' in terms of the images, values, portrayals, and ideologies that emerge through the lens of television."\textsuperscript{21} From the cultivation perspective the difference in the amount of television viewing, either light or heavy, will be the

\begin{itemize}
\item \textsuperscript{16} See Joseph T. Klapper, The Effects of Mass Communication 7–9 (1960).
\item \textsuperscript{17} See Elihu Katz et al., Utilization of Mass Communication by the Individual, in The Uses of Mass Communication: Current Prospectives on Gratifications Research 19, 28 (Jay G. Blumler & Elihu Katz eds., 1974) [hereinafter The Uses of Mass Communication].
\item \textsuperscript{18} F. Gerald Kline, Peter V. Miller, \& Andrew J. Morrison, Adolescents and Family Planning Information: An Exploration of Audience Needs and Media Effects, in The Uses of Mass Communication 113.
\item \textsuperscript{19} Lars Willnat, Agenda-Setting and Priming: Conceptual Links and Differences, in Communication and Democracy: Exploring the Intellectual Frontiers in Agenda-Setting Theory 58 (Maxwell E. McCombs, Donald L. Shaw, \& David Weaver eds., 1997).
\item \textsuperscript{21} Gerbner et al., supra note 3, at 47.
\end{itemize}
determination in the cultivation effect with heavy viewers more likely to take on the reality as expressed by television. People, therefore, essentially have different cultivation levels based on the amount of their media exposure.

Cultivation analysis tends to examine effects that are caused by a culmination of repeated exposure over a long period of time. Shanahan and Morgan explicitly state, “cultivation is not about how voters’ feelings about a political candidate might be affected by some newscast or ad campaign.”22 The principal concept of cultivation research—influence due to repeated television exposure of a message—is, however, applicable to the issue of campaign finance and the influence of advertising in the outcome of an election. Shanahan and Morgan explain that “cultivation is about the implications of stable, repetitive, pervasive and virtually inescapable patterns of images.”23 Advertisements in an election are certainly repeated, and although the argument that people are affected by exposure over a long period of time is not tested, the concept of repeated exposure is relevant. Applying cultivation to the regulation of elections informs that it takes a large amount of money to repeatedly air commercials and produce the cultivation effect.

Perspectives that believe in a powerful and influential mass media temper their ideas and recognize that the audience, through their experiences and interpretive abilities, are a mitigating factor in the ultimate effect that a media message might have on an audience. Gerbner et al. point out that cultivation analysis is an ongoing process that does take into account the interaction of messages, audiences, and contexts:

From the reception perspective, it seems logical to argue that other circumstances do intervene and can neutralize the cultivation process, that viewers do watch selectively, that program selections make a difference, and that how viewers construct meaning from texts is more important than how much they watch. We do not dispute these contentions. The polysemy of mediated texts is well established. From the cultivation perspective, though, to say that audiences’ interactions with media texts can produce enormous diversity and complexity does not negate that there can be important commonalities and consistencies as well across large bodies of media output.24

D. Media Framing Paradigm

In addition to the repeated exposure of advertisements, the potential of an effect is enhanced by the content of the message. Groups

23. Id.
engage in advertisement not only because of their ability to control the frequency and the placement of the message, but because by paying for that media time and space they also gain complete control of the content of the message. In a political advertisement with complete control of the content, the message is going to be framed to benefit the candidate or cause being endorsed.

Frames can be presented to shape public opinion on a particular topic and can also be transmitted across media formats. Frames can connect with particular viewpoints among audiences who process issue stories or advertising from very distinct perspectives. Media scholars find the paradigm of media framing to be a useful device for identifying or categorizing the ways in which stories are contextualized. Some researchers assert that it serves as a better descriptor than objectivity or bias. Within each story there are many frames, and some frames will be emphasized while others are completely ignored.25 Entman explains, "to frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described."26 He also claims that frames "call attention to some aspects of reality while obscuring other elements, which might lead audiences to have different reactions."27 Nelson, Clawson, and Oxley comment that "frames influence opinions by stressing specific values, facts, and other considerations, endowing them with greater apparent relevance to the issue than they might appear to have under an alternative frame."28 The frames do not represent a direct effect because an active audience is still interpreting the message. Reese speaks to the interpretive nature of frames, stating, "frames are never imposed directly on media audiences. The acceptance and sharing of a media frame depends on what understandings the 'reader' brings to the text to produce negotiated meaning."29

Through the selection of certain information to the exclusion of other potentially relevant facts, this framing can influence public opinion.30 Shen describes framing as a deliberate and strategic process.

