The Supreme Court Perspective of Media Effects as Expressed in Campaign Finance Reform

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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 paper posits what might be the Supreme Court’s view of the media effects debate by examining its ruling in *McConnell v. FEC.*
Introduction

On December 10, 2003, the United States Supreme Court, in a five to four ruling, upheld the major provisions in The Bipartisan Campaign Reform Act (BCRA) of 2002. 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 paper is to use the most recent arguments of the Supreme Court presented in the ruling in the case, McConnell v. FEC, 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 these messages 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 and (2) the media framing paradigm.
Supreme Court and Media Effects

Cultivation theory claims that people can be influenced by messages that they are repeatedly exposed to. The media framing paradigm focuses on the idea that messages that are only providing 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 message therefore creates an inequity in the election process with those with 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 to potentially influence legislation.

Background

The issue of campaign finance reform had long been debated with little formidable change. However, on March 27, 2002, President George W. Bush signed into law The Bipartisan Campaign Reform Act (BCRA) of 2002, campaign finance reform legislation commonly referred to as McCain/Feingold. The BCRA amends the Federal Election Campaign Act (FECA) of 1971 and changes campaign finance laws by banning unlimited soft money contributions to political parties and reforming the financing of advertising close to an election. Immediately upon signing the BCRA into law there were a dozen legal challenges brought from groups all along the political spectrum ranging from the

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5 Supra note 1
American Civil Liberties Union (ACLU) to the National Rifle Association (NRA). These twelve cases were consolidated under *McConnell v. Federal Election Commission (FEC)*, (2003)\(^6\), when the case eventually reached the Supreme Court. On December 10, 2003, the United States Supreme Court in a five to four ruling upheld the major provisions. 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 concept of the marketplace of ideas, as well as a brief discussion of mass media effects theory help put the complexities of campaign finance law into its proper context. The cultivation theory as articulated by Gerbner\(^7\) and the media framing paradigm\(^8\) are highlighted as they relate to the Supreme Court opinion in *McConnell v. FEC* 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 is a costly endeavor 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.

**Literature Review**

**The Marketplace of Ideas and Democracy**

The larger debate of how election messages are disseminated and how elections are funded occur within the context of The First Amendment and the marketplace of ideas

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\(^6\) supra note 2
\(^7\) supra note 3
\(^8\) supra note 4
concept. John Milton promoted the marketplace of ideas concept suggesting that freedom of expression and debate would lead to the discovery of truth.⁹ John Stuart Mill later stressed the need for debate and an open exchange of ideas so that faulty opinions would be exposed.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.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 marketplace of ideas utopian 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 to access all of these messages by the audience. The marketplace of ideas concept falters in that a characteristic of a marketplace is that inevitably an inequity is

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⁹ John Milton, AREOPAGITICA (1644)
¹⁰ John S. Mill, ON LIBERTY (1956, reprint in 1974)
¹¹ Thomas I. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Alexander Mielejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)
created based on economics as groups or people have an advantage based on 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 trying to keep the marketplace fair and equitable while maintaining The First Amendment principle of no law abridging 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 20th century. Napoli summarizes these discussions by observing that economic-centered interpretations of the metaphor are usually used to bolster arguments against regulation, while democracy-centered interpretations of the metaphor are often used to support regulation of the media.

Mass Media Effects

Another characteristic of a marketplace is that the public makes determinations about which products, or 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

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13 NAPOLI, supra note 13
the mass media to influence audience thinking and behavior is often debated. The core of mass media effect studies remain 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 describe that "traditional-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."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. Perspectives of a more powerful mass media effects also tend to view the audience in a more monolithic nature. The indirect, or limited effects perspective contends mass media messages are not an overwhelming influence and are only one potential factor in influencing behavior as the message is interpreted by the individual audience member as to its meaning. The indirect effects perspective contends that causality of behavior is due to a multitude of factors, not merely media exposure.16 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.17 Kline, Miller, and Morrison claim "individual uses for media content act as an intervening variable:

14 See generally Lee B. Becker & Gerald M. Kosicki, Understanding the Message-Producer/Message Receiver Transaction, 7 RESEARCH IN POLITICAL SOCIOLOGY 33 1995); Jennings Bryant & Dolf Zillmann eds., MEDIA EFFECTS: ADVANCES IN THEORY & RESEARCH 2ND (2002); Elizabeth M. Perse, MEDIA EFFECTS AND SOCIETY (2001).
15 GERBNER, GROSS, MORGAN, SIGNORIELLI, AND SHANAHAN, supra note 3 at 47.
mitigating or enhancing the ultimate effects of a media message.”\footnote{Gerald F. 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: CURRENT PERSPECTIVES ON GRATIFICATIONS RESEARCH 113 (Jay Blumler & Elihu Katz eds, 1974)} 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.”\footnote{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).}

Through an indirect effects perspective there would not be any fear of funding and airing an advertisement repeatedly that 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 of the message, can have effect on voters. Therefore, an argument for a more direct effects perspective or has been phrased as a strong indirect effects perspective\footnote{See generally, Vincent Price & David Tewksbury, News Values and Public Opinion: A Theoretical Account of Priming and Framing, in PROGRESS IN COMMUNICATION SCIENCES (George Barnett & Franklin J. Boster, eds. 1997); Werner J. Severin & James W. Tankard, COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN MASS MEDIA (2001).} 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) media framing paradigm.

