GETTING AROUND CIRCUMVENTION: A PROPOSAL FOR TAKING FECA ONLINE

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INTRODUCTION

During the 2004 election cycle, Americans went online in unprecedented numbers to obtain and exchange information about candidates and campaign issues.[1] In addition to facilitating political debate, this explosion of online political activity has galvanized substantial expenditures of money—over $27 million was spent on online advertisements, e-mail list services, and other Internet activities during the 2004 elections alone.[2] Because the pervasiveness of online campaign activity and related expenditures is only expected to increase in the coming years,[3] the question of how campaign finance law should regard such activity is of both immediate and increasing importance.

The Internet is distinct from other media in that the low cost of entry and continued use makes speech possible for a broad cross-section of the general public.[4] The medium's low-cost character is central to the campaign finance question insofar as it permits a broader pool of participants. Whereas the opportunity to be heard in television, radio, or print news must generally be purchased at substantial cost, anyone with access to a computer and a phone line can express her views online.[5] "Marginalized voices [and] dissenting viewpoints . . . flourish in the weblog universe" and can have a meaningful presence in that forum without expending substantial funds.[6] The sheer volume of online political actors makes it less likely that monied parties will be able to dominate political debate on the Internet, as they can in other media.

Despite its distinctive ability to facilitate public participation in the political process, the Internet may also present new opportunities for circumventing the Federal Election Campaign Act (FECA or the Act) and its regulations. At the very least, it may provide little-explored avenues for

1. JOHN HORRIGAN ET AL., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND DEMOCRATIC DEBATE 2 (2004), http://www.pewinternet.org/pdfs/PIP_Political_Info_Report.pdf (last visited Feb. 8, 2005) (reporting that between 2000 and 2004, the number of Americans who visited the Internet to obtain campaign news more than doubled, rising from 30 million to 63 million).

2. *Internet Communications: Hearing Before the FEC*, at 54, June 29, 2005 (statement of Chairman Scott E. Thomas), http://www.fec.gov/pdf/nprm/internet_comm/20050629transcript_rev.doc.

3. Lee E. Goodman, *The Internet: Democracy Goes Online*, *in* LAW AND ELECTION POLITICS: THE RULES OF THE GAME 97, 101 (Matthew J. Streb ed., 2005); *see also* Internet Communications, 70 Fed. Reg. 16,967, 16,970 (proposed Apr. 4, 2005) [hereinafter Internet Communications] ("The 2004 election cycle marked a dramatic shift in the scope and manner in which citizens used Web sites, blogs, listservs, and other Internet communications to obtain information on a wide range of issues and candidates.") (internal citations omitted).

4. Internet Communications, *supra* note 3, at 16,971 (noting that the Internet "allows almost limitless, inexpensive communication across the broadest possible cross-section of the American population").

5. *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).

6. REBECCA BLOOD, THE WEBLOG HANDBOOK: PRACTICAL ADVICE ON CREATING AND MAINTAINING YOUR BLOG 15 (2002).

undermining media accountability and thwarting FECA's goal of promoting transparency in federal elections. "Like all media, blogs hold the potential for abuse."[7] But far less is known about that potential in the case of blogs than is with regard to more traditional media. Moreover, the Internet lacks many of the mechanisms that promote accountability in the institutional media: "Where journalists' careers may be broken on ethics violations, bloggers are writing in the Wild West of cyberspace. There remains no code of ethics, or even an employer, to enforce any standard."[8] It was with this lack of institutional safeguards in mind that the D.C. District Court cautioned that a broad, per se exclusion of the Internet from FECA's regulations would "permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption" in federal elections.[9] Consistency with FECA's goals therefore requires some degree of regulation of Internet activities. The question is, which online activities should be regulated, and to what extent?

The Internet's low-cost character is also relevant to the campaign finance debate because FECA is "predicated on an 'expenditure' or 'disbursement' being made,"[10] and the range of Internet activities that might be deemed to fall within the reach of the current law may therefore be limited according to how costs are assigned. However, given the new and growing importance of online political activities to federal campaigns, any system of cost assignment that ignores the value of those activities is difficult to defend. There appear to be two approaches to cost assignment that the Federal Election Commission (FEC) might reasonably take that would place Internet activities within FECA's ambit. One option is to calculate the cost of an activity's inputs—i.e., the share of hardware and software expenses, bandwidth charges, domain name fees, and other equipment costs attributable to a given activity. Although such costs will in most cases be nominal, they could still reasonably serve as the basis for determining the value of a given contribution or expenditure. A second option is to assign cost on the basis of the activity's value to a candidate—i.e., what the candidate would have been willing to pay for comparable coverage in that market. Under either method of assignment, a large volume of online activities could be seen to involve some kind of "expenditure or disbursement being made." Such activities could therefore reasonably be seen to fall within FECA's ambit.[11]

This Note discusses how FECA should apply to online political activities. Part I briefly describes how the federal government has historically regulated both federal elections and the Internet. This Part also provides an overview of

7. David Paul Kuhn, *Blogs: New Medium, Old Politics*, CBSNEWS.COM, Dec. 8, 2004, http://www.cbsnews.com/stories/2004/12/08/politics/main659955.shtml.

8. *Id.*

9. Shays v. FEC, 337 F. Supp. 2d 28, 70 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

10. Internet Communications, *supra* note 3, at 16,972.

11. *See infra* Part II.A.

FECA's regulatory framework and examines the rationales for regulating some activities while exempting others. Part II suggests that certain FECA regulations and exemptions ought to apply equally to online activities as to those conducted in more traditional media. Part III then proposes a disclaimer provision to prevent the exemptions from becoming the latest means for circumventing FECA. The provision would require online media actors who receive funding from candidates,[12] political parties, or political committees[13] to provide notice to the FEC. Although compelled speech requirements can be constitutionally questionable,[14] the importance of the informational and anticircumvention interests furthered by the proposed requirement justify the minimal restrictions that it would impose.

I. A BRIEF HISTORY AND OVERVIEW OF FECA

A. *Regulatory History*

Although campaign finance reform was originally intended to prevent financial quid pro quos between politicians and monied parties,[15] the Supreme Court has since recognized the government's interest in deterring corruption more broadly and has upheld regulation to that end.[16] FECA is now understood to be a means both for combating "the corrosive and distorting effects of immense aggregations of wealth"[17] on the political process and for protecting the public's right to participate meaningfully in that process.[18] Accordingly, to the extent that aggregated capital continues unduly to influence the public discourse about candidates and election issues, FECA's goal is undermined.

The scope of FECA has been the subject of continuing controversy. On the one hand, Congress has sought to implement a solution broad enough that it

12. Throughout this Note, "candidate" is used to refer both to individual candidates for federal office and to their authorized political committees, which are generally responsible for receiving contributions and making expenditures.

13. FECA recognizes two general types of political committees: those that are authorized by a candidate or political party and those that are not. 2 U.S.C. § 431(4)-(6) (2006). Unless otherwise indicated, "political committee" hereinafter refers to both types of committees.

14. Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).

15. *See* United States v. UAW-CIO, 352 U.S. 567, 570-72 (1957).

16. *Id.* at 570 ("Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.").

17. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

18. *See* McConnell v. FEC, 540 U.S. 93, 197 (2003) (recognizing FECA's role in protecting the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace") (citation omitted); FEC v. Pub. Citizen, 268 F.3d 1283, 1287 (11th Cir. 2001) (recognizing "assisting voters in evaluating the candidates by providing the voting public with important information about the relationship between the candidate and the sponsor of the advertisement" as one of FECA's objectives).

cannot easily be circumvented, and, on the other, the courts have invalidated overbroad provisions that unduly infringe upon individuals' constitutional rights. Various provisions of FECA and its implementing regulations have been challenged in the courts alternatively for being too restrictive, as in *Buckley*[19] and *McConnell*,[20] and for not being restrictive enough, as in *Shays*.[21] To determine the appropriateness of a provision's breadth, courts have weighed the provision's ability to protect open debate and promote elections free from corruption against the extent to which it interferes with individuals' First Amendment right to unfettered political speech.[22] The path of campaign finance reform has been directed from its inception by these competing interests,[23] and that long history of circumvention and reform should inform the current debate over regulation of online political activity by bringing into specific relief the competing interests at stake.

1. *Federal elections*

The concentration of wealth precipitated by the industrial expansion of the late nineteenth century "had profound implications for American life."[24] Among them was a growing concern that "aggregated capital unduly influenced politics," to the point of corruption.[25] Nineteenth-century industrial giants "controlled newspapers and magazines; subsidized candidates; bought legislation and even judicial decisions."[26] In response to that consolidation of wealth and power, many states, toward the end of the nineteenth century, initiated campaign finance reform and began requiring candidates to disclose the sources and amounts of campaign contributions and expenditures.[27] The 1904 presidential election brought the question of campaign finance into the

19. 424 U.S. 1 (finding valid some of plaintiffs' claims that a number of FECA's provisions as amended in 1974 were unconstitutionally broad).

20. 540 U.S. 93 (rejecting for the most part plaintiffs' claims that the Bipartisan Campaign Reform Act of 2002 (BCRA) is unconstitutional).

21. Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005) (finding that certain FEC regulations implementing BCRA created loopholes inconsistent with the Act's purpose and therefore were invalid).

22. In *Buckley*, for instance, the Court found a provision limiting independent expenditures unconstitutional because it burdened core First Amendment rights without effectively advancing the government's interest in stemming election-related corruption. 424 U.S. at 44-51. In contrast, the Court upheld FECA's contribution limits, as it found those provisions both more likely to further the government's anticorruption interest and less substantially infringing on the individuals' First Amendment rights. *Id.* at 21-28.

23. *See* McConnell v. FEC, 251 F. Supp. 2d 176, 188-207 (D.D.C. 2003), *aff'd in part*, *rev'd in part*, 540 U.S. 93 (2003).

24. United States v. UAW-CIO, 352 U.S. 567, 570 (1957).

25. *Id.*

26. 2 SAMUEL ELIOT MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 78 (7th ed. 1980).

27. *UAW-CIO*, 352 U.S. at 570-71.

national spotlight, and in 1907 Congress passed the Tillman Act,[28] which prohibited corporations from contributing to campaigns for federal office.[29] That Act was "the first concrete manifestation of a continuing congressional concern for elections free from the power of money," and "[i]ts underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government."[30]

Since then, federal election law has been punctuated by amendments intended to close emerging loopholes and by judicial responses to those amendments[31]—a cycle that even the passage of FECA in 1971 did little to interrupt.[32] The Bipartisan Campaign Reform Act of 2002 (BCRA)[33] marks Congress's most recent attempt to reduce actors' "infinite ability to eviscerate[] statutory limitations on contributions and expenditures."[34] Specifically, BCRA was intended to close emerging soft-money loopholes that had become a popular method to avoid FECA's contribution limits and reporting requirements.[35] And that Act is only the most recent legislative step in what promises to be a perpetually evolving process. As the Court itself professed: "We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet."[36]

This cycle of circumvention and amendment is largely a product of the difficulty inherent in Congress's task of formulating legislation comprehensive enough to eliminate the major avenues of circumvention without unconstitutionally impinging on rights granted by the First Amendment. Although the Court has been more deferential to Congress's action in the field of campaign finance reform in some periods than in others,[37] the struggle to

28. Ch. 24, 34 Stat. 864 (1907).

29. *UAW-CIO*, 352 U.S. at 575 (quoting 34 Stat. 864).

30. *Id.* (citations omitted).

31. For instance, in 1925 the Federal Corrupt Practices Act broadened the definition of "contribution" and made the recipient of any illegal contribution liable in addition to the contributor. McConnell v. FEC, 251 F. Supp. 2d 176, 190 (D.D.C. 2003), *aff'd in part*, *rev'd in part*, 540 U.S. 93 (2003) (citing Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070). In 1943, the Smith-Connally Act extended the earlier Act's provisions to unions to stem the flow of large amounts of money into the political process from that source. *Id.* at 191 (citing War Labor Disputes Act (Smith-Connally Act), ch. 144, § 9, 57 Stat. 163, 167 (1943)). And the Taft-Hartley Act of 1947 extended Smith-Connally's prohibitions to expenditures as well as contributions, in order to correct unions' evasion of the earlier Act. *Id.* at 192 (citing Taft-Hartley Act of 1947, ch. 120, 61 Stat. 136).

