

BOUNDARY-BASED RESTRICTIONS IN
BOUNDLESS BROADCAST MEDIA
MARKETS: *MCCONNELL V. FEC*'S
UNDERINCLUSIVE OVERBREADTH
ANALYSIS

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I. INTRODUCTION

In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), more commonly known as the “McCain-Feingold” campaign finance reform measure.¹ Perhaps the most controversial aspects of that law were provisions dealing with what the Act termed “electioneering communications,” broadcast ads that mentioned the name of a candidate within close proximity of an election, regardless of the reason for the mention. These provisions, which we will refer to in shorthand as “brownout” provisions,² purport to prohibit any union or incorporated entity from using general treasury funds, and prohibit any person or organization from using any corporate or union donations, to run a broadcast ad mentioning a federal candidate within thirty days of a primary or national convention or sixty days of a general election.³ In *McConnell v. FEC*, the electioneering communications provisions were challenged on the grounds

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1. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002).

2. As a matter of conversational shorthand, these provisions are usually called the “blackout” period, but that term is something of a misnomer. In fact, ads may run, but under sometimes severe restrictions or only in certain types of media. Thus, we believe it more accurate to refer to the “brownout” period.

3. See Bipartisan Campaign Reform Act, 2 U.S.C.S. § 434 (2006).

that they were unconstitutionally overbroad, but were upheld by the Supreme Court.⁴

In this Article, we do not seek to refight the theoretical constitutional analysis of *McConnell*.⁵ Rather, we will show that both the three-judge district court panel and the Supreme Court did not, in fact, fully apprehend the breadth of the electioneering communications restrictions, particularly as applied to presidential elections, leading them to substantially understate the impact of the law. This failure is reason for the Supreme Court to revisit the holding of *McConnell*. Our goal is modest; we merely underscore that the statute is expansive in ways not considered by the Court. Having identified the problem, we hope that further research will provide added guidance on the extent to which BCRA limits what the Court has acknowledged is constitutionally protected speech.

In Part II of this Article, we review the background of the Bipartisan Campaign Reform Act and in particular its electioneering communications provisions. In Part III, we discuss the Supreme Court's overbreadth analysis of the challenge to the electioneering communications provisions of BCRA. We find that the Court's analysis lacks any meaningful review of the impact of the law, even as the Court understood it to operate. More importantly, in Part IV we use specific market examples to show how the statute, in its actual operation, restricts advertising far beyond the thirty- and sixty-day time frames in which it was discussed by the Court, particularly in presidential elections. In some markets, BCRA restricts ads for a period in excess of 200 days. Additionally, BCRA frequently creates a confusing pattern of alternating brownout periods, making it more difficult to run a coherent issue campaign. Less often, but not infrequently, BCRA creates a discrepancy between brownout times for GOP and Democratic candidates in a market, creating potential equal protection issues.

We conclude that the Court should revisit these provisions in order to conduct an analysis of BCRA's electioneering communications provisions based on a proper analysis of the law's reach. In doing so, it should place little weight on *McConnell*, as that case is based on an inaccurate understanding of the law's scope.

II. "ELECTIONEERING COMMUNICATIONS" AND THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

The Federal Election Campaign Act (FECA) Amendments of 1974 limited direct financial contributions to federal candidates.⁶ The Supreme Court upheld this provision against First Amendment challenge in *Buckley v. Valeo* on the

4. 540 U.S. 93 (2003).

5. One of us is already on record. See Bradley A. Smith, *McConnell v. Federal Election Commission: Ideology Trumps Reality, Pragmatism*, 3 ELECTION L. J. 345 (2004).

6. Pub.L. 93-443, 88 Stat. 1263 (codified at 26 U.S.C. §§ 9031-9042).

grounds that the speech involved was “proxy speech,” and as such entitled to less constitutional protection than direct speech by an individual. It was also upheld because such restrictions met a compelling government interest in preventing political corruption or the appearance thereof.⁷ At the same time, the Court recognized that the threat of corruption was lower when expenditures were independent of a candidate and related to political issues rather than directly to a candidate campaign. It thus held that a statute that regulated “issue” speech, even though that speech might be intertwined with the mention of candidates, was unconstitutionally overbroad. To avoid this overbreadth, it construed the statutory definitions to reach only speech that specifically advocated the election or defeat of a candidate. The Court remained concerned, however, that even this standard was unconstitutionally vague unless limited to “explicit words of advocacy of election or defeat.”⁸ The Court supplied examples of the type of language, eventually known as “express advocacy,” that would constitute “explicit words of advocacy of election or defeat,” including words and phrases such as “vote for,” “elect,” “support,” and “defeat.”⁹ The Court recognized that under this test many campaign ads would go unregulated, but saw the test as necessary to prevent a “chilling” effect on protected speech.¹⁰

Over the next two decades political strategists mastered the art of “issue ads,” which avoided “express advocacy” but were otherwise indistinguishable from many campaign ads. As spending on these issue ads grew,¹¹ campaign finance reform advocates sought a new standard that would encompass such ads while meeting the Court’s vagueness requirements. The solution, enacted in McCain-Feingold, was to limit what were dubbed “electioneering communications.”¹²

The statutory language governing electioneering communications in BCRA is complex and opaque,¹³ but ultimately the provision is relatively simple. An

7. *Buckley v. Valeo*, 424 U.S. 1, 19-28 (1976).

8. *Id.* at 40-44.

9. *Id.* at 44 n.52.

10. *Id.* at 45-48.

11. By the mid-1990s, spending on broadcast issue ads in election years exceeded \$100 million; by 2000, it approximated \$500 million. *McConnell v. FEC*, 540 U.S. 93, 128, n.20 (2003).

12. See Bipartisan Campaign Reform Act, 2 U.S.C. §§ 434(f), 441b(c).

13. This is due to the procedural history of the provision. BCRA began primarily as a ban on political party “soft”—i.e. unregulated—money. The Snowe-Jeffords Amendment added the ban on the electioneering communications by unions and corporations, with certain exceptions for non-profit organizations that paid for such ads entirely with separate funds from individuals. 2 U.S.C. §§ 441b(a), 441b(b), 441b(c)(2)(2). However, the Wellstone Amendment to the Snowe-Jeffords Amendment then removed this exception for any “targeted” communication, i.e. one aired in the district of the candidate and reaching 50,000 voters. 2 U.S.C. § 441b(c)(6). A “targeted communication” is defined at 2 U.S.C. § 434f(3)(C). The end result is a broad ban, alleviated by an exception, which is then taken away through reference to a third section of the Act.

“electioneering communication” is a broadcast, cable, or satellite communication that makes reference to a “clearly identified candidate for Federal office” and is “targeted” to the area in which that candidate is up for election.¹⁴ Ads that mention or visually depict a candidate, including in most cases a president or vice president eligible for another term or a sitting member of the House or Senate, are generally deemed to refer to a “clearly identified candidate,” as are references to “your congressman,” “the president,” or “your Democratic senator.” An ad is considered “targeted” if it reaches 50,000 or more viewers or listeners in the relevant area.¹⁵ When these criteria are met, no union or incorporated entity, including incorporated non-profit membership organizations, nor any organization using corporate or union funds may air such an ad for thirty days prior to a primary or the start of a convention or caucus through the date of the primary or the last day of the convention or caucus—and for sixty days before, and the day of, a general election.¹⁶

III. BCRA AND OVERBREADTH IN *MCCONNELL V. FEC*

Unlike the 1974 FECA Amendments, which purported to regulate any ad that had the “purpose of influencing” an election, BCRA’s electioneering communications limitations do not suffer from vagueness. One can readily tell if an advertisement mentions or depicts a “clearly identified candidate,” and the thirty/sixty-day pre-election time frames provide a bright-line rule for when

14. Non-broadcast media are not covered. News stories that would otherwise be covered by the Act are exempt, as are communications that are regulated as “expenditures.” 2 U.S.C. § 434(f)(3)(B). “Expenditures” are defined at 2 U.S.C. § 431(9). Corporations and unions are generally prohibited from making “expenditures” pursuant to § 441(b). An organization becomes a “political committee” under the Act by making “expenditures” or receiving “contributions” in excess of \$1000. Both “expenditure” and “contribution” are defined terms, and becoming a “political committee” subjects an entity to a host of added regulations under many sections of the Act. See 2 U.S.C. §§ 431(4), 431(8), 431(9) for definitions. The importance of differentiating “expenditures” from “electioneering communications,” then, is to (a) prevent corporations and unions from facing conflicting requirements, especially in reporting, and (b) make clear that Congress did not intend for electioneering communications to trigger status as a “political committee.” Allison R. Hayward and Bradley A. Smith, *Don’t Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION L. J. 82, 95-6 (2005).