**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."²¹ From the cultivation perspective the difference in the amount of television viewing, either light or heavy, will be the 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 principle 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 "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 of an effect because of exposure over a long period of time is not tested, the concept of repeated exposure is relevant. The cultivation application to the regulation of elections is that it takes a large amount of money to repeatedly air the commercials and produce the cultivation effect.

Perspectives that lean toward a philosophy of 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 any ultimate effect that a media message might have on an audience. Gerbner et al. point out that cultivation analysis is an

²¹ GERBNER, GROSS, MORGAN, SIGNORIELLI, AND SHANAHAN, supra note 3 at 47.
²³ Id. at 5.
ongoing process that does take into account the interaction of messages, audiences, and contexts. They explain:

> 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.\(^{24}\)

**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 engage in advertisement because of their ability to not only control the frequency of the message and the placement of the message, but 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 a useful devise 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

\(^{24}\) GERBNER, GROSS, MORGAN, SIGNORIELLI, AND SHANAHAN, *supra* note 3 at 48.
frames and some frames will be emphasized and others completely ignored.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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."\textsuperscript{28} The frames do not represent a direct effect as 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.”\textsuperscript{29}

Through the selection of certain information, to the exclusion of other potentially relevant facts, this framing can influence public opinion.\textsuperscript{30} Shen (2004) describes

\begin{footnotesize}
\textsuperscript{26} ENTMAN, \textit{supra} note 4, 52.
\textsuperscript{27} \textit{Id} at 55.
\end{footnotesize}
framing as a deliberate and strategic process that can be executed through political advertisements to highlight issue positions, and the characters of the candidates and their opponents.  

Similar to 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."  

Legal Scholarship on Media Effects

The assumption that advertising has the potential to influence voters and applying 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 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. Ozmun examined the unfavorable FCC response to such political speech advertisement.

More recently Iyengar evaluated the effect of advertisements on low-profile election campaigns. 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 BCRA will certainly shift the way organizations who want to provide electioneering

31 Shen, supra note 31.
32 Id. at 126.
34 David Ozmun, Abortion and Harm to Children: Limits on Television Political Advertisements, 1 COMMUNICATION LAW & POLICY 99 (1996).
advertisements identify themselves, but the fact of hundreds of millions of dollars in campaign spending is undeniable.36

Any mass media effect can only be based on the content that is provided to the audience as Shoemaker and Reese state, "media content is the basis of media impact."37 Advertising that costs a great amount of money exacerbates the inequity of the marketplace concept where the organizations with the financial resources can continuously deliver ideas into the marketplace. The cultivation theory alludes to consistent exposure of messages leading to a change in the 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 the voting day particularly if a counter perspective is not being heard because it cannot fund advertisements. It is the need for fund raising and the potential financial impact on the electoral process 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 inference of media effects is clear in the explicitly limiting language of BCRA and McConnell v. FEC. Even if believing that advertising can produce a powerful effect, the central question for the Court 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.

**Research Focus**

The purpose of this paper is to use the most recent arguments of the Supreme Court presented in the ruling in the case, *McConnell v. FEC*, 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. This case 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."  

Communication theorists study media effects. They form and test hypothesis and draw conclusions based on their data. They publish these results with the impact of their findings not completely known. 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 does obviously significantly impact society. Because Supreme Court rulings have a direct and immediate impact, learning their perspective on an issue that many communication scholars debate and research, mass media effects, can assist in future

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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."  

Different from other First Amendment cases, *McConnell v. FEC* focuses on the communication around elections coming from the candidate and the various interest groups that are always trying to produce an effect, persuading a vote. This paper 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, the paper is also not intended to provide a history of judicial rulings on campaign finance legislation Kerr\(^4^0\) offers a summary of relevant case law to the Supreme Court's decision in *McConnell*, particularly: *First National Bank of Boston v. Bellotti*\(^4^1\); *Austin v. Michigan Chamber of Commerce*\(^4^2\); *Buckley v. Valeo*.\(^4^3\) The focus is instead to use the Supreme Court ruling in this case to provide the most recent views of the Court and apply their 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.