32. *Id.* at 193. FECA was amended as early as 1974 to impose dollar limitations on individuals' and political committees' contributions to candidates and political parties in an effort to reduce actors' "infinite ability to eviscerate[] statutory limitations on contributions and expenditures." *Id.* at 192-93 (internal quotations and citation omitted).

33. Pub. L. No. 107-155, 116 Stat. 81 (2002).

34. *McConnell*, 251 F. Supp. 2d at 193 (internal quotations omitted).

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

36. McConnell v. FEC, 540 U.S. 93, 224 (2003).

37. Before 1971, the Supreme Court generally deferred to Congress's legislative

find a satisfactory middle ground between easily circumvented and unconstitutionally overbroad legislation has permeated the law's history. The incessant development of new means of circumvention only serves to further complicate that already difficult endeavor.

2. *The Internet*

Unlike federal elections, which have been heavily regulated for over a century, the Internet has only been in general public use for a decade, and Congress has thus far been somewhat reluctant to regulate it. In its early confrontations with the issue, Congress has articulated a hands-off policy toward regulating online activities. The Telecommunications Act of 1996, for instance, made it "the policy of the United States to promote the continued development of the Internet . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[38]

Despite Congress's reluctance, the FEC has contemplated for more than six years that FECA might govern political activities conducted on the Internet. As early as 1999, the Commission considered whether a hands-off approach to Internet regulation might not be appropriate and opened for comment the question of FECA's applicability to campaign activity conducted through that medium.[39] But the Commission never issued a rule to resolve the questions it raised,[40] and it has instead been determining FECA's applicability to the Internet primarily through Advisory Opinions, on a case-by-case basis.[41]

decisions in the field of campaign finance. *See, e.g.*, Burroughs v. United States, 290 U.S. 534, 547-48 (1934) ("If it can be seen that the means adopted are really calculated to [protect federal elections from corruption], the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone."). That early deference eventually gave way to the more exacting scrutiny of *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), which in turn appears to have been succeeded by a trend toward somewhat greater deference. *See McConnell*, 540 U.S. 93; FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (finding constitutional a Missouri statute limiting contributions to candidates for state office); *see also* DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS 861-956 (3d ed. 2004) (discussing *McConnell* and *Shrink Missouri*, among others, in a chapter entitled "The New Deference").

38. Telecommunications Act of 1996, 47 U.S.C. § 230 (2006).

39. Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360, 60,360-61 (proposed Nov. 5, 1999).

40. After a period of comment, the FEC issued a Notice of Proposed Rulemaking (NPRM), concluding that "several provisions of the Act are broad enough to potentially encompass some types of campaign-related Internet activity conducted by individuals, corporations and labor organizations," but those rules were never finalized. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358, 50,359 (proposed Oct. 3, 2001).

41. 2 U.S.C. § 437d authorizes the Commission to issue advisory opinions, and 2

BCRA did little to answer the question of how online political activity should be regulated. If anything, its failure to address the question directly further clouded those already muddy waters. Although certain provisions of BCRA refer to the Internet,[42] the statute does not expand any of FECA's definitions of regulated activity to explicitly include online activities, leaving FECA's applicability to such activities open to interpretation. In promulgating regulations, the FEC took BCRA's silence to evince congressional intent to exempt all online activities from FECA's reach.[43] The D.C. District Court rejected that interpretation,[44] and on April 4, 2005, the FEC issued a Notice of Proposed Rulemaking (NPRM), raising a number of questions as to how FECA should apply to activity conducted on the Internet.[45]

B. *An Overview of FECA*

1. *FECA's framework*

FECA employs two predominant tools to regulate the flow of money in federal elections: limitations on the dollar amount of different actors' political

U.S.C. § 437f describes the conditions under which opinions may be requested and the deference they are to be given. For examples of opinions regarding FECA's applicability to online activities, see FEC Advisory Op. 2005-16 (finding that disbursements made by a company for news stories and commentary on its websites were "encompassed by the press exception"); FEC Advisory Op. 2004-07 (making "election-related educational materials" available online was "within MTV's legitimate press functions"); FEC Advisory Op. 2001-04 (finding that FECA's separate segregated fund (SSF) provisions apply to solicitations made by a corporation to its restricted class via e-mail and through a website).

42. For instance, BCRA requires the FEC to "maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information." 2 U.S.C. § 438a(a) (2006); *see also* § 434(a)(11)(B); § 434(a)(12)(A), (D); § 434(d)(2). In certain other provisions, however, Congress clearly excluded Internet communications from statutory definitions. For instance, BCRA defines "electioneering communication" to include only "broadcast, cable, or satellite communication[s]," § 434(f)(3)(A)(i)—a deliberately narrow definition in contrast to the Act's broader "public communication" definition, § 431(22) (including "any other form of general public political advertising").

43. *See, e.g.*, 11 C.F.R. § 100.26 (2006) (excluding "communications over the Internet" from the definition of public communication); *see also* Shays v. FEC, 337 F. Supp. 2d 28, 66 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) (citing the FEC's Explanation and Justification); FEC Advisory Op. 2002-09. Contrary to the Commission's suggestion, it is possible that even in 2002 Congress had not fully imagined the Internet's full potential as a vehicle for online political participation. Although many candidates had established websites by the late 1990s, Goodman, *supra* note 3, at 99, it remained unclear at the time of BCRA's passage whether Internet users would ultimately play a substantial role in politics, LEE RAINIE ET AL., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CAMPAIGN 2004, at 1 (2005), http://www.pewinternet.org/pdfs/ PIP_2004_Campaign.pdf.

44. *Shays*, 337 F. Supp. 2d at 70 (rejecting the FEC's exclusion of the Internet from regulation in part because "to allow [Internet] expenditures to be made unregulated would permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption").

45. Internet Communications, *supra* note 3.

contributions, and requirements that actors making expenditures to influence the outcome of a federal campaign disclose to the FEC and/or the public the fact and nature of their expenditures. Although both tools are generally used to further the same goals—namely, to prevent corruption, further public participation in the political process, and prevent circumvention of FECA's other provisions—each imposes different burdens in achieving them. Whereas disclosure requirements are "the least restrictive means of curbing the evils of campaign ignorance and corruption,"[46] limits on dollar amounts of contributions are among the most restrictive. The relative burden imposed by each tool is critical to the analysis as to when the use of either (or both) is appropriate, because in order to be constitutional, a regulation must be sufficiently broad to further a compelling governmental interest and yet sufficiently narrow to "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[47]

Very generally, FECA applies the limitations tool to disbursements qualifying as "contributions"[48] and the disclosure requirement to disbursements qualifying as "expenditures."[49] A contribution is anything of value conferred to a candidate, political party, or political committee,[50] with certain exceptions.[51] An expenditure, on the other hand, is anything of value conferred to a third party for the purpose of influencing a federal election,[52] again exempting certain activities.[53] Because expenditures very often take the form of candidate advertisements or other public communications, they are regarded as more substantial speech activities than are contributions,[54] and are accordingly regulated by means of the less restrictive tool.[55] When such expenditures are made in concert with, at the behest of, or otherwise in cooperation with a

46. Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam); *see also* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 633, 688 (1997) (advocating abandonment of contribution limits and adoption of vigorous, but still less restrictive, disclosure requirements identifying contributors).

47. *Buckley*, 424 U.S. at 44-45.

48. 2 U.S.C. § 441a(a) (2006); 11 C.F.R. § 110.1(a) (2006); *see also* 2 U.S.C § 441a(a)(1)(B) (2006) (prohibiting annual contributions to the political committees of national parties in the aggregate of more than $25,000); 11 C.F.R. § 110.1(c) (2006) (same); 2 U.S.C. §441a(a)(1)(C) (2006) (prohibiting annual contributions to unauthorized political committees in the aggregate of more than $5000); 11 C.F.R. § 110.1(d) (2006) (same).

49. 11 C.F.R. § 109.10(b) (2006) (stating that any individual who "makes independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year shall file a verified statement or report" with the FEC).

50. 2 U.S.C. § 431(8)(A) (2006).

51. § 431(8)(B).

52. § 431(9)(A).

53. § 431(9)(B).

54. Buckley v. Valeo, 424 U.S. 1, 44 (1976) (per curiam) (recognizing that "expenditure limitations impose far greater restraints on the freedom of speech and association than do . . . contribution limitations").

55. *See* 11 C.F.R. §§ 104, 109.10 (2006).

candidate or political party, however, they are termed "coordinated expenditures" and are counted as contributions.[56] Although such disbursements are superficially expenditures, the fact of coordination justifies the more restrictive limitations rule, as it is necessary to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions."[57] The approach also illustrates FECA's generally function-driven approach to regulation. Because FECA employs these different means, with their substantially different burdens, to regulate contributions and expenditures, the characterization of a given disbursement is usually determinative of the disburser's obligations under the Act.[58]

2. *Activities exempted from regulation*

Just as FECA regulates as contributions any activities that could otherwise lead to corruption or circumvention of the Act, so too it tends to exempt from regulation activities that present little risk of corruption or circumvention. To determine whether regulation of a given activity is appropriate, Congress (often followed by the courts) balances the magnitude of those risks (and the government's interests in preventing them) against the extent to which regulation would infringe on individual rights. For instance, in *Buckley v. Valeo*,[59] the Court found that the statute limiting independent expenditures by individuals was unconstitutional because the weight of the government interest (in preventing circumvention of contribution limits) that it furthered, discounted by the likelihood that the provision would fail to achieve that goal, was less substantial than the First Amendment rights on which the regulation would infringe.[60] That analysis provides the central justification for both the individual volunteer and media exemptions, as each is concerned with core First Amendment activity that presents relatively little risk of corruption or circumvention.

a. *The individual volunteer activity exemption*

Under the individual volunteer activity exemption, FECA exempts from its definition of contribution "the value of services provided without compensation

56. 2 U.S.C. § 441a(a)(7)(B)(i) (2006). Similarly, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any . . . campaign materials prepared by [a] candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure" by that candidate. § 441a(a)(7)(B)(iii).

57. *Buckley*, 424 U.S. at 47.

58. Corporations and labor unions provide the only exception to this rule. For such organizations, both types of disbursements are prohibited unless made through the organization's SSF. 2 U.S.C. § 441b(2)(C) (2006).

59. 424 U.S. 1.

60. *Id.* at 44-51.

by any individual who volunteers on behalf of a candidate or political committee,"[61] as well as the nominal cost of real or personal property used to carry out such activities.[62] Such services are exempted regardless of whether the volunteer is acting in coordination with a candidate.[63]

Exempting volunteer activities is appropriate because the First Amendment interests at stake are substantial and because such activities, as defined by FECA, provide little risk of corruption or circumvention. The necessarily low-cost nature of volunteer activity leaves little opportunity for actors to use it as a subterfuge to circumvent the Act's limits and reporting requirements. Additionally, the statute precludes individuals from couching contributions as volunteer activities by making nonexempt all in-kind contributions.[64]

Public policy considerations and the purpose of the statute also counsel in favor of the exemption. It is both in the public interest and consistent with the spirit of FECA to facilitate (or at the very least avoid discouraging) direct individual engagement in the political process through means other than making disbursements.

b. *The media exemption*

FECA exempts from its definition of expenditure the costs incurred in conducting "media activities."[65] The exemption is intended to "assure the unfettered right of the newspapers, television networks, and other media to cover and comment on political campaigns,"[66] and it is consistent with the long-standing national policy that "debate on public issues should be uninhibited, robust, and wide-open."[67] A free press is also thought to give rise to "more fully and completely inform[ed] . . . voters."[68] Although media activities, due to their commercial nature, present greater opportunities for circumvention and corruption than do volunteer activities, those risks are effectively cabined through the exemption's narrow tailoring and are accordingly outweighed by the substantial First Amendment interests that the exemption protects.

61. 2 U.S.C. § 431(8)(B)(i) (2006).

62. § 431(8)(B)(ii) (exempting such property-use contributions as long as they do not exceed $1000 with respect to a single candidate or campaign or $2000 in a given year); *see also* § 431(8)(B)(iii)-(iv).

63. § 431(8)(B)(i).

64. *Compare id.*, *with* 11 C.F.R. § 100.52(d) (2006) (stating that "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services is a contribution").

65. 2 U.S.C. § 431(9)(B)(i) (2006).