15. 2 U.S.C. §§ 434(f)(3)(C), 441b(c)(6)(B), 441b(c)(6)(C). Curiously, BCRA did not apply the targeting concept to the offices of president or vice president. However, the FEC added a targeting requirement in its implementing regulations at 11 C.F.R. § 100.29(b)(3)(ii)(A). Absent this addition, given existing primary schedules, the provision would have covered all broadcast ads mentioning or depicting a president or vice president seeking re-election or election anywhere in the United States from mid-December of the year before the presidential election (one month prior to the Iowa Caucuses that are the first in the presidential nominating process) through election day, except for a few days in late June.

16. A narrow exception exists for small non-profit advocacy groups pursuant to *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). This exception, the continued viability of which is in doubt following *FEC v. Beaumont*, 539 U.S. 146 (2003), does not affect this analysis.

such an ad is subject to the regulation. Nevertheless, even many proponents of the bill worried that the Supreme Court would find the provision unconstitutional—not on the grounds of vagueness, but on grounds of overbreadth.

The provision operates on the assumption that the vast majority of advertisements mentioning a candidate close to an election are not really ads about issues and therefore constitutionally protected under *Buckley*, but are in fact ads about candidates and therefore subject to regulation. By defining ads as “candidate ads” based on a specific proximity to the election, the revised law avoids the vagueness issue. If, however, a large number of ads prohibited by the electioneering communications provision are constitutionally protected “genuine” issue ads, then the law risks being struck down as overly broad.

BCRA supporters concede that not all ads mentioning a candidate within the thirty/sixty-day timeframes are “election” ads and that issue speech within those time frames can be important. Primary elections for president, House, and Senate are scattered throughout each even-numbered year, mostly when the House and Senate are in session. Even within sixty days of the general election, the House and Senate have frequently been in session in recent years, debating issues such as impeachment of the president,¹⁷ limitations on “partial birth” abortion,¹⁸ judicial nominations,¹⁹ creation of a Cabinet-level Department of Homeland Security,²⁰ and budget and appropriation bills.²¹ In the four election years prior to BCRA, there were over 500 roll call votes in the U.S. House and Senate within the sixty-day window preceding the general election.²²

For a statute to be found unconstitutional under the overbreadth doctrine, it must constrain significantly more behavior—in the case of BCRA, political speech—than can be properly regulated under the Constitution. “[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”²³

In determining whether a statute’s overbreadth is so substantial as to violate the Constitution, the Supreme Court has held that “substantial

17. 144 CONG. REC. H10,096 (daily ed. Oct. 8, 1998).

18. *Votes in Congress*, N.Y. TIMES, Sept. 20, 1998, § 1, at 48.

19. *See, e.g., Wis. Right to Life v. FEC*, 546 U.S. 410 (2006).

20. 148 CONG. REC. S8155 (daily ed. Sept. 4, 2002).

21. Jerry Gray, *House-Senate Negotiators Agree to Cost-of-Living Increase for Members of Congress*, N.Y. TIMES, Sept. 30, 1997, at A24; Carl Hulse, *As Deadline Nears, Congress Slogs in a Fiscal Quagmire*, N.Y. TIMES, Sept. 5, 2002, at A19; Marc Lacey & Katharine Q. Seelye, *The 2000 Campaign: The Democrats; Gore Reunites with President For Just a Day*, N.Y. TIMES, Oct. 21, 2000, at A1; John McCain, Op-Ed, *A Budget We Should Be Ashamed Of*, N.Y. TIMES, Oct. 25, 1998, §4, at 17; Eric Schmitt, *Senate Weighs Bill on Gay Rights on the Job*, N.Y. TIMES, Sept. 7, 1996, § 1, at 12; Tim Weiner, *Spending Bills Cannot Meet the Deadline, G.O.P. Admits*, N.Y. TIMES, Sept. 28, 1999, at A1.

22. Opening Brief of the “Business Plaintiffs,” Chamber of Commerce of the United States, National Ass’n of Manufacturers, and Associated Builders and Contractors, Inc. at 16-17, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1756).

23. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

overbreadth” cannot be “readily reduced to an exact definition” and that “in short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.”²⁴ In practice, one noted commentator suggests, “substantial overbreadth might be demonstrated by showing a significant number of situations where a law could be applied to prohibit constitutionally protected speech.”²⁵

Thus in the district court, a fierce battle was fought among the *McConnell* litigants about what percentage of advertisements restricted by BCRA’s electioneering communications brownout were “genuine” issue ads as opposed to candidate ads. The dispute centered in substantial part around a pair of controversial studies conducted by the Brennan Center for Justice called *Buying Time*²⁶ and expert testimony on the number of “genuine” issue ads restricted by the law.

Judge Henderson found as a factual matter that:

[n]o credible evidence in the record supports the defendants’ assertion that BCRA’s “electioneering communication” provisions will affect “very few genuine discussions of policy matters.” To the contrary, credible record evidence suggests that BCRA will actually capture a vast number of “genuine” issue advertisements.²⁷

Henderson noted that even defendants’ expert witnesses agreed that if the formula used in *Buying Time 2000* was used with the data from *Buying Time 1998*, the study would have concluded that 14.7% of all “genuine” issue ads in 1998 would have been blocked by BCRA, not the seven percent that was argued.²⁸

Judge Kollar-Kotelly, on the other hand, found that the studies could not provide a reliable figure for what percentage of covered ads were “genuine” issue ads and that it could be as high as seventeen percent.²⁹ But she concluded

24. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984); *see also* *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

25. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 1088 (2005).

26. *McConnell v. FEC*, 251 F. Supp. 2d 176, 412-17, 796 (D.D.C. 2003), *rev’d in part and aff’d in part*, 540 U.S. 93 (2003) (discussing CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BRENNAN CENTER, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS* (2001) and JONATHAN S. KRASNO & DANIEL E. SELTZ, BRENNAN CENTER, *BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS* (2000)). For harsh critiques of the methodology and legitimacy of these studies, *see McConnell*, 251 F. Supp. 2d at 307-12 (Henderson, J., concurring in part and dissenting in part); and David Tell, *An Appearance of Corruption*, WKLY. STANDARD, May 26, 2003. Among other things, it was found that the Brennan Center pledged to discontinue work on the studies if they did not appear to be leading to the desired result and that some data was recoded in order to help produce that result. *McConnell*, 251 F. Supp. 2d at 307-12 (Henderson, J., concurring in part and dissenting in part); Tell, *supra*.

27. *McConnell*, 251 F. Supp. 2d at 307 (Henderson, J., concurring in part and dissenting in part) (citations omitted).

28. *Id.* at 309-10 (citing KRASNO & SELTZ, *supra* note 26, at 60).

29. *Id.* at 586 (Kollar-Kotelly, J., memorandum opinion).

that whatever the actual number, the dispute was “largely an academic exercise,” as “one person’s genuine issue advertisement can be another’s electioneering commercial.”³⁰ Judge Kollar-Kotelly agreed that the plaintiffs’ un rebutted expert witness testimony was that the electioneering communications provisions captured in excess of thirty million group-to-voter communications.³¹ Through some back-of-the-envelope calculations, however, she decided that this figure probably amounted to some fourteen percent of all ads in the study and then concluded, abruptly and without explanation, that this did not provide a “sufficient basis . . . for determining whether BCRA is overbroad.”³²

The panel’s third member, Judge Leon, took a middle ground. He concluded that the studies were entitled to “some evidentiary weight,”³³ but found that the best readings of the studies showed that fourteen to seventeen percent of the ads covered were “genuine” and held that this was sufficient to strike the provision as overly broad.³⁴

The Supreme Court wasted no time on the factual disputes underlying the overbreadth argument. It dismissed the issue simply by noting that whatever the percentages, “the vast majority of ads clearly had [an electioneering] purpose” and added that the number could be lower in the future because organizations could simply change the content or financing of ads to be sure they complied with the law.³⁵

The Court did not specifically deal with the un rebutted testimony that, even accepting defendants’ adjusted coding of ads, at a minimum some thirty to sixty million uncontroverted “genuine” group-to-voter issue communications would be restricted.³⁶ Rather, it simply made the conclusory statement that plaintiffs had not carried the burden of demonstrating overbreadth, elaborating only to note that such overbreadth must be “substantial, ‘not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications.’”³⁷ Whatever the number of “sham” issue ads within the law’s “plainly legitimate application,” the Court gave no explanation as to why thirty to sixty million voter contacts, a great number by any calculation and well in excess of ten percent of all properly regulated activity under even the most conservative estimate, was insufficient. If that many incidents of suppression of

30. *Id.*

31. *Id.* at 586-87.