**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 candidates 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

**Provisions of The Bipartisan Campaign Reform Act of 2002 (BCRA)**

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended the Federal Election Campaign Act (FECA) of 1971. Through the BCRA the United States Congress sought to address the increased importance of non-federal or soft money, and the proliferation of

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issue advertisements. The legislation passed Congress by votes of 240-189 in the House of Representatives, 60-40 in the Senate, and on March 27, 2002, President George W. Bush signed 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 with 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. The revised FECA through the BCRA 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 included a $1,000 increase in what an individual can directly give a candidate to $2,000, and a $5,000 increase in what an individual can give a political party per year to $25,000. 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 can still advertise, but now must do so within the electioneering communication rules.

The BCRA also prominently focused 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." 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 George W. Bush the Supreme Court issued its ruling. On December 10, 2003, the Supreme Court upheld the two principle 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

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Stevens representing the majority, with Justices Anthony Kennedy, William Rehnquist, Antonin Scalia, and Clarence Thomas forming the minority opinion.

Rationale of the Supreme Court

In writing the majority opinion of the Court, Justices Sandra Day O'Connor and John Paul 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 an effect, influence a voter. Even though both of these effects perspectives recognize the interpretive abilities of the individual, the concern can still be justified as wealthy groups' advertisements can influence voters who might not be as versed in the candidates and issues and are only receiving messages close to an election.

It was the corporations, unions, as well as wealthy interest groups that provided the funding for issue advocacy advertisements. The ruling of the Court eliminated the previous critical distinction between issue advertisements and express advocacy advertisements. Justices O'Connor and Stevens stated, "Issue 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'.

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decisions and have that effect."\(^{48}\) They add, "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 freedom of speech" and 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."\(^{49}\) He added, "That
a law limiting the amount a person can spend to broadcast his political views is a direct
restriction on speech."\(^{50}\) Justice Kennedy stated, "The First 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 entitles 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 "never 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 as any of these groups could still engage in any amount of
communication they desire, 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 were also

\(^{48}\) Id. at 100.
\(^{49}\) Antonin Scalia, McConnell v. FCC, supra note 2, separate opinion at 3.
\(^{50}\) Id.
\(^{51}\) Id.
\(^{52}\) Id.
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, "It 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, however 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 different organizations across the political spectrum, such as the NRA and the ACLU, were parties to the case consolidated in \textit{McConnell}, Justice Scalia commented, "Giving 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 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

\(^{53}\) McConnell v. FCC, \textit{supra} note 2 at 98.
\(^{54}\) Kennedy, \textit{supra} note 51 at 58.
\(^{55}\) Scalia, \textit{supra} note 50 at 56.
\(^{56}\) Kennedy, \textit{supra} note 51 at 58.
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 as 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 the need for soft money by candidates to finance issue advertisements created the appearance of impropriety in terms of access to political officials and the potential influence of legislation by major donors. 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 potentially influencing 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 William Rehnquist countered,

57 Id.
58 McConnell v. FCC, supra note 2 at 15.
"The Court's willingness to impute the corruption on the basis of a relationship greatly infringes associational rights and expands Congress' ability to regulate political speech."\textsuperscript{59} He added, "political parties often foster speech crucial to a healthy democracy and fulfill the need for like-minded individuals to band together and promote a political philosophy."\textsuperscript{60}

Discussion

The purpose of this paper is to use the most recent arguments of the Supreme Court presented in the ruling in the case, \textit{McConnell v. FEC}, to provide an analysis and explanation and of how it views the media effects debate about political campaign advertising. 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. One of the reasons why politicians and interest groups use advertising strategies is 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, "evidently, however, these ads do persuade (no emphasis added) voters, or else they would not be so routinely used by sophisticated politicians of all parties."\textsuperscript{61}

\textsuperscript{59} William Rehnquist, McConnell v. FCC, \textit{supra} note 2, separate opinion at 4.

\textsuperscript{60} \textit{Id.} at 5.

\textsuperscript{61} Scalia, \textit{supra} note 50 at 16.
It is large amounts of money that is 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 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 ruling in *McConnell v. FEC* the Court is expressing a belief in cultivation through its upholding limitations on advertising financing and not permitting any group to fund multiple advertisements with unregulated soft money. The Court fears the cultivation process as 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 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 established in the BCRA. The Court believes the timing of the advertisements are critical by placing the financing limits of 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 for when 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, presumably when voters are most engaged and a critical time for undecided voters to make a final determination about their behavior on election day, is important in not allowing wealthy donors unjustified power in the political process.

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 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
issue and can impact the behavior of how they will vote. If the Court did not believe in the power of these advertisements' influence it would have ruled differently with that ruling essentially arguing that it would not matter how many advertisements people were exposed to or when they were exposed, these messages would not be influential.

The position of the minority is that even if accepting the principles of cultivation and media framing and that these political advertisements have a direct media effect, the infringement of the First Amendment is to 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 premise 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 (no emphasis added) speech." 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."

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.

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62 *Id.* at 14
63 Kennedy, *supra* note 51 at 54.
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 are also arguing 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 true, 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."