66. H.R. REP. NO. 93-1239, at 4 (1974).

67. McConnell v. FEC, 251 F. Supp. 2d 176, 266 (D.D.C. 2003) (Henderson, J., dissenting) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)), *aff'd in part*, *rev'd in part*, 540 U.S. 93 (2003).

68. S. REP. NO. 92-96 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1773, 1774.

As in the case of individual volunteer activities, the First Amendment is highly protective of media activity. Regulation of media activity would interfere with the "right of the newspapers, television networks, and other media to cover and comment on political campaigns,"[69] as well as the right of the public to draw from a broad and diverse pool of information, uninhibited by the government.[70] Moreover, the government itself has an acknowledged interest in the services performed by the media, namely "informing and educating the public, offering criticism, and providing a forum for discussion and debate."[71]

On the other hand, however, the government's interest in regulation is more substantial in regard to media activities than in the case of individual volunteer activities, because the former tend to involve large expenditures. Although the media is often viewed as "a powerful antidote to . . . abuses of power by governmental officials,"[72] rather than a tool for such abuse, it could easily become just such a tool if placed unregulated in the hands of a politically motivated actor. Similarly, if left unregulated, the press might be used to circumvent FECA's other provisions. For instance, if a political committee were able to disseminate without restriction anything resembling "news" or "commentary," it could publish unlimited coordinated communications on behalf of a candidate without being subject to FECA's contribution limits or reporting requirements.

Because some media activity poses a legitimate risk of corruption or circumvention, the exemption has been narrowly conceived to apply only to those activities that most substantially further robust political debate and pose the slightest risk of corruption or circumvention. The exemption "does not afford *carte blanche* to media companies generally to ignore FECA's provisions."[73] A three-part inquiry determines whether a given activity is exempt. First, the entity engaging in the activity must be a press entity.[74]

69. H.R. REP. NO. 93-1239, at 4 (1974).

70. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

71. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 667 (1990) (quoting *Bellotti*, 435 U.S. at 781).

72. Mills v. Alabama, 384 U.S. 214, 219 (1966) (stating also that the press is "a constitutionally chosen means for keeping [government] . . . responsible").

73. McConnell v. FEC, 540 U.S. 93, 208 (2003); *see also* Reader's Digest Ass'n v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981) (noting that FECA "exempt[s] only those kinds of distribution that fall broadly within the press entity's legitimate press function," rather than "any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function").

74. *See* FEC Advisory Op. 2005-16; FEC Advisory Op. 2004-17; FEC Advisory Op. 2003-34. Although each of these opinions states that the first step of the analysis is to "ask whether the entity engaging in the activity is a press entity as described by the Act and Commission regulations," the term "press entity" is actually defined in neither FECA nor the Commission regulations. Instead, press entity status appears to be something that the Commission has taken for granted, as in Advisory Opinion 2003-34, where it "assume[d]" that a production company was a press entity on the basis of its editorial control. The courts

Additionally, the entity must not be "controlled by any political party, political committee, or candidate."[75] Finally, the activity conducted must be "part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area."[76]

The exemption's narrow applicability to only those activities that satisfy the weighing test is further assured by the highly fact-specific analysis that has characterized courts' determination as to when the exemption applies. In *FEC v. Massachusetts Citizens for Life* (*MCFL*),[77] for instance, the Court looked to the fact that a "Special Edition" of MCFL's newsletter was "not published through the facilities of the regular newsletter" but by a separate staff; that the newsletter "was not distributed to the newsletter's regular audience" but to a much larger group; that the "MCFL masthead did not appear on the flyer"; and that "the Edition contained no volume and issue number identifying it as one in a continuing series," in determining that the issue did not represent a legitimate press function and could therefore not claim the exemption.[78] The Court acknowledged that its analysis might seem to focus on "superficial considerations of form," but it maintained that "it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications."[79]

Although the exemption's narrow tailoring effectively reduces avenues for corruption or circumvention, various commentators remain concerned that exempting activity in both traditional and online media forums will enable parties to undermine the Act. In the traditional media, a common complaint is that the exemption will encourage nonmedia corporations to engage in "media" activities in order to circumvent the Act's general prohibition on corporate contributions and expenditures. So great was that risk in the mind of one

similarly have often skipped over the first part of the analysis and even go so far as to state the inquiry as a two-part examination of whether the press entity is controlled by a political actor and whether the activity at issue is within its legitimate press function. *See* FEC v. Phillips Publ'g, Inc., 517 F. Supp. 1308, 1313 (D.D.C. 1981); *Reader's Digest*, 509 F. Supp. at 1214.

75. 2 U.S.C. § 431(9)(B)(i) (2006); 11 C.F.R. § 100.73 (2006).

76. 11 C.F.R. § 100.73(b); FEC Advisory Op. 2005-16. This prong of the test has alternatively been articulated as a requirement that the activity "fall broadly within the press entity's legitimate press function," *Reader's Digest*, 509 F. Supp. at 1214, or that the "press entity [act] as a press entity in conducting the activity at issue," FEC Advisory Op. 2004-07.

77. 479 U.S. 238 (1986).

78. *Id.* at 250-51.

79. *Id.* at 251. Although the bounds of the "legitimate press function" have in other instances been interpreted more broadly, the case-specific inquiry characteristic of the *MCFL* decision prevents overbroad application of the exemption. *See Phillips Publishing*, 517 F. Supp. at 1313 (finding that in distributing of a solicitation letter critical of a federal candidate but intended to increase subscriptions the publisher of the newsletter was acting "in [his] capacity as publisher"); FEC Matter Under Review 296(76) (dismissing an internally generated complaint after finding that an ad directing individuals toward an article critical of a federal candidate was "an effort, albeit suggestive, to promote . . . the selling of a magazine with a controversial article").

Arizona congressman that he proposed to amend the exemption to exclude any activities conducted through a facility owned or controlled by another corporation.[80] Although the corporate media control envisioned by the proposed amendment is increasingly becoming a reality,[81] the exemption's narrow tailoring prevents it from becoming a widespread means for circumvention. The fact that General Electric owns NBC, for instance, does not substantially increase the likelihood that NBC will become a conduit for activities that corrupt the political process or circumvent FECA, because media activities conducted through that network must satisfy the three-prong test in order to be exempt.[82] Any activity not meeting those criteria would be prohibited under FECA as a corporate expenditure[83] or, if made through GE's Separate Segregated Fund (SSF),[84] regulated pursuant to the Act's reporting requirements and other provisions.[85] (SSFs are political committees[86] and as such cannot claim the exemption.) The same would be true if media activity were attempted by a 501(c)(4) organization such as the National Rifle Association (NRA).[87] Accordingly, as long as the courts and Commission maintain their commitment to the three-part inquiry and the kind of narrow, function-driven analysis seen in *MCFL*, the media exemption is unlikely to become a means for corporations or unions to circumvent FECA.[88]

80. H.R. REP. NO. 107-135, at 12 (2001). The amendment, offered by Representative Jeff Flake of Arizona, would limit the exemption to the media activities of entities whose facilities are not owned or controlled by "any corporate media outlet," *id.* at 12, 21, which the proposed amendment further defined as "a broadcasting station, newspaper, magazine, or other periodical publication" that is "owned, operated, or controlled by another corporation or entity," "derives income from any source other than subscriptions to, or advertising appearing within, the material it disseminates," or "receives funds directly or indirectly from a government." *Id.* at 12.

81. For instance, Viacom owns CBS, Disney owns ABC, General Electric owns NBC, and Time Warner owns HBO, TNT, the WB, and the CNN channels. Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J. L. & ARTS 91, 178 (2005); Christa Corrine McLintock, Comment, *The Destruction of Media Diversity, Or: How the FCC Learned To Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 573 (2004).

82. *See supra* notes 74-76 and accompanying text.

83. 2 U.S.C. § 441b(a) (2006).

84. § 441b(b)(2)(C).

85. § 434(a)-(b).

86. 11 C.F.R. § 100.5(b) (2006).

87. *See* Sharon Theimer, *NRA Seeks Status as News Outlet*, WASH. POST, Dec. 7, 2003, at A9 (reporting that the NRA was looking to acquire a broadcast outlet).

88. It is worth noting that expenditures by corporations or labor unions to produce and distribute communications to their restricted classes (which include their stockholders, employees, members, and their families) are *not* prohibited expenditures. 2 U.S.C. § 441b(b)(2)(A) (2006).

II. APPLYING FECA TO ONLINE ACTIVITIES

Two inquiries are necessary to determine whether FECA applies to online campaign activities: whether regulation of such activities is consistent with the Act's broad purpose; and whether a given online activity satisfies the factual prerequisites to regulation (e.g., whether a disbursement was made or a disbursor acted in coordination with a candidate). To address these questions, this Part first considers whether FECA can be extended to online activities at all, and then proceeds to examine whether specific provisions should be so construed. It concludes that at least certain of the Act's regulations and exemptions should apply equally to online activity as to substantially similar activity conducted through more traditional media.[89]

A. *The Question of Costs*

In discussing FECA's applicability to online activities, it is critical to keep in mind the Act's purpose and resulting limitations. FECA was meant "to limit the actuality and appearance of corruption resulting from large individual financial contributions" to political campaigns.[90] Even if that purpose is read as being broadly protective of federal elections,[91] FECA is fundamentally about money, and its regulations reach only those activities that involve a transfer or exchange of value.[92] That requirement might at first seem to eliminate the vast majority of online activities from FECA's reach, given the low-cost nature of those activities.[93] But the Act's broad definitions of "contribution" and "expenditure" as including "anything of value made by any person for the purpose of influencing any election for Federal office"[94] in fact easily cover a variety of online activities.

The cost of an online activity can be assigned in two ways. One option is to

89. On March 24, 2006, the FEC promulgated new rules regarding the regulation of the Internet. *See* Draft Final Rules and Explanation and Justification for the Internet Communications Rulemaking, *available at* http://www.fec.gov/agenda/2006/mtgdoc06-20.pdf (last visited Mar. 28, 2006). Because these rules were promulgated as this Note was going to press, they are not incorporated in the following analysis.

90. Buckley v. Valeo, 424 U.S. 1, 26 (1976).

91. Kathleen Sullivan suggests that, as used in the Act, "corruption" broadly refers to "deviation from appropriate norms of democratic representation." Sullivan, *supra* note 46, at 679. Similarly, the Eleventh Circuit has recognized the compelling interests furthered by FECA to include the government's interest "in assisting voters in evaluating the candidates by providing the voting public with important information about the relationship between the candidate and the sponsor of the advertisement, information which, in turn, aids the overall election process." FEC v. Pub. Citizen, 268 F.3d 1283, 1287 (11th Cir. 2001).

92. Internet Communications, *supra* note 3, at 16,972.

93. *See Internet Communications: Hearing Before the FEC*, at 37, June 28, 2005 (statement of Lawrence M. Noble, Center for Responsive Politics), http://www.fec.gov/pdf/nprm/internet_comm/20050628transcript_rev.doc.

94. 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i) (2006).

measure the cost of the activity's inputs. The FEC took that approach in a 1998 Advisory Opinion, in which it determined that the expenses involved in creating and maintaining a website—including disbursements made for registering the domain name and for purchasing hardware and software, and the utility costs (time and energy) of creating and maintaining the site—would be considered expenditures under the Act and Commission regulations.[95] That Opinion, however, rested on the fact that the person responsible for the communication at issue was an individual.[96] The "situation differs significantly" where the actor is a political committee, because expenditures for creating and maintaining a website are in such cases generally reportable as committee operating expenses rather than component costs of independent expenditures.[97] Only in cases in which expenditures for overhead costs are directly attributable to a communication on behalf of a given candidate are such expenditures reportable by a political committee as independent expenditures.[98]

Another option (and one that resolves the political committee issue) is to calculate value based on an activity's worth to the recipient, i.e., the amount a candidate would typically pay for comparable publicity. That basis for assigning cost is consistent with the principle that "the economic value of something is how much someone is willing to pay for it."[99] The FEC has determined that the cost of certain offline activities might be calculated in that way. FECA's in-kind contribution regulations specify that in-kind contributions are assessed as "the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee," where "usual and normal charge" means "the price of those goods *in the market* from which they ordinarily would have been purchased."[100] In that cost-assignment scheme, then, the market becomes the

95. FEC Advisory Op. 1998-22. In this case the website was an endorsement and therefore constituted general public political advertising, rather than news or editorial coverage. *Id.* But there is no reason to think that the same expenditures would not also constitute costs in other contexts—for instance, if the individual had been using his own equipment and facilities to produce news and/or editorial communications.