32. *Id.* at 587.

33. *Id.* at 796 (Leon, J., memorandum opinion).

34. *Id.* at 798. However, Judge Leon went on to hold that the back-up definition of electioneering communication was constitutional. As the Supreme Court would uphold the primary definition based on its thirty/sixty-day formula, for our purposes it is not necessary to discuss the back-up definition.

35. *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

36. See James L. Gibson, *BCRA’s Assault on the First Amendment: The Death of the Overbreadth Doctrine?*, 3 *ELECTION L. J.* 245, 247 (2004).

37. *McConnell*, 540 U.S. at 207 (quoting *Virginia v. Hicks*, 539 U.S. 113, 120 (2003)).

protected speech does not constitute overbreadth, “the doctrine has little rigorous or objective meaning after *McConnell*.”³⁸

Our goal, however, is not to refight this battle. Rather, the purpose of this Article is to demonstrate that even in reaching this conclusion, the Supreme Court failed to properly understand the working of the statute, leading it to understate the number of “genuine” issue ads curtailed by the law and to underestimate its potential impact on political speech. If thirty to sixty million voter contacts is not enough to count as “substantial,” what if both the raw number and the percentage of ads restricted were substantially larger still?

Both the three-judge district court and the Supreme Court appear to have assumed that the brownout period in the law lasted a total of ninety days every two years: thirty days before the primary and sixty days before the general election. None of the many opinions in the case—there were four in the district court and eight in the Supreme Court—whether concurring or dissenting, made any reference to the fact that the brownout in presidential elections also extended nationwide another thirty days before the national nominating conventions, thus bringing the brownout period for presidential nominees to a minimum of 120 days. None noted that the thirty-day pre-primary brownout was typically extended by three to four days to cover the length of the national nominating conventions, and sometimes by one to two days to cover the length of caucuses or conventions in states using those mechanisms to choose nominees. Most importantly, none of the opinions recognized that multi-state media markets greatly increase the brownout period for large segments of the U.S. population. In short, not one of the twelve opinions written by the two courts, at any point, exhibited the slightest awareness that the electioneering communications brownout routinely exceeds ninety days in an election year.

The multi-state nature of many American media markets means that in a great many portions of the country, including many large urban areas, broadcast stations can be received by 50,000 persons in each of two or more states. Where these states have staggered primary dates, advertising on stations in that market may be subject to BCRA’s electioneering communications limitations for upwards of 200 days a year. All evidence indicates that neither the district nor the Supreme Court considered this possibility. Indeed, in the district court, Judge Kollar-Kotelly cited as an example of a “genuine” issue ad not affected by BCRA one airing on WTTG in Washington, D.C., mentioning Delaware Senator Joe Biden within sixty days of election day, in the apparent belief that an ad run in Washington, D.C., would not be covered for a Senate race in Delaware.³⁹ In fact, WTTG reaches 50,000 viewers in Delaware.⁴⁰ In

38. Gibson, *supra* note 36, at 249.

39. *McConnell v. FEC*, 251 F. Supp. 2d 176, 574 (D.D.C. 2003) (Kollar-Kotelly, J., memorandum opinion), *rev’d in part and aff’d in part*, 540 U.S. 93 (2003)

(The *McConnell* plaintiffs provide this three-judge District Court with 21 advertisements Defendants point out that nine of the twenty-one advertisements . . . would not have been affected by BCRA; eight were not run

fairness to the courts, the plaintiffs themselves seem to have largely overlooked this aspect of the law. Only in the Supreme Court did any of the plaintiffs or plaintiffs' amici raise the issue, and then it was only briefly discussed in the joint brief of the U.S. Chamber of Commerce, National Association of Manufacturers, and Associated Builders and Contractors.⁴¹ Nevertheless, we believe that the failure to account for interstate broadcast markets undermines the overbreadth analysis that both the district court and Supreme Court applied in *McConnell*.

Our modest contribution to the debate in this Article is to illustrate the extent of the problem by examining the effects of interstate broadcast markets on the brownout periods in a number of markets.

IV. THE TRUE EXTENT OF BCRA'S ELECTIONEERING COMMUNICATIONS "BROWNOUT" PERIODS: SPECIFIC MARKET EXAMPLES

In this Part we will show how, in specific markets, BCRA is not limited to ads run within thirty or sixty days of an election. This problem is most acute in presidential contests. We look retrospectively at the 2004 primary and convention schedule, not the 2008 schedule, because several 2008 primary and caucus dates have yet to be determined. While changing dates in future years may alter specific consequences from 2004, only radical and unlikely changes in the election calendar would alter the general finding that BCRA's electioneering communications provisions are far broader in scope than recognized by the courts in the *McConnell* litigation.⁴²

within 60 days of a general election or 30 days of a primary contest, and one was run in the Washington, D.C. media market where the two Senators mentioned, Senator Jesse Helms of North Carolina, and Senator Joseph Biden of Delaware, were not running for office.”)

In fact, neither Senator Helms nor Senator Biden was a candidate for re-election in 1998, the year of the ad. But it seems clear that Judge Kollar-Kotelly assumed the ad did not cover Biden because he was not running in the “D.C. media market,” not because he was not up for re-election. If Judge Kollar-Kotelly thought he merely was not a candidate, she could have included the ad within the first clause, concerning ads not run within sixty days of the candidate's election. Her confusion may be caused by the defendants' brief, which states, “The [ad] was run only in Washington, D.C. and neither Senator Jesse Helms nor Joseph Biden was a candidate for Senate in the D.C. television market.” Brief of Appellants in Opposition, at 77 n.78, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-1676). It is not clear if the defendants were arguing that this was because Biden was not up for re-election or because they did not believe that the ads reached Biden's state of Delaware.

40. Federal Communications Commission, Electioneering Communications Database, <http://gullfoss2.fcc.gov/ecd/> (database established pursuant to BCRA, 11 C.F.R. § 100.29(b) (2006)) (enter election, state, media type, and station call sign in pull-down menus; then click on “search” button).

41. Opening Brief of “Business Plaintiffs” Chamber of Commerce of the United States, National Association of Manufacturers, and Associated Builders and Contractors, Inc. at 9-10, *McConnell v. FEC*, 540 U.S. 93 (2003) (No. 02-1756).

42. Because of the disproportionate effect early state primaries have in choosing a

A. TIMING OF PRESIDENTIAL PRIMARIES, CONVENTIONS, AND ELECTIONS IN THE 2004 ELECTION SEASON

The 2004 presidential primary season began in Washington, D.C., on January 13.⁴³ Howard Dean's infamous scream occurred on January 19, the day of his third-place finish in the Iowa Caucuses. Dean ended his campaign one month later, on February 18.⁴⁴ Two weeks after Dean's withdrawal, and after Senator John Kerry's significant victories on "Super Tuesday," John Edwards announced his departure from the race, sealing Kerry's nomination in all but the formalities.⁴⁵ Despite Kerry's lock on the Democratic nomination for president, state primaries continued to be held through June 8. Similarly, although President George W. Bush had no serious opposition for the Republican nomination, state caucuses and primaries were held from January through June of 2004.⁴⁶

In 2004, a majority of states held one primary or caucus day on which convention delegates for both major parties were selected.⁴⁷ In six states, however, individual parties held state conventions that lasted more than one day, thus altering the pre-primary brownout period from a simple thirty-day period to a period of thirty-one to thirty-two days, and in each of those six states, only one of the two parties had a multi-day caucus or convention.⁴⁸ Additionally, in sixteen states plus Washington, D.C., the two major parties held their nominating primaries, caucuses, or conventions on different dates, thus triggering differing days on which the brownout began, depending on whether a sponsor sought to include reference to Senator Kerry, President Bush, or both in an ad.⁴⁹

From July 26 to August 1, the Democratic National Convention was held in Boston, officially nominating Senator Kerry for president.⁵⁰ The Republican

party nominee, several states have charged groups with reviewing their primary nomination device and suggesting changes. See PA. ELECTION REFORM TASK FORCE, FINAL REPORT ON EXECUTIVE ORDER 2004-11 (2005), http://www.dos.state.pa.us/election_reform/lib/election_reform/PERTF_Final_Report_051705_Website.pdf. Future presidential primary schedules will likely look different from 2004, yet still remain substantially staggered as states jockey for the increased effect on party nominations.