26. Entman, supra note 4, at 52.
27. Id. at 55.
29. Stephen D. Reese, Prologue—Framing Public Life: A Bridging Model for Media Research, in Framing Public Life 15.
30. See Shanto Iyengar, Is anyone Responsible? How Television Frames Political Issues 13 (1991); Framing Public Life, supra note 4; William J. Schenck-Hamlin, David E. Procter, & Deborah J. Rumsey, The Influence of Negative Advertis-
that can be executed through political advertisements to highlight issue positions and the character of the candidates and their opponents.\textsuperscript{31} Like Reese, Shen does acknowledge the interpretive ability of the audience, stating, "the persuasive impact of any given frame will likely depend on how the messages interact with individuals' own predispositions of knowledge structures. A framing effect is more likely to occur when the media frames comport with the existing beliefs of the audiences."\textsuperscript{32}

E. Legal Scholarship on Media Effects

The assumption that advertising has the potential to influence voters and the application of legal scholarship to mass media effects has been examined by scholars. The challenges to the Communications Act provisions and restrictions on political advertisements that may cross the bounds of decency or have harmful effects on particular viewers have been researched for a dozen years. Rivera-Sanchez and Gates reviewed the problems that were anticipated when abortion activists wanted to air issue commercials.\textsuperscript{33} Ozmun examined the unfavorable FCC response to such political speech advertisement.\textsuperscript{34}

More recently Iyengar evaluated the effect of advertisements on low-profile election campaigns.\textsuperscript{35} Specifically, he reviewed the context of voter response in local-level judiciary elections and found that advertisements often set the campaign agendas where both candidates and issues were relatively unknown. Holman and Claybrook asserted that the BCRA will certainly shift the way organizations that want to provide electioneering advertisements identify themselves, but the reality of hundreds of millions of dollars in campaign spending is undeniable.\textsuperscript{36}

Any mass media effect can only be based on the content that is provided to the audience; as Shoemaker and Reese state, "media con-

\textsuperscript{31} See Shen, supra note 30, at 124.
\textsuperscript{32} Id. at 126.
\textsuperscript{33} See generally Milagros Rivera-Sanchez & Paul H. Gates, Jr., Abortion on the Air: Broadcasters and Indecent Political Advertising, 46 FED. COMM. L.J. 267 (1994) (discussing the anticipated problems created by abortion activists airing commercials).
\textsuperscript{34} See David Ozmun, Abortion and Harm to Children: Limits on Television Political Advertisements, 1 COMM. LAW & POL’Y 99, 99 (1996).
\textsuperscript{35} See Iyengar, supra note 30.
tent is the basis of media impact." Advertising that costs a great amount of money exacerbates the inequity of the marketplace concept where the organizations with financial resources can continuously deliver ideas into the marketplace. The cultivation theory alludes to consistent exposure of messages leading to changes in attitude and behavior, as desired by the advertiser. The media framing paradigm asserts that these messages are not objective, but clearly presented in a manner that favors a particular candidate or position. These repeated, framed messages have the potential to predict a short-term effect as the electorate moves closer to the voting day, particularly if a counter-perspective is not being heard because it cannot fund advertisements. The need for fund raising and the potential financial impact on the electoral process is where the First Amendment, marketplace of ideas, and mass media effects converge in addressing the issue of campaign finance reform. Whether the courts and legislature avail themselves of media effects studies is unclear. But their belief in the inference of media effects is clear in the explicitly limiting language of the BCRA and McConnell. Even if it believed that advertising can produce a powerful effect, the central question for the Court in McConnell was essentially whether the donation of money that funds advertisements and gives an appearance of impropriety is enough to subjugate the freedom of speech guaranteed in the First Amendment. The Court’s ruling would not only validate new election practices, but also provide an argument on media effects from the highest perch of the judicial branch.