96. *Id.*

97. FEC Advisory Op. 1999-37 (citing 11 C.F.R. § 106.1(c) (1999)).

98. 11 C.F.R. § 106.1(c)(1) (2006) (stating that "[e]xpenditures for rent, personnel, overhead, general administrative, fund-raising, and other day-to-day costs of political committees need not be attributed to individual candidates, *unless these expenditures are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate*") (emphasis added); *see also* FEC Advisory Op. 1999-37 (illustrating the same).

99. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (6th ed. 2003); *see also* Ryan L. Blaine, Comment, *Election Law and the Internet: How Should the FEC Manage New Technology?*, 81 N.C. L. REV. 697, 716-17 (2003).

100. 11 C.F.R. § 100.52(d) (2006) (emphasis added); *see also* Shays v. FEC, 337 F. Supp. 2d 28, 65 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) ("A communication that is coordinated with a candidate or political party *has value to the political actor*.") (emphasis added).

metric for determining the value of the activity to a candidate and, in turn, for determining the "cost" of that activity for purposes of regulation.[101]

What is important for the purposes of this Note, however, is not *how* costs are assigned, but that they *can* be assigned to online activities. Whether determined through the inputs or market-value approach, online activities generally involve costs of some kind, and they are therefore the sort of activity that might appropriately be regulated under FECA. The remainder of this Part contemplates when it is appropriate to regulate online political activities, taking into account the possibilities for circumvention and corruption presented by such activities and the extent to which individual rights might be infringed by regulation.

B. *Paid Online Advertisements as Coordinated Communications*

Paid advertisements on the Internet should be regulated under FECA in the same manner and to the same extent as paid advertisements in other media, as the online medium creates no legally meaningful difference with regard to such communications. As mentioned in Part I.B.1, FECA treats coordinated expenditures as contributions in order to prevent attempts to circumvent the Act's contribution limits by disguising contributions as expenditures.[102] Because the same avenues for circumventing contribution limits exist online as through other media, coordinated expenditure provisions should apply equally to online communications.

Before BCRA, the FEC deemed all "general public political communications" meeting certain conduct requirements to be coordinated communications.[103] At that time, "general public political communications" included communications "made through a broadcasting station . . . , newspaper, magazine, outdoor advertising facility, mailing *or any electronic medium, including the Internet or on a web site*, with an intended audience of over one hundred people."[104] After BCRA, the Commission reversed its course

101. Within that scheme, however, there might be some activities of substantial "value" to a candidate that the government might want to exempt. Hyperlinks, for instance, can confer substantial value to a candidate or political party and could therefore reasonably be regulated under FECA. *See* Blaine, *supra* note 99, at 714-18. However, because such activity (when not conducted for a fee) presents little risk of circumvention or corruption, regulation is unnecessary and arguably inappropriate. *See* Internet Communications, *supra* note 3, at 16,973 (recommending adoption of a rule proposed by Senator Russ Feingold that would exempt "linking campaign Web sites, quoting from, or republishing campaign materials and even providing a link for donations to a candidate, *if done without compensation*" from the Act's contribution limits and reporting requirements) (quoting Posting of Senator Russ Feingold to MyDD.com, http://mydd.com/story/2005/3/10/112323/534 (Mar. 10, 2005, 11:37:10 EST)) (emphasis added).

102. *See supra* notes 56-57 and accompanying text.

103. 11 C.F.R. § 100.23(c)(2)(iii) (2001) (repealed). For further discussion, see *Shays*, 337 F. Supp. 2d at 28.

104. 11 C.F.R. § 100.23(e)(1) (2001) (repealed) (emphasis added).

and specifically excluded Internet communications from its definition of "public communication," thereby removing such communications from the Act's coordinated communication provisions.[105]

At the same time the Commission placed online paid advertisements outside the Act's coordinated communications regulations, it revised another paid communication regulation to make it *more* inclusive of online activities. For purposes of the disclaimer requirement for paid advertisements,[106] the FEC expanded the definition of "public communication" to include "unsolicited electronic mail of more than 500 substantially similar communications and Internet websites of political committees available to the general public."[107] By way of explanation for this revision, the Commission pointed to its interest in promoting "symmetry within its regulations": because the disclaimer requirement already applied to nonelectronic mailings and all communications supported by political committee disbursements, consistency required similarly extending the provision to equivalent Internet communications.[108]

That same interest, however, also supports a return to the pre-BCRA definition of public communication for coordinated communication purposes. Although online communications do not always have direct parallels in traditional media and may take previously unknown forms (such as banner or pop-up ads), paid communications transmitted over the Internet are functionally similar to paid communications in other media; the purpose of political advertisements and the fact of payment are the same regardless of the medium.[109] Moreover, online communications provide the same avenues for coordination with candidates (and, accordingly, circumvention) as do communications in other media. The interest of symmetry within the Commission's regulations therefore requires that FECA's coordinated communications provisions be similarly applied to online communications.

Despite the simple logic supporting regulation of paid online advertisements, Congress and the FEC have not yet reached consensus on the

105. *Id.* § 100.26 ("The term public communication shall not include communications over the Internet.").

106. 2 U.S.C. § 441d(a) (2006) (requiring paid advertisements to state whether the communication is authorized by a candidate and the name and address of the party that paid for the communication); 11 C.F.R. § 110.11(b) (2006) (same).

107. 11 C.F.R. § 110.11(a). In April 2005, the Commission proposed to amend 11 C.F.R. § 110.11(a) "to focus on those e-mail communications for which the e-mail addresses of the recipients were acquired through a commercial transaction," in order to "strike a balance between the disclosure purposes of the Act . . . and the protection of individual free speech and robust communication." Internet Communications, *supra* note 3, at 16,972.

108. Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,964 (Dec. 13, 2002) [hereinafter Disclaimers].

109. *See also* Shays v. FEC, 337 F. Supp. 2d 28, 70 n.39 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) (noting that the Internet "is similar in nature" to the other forms of communication enumerated in FECA's definition of public communication "in that it is capable of being used to convey general public political advertising") (citations omitted).

issue. In *Shays v. FEC*,[110] the district court found the FEC's Internet-excluding coordinated communications rule to be an unreasonable interpretation of the statute.[111] The Commission has since proposed to broaden the definition of public communication to include "paid Internet advertisements placed on another person's or entity's Web site,"[112] but it would continue to "exempt from the coordinated communication rules advertisements that require payments to outside vendors to create, but that are placed only on the payor's own Web site," including "a corporation or other prohibited source."[113] If finalized, that rule would permit an online actor to spend unlimited funds to produce advertising, solicit donations, and reproduce campaign materials in full coordination with a candidate, and still not be subject to the Act's contribution limits.[114] Allowing such activity to go unregulated provides an easy means for online actors to circumvent the Act's contribution limits and is therefore not a faithful implementation of the Act. The Commission has also proposed to "exempt from the coordinated communication rules advertisements that are placed on a prohibited source's Web site for free, even though a fee would normally be charged."[115] That regulation flies in the face of the Act's in-kind contribution regulations[116] as well as its function-driven approach to regulation more broadly,[117] and is accordingly not an appropriate regulatory action.

Congress has also recently proposed to settle the question of whether to regulate online advertisements as coordinated communications itself, but it is unclear which way the legislation will come out. At the time of this writing, two competing bills are under consideration in the House. One bill would expand FECA's definition of "public communication" to include certain communications on the Internet,[118] and the other proposes to exclude all "communications over the Internet" from that definition, thereby codifying the regulation that the district court invalidated in *Shays*.[119]

Although the eventual outcome of the question remains uncertain, it is

110. *Id.*

111. *Id.* at 65-71.

112. Internet Communications, *supra* note 3, at 16,970.

113. *Id.* at 16,973. The NPRM further states that, "[b]ecause republishing campaign materials on one's own Web site, blog, or e-mail would not be a public communication, it would not be a contribution to the candidate" under the revised regulations. *Id.*

114. As discussed in Part II.B.1, much activity conducted on an actor's own website should be exempt from the Act's contribution limits as individual volunteer activity, regardless of coordination. However, when the expenditures incurred in the course of such activity are more than nominal, the activity ceases to be the sort of individual, grassroots participation that the Act is designed to foster, and it instead threatens to become a means for those with money to unduly influence the outcome of federal elections. Accordingly, such activity should be regulated through disclosure, as proposed in *infra* Part III.

115. Internet Communications, *supra* note 3, at 16,973.

116. *See supra* note 56 and accompanying text.

117. *See supra* note 57 and accompanying text.

118. Internet Free Speech Protection Act of 2006, H.R. 4900, 109th Cong. (2006).

119. Online Freedom of Speech Act, H.R. 1606, 109th Cong. (2005).

clear that only one result is consistent with the purposes of FECA. The substantial similarity of paid online advertisements to paid advertisements in other media, and the consequent transferability of the rationale supporting regulation, dictate that paid online advertisements should be regulated under FECA in the same manner and to the same extent. Extending FECA's paid advertisement provisions broadly to online activity would also comport with the FEC's professed commitment to simplicity and symmetry within its regulations. Unless Congress and the FEC wish to permit the proliferation of activities that undermine existing laws and regulations, bringing paid online advertisements within FECA's ambit is the only reasonable course of action.

C. *The Individual Volunteer and Media Exemptions*

As mentioned in Part I.B.1, FECA's exemptions for certain individual volunteer and media activities are justified because they limit regulation in circumstances in which the likelihood of circumvention or corruption is outweighed by the impingement on individual rights.[120] That justification applies equally to such activities whether conducted online or in more traditional media. Accordingly, online volunteer and media activities should be exempted to the same extent as substantially similar activities conducted offline. Indeed, the FEC has proposed to amend the exemptions to extend them explicitly to Internet communications.[121] But although the Commission's proposed rules are correct in principle, additional regulatory language may serve to confuse the rule's application rather than to clarify it. Instead, the exemptions as they are currently written should be construed to apply to online activity, as the language and policies of the statute permit.

1. *The individual volunteer activity exemption*

FECA's exemption for individual volunteer activity is intended to prevent the Act from interfering with individual participation in the political process. Both that purpose and the statute's plain language support applying the rule to the uncompensated volunteer activity that has proliferated online.

First, the public's interest in not discouraging such activity is arguably

120. *See supra* note 60 and accompanying text.

121. Internet Communications, *supra* note 3, at 16,975 (proposing that "an uncompensated individual acting independently or as a volunteer would not make a contribution or expenditure simply by using computer equipment and services to engage in Internet activities for the purpose of influencing an election for Federal office," as long as the individual used "computer and other facilities to which [she] would otherwise have access"); *id.* at 16,974 (proposing to amend the media exemption to include news stories, commentary, and editorials that appear on the Internet). A bill under consideration at the time of this writing would codify both exemptions' application to online activities. *See* Internet Free Speech Protection Act of 2006, H.R. 4900, 109th Cong. (2006).

even greater with regard to the online forum than more traditional media, since the Internet has proved to be so uniquely conducive to grassroots political activity. The Internet enables individual participation in the political process to an unprecedented extent. Moreover, even if the public's interest in online grassroots political activity is only as great as its interest in similar activity conducted offline, the exemption should nonetheless apply equally to on- and offline activities, because it is ultimately the nature of the activity, not the medium in which it is conducted, that determines whether the exemption applies.[122] Whether an unpaid volunteer is utilizing her home, or her home computer, to support a candidate or political party, the individual is actively engaging in the democratic process, and the Act should encourage that participation, or at the very least avoid discouraging it. Because the First Amendment right to that kind of speech and association substantially outweighs the minimal government interests that regulation might further, exempting such activity is unquestionably appropriate.

Additionally, the statute's plain language is consistent with that reasoning, as it is broadly concerned with grassroots "services provided without compensation,"[123] rather than more narrowly with matters of form. Together, these policy and statutory justifications support extending the exemption to online volunteer activities, thereby excluding from FECA's individual contribution limits the nominal costs of conducting those activities.