43. FED. ELECTION COMM'N, 2004 PRESIDENTIAL PRIMARY DATES I (2004) <http://www.fec.gov/pubrec/fe2004/2004pdates.pdf>.

44. Nina J. Easton, *For Dean's Movement, An Unlikely Inspiration*, BOSTON GLOBE, Feb. 11, 2005, at A1.

45. Raja Mishra, *Campaign 2004 / Edwards; His Bid Ends Where It Began: On Positive Note*, BOSTON GLOBE, Mar. 4, 2004, at A18.

46. FED. ELECTION COMM'N, *supra* note 43, at 6-7. The first contest for Republican candidates was the Iowa 2004 Presidential Caucus held on January 19. The final contest was the New Jersey 2004 Presidential Primary held on June 8.

47. *See id.*, at 1-3.

48. *See id.*

49. *See id.* This was also true in the territories of Guam, the Virgin Islands, and American Samoa.

50. Adam Nagourney, *Clinton Assails Bush as Democrats Open Convention*, N.Y.

National Convention opened in New York on August 30 and closed on September 2.⁵¹ Although major party conventions have, as a practical matter, long since lost any significant role in choosing the candidate, they remain the place where the nomination is formally made and thus trigger BCRA's limitations on electioneering communications. Because the nominations are for the nationwide fall election of the president, this additional thirty-day brownout applies throughout the country. Thus, in addition to the sixty-day national brownout on both major candidates, BCRA imposed a nationwide ban on electioneering communications mentioning Senator Kerry⁵² from June 26 through July 29, a period of thirty-four days, and President Bush from July 31 through September 2, also a period of thirty-four days. Finally, following the nominations, the general election in 2004 was held on November 2, meaning that a nationwide prohibition on certain broadcast communications mentioning either President Bush or Senator Kerry, both incumbent federal officeholders, began on September 3. Thus, the total presidential brownout period for candidates from each party, at a minimum, was not ninety days but 124 days in every state.

Perhaps most importantly for overbreadth analysis, while traditional state borders often establish significant political, legal, and jurisdictional consequences, they do not reflect modern media markets. Cities such as New York, Philadelphia, Washington, D.C., and Kansas City are located on or near state borders. Broadcasters in these cities reach regional audiences that share climate, geography, culture, and, often, political concerns, without regard for political borders. Similarly, in many more rural parts of the country, and particularly in the Rocky Mountains and the Great Plains, media markets cover vast swaths of land covering parts of several states. In these situations, broadcast stations must often observe the electioneering communications

TIMES, July 27, 2004, at A1. The Green and Constitution Parties began their national conventions on June 23, at which they selected their respective nominees. *Constitution Party National Convention Begins Thursday in Historic Valley Forge, PA, June 23-26*, U.S. NEWSWIRE, June 21, 2004; Green Party, Green National Convention: Forward 2004!, <http://www.gp.org/convention2004/>. Additionally, the Reform Party held its national "meeting" on Friday, August 27. Brandon Formby, *Nader Nominated by Reform Party*, DALLAS MORNING NEWS, Aug. 29, 2004, at 5B. While not as significant as the Republican or Democratic National Convention's effects, one can imagine scenarios where minor party conventions could also affect electioneering communications involving well-funded candidates such as Ross Perot in 1992 and 1996 or incumbent members of Congress such as John Anderson in 1980.

51. Michael Slackman, *G.O.P. Convention Cost \$154 Million, Most of It Donated*, N.Y. TIMES, Oct. 14, 2004, at B1, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0DEED61F3BF937A25753C1A9629C8B63&n=Top%2FReference%2FTimes%20Topics%2FPeople%2FR%2FRockefeller%2C%20David>.

52. The restrictions also applied to ads mentioning Representative Dennis Kucinich who remained officially in the Democratic race until the Convention. See Maria L. La Ganga & Doyle McManus, *The Race to the White House*, L.A. TIMES, July 31, 2004, at 17 (noting that Kucinich did not release his delegates until Monday, July 26, 2004).

limitations in multiple states, thus substantially lengthening the brownout period. Additionally, these brownouts may occur in a series of “on” and “off” periods for any particular Democratic or Republican candidate in multi-state media markets. It is quite common for one state to be in a free broadcast period, while neighboring states in the same media market fall under BCRA’s limits.

B. SPECIFIC MARKET EXAMPLES OF ELECTIONEERING BROWNOUT PERIODS

This Subpart details the 2004 brownout periods in thirteen different interstate media markets in order to more realistically illustrate the significant limitation BCRA places on “genuine” issue advocacy.

Six of the ten largest metropolitan areas in the United States, and seventeen of the fifty largest, are multi-state metropolitan areas.⁵³ However, broadcast markets often extend well beyond the defined metropolitan area. Literally dozens of multi-state broadcast media markets exist in the United States. Nielsen Media Group, which conducts ratings surveys for television, divides the nation into 210 television “Designated Market Areas” (DMAs). Of the 100 largest DMAs, fifty-two serve multiple states and twenty-two serve more than two states.⁵⁴ For radio, Arbitron divides the nation into 286 market areas, called “Areas of Dominant Influence” (ADIs). Excluding Puerto Rico, twelve of the thirty largest ADIs cross state lines.⁵⁵ The fifty-two largest multi-state television DMAs alone account for 45.62% of the nation’s population⁵⁶, meaning that nearly half the nation’s population is potentially subject to electioneering communication brownout periods in excess of 120 days in election years.⁵⁷ This is without considering smaller, multi-state DMAs. But these figures still vastly understate the number of radio and television stations whose broadcast markets include multiple states and the number of viewers and listeners potentially subject to brownout periods in excess of 120 days.

The Federal Communications Commission (FCC) provides a searchable website database to determine, for purposes of compliance with BCRA,

53. Authors used the FCC Electioneering Communications Database, *supra* note 40, to determine which markets encompass a multi-state audience by identifying those stations which have over 50,000 viewers in more than one state. The list of market ranks is available at NIELSEN MEDIA RESEARCH, LOCAL MARKETS UNIVERSE ESTIMATES (2005), <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?allRmCB=on&newSearch=yes&vgnextoid=c09f479caf306010VgnVCM100000880a260aRCRD&searchBox=demographics> (click on “Local Markets Universe Estimates” under the heading “Related Items”).

54. *See supra* note 53.

55. *See* Arbitron, Radio Market Rankings Spring 2006, http://www.arbitron.com/radio_stations/mm001050.asp (last visited Aug. 14, 2006) and Arbitron, Market Definitions for Arbitron Surveys, http://www.arbitron.com/ad_agencies/mktdefs.asp (last visited Jan. 8, 2007).

56. *See supra* note 53; NIELSEN MEDIA RESEARCH, *supra* note 53.

57. Sixty days before the general election, thirty days before national nominating conventions, and thirty days before state primaries or caucuses.

whether a specific broadcast station reaches 50,000 viewers in a particular state⁵⁸ Many stations reach states far beyond the ADI/DMA in which they are located. For example, the New York ADI covers three states—New York, Connecticut, and New Jersey—but the ABC network’s flagship station, WABC, not only reaches 50,000 listeners in each of those states, it also reaches 50,000 listeners to trigger BCRA’s brownouts in Rhode Island.⁵⁹ Several Chicago television stations reach 50,000 viewers not only in the Chicago DMA of Illinois and Indiana, but also in Wisconsin and Michigan.⁶⁰ The electioneering communications brownout periods are therefore triggered by primaries in these other states as well as by multiple states within the ADI/DMA. At the same time, listeners in those states outside the ADI who nonetheless rely on these stations for news may find the brownout period in effect far outside the thirty-day pre-primary period in their own states.