IV. Research Focus

The purpose of this Article is to use the Supreme Court’s most recent arguments, presented in its ruling in McConnell, to provide an analysis and explanation and of how it views the media effects debate about political campaign advertising. Learning the perspective of the Court is vital for any communication issue because the Court’s rulings directly dictate how future communication is conducted. McConnell also addresses two of the fundamental components of a functioning democracy: (1) the right to free speech, and (2) the election of government officials. The importance of election-oriented communication cannot be underestimated in a functioning democracy. Burson claims, “the quality of our government, the quality of our society depends on the quality of the public opinion that directs it. And the value of the public’s opinion depends on how well the public is informed.”


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Communication theorists study media effects. They form and test hypotheses and draw conclusions based on their data. They publish these results without completely knowing the impact of their findings. By placing regulations on advertising, the Supreme Court is in essence making a decision about the media effects debate, and any ruling from this body will obviously impact society significantly. Because Supreme Court rulings have a direct and immediate impact, learning the Court’s perspective on an issue such as mass media effects, which many communication scholars debate and research, can assist in future research. Devol simply states, “historians usually look at the development of the United States in terms of presidential administrations, yet decisions rendered by the Supreme Court often surpass administrative programs in their impact on the American scene.”

Unlike other First Amendment cases, McConnell focuses on the communication around elections coming from the candidate and the various interest groups that are always trying to produce the effect of persuading a vote. This Article is not designed to discuss the legal merits of the case or provide an opinion of the ruling. Although any Supreme Court ruling is grounded in and directed by previous case law, this Article is also not intended to provide a history of judicial rulings on campaign finance legislation; Kerr offers a summary of case law relevant to the Supreme Court’s decision in McConnell, particularly: First National Bank of Boston v. Bellotti; Austin v. Michigan Chamber of Commerce; and Buckley v. Valeo. Instead, the focus is to use the Supreme Court’s ruling in this case to provide the most recent views of the Court and apply its statements to the media effects debate, particularly as these messages relate to the First Amendment, marketplace of ideas, media effects theory, campaign finance reform, and election-oriented communications.

V. Findings

Prior to passage of the BCRA there was little, if any, regulation of soft money. The emergence of soft money was largely in response to other kinds of campaign contribution limitations. Money donated within the FECA disclosure requirements and source and amount limitations is referred to as federal or hard money. Federal law had permitted corporations, unions, and individuals who had already made the maximum permissible hard money contributions to federal candi-

dates to donate soft money to political parties for activities intended to influence state or local elections. National political parties could take the unregulated soft money and direct it to state organizations where elections were the most contentious. Soft money could be used to fund get-out-the-vote drives and generic party advertising, commonly referred to as issue advocacy advertising.

It is the use of soft money raised to finance issue advocacy advertising as permitted by the FEC that precipitated the large influx of this type of fund raising. Prior to the BCRA, even if the advertisement mentioned the name of a federal candidate, so long as the advertisement did not expressly advocate the candidate’s election or defeat, it was considered an issue advertisement. Distinctions were made between express advocacy advertising and issue advertising through the use of “magic words,” such as “vote for” or “vote against.” With issue advocacy advertising becoming such a prominent part of election-oriented communications, the amount of soft money raised and spent by national political parties increased exponentially to 42% ($498 million) of money raised in 2000. The national parties diverted more than half of that soft money ($280 million) to state parties in 2000.44

A. Provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA)

The BCRA amended the Federal Election Campaign Act of 1971 (FECA). Through the BCRA, the U.S. Congress sought to address the increased importance of non-federal or soft money and the proliferation of issue advertisements. The legislation passed Congress by votes of 240-189 in the House of Representatives and 60-40 in the Senate, and on March 27, 2002, President Bush signed it as Public Law 107-155. Upon signing the legislation, President Bush stated that the provisions of the law “will result in an election finance system that encourages greater individual participation, and provides the public more accurate and timely information, than does the present system. All of the American electorate will benefit from these measures to strengthen our democracy.”45

The BCRA prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending soft money in connection with federal elections. It also bans national political parties from raising and spending money outside of the limits and prohibitions of the revised FECA. Through the BCRA, the revised FECA allows for an increase in hard money as individuals can now give a total of $95,000 in each two-year election cycle, an increase from $50,000 to all federal candidates, political parties, and political

action committees. These increases include an increase from $1,000 to $2,000 in what an individual can directly give a candidate and an increase from $20,000 to $25,000 in what an individual can give a political party per year. To comply with the BCRA, corporations and unions may not use their general treasury funds but can form political actions committees (PACs) to finance election-oriented communication.