In its April 2005 NPRM, the FEC proposed to clarify the application of the volunteer exemption to online activities under specific circumstances. For instance, the Commission suggested that the exemption apply regardless of whether a volunteer was producing content on her own blog or someone else's.[124] Similarly, it recommended that the revised rule state that downloading materials from "a candidate or party Web site, such as campaign packets, yard signs, and other items . . . would not constitute republication of campaign materials"[125] (which is regulated as a contribution under the Act[126]). The FEC also proposed more generally to define such terms as "computer equipment and services" and "Internet activities" in the regulations.[127] Such clarification, however, is unnecessary and might ultimately serve to complicate, rather than simplify, the exemption. As currently written, "[n]either the Act or Commission regulations limit the type of volunteer activity which may receive the benefit of the exception," whether the activity is conducted on- or offline.[128] That approach is consistent with the character of the exemption: a

122. *See generally supra* Part I.B.2.

123. 2 U.S.C. § 431(8)(B)(i) (2006).

124. Internet Communications, *supra* note 3, at 16,975-76.

125. *Id.* at 16,976.

126. 2 U.S.C. § 441a(a)(7)(B)(iii) (2006).

127. Internet Communications, *supra* note 3, at 16,976.

128. FEC Advisory Op. 1999-17 (finding that an individual preparing a website for a candidate from the individual's home computer is covered by the volunteer exemption and

rule intended to avoid discouraging individuals from volunteering for political campaigns must first avoid burdening those individuals with complicated regulations. Moreover, clarification is unnecessary, because determining what constitutes volunteer activity on the Internet should prove no more difficult than characterizing activity conducted in other forums. Accordingly, the exemption need not, and ought not, be amended to clarify its application to online activity.

2. *The media exemption*

Consistency with FECA's plain language and the policies justifying the media exemption support applying the exemption to a broad spectrum of online political speech.[129] The institutional media does not have a monopoly on the First Amendment,[130] and nothing in the statute or the implementing regulations limits the media exemption's applicability to the "institutional media,"[131] however defined. As a practical matter, the exemption has historically been applied primarily to the institutional media[132] because the great expense that mass communication entailed made such organizations exclusively capable of qualifying speech.[133] But the Internet has removed that barrier to publication, making widespread dissemination of information possible at virtually no cost to the speaker. To the extent that online activities further the public interests that the media exemption was intended to protect, those activities should be covered

accordingly does not make a contribution to the candidate through that activity). The FEC had previously found that an individual acting independently and incurring no costs beyond the software, ISP, and other overhead costs that he paid as part of other activities did make a reportable expenditure. FEC Advisory Op. 1998-22. Although that Opinion generated some uncertainty in the regulated community, the FEC stated in Advisory Opinion 1999-17 that the exemption applies broadly to volunteer activities, and there is no reason why that superseding Opinion would not be sufficient to clarify the rule.

129. *Cf.* Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act's Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6, 6 (2004) (arguing that the Act should be *amended* "to include Web sites among the exempted media types and *adopt* a presumption in favor of applying the exemption to online political speech") (emphasis added).

130. McConnell v. FEC, 251 F. Supp. 2d 176, 235 (D.D.C. 2003) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)), *aff'd in part*, *rev'd in part*, 540 U.S. 93 (2003).

131. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990), the Court used the term in discussing the press exemption, and it was adopted by the *McConnell* Court, 540 U.S. at 208, 228, but in neither decision did the Court suggest that it meant to limit the exemption's applicability to some narrower class of media entities meeting "institutional" criteria.

132. *But see infra* note 136 and accompanying text.

133. *See* WILLIAM ERNEST HOCKING, FREEDOM OF THE PRESS 99 n.4 (1947) ("Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press.").

by the exemption. In its April 2005 NPRM, the FEC proposed to clarify that the exemption includes online news and commentary,[134] but the Act's plain language and the *Buckley* weighing test together suggest that application of the exemption to online media activities is appropriate even in the absence of amendment.

First, the statute's plain language supports an inclusive reading of the exemption by embracing the broad general category of "other periodical publication[s]."[135] In *Phillips Publishing*, the court found that language broad enough to support extending the exemption to a biweekly newsletter with a circulation of only 14,000.[136] And the Commission more recently found that a network of interactive websites satisfied the statutory criteria.[137] The statute's plain language thus presents no obstacle for political commentary and editorials produced by bloggers to qualify for exemption as media activities.

Second, the policies supporting the exemption generally also support applying it to media activities conducted online. Whether a media activity is conducted on- or offline, the Act should exempt the activity from contribution and expenditure regulations if the strength of the media entity's interest in expressing itself and the public's interest in receiving the expression outweigh the government's twin interests in preventing corruption and circumvention opportunities flowing from such activities.

The online context modifies the weight of both the rights at stake and the interests furthered by regulation. With regard to the rights at stake, the uniquely broad cross-section of participants engaged in online debate arguably makes the societal interest furthered by the unfettered continuation of that debate even more substantial than the public's interest in traditional media activity. And restrictions on such speech are therefore more likely to interfere with the public's right to access information and engage in political debate than would restrictions on other media outlets.

Weighed against that uniquely substantial interest in unfettered speech are the government's interests in keeping federal elections free from corruption and in preventing circumvention of FECA's other provisions. Some argue that because the potential for entry into online publishing is practically unlimited,

134. Internet Communications, *supra* note 3, at 16,974-75.

135. 2 U.S.C. § 431(9)(B)(i) (2006).

136. 517 F. Supp. 1308 (D.D.C. 1981); *see also* FEC v. MCFL, 479 U.S. 238 (1986).

137. FEC Advisory Op. 2005-16. In that Opinion, the Commission found that certain websites owned and operated by Fired Up! LLC qualify as press entities because the "websites are both available to the general public and are the online equivalent of a newspaper, magazine, or other periodical publication as described in the Act and Commission regulations." *Id.* Consistent with a function-driven analysis, the Commission gave weight to the fact that "a primary *function* of the websites is to provide news and information to readers through" commentary, hyperlinks, and original reporting. *Id.* (emphasis added). The Commission also analogized user contributions to the website to letters to the editor and accordingly found that such contributions did not alter the website's basic media function. *Id.*

even an actor spending a great deal of money is not necessarily more likely than the next person to successfully influence the debate; accordingly, attempts to circumvent FECA through online expenditures are not likely to have their intended effect.[138] Such commentators similarly dismiss the possibility that unregulated online political activity will lead to corruption of federal elections.[139] Others, however, are less optimistic and worry that opening the media exemption to online speech will enable corporations, labor unions, and others to circumvent many of the Act's provisions.[140] Such commentators warn that, in the absence of employment relationships and professional standards of conduct, there is nothing to prevent corporate investors from teaming with bloggers and spending unlimited resources to further a partisan agenda without being accountable to the FEC.[141] Although these arguments may have merit, given the strength of the First Amendment interests at stake and the lack of more concrete evidence of likely circumvention or corruption,[142] the weighing test seems to favor exempting online political news and commentary from regulation. Moreover, the availability of measures to allay the circumvention concern further tips the balance in favor of the First Amendment concerns and, accordingly, in favor of exemption.[143]

138. *See Internet Communications: Hearing Before the FEC*, at 43, June 28, 2005 (statement of Markos Moulitsas Zúniga, Founder, DailyKos.com), http://www.fec.gov/pdf/nprm/internet_comm/20050628transcript_rev.doc (He suggests through the following analogy that monied parties are unlikely to unduly influence the online forum: "Corporate America has spent a lot more money than that trying to influence consumer behavior on the Internet, and what they've found is that you can't really influence consumer behavior. The opposite is happening. Consumers are influencing corporate behavior via the Internet.").

139. *Id.*

140. *See Internet Communications: Hearing Before the FEC*, at 123-26, June 28, 2005 (statement of Carol Darr, Director, Institute for Politics, Democracy and the Internet), http://www.fec.gov/pdf/nprm/internet_comm/20050628transcript_rev.doc; Posting of Neural Gourmet to http://www.neuralgourmet.com/node/466 (Nov. 18, 2005) (warning that the FEC's decision to extend the media exemption to the Fired Up websites in Advisory Opinion 2005-16 will encourage "every campaign [to] set[] up blogs that are supposedly independent from the campaign but will serve primarily to echo campaign talking points and launch attacks on opponents").

141. *Internet Communications: Hearing Before the FEC*, at 123-26, June 28, 2005 (statement of Carol Darr, Director, Institute for Politics, Democracy and the Internet), http://www.fec.gov/pdf/nprm/internet_comm/20050628transcript_rev.doc.

142. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 379 (2000) (stating that mere conjecture is "[in]adequate to carry a First Amendment burden").

143. One option would be to correct the Internet's lack of institutional constraints by adding more explicit conduct requirements to the criteria triggering the media exemption as it applied to online activity—i.e., not only would exempted activities need to be within the legitimate press function and free from outside editorial control, but authors would also have to refuse investments or other disbursements from candidates, political parties, political committees, corporations, or labor unions in order to be covered. Such a requirement, however, would further complicate the already fact-intensive determination of when the exemption applies. A more practical approach to curtailing opportunities for this kind of circumvention is a disclaimer requirement that would compel online actors to provide notice of the fact of payments received, whether in the form of investments, donations, or salary.

The exemption's narrow tailoring further ensures that its application to online activities would not create new opportunities for corruption or new means for parties to circumvent FECA. As mentioned above, the exemption only covers those media activities that satisfy the three-part test laid out by the FEC. To qualify for the exemption, online activities would have to satisfy that inquiry: (1) the entity engaging in the online activity would have to be a press entity; (2) the entity could not be "controlled by any political party, political committee, or candidate"; and (3) the online activity would have to be "part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area."[144]

In applying that inquiry to online activities, the question of what constitutes a press entity is the most difficult, as many online actors that produce news, commentary, and editorial content relating to federal elections have no clear counterpart in the traditional press. A blogger, for instance, engaged in media activities on his home computer, cannot easily be compared to a traditional journalist. The closest analogy is probably to a freelance writer, but even that type of journalist is part of the institutional media apparatus, as she must sell her work to larger publishing or broadcast corporations, which are themselves clearly press entities.[145] As lone operators, many bloggers seem to elude "press entity" characterization. But overemphasizing the importance of that characterization is inconsistent with the exemption's purpose. Indeed, courts often exclude that part of the inquiry, and the Commission has taken to assuming press entity status with little supporting analysis.[146] A more instructive inquiry, and one more consistent with the exemption's purpose, would focus on the nature of the activity conducted. As one blogger stated, "It isn't about creating a special class of people who are above the law, it's about understanding that certain types of activities deserve certain protections because it's in the public interest to preserve the ability of people—all people—to engage in those activities if they so choose."[147] Accordingly, the first prong of the test should present no great hurdle to application, and application of the other two prongs is no different for online media activity than for activity in more traditional forums.

This option is discussed at length in Part III.C, *infra*.

144. *See supra* notes 74-76 and accompanying text.

145. A blogger may seem more aptly compared to a volunteer than to a media actor, but in any case in which the costs of a blogger's campaign-related activities exceed the statutory maximum provided by 2 U.S.C. § 431(8)(B)(i) (2006), she cannot claim the volunteer exemption for her activities.

146. *See supra* note 74.

147. Posting of Duncan Black, alias Atrios, to Eschaton, http://atrios.blogspot.com/2005_10_09_atrios_archive.html#112898803434354248 (Oct. 9, 2005, 19:36 EST); *see also Internet Communications: Hearing Before the FEC*, at 54, June 28, 2005 (statement of Michael Krempansky, Founder, RedState.org), http://www.fec.gov/pdf/nprm/internet_comm/20050628transcript_rev.doc ("I don't think the question really is who is a journalist; I think the question is what do journalists do?").

Although the Commission's three-part inquiry is designed to ensure that only those activities that present little risk of corruption or circumvention are exempted from the Act's regulations, the Internet creates possibilities for circumvention without parallels in the traditional press. Possibilities for circumvention may therefore exist, the three-part inquiry notwithstanding. The FEC recognized one such scenario in its April 2005 NPRM, when it asked "whether it makes any difference under the Act if a blogger receives compensation or any other form of payment from any candidate, political party, or political committee for his or her editorial content."[148] The receipt of such payment certainly seems to make a difference, given the purposes of the exemption. And it is a difference for which the exemption's narrow tailoring does not account. The remainder of this Note explores the problem of paid speech in greater detail and proposes a new disclosure requirement to resolve the opportunities for circumvention that it creates.