Following is an illustration of television brownout dates in 2004 in thirteen markets.⁶¹ These markets were not chosen randomly, but neither were they chosen with any particular purpose in mind, other than to gain a mix of large and small media markets.⁶² The reader should not infer that every multi-state market creates brownout periods longer than the national brownouts plus a single, thirty-day state brownout, though it appears that the vast majority do. Our goal is merely to show that at a minimum, in many markets the brownout period extends far beyond ninety or even 120 days. We also will speak of the “national” or “nationwide” brownout period as being ninety-four days: sixty before the general election plus thirty-four for the Republican National Convention or thirty-four for the Democratic National Convention. Of course, these convention periods ran serially, not simultaneously, so in truth they imposed sixty-eight days of partial brownouts. We will lump them together as thirty-four days of national brownout, to account for the time that mentions of each party’s presidential candidates are covered by the brownout.

Additionally, these market analyses apply only to television markets, not to radio. Television has long since replaced radio as the key medium for campaigns. Nevertheless, the reader should be conscious that in many areas the market brownouts will be longer or shorter on various radio stations. Finally, for simplicity, we address below only the brownout periods caused by

58. FEC regulations require the FCC to provide the website. 11 C.F.R. § 100.29(b)(6)(i); see Federal Communications Commission, *supra* note 40.

59. *Id.*

60. *Id.*

61. A chart of Total Brownout Dates and Affected States by Market is in the Appendix. Market geography and market populations were determined relying on NIELSEN MEDIA RESEARCH, *see supra* note 54. The reach of particular stations to 50,000 or more viewers was determined from FCC Electioneering Communications Database, *supra* note 40. 2004 primary dates were determined from FED. ELECTION COMM’N, *supra* note 43.

62. Most of these thirteen markets are quite small, although we also included the megamarkets of New York, Chicago, Philadelphia, and Washington, D.C. Combined, these thirteen markets alone serve nearly twenty million people. *See* Federal Communications Commission, *supra* note 40.

presidential elections—in many of these markets, additional brownout periods will apply for congressional and senatorial elections.⁶³

1. ANALYSIS OF THE MOBILE (ALABAMA) MEDIA MARKET

The Mobile media market is centered in the southernmost tip of Alabama. Residents of western Florida and southeastern Mississippi rely on broadcast communication stations in the Mobile media market. The market is so intertwined with western Florida that the ABC affiliate broadcasts out of Pensacola, Florida. Alabama, Florida, and Mississippi each have the requisite 50,000 viewers who receive all major broadcast stations out of the Mobile market: WKRK (CBS), WALA (FOX), WPMI (NBC), and WEAR (ABC).

In 2004, the 501,130 viewers who rely on the major Mobile stations were subjected to sixty days of brownout prior to the general election, plus thirty-four days of brownout (in reality, sixty-eight days of alternating brownout for the Democratic and Republican presidential candidates) prior to and through the national nominating conventions. Additionally, Mobile broadcast ads were limited for thirty days to account for the Alabama Primary on June 1 and another thirty days for the Mississippi and Florida primaries held on March 9.

The total BCRA brownout on the major Mobile broadcast stations was 154 days of electioneering communications brownout for both major party candidates.

2. ANALYSIS OF THE CINCINNATI MEDIA MARKET

The Cincinnati media market covers southwestern Ohio and parts of Indiana and northern Kentucky. All three states have the requisite 50,000 viewers who receive the major broadcast stations out of the Cincinnati market: WLWT (NBC), WCPO (ABC), WKRC (CBS), andWSTR (WB).

In addition to the standard national brownout of sixty days for both major parties before the general election, plus thirty-four days (again, alternating by party for a total of sixty-eight days) before the party conventions, the 880,190 viewers who rely on these major stations were limited in 2004 for an additional seventy-four days to account for the Ohio Primary on March 2, the Indiana Primary on May 4, and the Kentucky Primary on May 18. Only fourteen days counted against the total from the Kentucky Primary because of the overlap with the brownout period for the Indiana Primary.

The total electioneering communications brownout on the major Cincinnati broadcast stations in 2004 was 168 days. These 168 days occurred in the last 273 days before the general election, meaning that in the nine months before the general election, over sixty percent of broadcast days were subject to electioneering communication brownouts for each major presidential candidate.

63. *See infra* Part V.

3. ANALYSIS OF THE OMAHA MEDIA MARKET

The Omaha media market spreads across most of the Nebraska-Iowa border. Residents of both of these states, as well as Missouri, rely on broadcast communication stations in the Omaha media market. Although an entire county of Missouri is in the market, no Omaha station reaches the requisite 50,000 Missourians. Nebraska and Iowa each have the requisite 50,000 viewers who receive the major broadcast stations in Omaha: KMTV (CBS), WOWT (NBC), KETV (ABC), and KXVO (WB). Two significant stations in Omaha that do not reach the requisite number of Iowans are KKAZ (FOX) and KAXO Azteca America, a Spanish language channel.

In 2004, the 399,830 viewers in the Omaha market were limited in exposure to ads mentioning either the president or a leading U.S. Senator for ninety-four days due to the nationwide brownouts of the general election and conventions, plus an additional sixty days of brownouts for the Iowa Primary on January 19 and the Nebraska Primary on May 11. The only way to get television ads, the most important source of voter information, around the Iowa Primary blackout in Nebraska was to use the smaller-powered stations that don't reach the requisite 50,000 in Iowa: FOX and Azteca America.

Aside from Azteca America and FOX, the total brownout on the major Omaha broadcast stations was 154 days, instead of the ninety days assumed by the *McConnell* Court.

4. ANALYSIS OF THE SIOUX CITY (IOWA) MEDIA MARKET

The Sioux City media market is north of the Omaha media market, along the northern border between Nebraska and Iowa. Residents of southeastern South Dakota, Nebraska, and Iowa rely on broadcast communication stations in the Sioux City media market. Each of these states has the requisite 50,000 viewers who receive the major broadcast stations out of Sioux City: KTIV (NBC), KCAU (ABC), KMEG (CBS), and KPTH (FOX).

In addition to the standard national brownout periods, the 156,950 viewers who rely on the major Sioux City stations were limited for an additional eighty days to account for the Iowa Caucus on January 19, the Nebraska Primary on May 11, and the South Dakota Primary held on June 1. As in the Cincinnati market, the brownout dates for the South Dakota and Nebraska primaries overlapped, thus limiting the total effect of the blackout on the major broadcast stations.

The total brownout period in the presidential race for the major Sioux City broadcast stations in 2004 was 174 days.

5. ANALYSIS OF THE SHREVEPORT (LOUISIANA) MEDIA MARKET

The Shreveport media market is located in the northwestern corner of

Louisiana. Residents of Arkansas, Texas, and Oklahoma rely on broadcast communication stations based in Shreveport. The market is so intertwined with bordering states that the NBC affiliate broadcasts out of Texarkana, Arkansas. Despite southeastern counties of Oklahoma being a part of the Shreveport media market, no television station in the market reaches the requisite 50,000 Oklahomans. Louisiana, Texas, and Arkansas, however, each have the requisite 50,000 viewers who receive the major broadcast stations out of the Shreveport market: KTBS (ABC), KTAL (NBC), KSLA (CBS), KMSS (FOX), and KSHV (WB).

The 382,080 viewers who rely on the major Shreveport media market stations were limited in 2004 by the ninety-four days of nationwide brownouts, as well as an additional sixty days for the Louisiana and Texas primaries on March 9, and the Arkansas Primary on May 18. Additionally, the late date of the Arkansas Primary produced an all-on, all-off, all-on, all-off, all-on period of brownouts leading up to the alternating national brownouts that began with the Democratic National Convention. With no significant alternative broadcast stations, the off-and-on brownout periods only add to the BCRA burden on the Shreveport media market by making an organized, sustained grassroots issue campaign more difficult.

The total brownout for the major Shreveport broadcast stations was 154 days rather than the ninety presumed by the *McConnell* Court.

6. ANALYSIS OF THE MEMPHIS MEDIA MARKET

The Memphis media market covers the southwestern corner of Tennessee. Viewers in Tennessee, Arkansas, Mississippi, and Missouri receive the broadcast communication stations in the Memphis media market. Tennessee, Arkansas, and Mississippi each have the requisite 50,000 viewers who receive the major broadcast stations out of the Memphis market: WREG (CBS), WMC (NBC), WHBQ (FOX), WPTY (ABC), and WLMT (UPN/WB).

The 657,670 viewers who rely on the major Memphis stations sat through the ninety-four days of nationwide brownouts in 2004, in addition to eighty-eight days of brownout for the Tennessee Primary on February 10, the Mississippi Primary on March 9, and the Arkansas Primary on May 18. Again, the lateness of the Arkansas Primary produced an all-on, all-off, all-on, all-off, and all-on period of brownouts leading up to the brownout triggered by the Democratic Convention. In the Memphis media market, even the religious channel PAX (WPXX) reaches 50,000 viewers each in Mississippi and Arkansas. Without alternative broadcast stations, except the smallest religious channels, the off-and-on brownout periods make it difficult to operate any sustained issue campaign.