In addition to addressing the proliferation of soft money, the BCRA includes new provisions regarding when money can be used for certain broadcast, cable, and satellite election-oriented advertising communications. The BCRA creates and defines a new term called "electioneering communications." As defined by the FEC, electioneering communications refer to a clearly identified candidate for federal office and are distributed to a relevant electorate—defined as communications that reach at least 50,000 voters—within 60 days prior to a general election and 30 days prior to a primary. This electioneering communication must be financed with federal or hard money. The PACs that can be formed may still advertise, but now must do so within the electioneering communication rules.

The BCRA also prominently focuses on disclaimers to identify the source of the advertisement. All public communications by political committees must have a clear disclaimer indicating who paid for the advertisement and whether or not it was authorized by a candidate. The FEC defines public communications as any cable, satellite or broadcast communication, newspaper, magazine, billboard, poster, mass mailing or phone bank (more than 500 pieces/calls that contain the same basic communication within 30-day period), or any other form of general public political advertising.46 Under the BCRA, candidates and committees are required to "stand by their ads" as television and radio communications that are authorized by a candidate must feature the voice (and image for television) of the candidate identifying himself or herself and stating that he or she has approved the communication.

The constitutionality of the BCRA was immediately challenged, and thirteen months after its signature into law by President Bush, the Supreme Court issued its ruling. On December 10, 2003, the Supreme Court upheld the two principal features of the BCRA: (1) the control of soft money; and (2) the regulation of electioneering communications. The five-to-four verdict by the Supreme Court had Justices Steven Breyer, Ruth Bader Ginsburg, Sandra Day O'Connor, David Souter, and John Paul Stevens representing the majority, with Justices Anthony Kennedy, William Rehnquist, Antonin Scalia, and Clarence Thomas forming the minority opinion.

B. Rationale of the Supreme Court

In writing the majority opinion of the Court, Justice O'Connor and Stevens provide a rationale for the regulation of soft money and issue advertising. The majority did not separate the regulation of soft money and electioneering communication as distinct issues, but rather saw a clear connection between the two provisions. The general conclusion is that the inequity in funding advertisements creates an inequity in the power of groups to influence an election, thus illuminating the flaw in the utopian marketplace of ideas concept. It is the money that is necessary for repeated, framed messages, which as described in the cultivation theory and the media framing paradigm can help produce the effect of influencing a voter. Even though both of these effects perspectives recognize the interpretive abilities of the individual, the concern can still be justified because wealthy groups' advertisements can influence voters who might not be as informed about the candidates and issues and are only receiving messages close to an election.

It was the corporations and unions, as well as wealthy interest groups, that provided the funding for issue advocacy advertisements. The Court's ruling eliminated the previous critical distinction between issue advertisements and express advocacy advertisements. Justices O'Connor and Stevens stated, "[I]ssue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads during those periods if the ads are intended to influence the voters' decisions and have that effect." They added, "One might just as well argue that the electioneering communication definition is underinclusive because it leaves advertising 61 days in advance of an election entirely unregulated."

Even if accepting the notion that advertising can directly affect the outcome of an election, thereby giving unequal power to the more wealthy groups, the major contention of the dissenting justices was on First Amendment grounds. Justice Scalia called the ruling "a sad day for the freedom of speech" and said that the new law "cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government. For that is what the most offensive provisions of this legislation are all about." He added that "a law limiting the amount a person can spend to broadcast his political views is a direct restriction on speech." Justice Kennedy stated, "The First

47. See McConnell, 540 U.S. at 122-29.
48. Id. at 206.
49. Id. at 248 (Scalia, J., concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II).
50. Id. at 254.
Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers." 51 He added, "The prohibition, with its crude temporal and geographic proxies, is a severe and unprecedented ban on protected speech" and "[n]ever before in our history has the Court upheld a law that suppresses speech to this extent." 52