III. A DISCLAIMER REQUIREMENT FOR PAID ONLINE SPEECH

Assuming the media exemption applies generally to online activities, the question remains as to whether the exemption should treat differently media actors who receive gifts, fees, or other items of value from a candidate, political party, or political committee.[149] This scenario is unique to the Internet among news media, as more traditional media are bound by institutional constraints that generally preclude such paid relationships.[150] For instance, whereas employers in newspaper, radio, and print news media hold journalists to certain professional standards and require them to "remain free of associations and activities that may compromise integrity or damage credibility,"[151] few institutional constraints operate to hold online actors to standards of any kind.[152] This Part first explores the dimensions of the paid-speech problem. It

148. Internet Communications, *supra* note 3, at 16,975.

149. *Id.* at 16,972-73.

150. This is not to suggest that the institutional media is entirely free from such issues. To the contrary, 2005 saw Cato Institute Fellow and Copley News Service columnist Doug Bandow admit to receiving $2000 per article from lobbyist Jack Abramoff in exchange for coverage favorable to his clients, and conservative columnist and television host Armstrong Williams admit to receiving payments from the Federal Department of Education while supporting the administration's education policies in his column. Anne E. Kornblut & Philip Shenon, *Columnist Resigns His Post, Admitting Lobbyist Paid Him*, N.Y. TIMES, Dec. 17, 2005, at A14. Although such instances of unethical conduct occur, the traditional press possesses institutional safeguards, such as employee oversight and internal review committees that thus far remain absent from the Internet. For an example of an extensive internal review, see N.Y. TIMES, PRESERVING OUR READERS' TRUST, http://www.nytco.com/pdf/siegal-report050205.pdf (last visited Mar. 1, 2006).

151. SOC'Y OF PROF'L JOURNALISTS, CODE OF ETHICS (1996), http://spj.org/ethics_code.asp (last visited Mar. 1, 2006).

152. *See supra* text accompanying note 8. Although many commentators have contemplated and even proposed ethical codes for online actors, as of yet, there is nothing to

then proposes a disclaimer requirement that would curb the potential corruption, circumvention, and misinformation flowing from such paid relationships, without substantially burdening the First Amendment rights of online actors.[153]

A. *Bloggers on Payrolls*

Although FECA requires candidates to disclose payments made to consultants and other campaign workers in periodic statements to the FEC,[154] it is the rare voter, or even journalist, who will take advantage of the statements available on the FEC's website[155] and use that information to calculate a blogger's likely bias. Moreover, disclosure can lag behind transactions, depending upon the timing of the payment within a reporting period, so that even a voter seeking to take advantage of the existing disclosure requirements might not have access to essential information.[156] Indeed, that lag may explain opposing campaigns' failure to learn of and subsequently bring to the public's attention the fact of such payments.[157] Requiring bloggers to disclose on their websites the fact of any such relationship is a simple and relatively unrestrictive means of enabling voters to evaluate the veracity of the election-related information they access online. And unlike current disclosure requirements, notices posted conspicuously on websites would be immediate and "meaningfully public."[158]

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indicate that any such code has taken hold. *See, e.g.*, BERKMAN CTR. FOR INTERNET & SOC'Y, CONFERENCE ON BLOGGING, JOURNALISM, AND CREDIBILITY: BATTLEGROUND AND COMMON GROUND 3, http://cyber.law.harvard.edu:8080/webcred/wp-content/webcredfinalpdf_01.pdf (last visited Mar. 25, 2006); BLOOD, *supra* note 6, at 114-21; Posting by Jonathan Dube to Cyberjournalist.net, http://www.cyberjournalist.net/news/000215.php (Apr. 15, 2003) (adapting the Society of Professional Journalists Code of Ethics for use by bloggers).

153. A somewhat different disclaimer requirement is briefly outlined in Ryan P. Winkler, Note, *Preserving the Potential for Politics Online: The Internet's Challenge to Federal Election Law*, 84 MINN. L. REV. 1867, 1893 (2000) (proposing a rule requiring "disclosure of the source of any funds over $200 used to support" online political communication by providing "a simple message at the bottom of an e-mail or webpage").

154. Candidates and their authorized political committees must report all "expenditures made to meet candidate or committee operating expenses," 2 U.S.C. § 434(b)(4)(A) (2006), as well as the name and address of each "person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made . . . to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure," *id.* § 434(b)(5)(A).

155. FECA requires the FEC to "maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information." 2 U.S.C. § 438a(a) (2006). However, the FEC's Direct Access Program (DAP), which enables the public to research computerized FEC information from home and office computers, is not exactly user friendly. Access costs $20 per hour, and subscribers must request the service in advance. FEC, AVAILABILITY OF FEC INFORMATION 10 (1999).

156. See 2 U.S.C. § 434(a) (2006) for political committee filing requirements.

157. *See infra* Part III.A.1.

158. Sullivan, *supra* note 46, at 688-89 (making a critical distinction between

As the following examples show, paid relationships between bloggers and political actors are not merely hypothetical. Indeed, some commentators believe that "the practice of politicos paying bloggers was more widely used than has been disclosed" during the 2004 election cycle[159]—the first election cycle in which the Internet played a truly major role.[160] The fact that such paid relationships already "appear to pose dangers of real or apparent corruption"[161] suggests that regulation is both appropriate and necessary.

1. *The Thune bloggers: How paid speech undermines FECA*

During the 2004 U.S. Senate race in South Dakota, then-Representative John Thune put two of the state's most popular bloggers on his campaign's payroll. Although FECA required the Thune campaign to report the payments,[162] it did not require the bloggers to do the same, and they did not do so voluntarily.[163]

Thune, who was challenging then-Senate Minority Leader Tom Daschle, faced "an impossibly close" and incredibly expensive race.[164] Although the bloggers' fees constituted only a small part of total campaign expenditures—the two men, Jon Lauck of Daschle v. Thune and Jason Van Beek of South Dakota Politics, reportedly received only $35,000—the impact of their activities may have substantially affected the race.[165] Perceiving the political writers of the Sioux Falls *Argus Leader* (South Dakota's largest paper) as the state's political agenda-setters,[166] Lauck and Van Beek determined to call into

disclosure and meaningful disclosure); *see also* Buckley v. Valeo, 424 U.S. 1, 68 n.82 (1976) (per curiam) (observing that "[d]elayed disclosure" is not as effective and therefore does "not serve the equally important informational function" of more immediate disclosure).

159. Chuck Raasch, *Transparency and the Blog Fog*, ALBANY TIMES UNION, Mar. 13, 2005, at B8.

160. *See* RAINIE ET AL., *supra* note 43, at i, 1 (noting that in early 2003, "it was still not very clear whether there would be major roles for Internet users to play in politics," and calling 2004 a "breakout year" in that regard).

161. *Buckley*, 424 U.S. at 46.

162. 2 U.S.C. § 434(b)(5)-(6) (2006) (requiring authorized committees to disclose to the FEC the name and address of each person to whom a payment or other transfer of value in an aggregate amount in excess of $200 is made within the calendar year or election cycle).

163. Kuhn, *supra* note 7 (reporting that "neither [blogger] gave any disclaimer during the election that the authors were on the payroll of the Republican candidate").

164. David Espo, *Republicans Tighten Grip on Senate; GOP Rides String of Victories Across South as Daschle Faces Strong Challenge*, CHI. SUN-TIMES, Nov. 3, 2004, at 11 (reporting that the race was decided by fewer than 1000 votes and that the candidates spent approximately $50 per registered voter, or a total of about $26 million).

165. Kuhn, *supra* note 7.

166. Posting by Jon Lauck to Daschle v. Thune, http://daschlevthune.typepad.com/daschle_v_thune/2004/04/the_argus_leade_1.html (Apr. 22, 2004) ("The newspaper's reporting and selection of stories determines, to a large extent, the information available to the citizens in the state. The *Argus*, in short, is critical to the proper functioning of the democratic process in South Dakota.").

question the reporting of that group's members, in particular David Kranz, who allegedly had ties to Daschle in college.[167] The men eventually created the South Dakota Blog Alliance and worked in concert to generate skepticism about articles written by the *Argus*'s political correspondents.[168] The Alliance also publicly urged the *Argus* to move Kranz to a different story, which it eventually did (although the paper's executive editor maintains that pressure from the bloggers did not lead to the reassignment).[169]

The apparent ability of these bloggers to influence traditional media coverage is not unique, nor is that kind of influence necessarily something to discourage.[170] Indeed, the Internet's ability to breathe new life into institutional coverage is one of the achievements for which it has been most heralded.[171] But as this example shows, the failure to disclose bias can mislead readers who are inadequately equipped to evaluate the impact of a source's conflicting motivations.[172] Given that the government has a substantial interest "in

167. Posting of Jan Frel to Personal Democracy Forum, http://www.personaldemocracy.com/node/378/ (Feb. 22, 2005, 11:26).

168. *Id.*

169. Eric Black, *In New Era of Reporting, Blogs Take a Seat at the Media Table*, STAR TRIB. (Minneapolis), Mar. 9, 2005, at 1A.

170. For instance, in 2004 it was bloggers who first challenged Dan Rather's report on President Bush's National Guard service. *See id.*; Raasch, *supra* note 159. Bloggers were similarly credited with bringing to the mainstream media's attention the allegedly racist remarks made by Senator Trent Lott in 2002, which led to his resignation as Senate majority leader. *See* Black, *supra* note 169. Bloggers are able to achieve these results by creating so much buzz around a story that it cannot be ignored—something more easily achieved on the Internet than through other media due to the low cost of additional coverage and the possibility of linking. *See id.*

171. *See* BLOOD, *supra* note 6, at 13 (stating that, "[t]oo often, mass media represent only the views of the powerful, ignore important context, or even misunderstand crucial facts," and that the Internet has provided a means for bringing to light overlooked stories and for presenting stories in a more complete context); *Internet Communications: Hearing Before the FEC*, at 120, June 28, 2005 (statement of Carol Darr, Director, Institute for Politics, Democracy and the Internet), http://www.fec.gov/pdf/nprm/internet_comm/20050628transcript_rev.doc ("[T]hanks to the investigative efforts of bloggers, we no longer have to treat the pronouncements of network television anchors . . . as received wisdom.").

172. The Thune bloggers are by no means the only known example of this problem. In the 2006 Vermont Senate race, for instance, a paid staffer on Rich Tarrant's campaign was revealed as the operator of VermontSenateRace.com—a self-styled "nonpartisan discussion" forum. *Senate 2006 Vermont: Pay No Attention to the Blog Behind the Curtain*, HOTLINE, vol. 9, no. 10, Feb. 22, 2006. Only in instances in which the online author is receiving funds from a campaign, however, would the proposed disclaimer provision apply. On that basis, a recent flurry of online activity in Arkansas appears to be beyond the requirement's reach. Although a number of bloggers have begun "almost without exception . . . [to] hew to Hutchinson's talking points, touting his message of the day and leveling harsh attacks against his [opponent]," generating for the candidate substantial buzz, there is as of yet no evidence that the anonymous authors are receiving funds from the candidate, his political party, or a political committee. Warwick Sabin, *A Blog-Eat-Blog World*, ARK. TIMES, Nov. 3, 2005, http://www.arktimes.com/Articles/ArticleViewer.aspx?ArticleID=4331eaed-68b2-46c0-bd3c-8fd4ccaca7c6.

assisting voters in evaluating . . . candidates,"[173] and because it is largely that information interest that justifies the media exemption in the first place, an activity should not be exempt to the extent that it undermines that interest.

2. *Dean and DailyKos.com: "Technical consulting" and voluntary disclosure*

Like the Thune campaign, Howard Dean's presidential campaign sought to harness some of the Internet's political potential. As part of that effort, the campaign paid for the consulting services of Markos Moulitsas Zúniga of DailyKos.com and Jerome Armstrong of MyDD.com[174]—a fact that both bloggers voluntarily disclosed to their readers.[175] This example, particularly when juxtaposed with the Thune example, demonstrates the varied shape that such financial relationships can take.

Although Moulitsas and Armstrong maintain that their work for the campaign was technical and that the payment was not in exchange for favorable coverage, the potential conflict of interest to which that relationship gave rise is functionally no different from that deriving from an explicit advocacy agreement.[176] Because it will very often be difficult to distinguish technical consulting from paid advocacy, a provision concerned with such relationships must be broad enough to exclude from its analysis any inquiry into the nature of the relationship. If regulated relationships are defined narrowly, definitional loopholes will arise: every blogger on a campaign payroll will suddenly be a technical consultant and will thereby avoid disclosure requirements. Disclosure must therefore be required of all bloggers with paid relationships to those with vested interests in the outcome of a campaign if the proposed requirement is to close this potential loophole.