The total BCRA brownout on the major Memphis broadcast stations was 182 of the 296 days leading up to the election. This meant that it was illegal even to mention the president, vice president, or other presidential candidates in

most broadcast ads for more than sixty percent of the ten-month period before the election.

7. ANALYSIS OF THE PADUCAH (KENTUCKY) MEDIA MARKET

The Paducah media market engulfs the four-state junction of Kentucky, Illinois, Missouri, and Tennessee. Residents of all four states receive the broadcast communication stations in the Paducah media market. The market is so intertwined that the CBS affiliate operates out of Cape Girardeau, Missouri and the ABC affiliate is broadcast from Harrisburg, Illinois. Missouri, Illinois, and Kentucky each have the requisite 50,000 viewers who receive all major broadcast stations out of the Paducah market: WPSD (NBC), WQWQ (UPN), WDKA (WB), WSIL (ABC), and KFVS (CBS). Additionally, more than 50,000 Tennessee viewers receive WPSD and KFVS, the NBC and CBS affiliates.

In addition to the nationwide brownouts, the 383,330 viewers who rely on the major Paducah media market stations faced an additional ninety days of brownout for the Missouri Primary on February 3, the Illinois Primary on March 16, and the Kentucky Primary on May 18. Additionally, the CBS and NBC affiliates observed an extra seven days of brownout because of the Tennessee Primary on February 10.

Because of the lateness of the Kentucky Primary and the brief respite before the Illinois Primary, there was an all-on, all-off, all-on, all-off, all-on, all-off, all-on period of brownouts leading up to the nationwide brownouts before the Democratic Convention. This alternating period consisted of seven changes in the status of electioneering communications in just five months. With limited alternative broadcast stations in Tennessee, the off-and-on brownout periods worsened the longer BCRA brownouts on the Paducah stations.

The total BCRA brownout on all major Paducah broadcast stations was 184 days, and 191 days for the CBS and NBC affiliates. In both cases, this totals over sixty percent of the ten-month period before the 2004 general election in November.

8. ANALYSIS OF THE WASHINGTON, D.C., MEDIA MARKET

The Washington, D.C., media market reaches viewers in D.C., Virginia, Maryland, Pennsylvania, West Virginia, and Delaware. All of those states, with the exception of Delaware, have the requisite 50,000 viewers who receive all major broadcast stations out of the D.C. Market: WRC (NBC), WTTG (FOX), WJLA (ABC), WUSA (CBS), WBDC (WB), and WDCA (UPN). Additionally, WTTG (FOX) reaches the requisite 50,000 viewers in Delaware to trigger BCRA's electioneering communications limitations.

The channels that broadcast in the D.C. media market that do not reach the

requisite trigger in any other state are WIAV (Asiavision), WZDC (Telemundo), and WDDN (Word of God Fellowship). There are smaller stations that create multiple combinations of reaching or not-reaching the requisite audience in West Virginia and Pennsylvania.

The 2,252,550 viewers who rely on the major D.C. media market stations in 2004 endured ninety-four days of nationwide brownouts, as well as an additional seventy-four days of brownout for the Maryland Primary on March 2, the Pennsylvania Primary on April 27, and the West Virginia Primary on May 11. The District of Columbia, Virginia, and Delaware are unique because they each allow parties to have separate primary or caucus dates. D.C. Republicans caucused on February 10, while the Democrats caucused on February 14. In Virginia, the Democratic Primary was on February 10, and the Republican State Convention June 5. Delaware's Democrats held a primary on February 3, and the GOP state convention ran May 14 and 15.

The D.C. caucuses increased the brownout on Democratic candidate electioneering communications for an additional sixteen days.⁶⁴ Likewise, there was an extra twenty-one days of brownout time for GOP candidate electioneering communications during the D.C. caucuses. The Virginia primaries also increased each of the party-specific brownout periods. The February 10 Democratic Primary added another four days to the Democratic candidate brownout, for a total of twenty additional days to the Democratic candidate brownouts. Due to less overlap, twenty-five days were added to the GOP candidate brownout for Virginia alone, and a total of forty-six days for Virginia and D.C. combined.

WTTG, the FOX affiliate, reaches the requisite 50,000 in Delaware and triggers an additional blackout. Because Delaware has split primaries that overlap with other primary brownouts, the impact creates a smaller discrepancy. WTTG had the same seventy-four day brownout as its competitors to account for Pennsylvania, Maryland, and West Virginia, as well as an additional forty-six days of blackout for Republican electioneering communications and an extra forty-nine days of blackout for Democratic electioneering communications for the District of Columbia, Virginia, and Delaware.

The total BCRA blackout on the major D.C. broadcast stations (except FOX's WTTG) was 168 days of electioneering communications brownout applicable to both candidates, plus an additional forty-six day brownout on GOP candidate electioneering communications and twenty-one days of Democratic candidate electioneering communications—a total of 214 days for the GOP candidate and 188 for the Democratic candidate. For ads on WTTG, that period expanded to 217 days for Democrats. For all stations, this meant a brownout on Democratic candidates of over sixty percent of days in the ten months prior to the November elections and a brownout on the Republican side

64. Due to overlap with another brownout, it was not a full thirty-day brownout.

of over seventy percent of all broadcast days prior to the elections. On WTTG, the brownout was in excess of seventy percent of all days for the Democratic candidates as well.

In addition to the lengthy brownout periods, the D.C. market creates a scenario in which there is a substantial difference in the ability of citizens to mention Republican or Democratic candidates. This disparity in 2004 was a minimal three days on the FOX affiliate, but twenty-six days on all other stations.

Compounding the problems of the broad brownout and the varying party-specific brownouts, the five months of primaries in the D.C. media market created a confusing on-and-off-again pattern, as follows: all-on, Democrat-off, all-off, all-on, all-off, Democrat-on, and GOP-on again. This was followed by the alternating brownouts before the national conventions. With Asian and Spanish language stations and religious channels as the only alternative broadcast stations in Washington, D.C., the off-and-on electioneering communications brownouts increased the difficulty of running a genuine issue campaign in the important D.C. media market.

9. ANALYSIS OF THE CHATTANOOGA MEDIA MARKET

The Chattanooga media market covers the southeastern corner of Tennessee plus parts of Georgia, Alabama, and North Carolina. Tennessee, Georgia, and Alabama each have the requisite 50,000 viewers who receive most of the major broadcast stations out of the Chattanooga market: WRCB (NBC), WTVC (ABC), and WDEF (CBS/UPN). WDSI (FOX) is affected by Tennessee and Georgia elections, but not Alabama.

The 354,230 viewers who receive the major Chattanooga television stations endured the nationwide brownouts, plus an additional eighty-one days of brownout for the Tennessee Primary on February 10, the Georgia Primary on March 2, and the Alabama Primary on June 1. The lateness of the Alabama Primary caused an all-on, all-off, all-on, all-off, all-on period of brownouts leading up to the brownout triggered by the Democratic National Convention.

The total BCRA brownout on the major Chattanooga broadcast stations was 175 days, except on WDSI (FOX), which was 145 days.

10. ANALYSIS OF SIOUX FALLS (SOUTH DAKOTA) MEDIA MARKET

Residents of South Dakota, Minnesota, and Iowa rely on broadcast communication stations based in Sioux Falls. Each of these states has the requisite 50,000 viewers who receive major broadcast stations: KELO (CBS) and KSFY (ABC). KTTW (FOX) and KDLT (NBC) are only received by the requisite 50,000 in South Dakota and Minnesota. Finally, KCPO (UPN), KWSD (WB), and KAUN (Independent) only reach the requisite number in South Dakota.

In 2004, the Sioux City CBS and ABC affiliates were limited for ninety-four days of nationwide brownouts, and an additional ninety days of brownouts for the Iowa Caucuses on January 19, the Minnesota Primary on March 2, and the South Dakota Primary on June 1. The FOX and NBC affiliates had only an additional sixty days of local brownouts for the Minnesota and South Dakota primaries. Finally, the UPN and WB affiliate audience had only an additional thirty days of brownouts for the South Dakota Primary. Thus the UPN and WB affiliates had the minimum brownout period—124 days—allowed by BCRA in 2004. Ads on other stations were subject to the limitations for up to 184 days. This compares to the ninety days assumed by the courts.