The majority of the Court contended that there was not an infringement on First Amendment freedoms because any of these groups could still engage in any amount of communication they desired, but now those advertisements had to be funded with regulated money in the electioneering communication time period. The funding of other forms of communication, such as direct mail, telephone banks, and Internet sites, was also still permissible under the BCRA. By allowing corporations and unions to form PACs and fund electioneering communications with PAC money, the Court also stated in the majority opinion, "[i]t is 'simply wrong' to view the provision as a 'complete ban' on expression rather than a regulation." 53 In writing about the formation of PACs as a viable alternative to the previously unregulated system of soft money issue advertising, Justice Kennedy countered, "PACs are a legal construct sanctioned by Congress. They are not necessarily the means of communication chosen and preferred by the citizenry." 54

Regarding the role of corporations in election-oriented communication and recognizing that organizations across the political spectrum, such as the NRA and the ACLU, were parties to the case consolidated in McConnell, Justice Scalia commented, "[G]iving the government power to exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views. People who associate—who pool their financial resources—for purposes of economic enterprise overwhelmingly do so in the corporate form; and with the increasing frequency, incorporation is chosen by those who associate to defend and promote particular ideas . . . ." 55

Justice Kennedy also wrote in detail of the role of corporations describing them as "engines of our modern economy" that "facilitate

51. Id. at 286 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II).
52. Id. at 334.
54. Id. at 340 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II).
55. Id. at 257–58 (Scalia, J., concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II).
complex operations on which the Nation’s prosperity depends.”56 He stated, “To say these entities cannot alert the public to pending political issues that may threaten the country’s economic interests is unprecedented.” In recognizing the advertising from unions as being equally vital in election-oriented communication, Kennedy continued, “Unions are also an established part of the national economic system. They, too, have their own unique insights to contribute to the political debate, but the law’s impact on them is just as severe.”57

The wealthy corporations purchasing unlimited advertising time and influencing an election also created another major concern argued by the Court—the fear of wealthy donors influencing legislation. It is the wealthy corporations or interest groups with the most financial resources that are most interested in funding repeated, framed messages to influence the outcome of the election because these groups have the most to gain or lose through favorable or unfavorable legislation. This funding created a disproportionate influence in a one person/one vote system. The majority feared that the candidates’ need for soft money to finance issue advertisements created the appearance of impropriety in terms of access to political officials and the potential influence of major donors on legislation. Justices O’Connor and Stevens stated, “many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors . . . .”58

In demonstrating that access to officials and the potential to influence legislation was a major goal of contributors, the Court pointed out that the largest corporate donors made substantial contributions to both political parties. The majority opinion also claimed that candidates would often direct potential donors who had already contributed the maximum hard money to the campaign committee that they could still donate soft money to the political party. In writing one of the dissents, Chief Justice Rehnquist countered, “The Court’s willingness to impute corruption on the basis of a relationship greatly infringes associational rights and expands Congress’ ability to regulate political speech.”59 He added, “political parties often foster speech crucial to a healthy democracy . . . and fulfill the need for like-minded individuals to ban together and promote a political philosophy . . . .”60

56. Id. at 340 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II).
57. Id.
58. Id. at 124–25 (majority opinion).
60. Id. at 353.
The analysis of the Court's ruling begins with an assumption that advertisements can potentially influence an election. An advertised message is produced and designed to promote and persuade with only the interests and perspectives of that entity being provided. The reasons politicians and interest groups use advertising strategies are the complete control of the frequency with which the message airs, its media placement in relation to an important target audience, and the content of the message. Advertising appears to be an effective tool in campaigns to persuade voters, otherwise more money would be spent on other election-oriented endeavors, such as get-out-the-vote efforts. Justice Scalia explicitly commented on the value of advertising, stating, "[e]vidently, however, these ads do persuade voters, or else they would not be so routinely used by sophisticated politicians of all parties."61

Large amounts of money are necessary to finance campaign advertising, thereby creating an inequality among those interested in funding campaign communications. The concern is that wealthy groups with the ability to buy more advertising time have a considerable advantage in trying to influence the outcome of elections. This appearance of impropriety in gaining access to elected officials also conveys the potential to influence legislation. Because of these concerns, the focus of the Court's ruling is on regulating soft money and limiting what can be given to candidates and political parties and how and when that money can be spent.