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173. FEC v. Pub. Citizen, 268 F.3d 1283, 1287 (11th Cir. 2001); *see also* JAMES MADISON, *Report on the Resolutions*, *in* 6 WRITINGS OF JAMES MADISON 397 (Gaillard Hunt ed., 1906) ("The value and efficacy of [the right to elect the members of government] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.").

174. *See* Charles Babington & Brian Faler, *A Committee Post and a Pledge Drive—Bloggers on the Payroll*, WASH. POST, Dec. 18, 2004, at A16; William M. Bulkeley & James Bandler, *Dean Campaign Made Payments to Two Bloggers*, WALL ST. J., Jan. 14, 2005, at B2.

175. Mr. Armstrong stopped blogging while he consulted for the campaign to avoid conflict of interest questions, Bulkeley & Bandler, *supra* note 174, at B2, and Mr. Moulitsas posted a disclaimer on his blog to give readers notice, *see* http://web.archive.org/web/20030623112413/http://www.dailykos.com/ (last visited Mar. 25, 2006).

176. Indeed, Zephyr Teachout, a former head of Internet outreach for the Dean campaign, stated that, although the bloggers "never committed to supporting Dean for the payment . . . it was very clearly, internally, our goal," and there was further speculation that the bloggers were hired "so that they would say positive things about the former governor's campaign in their online journals." Bulkeley & Bandler, *supra* note 174, at B2.

The Dean example also suggests the reasonableness of a disclosure requirement. Mr. Moulitsas gave notice of his relationship to the campaign even in the absence of a requirement that he do so, presumably in order to preserve his credibility with readers. That his blog continues to be the most popular political blog on the Internet[177] suggests that other bloggers could be required to make similar disclosures at little cost to online speech.

B. *The Constitutionality of Compelled Disclosure:* Buckley *and* McIntyre

Disclosure requirements have been one of the predominant tools for regulating the influence of money on federal elections since 1910.[178] FECA prescribes two general types of disclosure: reports detailing expenditures and receipts; and statements disclaiming communication authorization and sponsorship. Under the Act's reporting provisions, any actor whose aggregated contributions or expenditures exceed certain dollar amounts must periodically report the details of those disbursements to the FEC.[179] The Commission then makes available to the public the information contained in those reports.[180] The Act's disclaimer provisions, on the other hand, require that public communications contain statements identifying the parties that authorized and paid for the communication.[181]

Under FECA, disclosure requirements were intended to be, and in many cases are, "the least restrictive means of curbing the evils of campaign ignorance and corruption."[182] But such requirements nonetheless have the potential to "seriously infringe on [the rights] guaranteed by the First Amendment."[183] The constitutionality of these and similar requirements has been challenged in the courts, but those specific to FECA have generally been upheld as a relatively unrestrictive yet effective means of furthering FECA's objectives.[184]

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177. The TTLB Blogosphere Ecosystem: Rankings by Traffic, the Truth Laid Bear, http://www.truthlaidbear.com/TrafficRanking.php (last visited Mar. 1, 2006) (showing DailyKos.com ranked as the second most visited blog on March 1, 2006).

178. United States v. UAW-CIO, 352 U.S. 567, 575 (1957) (citing Act of June 25, 1910, ch. 392, §§ 5-6, 36 Stat. 822, 823).

179. 11 C.F.R. § 109.10(b) (2006).

180. 2 U.S.C. § 438a(a) (2006).

181. § 441d(a).

182. Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam); *see also* Sullivan, *supra* note 46, at 688 (advocating abandonment of contribution limits and adoption of vigorous, but still less restrictive, disclosure requirements identifying contributors).

183. *Buckley*, 424 U.S. at 64.

184. *See* McConnell v. FEC, 540 U.S. 93, 196 (2003) (upholding BCRA's disclaimer provisions requiring public communications to contain statements of authorization and sponsorship); *Buckley*, 424 U.S. 1 (upholding FECA's disclosure provisions requiring political committees to report to the FEC certain information related to contributions and expenditures, because the provisions constituted the least restrictive means of accomplishing the government's very substantial interests). For examples of state law provisions that have

Because any statutory provision burdening First Amendment rights must be narrowly tailored to serve a compelling state interest,[185] a disclosure requirement will in any case be constitutional only if it furthers a substantial government interest sufficient to subordinate the rights that it burdens.[186] In *Buckley*, for instance, the Court upheld provisions requiring political committees to disclose to the FEC detailed information about the date, amount, and source or recipient of all contributions and expenditures in excess of certain statutory amounts.[187] The Court based its holding on its conclusion that the requirement was narrowly tailored to serve the following three government interests: providing voters with information about candidates; deterring actual corruption and the appearance thereof by exposing large contributions and expenditures to the light of publicity; and facilitating government data-gathering necessary to detect violations of the Act's contribution limits.[188]

An insufficiently narrowly tailored provision will likely be struck down as an impermissible intrusion on First Amendment rights, as was the case in *McIntyre v. Ohio Elections Commission.*[189] The statute at issue in that case required the author of any public communication intended "to promote the adoption or defeat of any issue, or to influence the voters in any election" to include her name and address in the communication.[190] Although the Court recognized as compelling the government's interest in preventing corruption or the appearance thereof in state elections, it found that the statute was not narrowly tailored to that purpose. Unlike the *Buckley* requirement, which applied only to candidate advocacy, the Ohio law more broadly restricted activities intended to influence voters in any election, even those related to issue-based ballot initiatives. Because the potential for corruption is much less in the case of disbursements supporting issue advocacy than in the case of express support for a political candidate, the Court found the *McIntyre* statute to be insufficiently narrowly tailored to serve that government purpose.[191] The statute's breadth also made its infringement on First Amendment rights more substantial than that of the *Buckley* provision, as it invaded a broader sphere of

been challenged (and more often invalidated), see *infra* note 189 and accompanying text.

185. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995); FEC v. MCFL, 479 U.S. 238, 256 (1986).

186. *Buckley*, 424 U.S. at 68; *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978).

187. For details of the parameters and specific requirements of the provisions, see *Buckley*, 424 U.S. at 63-64.

188. *Id.* at 66-68.

189. 514 U.S. 334; *see also* Talley v. California, 362 U.S. 60 (1960) (invalidating a state law prohibiting the distribution of election-related materials unless they contained the names and addresses of all those who helped sponsor, prepare, or distribute them); Am. Const. Law Found., Inc. v. Meyer, 120 F.3d 1092 (10th Cir. 1997) (invalidating a Colorado provision regulating the petition process as unduly burdensome of First Amendment rights).

190. OHIO REV. CODE ANN. § 3599.09(A) (1988), *invalidated by McIntyre*, 514 U.S. 334.

191. *McIntyre*, 514 U.S. at 354-58.

individual political speech. Consequently, the Court found the provision unconstitutional.[192]

Along with *Buckley*, *McIntyre* stands for the principle that a regulation may only burden First Amendment rights where it is narrowly tailored to serve overriding government interests. The two cases together "provide the parameters for . . . analysis of th[e disclosure] issue."[193]

C. *The Proposed Requirement*

The disclaimer requirement proposed in this Note would apply to communications advocating the election or defeat of candidates for federal office—"pure political speech that occupies the core of the First Amendment's protection."[194] To pass constitutional muster, therefore, the requirement must be justified by an overriding state interest.[195] This Part discusses in greater detail both the government interests justifying the requirement and the parameters of the requirement itself.

1. *Compelling government interests*

The proposed requirement would further at least two of the three government interests recognized by the Court in *Buckley*. First, a disclaimer providing readers with information about a blogger's funding would facilitate the electorate's access to reliable information with which to compare candidates' respective merits and would thereby improve the public's ability to make the type of informed decisions critical to effective democracy.[196] Although "press responsibility is not mandated by the Constitution,"[197] the government has a substantial interest "in assisting voters in evaluating the candidates by providing the voting public with important information about the relationship between the candidate and the sponsor of the advertisement, information which, in turn, aids the overall election process."[198] By alerting voters to sources of bias, the proposed requirement would enable them to better evaluate the information communicated by that source and thereby facilitate efficiency in the political marketplace.[199]

An analogy to paid advertisements further illustrates the requirement's

192. *Id.*

193. Ky. Right to Life, Inc. v. Terry, 108 F.3d 637, 647 (6th Cir. 1997).

194. FEC v. Pub. Citizen, 268 F.3d 1283, 1287 (11th Cir. 2001).

195. *McIntyre*, 514 U.S. at 347.

196. For recognition of the government's interest in providing the public with information about candidates, see *McConnell v. FEC*, 540 U.S. 93, 201 (2003); *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (per curiam); *Pub. Citizen*, 268 F.3d at 1287.

197. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

198. *Pub. Citizen*, 268 F.3d at 1287; *see also* MADISON, *supra* note 173, at 397.

199. *See Buckley*, 424 U.S. at 66-67; LOWENSTEIN & HASEN, *supra* note 37, at 989.

information function. Just as an advertisement posted on a website alerts readers that the website's operator has a paid relationship with the advertisement's sponsor, a disclaimer would provide readers with immediate notice of some paid relationship between an online media actor and a political actor, whatever the nature of that relationship. The effect of such notice can be to generate skepticism about editorial incentives. For instance, when the appearance of paid advertisements for Sherrod Brown (a candidate for U.S. Senate in Ohio) on DailyKos.com coincided with the blogger's withdrawal of support for Brown's primary opponent, members of the online community openly questioned the author's motives.[200] Such skepticism is generally desirable, as voters who question the veracity of the information they receive will, at the end of the day, be better equipped to make informed decisions at the polls. The requirement would therefore "create a largely self-policing arena of political communication, well-suited to a free exchange of ideas"[201] and supportive of the government's interest in facilitating an inquiring and informed electorate.

The disclaimer provision would also further the government's interest in preventing parties from circumventing FECA's other regulations. In the absence of a disclaimer requirement, candidates, political parties, and political committees could more easily exploit the delays inherent in the existing disclosure system by making disbursements to online actors at strategic points in the reporting period so that readers wishing to discover such payments would have to wait several weeks before that information became available. The requirement's parallel reporting function for the payor would also assist the FEC in enforcing existing disclosure requirements by providing "an essential means of gathering the data necessary to detect violations."[202]

Together, these interests are almost certainly sufficient to justify the slight infringement on protected speech that a narrowly tailored disclaimer requirement would entail. The question, then, is how to tailor the provision narrowly to ensure that the infringement involved is indeed very slight.

2. *Narrow tailoring*

To be constitutional in its application to core political speech, the disclaimer requirement must be narrowly tailored to serve the compelling government interests outlined above and yet broad enough to further those interests effectively.[203] Tailoring speaks both to the circumstances under which the regulation applies and to the information it requires actors to disclose. As the remainder of this Part explains, the provision would only require that an

200. *Brown v. Hackett*, HOTLINE, vol. 9, no. 10, Oct. 25, 2005.

201. Winkler, *supra* note 153, at 1893.

202. *Buckley*, 424 U.S. at 68; LOWENSTEIN & HASEN, *supra* note 37, at 989.

203. *See supra* Part III.B.

online media actor, upon receiving anything of value from a candidate, political party, or political committee, or from an individual acting in coordination with any such party, provide immediate notice of the fact of payment. The notice would have to appear conspicuously on the actor's website or other online location and remain there either for the duration of the relationship or the duration of the election cycle, whichever is longer, but in either case for no more than one year beyond the last disbursement.

a. *When the provision would apply*

The source of payment and the type of advocacy undertaken by an online actor together determine when the proposed requirement would apply. Consistent with the demands of narrow tailoring, the provision would apply only to online actors who receive payment[204] from a candidate, political party, or political committee,[205] or from an individual acting in coordination with any such party. Because those parties are the most likely to purchase an online actor's support, it is with regard to those relationships that the public's interest in disclosure is strongest. Additionally, limiting the requirement to already regulated disbursements[206] narrowly furthers the government's interest in gathering information about election-related disbursements by providing a cross-reference function that would assist with enforcement. Although experience may later suggest that disbursements by other individuals should also be subject to the provision, this requirement would initially apply only to individuals acting in coordination with a political actor, in order to avoid overbreadth.[207] Unlike other disbursements by individuals, inclusion of coordinated expenditures is immediately necessary to prevent the wholesale circumvention that would predictably result if individuals were allowed to make payments to online actors at a candidate's or political party's behest

204. Throughout this discussion, "disbursement" and "payment" refer broadly to any exchange of value, including, but not limited to, salary, in-kind donations, and quid pro quo arrangements. Admittedly, relationships involving less tangible exchanges of value will create greater obstacles to enforcement.