11. ANALYSIS OF THE CHICAGO MEDIA MARKET

The Chicago media market reaches residents in Illinois, Indiana, Wisconsin, and Michigan. Each of these states have the requisite 50,000 viewers who receive all of the major broadcast stations: WBBM (CBS), WMAQ (NBC), WLS (ABC), WGN⁶⁵ (Independent/WB), and WFLD (FOX). Smaller alternative channels such as WCPX (PAX), WSNS (Telemundo), WPWR (UPN), WKFT (Telefutura), and WGBO (Univision) reach the trigger number in all of those states except Michigan.

The 3,430,790 viewers who rely on the major Chicago stations were subjected to ninety-four days of nationwide brownouts, plus an additional eighty-eight days for the Wisconsin Primary on February 17, the Illinois Primary on March 16, and the Indiana Primary on May 4. The Michigan party primaries were held at different times and created different party-specific brownout periods. The Democratic Caucus on February 7 overlapped with the brownout from Wisconsin, resulting in a twenty-day brownout of Democratic candidate electioneering communications. Michigan Republicans caucused on May 21 and 22, which overlapped with the brownout period for the Indiana Primary but still added an additional eighteen-day period to limitations on mentioning the president or vice president.

The schedule of primaries affecting the Chicago broadcast stations created an alternating pattern of Democrats-on, all-off, all-on, all-off, Democrats-on, GOP-on prior to the brownouts triggered by the national party conventions. The alternative stations provide relief only from the Michigan party-specific brownout, and primarily focus on religious, ethnic, and minority viewers.

The brownout on the major Chicago broadcast stations was 178 days, plus an additional eighteen-day brownout on GOP candidate electioneering communications and an additional twenty-day brownout on Democratic candidate electioneering communications on larger stations due to the

65. WGN and TBS, two nationally broadcast regional channels, reach nationwide audiences. The programming that is seen nationwide offers a different set of commercials and advertisements. The commercials broadcast on WGN in the Chicago media market are uniformly viewed by audiences who can receive the channel's local signal.

Michigan Primary, for a total of 196 to 198 days. This was sixty-five percent of broadcast days in a ten-month period when citizen groups were restricted from using the most effective form of mass communication to voice their views to the public.

12. ANALYSIS OF THE PHILADELPHIA MEDIA MARKET

The Philadelphia media market reaches residents in Pennsylvania, New Jersey, Delaware, and Maryland. Each of these states have the requisite 50,000 viewers who receive all of the major broadcast stations: KYW (CBS), WPVI (ABC), WCAU (NBC), WPHL (WB), WTXF (FOX), and WPSG (UPN). Smaller alternative channels exist in the market, but they are mostly local public broadcasting.

The 2,925,560 viewers who rely on the major Philadelphia stations were limited in 2004 for ninety-four days of national coverage, plus an additional ninety days for the Maryland Primary on March 2, the Pennsylvania Primary on April 27, and the New Jersey Primary on June 8. The Delaware party primaries are held at different times and create different party-specific brownout periods. The Democratic Primary was on February 3, overlapping slightly with the Maryland brownout period and resulting in an additional twenty-eight-day brownout of Democratic candidate electioneering communications. The Republican Caucus was on May 14. Because the brownout period triggered by this caucus overlapped with the periods triggered by the Pennsylvania Primary at one end and the New Jersey Primary at the other, it created only twelve more brownout days on GOP candidate electioneering communications.

Since the brownouts affecting the Philadelphia media market ran from January until June, an alternating pattern with as many as eight on-off status changes was created until the Democratic National Convention. Also, mention of Democratic candidates was limited for an additional sixteen days, creating an imbalance with GOP candidates. With few broadcast station alternatives, advertisers face substantial challenges in the Philadelphia media market.

The total BCRA brownout on the major Philadelphia broadcast stations was 196 days for Republican candidates and 212 for Democratic candidates. On the Democratic side, this amounted to over seventy percent of broadcast days in a 307-day period prior to elections.

13. ANALYSIS OF THE NEW YORK CITY MEDIA MARKET

The New York City media market reaches residents in New York, Pennsylvania, New Jersey, and Connecticut. Each of these states has the requisite 50,000 viewers who receive all of the major New York City broadcast stations: WCBS (CBS), WABC (ABC), WNBC (NBC), WNYW (FOX), WPIX (WB), and WWOR (UPN/Independent) out of Secaucus, NJ. Dozens of small, alternative channels exist in this market, many of them localized to specific

markets based on religion, ethnicity, and political subdivision.

The New York City market of 7,375,530 viewers is the largest in the country. That audience faced ninety-four national brownout days in 2004, plus an additional ninety days for the New York and Connecticut primaries on March 2, the Pennsylvania Primary on April 27, and the New Jersey Primary on June 8.

Because of the long line of primary brownouts affecting the New York City media market, an alternating pattern with as many as seven status changes was created until the Democratic National Convention. The smaller stations offer limited alternatives because they target specific audiences. These problems clearly illustrate the additional constraints BCRA places on the country's largest media market. The total BCRA brownout on the major New York City broadcast stations was 184 days.

The Appendix summarizes the electioneering communication effective brownout dates for the thirteen markets described above.

V. CONCLUSION: IMPLICATIONS FOR *MCCONNELL* AND THOUGHTS FOR FUTURE RESEARCH

These thirteen media market examples illustrate the significant burdens imposed by BCRA on electioneering communications. The *McConnell* Court upheld BCRA's electioneering communications provisions against an overbreadth challenge even though it accepted that somewhere between ten and twenty percent of the ads they prohibited were "genuine" issue ads and that these totaled a minimum of thirty million group-to-voter communications. Even so, the Court seriously understated the reach of the Act. The Court spoke of a thirty/sixty-day limitation, a total of just ninety days in the year prior to the general elections. At the presidential level, however, the statute clearly applies for a minimum of 120 days due to the nationwide brownouts caused by the national party conventions. And since those conventions are three to four days in length, the total brownout time provided by the statute for presidential races is in excess of 120 days in every jurisdiction in the country, with the total days in which at least some prohibitions on electioneering communications would be in effect possibly exceeding 150 days due to serial scheduling of national conventions.

Additionally, the Court failed to consider the millions of Americans who live in multi-state media markets. Serial brownout periods triggered by multiple states receiving station signals in many markets push the brownout to 180 days or more, well over twice the length of time that the Court considered. Further, given the assumption on which BCRA is based—that ads run close to an election are more likely to be "candidate" ads than "genuine" issue ads—it stands to reason that as the brownouts extend further away from election day, a higher percentage of "genuine" issue ads will be prohibited by the law. Thus, if we assume, as in the most conservative estimates in *McConnell*, that fifteen

percent of the ads within a ninety-day brownout are constitutionally protected, it is probably safe to assume that more than fifteen percent of the ads caught within a 180 day brownout are “genuine” issue ads that ought to benefit from the full constitutional protections outlined in *Buckley*.

The Court also paid no attention to the difficulty that the rotating pattern of brownouts creates for an organization attempting to mount a sustained issue campaign. While this would not directly increase the number of ads that would be illegal, it would have the probable indirect effect of reducing the amount of “genuine” issue communications by making such campaigns more difficult to sustain and the audiences for them more difficult to target. Also adding to the difficulty of a national issue campaign is that network ads, as opposed to local ad buys or ads on national cable stations WGN or WTBS, face a continuous brownout starting thirty days before the Iowa Caucuses and running through the last party primaries in early June, in addition to the national convention and general election brownouts that follow.