By placing limitations on advertising, the Court provides its perspective on media effects. Two primary mass media effects theories, cultivation and the media framing paradigm, indicate that repeated, carefully framed messages can influence an audience.

In the McConnell ruling, the Court is expressing its belief in cultivation by upholding limitations on advertising financing and not permitting any group to fund multiple advertisements with unregulated soft money. The Court fears the cultivation process because its effectiveness is dependent upon a large amount of money to buy the volume of time and space necessary for repeated advertising that could produce the cultivation effect. Critical in the cultivation perspective is that the process is not based on one-time exposure, but rather a subtle, continuous exposure to the message. The repetition of messages that people see is an important variable in producing an effect.

The media framing paradigm indicates that in conjunction with the repeated exposure, the fear of the Court was that these messages are framed by groups with a vested interest in the outcome of an election

61. Id. at 261 (Scalia, J., concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II) (emphasis in original).
and future legislation. It is the combination of these two concepts that produces a greater chance of a media effect. This funding system also creates a disproportionate influence in the electoral and legislative process.

To address this issue of repeated viewing and the money needed to buy advertising time and space, the Court affirmed the constitutionality of electioneering communication as established in the BCRA. The Court demonstrates its belief that the timing of the advertisements is critical by placing the financing limits on how advertising can be paid for 60 days prior to a general election and 30 days before a primary. The thought is that by limiting the type of money and regulating the time periods during which it can be used, there can only be so much advertising—cultivation and framing—that an interest group can do. The cultivation process and framing feed the fear of large donors funding many advertisements close to an election, and so the ruling is an attempt to prevent wealthy donors from exercising additional power in the political process. The timing of restricting advertising is important because it is during the period, presumably, when voters are most engaged, and a critical time for undecided voters to make a final determination about their vote.

The other important position of the majority in trying to curtail the financial influence, but maintain the constitutionality of the BCRA, is to point out that all of these groups can still engage in advertising. The majority presents the argument that the verdict is not limiting speech, but merely that these groups have to follow the rules of electioneering communication, establishing in the BCRA that advertising has to be done with regulated federal money. The BCRA does allow for communication through direct mail, telephone banks, and Internet sites, and the funding of advertising 61 days prior to an election is not regulated.

The Supreme Court obviously believes that repeated exposure to framed political advertisements can cause a change—a media effect—in how people view a candidate or an issue and can impact their voting behavior. If the Court did not believe in the power of these advertisements’ influence, it would have ruled differently, essentially arguing that it would not matter how many advertisements people were exposed to or when they were exposed because these messages would not be influential.

The position of the minority is that even if accepting the principles of cultivation and media framing and admitting that these political advertisements have a direct media effect, the infringement of the First Amendment is too severe. In speaking almost directly to the media effects debate, Justice Scalia stated, “The premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that pre-
mise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as too much speech. "62 Justice Kennedy argued, "The mere fact that an ad may, in one fashion or another, influence an election is an insufficient reason for outlawing it. I should have thought influencing elections to be the whole point of political speech."63

VII. Conclusion

McConnell v. FEC addresses two of the fundamental components of a functioning democracy: (1) the right to free speech; and (2) the election of government officials. The final conclusion that can be drawn is that there is sharp division within the Supreme Court, and the possibility for future rulings into campaign finance law certainly exists. The Court is divided on the issue, with the majority arguing that the unregulated money can buy more commercial time that can influence the electorate, and in turn provide them with influence to the government official they helped elect. They are concerned with that level of impropriety due to financial influence. They also argue that the amount of advertisements and the repeated, framed messages can have an influence, a media effect, on the voter. While the minority might even believe this influence to be real, they do not see a potential media effect as a reason for subjugating the First Amendment, which clearly articulates, "Congress shall make no law... abridging the freedom of speech."

63. Id. at 336 (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II).