Finally, the Court failed to recognize a potential equal protection violation in that due to differing primary dates and multi-state overlaps, in many states the Act limits “candidate” ads differently for the two parties. In the Philadelphia media market, ads referencing Democratic candidates were limited for sixteen days longer than ads referencing their GOP adversaries. The most extreme disparity in the markets we examined was the twenty-five day difference in the brownout in the Washington, D.C., media market for GOP and Democratic candidates. Disparities are not unique to these media markets. Twenty states held their respective party primaries or caucuses on different days in 2004, creating the potential for differing brownout periods.⁶⁶

We have focused on presidential races because this is where the law’s impact will be greatest. For example, if a group wanted to run ads urging Wisconsin voters to address an issue involving Senator Russ Feingold, the primary dates for Illinois, Indiana, and Michigan would not limit the group’s ability to run ads on Chicago television stations (assuming Feingold were not seeking election to the presidency or vice presidency). Nevertheless, our simple review of the law’s scope has implications for Senate and House races as well. First, many states have run-off provisions for primary elections in which no candidate receives fifty percent or more of the vote, adding up to twenty-nine days to their brownout periods.⁶⁷ Second, because, as *Buckley* recognized, issues are often tied to candidates and politicians, and in particular to the president, a lengthy brownout on the identification of the president may hinder effective issue advocacy aimed at senators and congressmen. For example, an ad urging a congressman to “support the president” or “support the president’s

66. See FED. ELECTION COMM’N, *supra* note 43.

67. These states include Alabama, Arkansas, Georgia, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, and Texas. See Fed. Election Comm’n, 2004 Presidential Primary Dates and Candidate Filing Deadlines for Ballot Access, <http://www.fec.gov/pubrec/fe2004/2004pdates.pdf>.

judicial nominees” would be subject to the law everywhere that reference to the president is limited by the law. The same may apply, on a more limited scope, to popular senators and congressmen. For example, assuming he completes his current Senate term and seeks reelection, in 2010 one could not invoke Senator Feingold’s support for a legislative measure on most Chicago area broadcast stations, even if urging Illinois voters to contact Illinois senators, because of the overlap of those stations with Wisconsin viewers.

The Court’s acceptance of such lengthy brownouts could have tremendous impact on congressional, state, and local elections. If it is constitutionally permissible to limit ads pertaining to the president for upwards of 200 days during the ten months preceding the November elections, then it is hard to see why it would not also be permissible to extend the electioneering communications provisions to 200 or more days, or more than seventy percent of broadcast days, for U.S. Senate or House candidates, or state and local candidates, as well. The *McConnell* Court claimed to be acting in accordance with *Buckley*. Yet a limitation on even naming a candidate in a political ad for six or more months of each election year seems far less acceptable than the ninety-day limit discussed by the *McConnell* Court, and it certainly seems to depart from the protections that *Buckley* gave to issue speech. And if a 200-day limitation is possible, it is difficult to see, frankly, why there should be any stopping point short of a complete restriction on independent issue ads.

Our goal in this Article has been to demonstrate that at the presidential level, in a great many markets the brownout periods of McCain-Feingold are substantially longer than was apparently assumed by the Supreme Court—often double or more, and usually at least two-thirds longer. We selected thirteen markets, but we could have chosen many others and shown similar results.⁶⁸ Further analysis might aim to identify the number of ads that would have been prohibited by the law but were not analyzed by the Court. A comprehensive review of the ad data might reveal ads that proponents of the law miscategorized by failing to consider multi-state markets.

The Supreme Court’s apparently incorrect assumption about the scope of BCRA’s electioneering communications provisions provide ample reason for the Court to revisit that part of the *McConnell* case, giving minimal weight to *McConnell* as precedent. It may be that when all is said and done, the Court will decide that *McConnell* was correct. But such a determination should at least be based on a proper understanding of how the statute before the Court works. We hope that the examples in this Article will contribute to that understanding.

68. Examples that come readily to mind include Toledo, El Paso, Kansas City, Salt Lake City, Boston, Jacksonville, and Portland, Oregon. As noted earlier, fifty-two of the 100 largest DMAs are defined as serving multi-state markets, and many smaller DMAs are also defined as multi-state markets. *See supra* note 54 and accompanying text. Additionally, many DMAs reach enough viewers in more than one state to trigger the brownout provisions. In most markets, this will trigger extended brownout periods.

APPENDIX: TOTAL BROWNOUT DATES AND AFFECTED STATES BY MARKET⁶⁹

| Market | States Reached | Total Brownout Dates | Days of Brownout/ Days Before Election ⁷⁰ | Percentage of Brownout Days Before General Election | Size of Media Market Audience |
|-------------------------------|-----------------------|----------------------|--|---|-------------------------------|
| Mobile | AL, MS, FL | 154 | 154/266 | 57.9% | 501,130 |
| Cincinnati | OH, KY, IN | 168 | 168/273 | 61.5% | 880,190 |
| Omaha | IA, NE | 154 | 154/318 | 48.4% | 399,830 |
| Sioux City, IA | IA, NE, SD | 174 | 174/318 | 54.7% | 156,950 |
| Shreveport | LA, AR, TX | 154 | 154/266 | 57.9% | 382,080 |
| Memphis | TN, MO, AK | 182 | 182/296 | 61.5% | 657,670 |
| Paducah, KY ^a | MO, IL, KY | 184 | 184/303 | 60.7% | 383,330 |
| Paducah, KY ^b | MO, IL, KY, TN | 194 | 194/303 | 64.0% | 383,330 |
| Washington, D.C. ^c | VA, MD, PA, WV | 188 | 188/303 | 62.1% | 2,252,550 |
| Washington, D.C. ^d | VA, MD, PA, WV | 214 | 214/303 | 70.6% | 2,252,550 |
| Washington, D.C. ^e | VA, MD, PA, WV, DE | 217 | 217/303 | 71.6% | 2,252,550 |
| Washington, D.C. ^f | VA, MD, PA, WV, DE | 214 | 214/303 | 70.6% | 2,252,550 |
| Chattanooga | TN, GA, AL | 175 | 175/296 | 59.1% | 354,230 |
| Sioux Falls ^g | SD | 124 | 124/185 | 67.0% | 246,020 |
| Sioux Falls ^h | SD, MN | 154 | 154/275 | 56.0% | 246,020 |
| Sioux Falls ⁱ | SD, MN, IA | 184 | 184/318 | 57.9% | 246,020 |
| Chicago ^j | MI, WI, IL, IN | 196 | 196/303 | 64.7% | 3,430,790 |
| Chicago ^k | MI, WI, IL, IN | 198 | 198/303 | 65.4% | 3,430,790 |
| Philadelphia ^l | DE, MD, PA, NJ | 196 | 196 /307 | 63.8% | 2,925,560 |
| Philadelphia ^m | DE, MD, PA, NJ | 212 | 212/307 | 68.4% | 2,925,560 |

69. Market geography and market populations were determined relying on NIELSEN MEDIA RESEARCH, see *supra* note 53. The reach of particular stations to 50,000 or more viewers was determined from FCC Electioneering Communications Database, *supra* note 40. 2004 primary dates were determined from FED. ELECTION COMM'N, *supra* note 43.

70. This figure is the total number of days of brownout over the total number of days from the first day a brownout takes effect in the media market until the general election.

| | | | | | |
|--|-------------------|-----|---------|-------|-----------|
| New York City | NY, CT, PA, NJ | 184 | 184/273 | 67.4% | 7,375,530 |
| District & Supreme Court Assumptions | Just One | 90 | 90/365 | 24.7% | Unknown |

- a: Includes only the following television stations: WQWQ (UPN); WDKA (WB); WSIL (ABC).
- b: Includes only the following television stations: WPSD (NBC); KFVS (CBS).
- c: Represents the brownout for Democratic presidential candidates on WRC (NBC); WJLA (ABC); WUSA (CBS); WBDC (WB); WDCA (UPN)
- d: Represents the brownout for Republican presidential candidates on WRC (NBC); WJLA (ABC); WUSA (CBS); WBDC (WB); WDCA (UPN).
- e: Represents the brownout for Democratic presidential candidates on WTTG (FOX).
- f: Represents the brownout for Republican presidential candidates on WTTG (FOX).
- g: Represents the brownout for presidential candidates on KCPO (UPN); KWSD (WB); KAUN (IND).
- h: Represents the brownout for presidential candidates on KTTW (FOX); KDLT (NBC).
- i: Represents the brownout for presidential candidates on KELO (CBS); KSFY (ABC).
- j: Represents the brownout for Republican presidential candidates on WBBM (CBS); WMAQ (NBC); WLS (ABC); WGN (IND/WB); WFLD (FOX).
- k: Represents the brownout for Democratic presidential candidates on WBBM (CBS); WMAQ (NBC); WLS (ABC); WGN (IND/WB); WFLD (FOX).
- l: Represents the brownout for Republican presidential candidates on KWY (CBS); WPVI (ABC); WCAU (NBC); WTXF (FOX); WPHL (WB); WPSG (UPN).
- m: Represents the brownout for Democratic presidential candidates on KWY (CBS); WPVI (ABC); WCAU (NBC); WTXF (FOX); WPHL (WB); WPSG (UPN).