205. Although payments by corporate SSFs would be included within that parameter as political committee payments, corporations may prove able to circumvent the requirement by couching payments as nonpolitical investments made directly from their corporate treasuries. However, the rule and its application can be expected to evolve over time to respond to such challenges as they arise. For now, it is enough to recognize that payments from corporate sources present a sufficient threat to the electorate's right to information to justify this minimal amount of regulation.

206. 2 U.S.C. §§ 434(b)(4), 434(b)(5), 441d(a) (2006) (collectively detailing FECA's reporting requirements).

207. Winkler's proposal, in contrast, appears to apply broadly to anyone making a disbursement in excess of $200, including individuals acting independently. *See* Winkler, *supra* note 153, at 1892-93. His requirement therefore does not account for the likelihood that bloggers will increasingly depend on subscriptions to cover the cost of their operations and to avoid dependence on revenue from advertisements.

without triggering the requirement.

For purposes of determining when disclosure is required, the nature and duration of the paid relationship is irrelevant. Whether an online actor works full-time for a campaign or receives a one-time payment for a discrete consulting project, the public's interest in knowing of her relationship with that campaign is the same, and the requirement should treat the relationships equally. Moreover, as discussed in Part III.A.2, it would be impractical to require disclosure only of those engaged in more specific types of relationships—for instance, those receiving payment specifically in exchange for advocacy—because actors could easily couch their financial relationships in other terms, making enforcement of the provision difficult and costly. Accordingly, the requirement would apply to any online actor with a paid relationship to a qualifying party, regardless of the nature of the relationship.

In addition to limiting the group of disbursers that trigger the provision, narrow tailoring requires restricting the provision's reach to actors engaged in express advocacy. Express advocacy is a useful concept created by the Court in *Buckley* "to avoid constitutional problems of vagueness and overbreadth."[208] A communication constitutes express advocacy if, "[w]hen taken as a whole and with limited reference to external events . . . [it] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates."[209] By excluding from its reach websites or webpages that engage only in issue advocacy, the proposed requirement avoids the problem of the Ohio statute in *McIntyre*, which the Court found invalid largely because it applied to an unnecessarily broad range of activity. Although a perfectly tailored provision would target only those payments made in exchange for express advocacy, such payments would be difficult to identify as such and could easily be couched in other terms. Therefore, effective regulation requires that any online media actor engaged in express advocacy and receiving payments from a political actor provide notice of the fact of all sources of such payments. Stated that way, the requirement still avoids overbreadth, as the fact of a payment received from any political actor enables the public to better evaluate information coming from the receiver of that payment, even where the payment is not formally in exchange for the advocacy undertaken.

b. *What the provision would require*

To avoid overbreadth, the proposed provision would only require an online actor receiving money from a political source to state conspicuously on her website that she has a paid relationship with that source. Reference to the fact of payment would have to be explicit.[210] The provision would not, however,

208. McConnell v. FEC, 540 U.S. 93, 103 (2003).

209. 11 C.F.R. § 100.22(b) (2006).

210. Accordingly, Mr. Moulitsas's statement that he did "technical work for Howard

require disclosure of the payment amount or the nature of the relationship, as the fact of a paid relationship is sufficient information both to assist the government in gathering data about election-related disbursements and to give readers notice of the online actor's potential conflict of interest. Those wishing to know more about the nature of the payment could access the disburser's already required financial reports[211] through the FEC's website. By requiring disclosure only of the fact of payment and the source, the provision would effectively further the government's information and enforcement interests without substantially intruding on core First Amendment speech.

The requirement would also include duration and appearance provisions. With regard to duration, the disclaimer would have to remain on the website for either the length of the paid relationship or the relevant election cycle, whichever is longer.[212] As for appearance, the provision would require that the statement be provided in a clear manner, so that a reader viewing the webpage could be expected to see it.[213]

Along with the source and advocacy parameters governing when the provision would apply, the minimal content requirements make the proposed provision sufficiently narrowly tailored to promote honest and informed debate without impermissibly burdening core First Amendment activity. The requirement's practical and easily identifiable parameters are also consistent with the Commission's goal of "promot[ing] simplicity and symmetry within its regulations."[214] Not only do these parameters make the proposed

Dean," although notable both for its voluntary and conspicuous nature, would not satisfy the requirement. DailyKos, http://web.archive.org/web/20030623112413/http://www.dailykos.com (last visited Mar. 25, 2006). Under the proposed provision, the disclosure would have to state something like, "I do paid technical work for Howard Dean."

211. *See supra* note 206.

212. This time-limit provision finds no parallel in FECA's other disclaimer provisions, as those requirements attach to periodically recurring advertisements rather than a static forum, as in the case of a blog or other website. But there must be some limit on the requirement—it is neither necessary nor reasonable to expect a blogger to maintain the disclaimer for years after receiving the last payment—and the duration of the relationship and the end of the relevant election cycle are the most logical parameters.

213. It is sufficient to look at FECA's existing disclosure requirements to determine what kind of notice is sufficiently conspicuous. For instance, 11 C.F.R. § 110.11(c)(1) (2006) requires that the statement be "presented in a clear and conspicuous manner, to give the reader . . . adequate notice of the" required information. "A disclaimer is not clear and conspicuous if it is difficult to read . . . or if the placement is easily overlooked." *Id.* Examples of statements that would satisfy the "sufficiently conspicuous" criteria can also be viewed at DailyKos, http://web.archive.org/web/20030623112413/http://www.dailykos.com/ (stating in the upper left-hand margin in a font of approximately the same size and color as that in which the website's other entries are written that the author does "technical work for Howard Dean"); Minnesota Democrats Exposed, http://web.archive.org/web/20060105134350re_/http://www.minnesotademocratsexposed.com/ (stating in the right-hand margin in a font of approximately the same size and color as other entries on the website that the site is "not created, endorsed, sponsored, or authorized, by any political party, candidate, or candidate's committee").

214. Disclaimers, *supra* note 108, at 76,964.

requirement substantially dissimilar to the *McIntyre* statute, they make it arguably less restrictive even than FECA's existing disclosure requirements. Whereas FECA requires sponsors of paid public communications to provide notice of (1) whether a communication was authorized by a candidate, and (2) the name and address (or phone number or web address) of the person or group that paid for the communication,[215] the proposed rule would only require online actors to give notice of the fact of a paid relationship with an identified political actor when such a relationship exists. The proposed rule is also less restrictive than the *McIntyre* rule and existing FECA provisions insofar as it does not interfere with anyone's right to anonymous speech, since the regulated parties have already forfeited that right.[216] As such, the requirement unquestionably falls closer to *Buckley* than to *McIntyre* on that continuum.

D. *Practical Implications: The Requirement's Effect on Online Speech*

It is impossible to predict precisely how the proposed disclaimer requirement would affect online speech. On the one hand, if the requirement deterred bloggers from consulting or receiving payments for their journalistic efforts generally, the volume of online speech might be diminished, as more people would have to work more hours at other jobs to make a living, leaving fewer hours available for blogging. That risk derives from the fact that, unlike traditional journalists, the vast majority of bloggers write as a hobby, rather than a career; only a very small handful of political bloggers are able to capitalize financially on their reporting and editorializing.[217] Accordingly, one could reasonably believe that if more bloggers were paid to blog, they could devote more time to that endeavor, and payment would thereby increase the total volume of online political speech.

The flaw in this reasoning is the assumption that a disclosure requirement would deter paid relationships in the first place. Most political bloggers do not claim to be nonpartisan. In fact, "[m]ost webloggers are quite transparent about their jobs and professional interests."[218] Just as "the computer programmer's expertise . . . gives her commentary special weight when she analyzes a

215. 2 U.S.C. § 441d(a) (2006).

216. A blogger undermines her right to anonymous speech by accepting a disbursement of a kind regulated by FECA, since the disburser (the political actor) is required to report the recipient's name to the FEC, and, once reported, that information is publicly available. 11 C.F.R. 109.10(e)(1)(ii) (2006). The proposed requirement does not itself interfere with the blogger's right to anonymous speech.

217. *See Internet Communications: Hearing Before the FEC*, at 99-100, June 28, 2005 (statement of Markos Moulitsas Zúniga, Founder of DailyKos.com), http://www.fec.gov/pdf/nprm/internet_comm/20050628transcript_rev.doc (stating that "for 99.9 percent of bloggers . . . blogging is a side thing, and they use their expertise to do their day jobs, and blogging is something they do when they have the opportunity to do so").

218. BLOOD, *supra* note 6, at 120.

magazine article about the merits of the latest operating system,"[219] a blogger's work on a campaign makes her something of an authority on campaign strategy (or at least on stories coming out of that campaign). Because the expectation of neutrality that characterizes traditional journalism does not exist online, disclosure of an affiliation with a campaign or political party also seems unlikely to deter readers significantly.

To the contrary, a uniform disclaimer requirement might promote credibility in the blogosphere and thereby increase the demand for (and presumably the supply of) online political news and commentary.[220] If readers knew that bloggers were required to disclose all paid relationships, they would likely be reassured every time they visited a blog and saw a blogger's disclaimer that she was being upfront about potential sources of bias. That mechanism would be particularly valuable for bloggers not receiving funds, as the lack of a disclaimer on such sites would signal to readers the author's lack of paid affiliations.

On the basis of these predictions alone, the possibility that the proposed disclaimer requirement would promote speech seems at least as likely as the possibility that it would deter speech. But it is also useful to ground that speculation in recent events. On October 26, 2005, Jerome Armstrong—a blogging behemoth who founded the left-leaning MyDD.com—announced that he will stop blogging through the 2008 elections due to difficulties arising from his attempt to manage blogging and campaigning.[221] Mr. Armstrong's "efforts to blog and work campaigns hit a wall against those who would use his client roster to create fantastic conspiracy theories *even though he has fully disclosed every one of his candidate clients*."[222] Although this example confirms that allegations of bias and conflicts of interest can indeed turn bloggers away from writing, it is not evidence that a disclaimer requirement would have the same effect for all those who blog about political issues. To the contrary, a disclaimer requirement might protect those like Mr. Armstrong who want to campaign and blog simultaneously by exposing the prevalence of such relationships and bringing a healthy speculation to bear on all those potential conflicts of interest.

By making the fact of paid relationships an acknowledged and accepted fact of online political activity, the proposed requirement may make it easier for online actors to continue blogging while working or consulting for a campaign. At worst, the requirement might deter some small number of bloggers from accepting the sort of payments that would enable them to blog full-time, and it might turn some small number of readers away from online

219. *Id.*

220. As Rebecca Blood suggests, "Since weblog audiences are built on trust, it is to every weblogger's benefit to disclose any monetary (or other potentially conflicting) interests when appropriate." *Id.*

221. *See* Posting by Markos Moulitsas Zúniga to DailyKos, http://dailykos.com/story only/2005/10/26/14332/775 (Oct. 26, 2005, 11:03 PDT).

222. *Id.* (emphasis added).

sources of political information. The more likely result, however, is that the requirement will add credibility to online political news and commentary and help voters better evaluate the sources of their political news and information, without substantially deterring online political speech.

CONCLUSION

The Internet has given individual members of the public an unprecedented opportunity to engage in meaningful political debate, and the government should avoid taking any action that might stifle such activity. In particular, it should avoid doing so under FECA—a law whose purpose is in part to preserve the ability of individuals to participate in the political process. By both extending the volunteer and media exemptions to online actors and requiring those actors to disclose to readers the fact and source of funding, Congress and the FEC can facilitate the public's continued use of the Internet in pursuit of those democratic goals.

At least until its potential is better understood, however, the Internet will inevitably be a source of a certain amount of activity that runs counter to FECA's purposes. Some of that activity will undoubtedly be corrected over time, as FECA continues to evolve in response to new developments in both technology and circumvention. But as the Supreme Court has long held, it is far better to permit some amount of undesirable activity than unjustifiably to stifle core political speech and in turn damage the democratic process in its own name. Although the requirement proposed in this Note is not a complete answer to the possibilities for circumvention and corruption that the Internet creates, it is a first step. And it is one that carefully balances the government's interest in protecting public confidence in the electoral process and the public's interest in broad and robust debate. Recognizing that the importance of the Internet in the political process will only grow in the coming years, the proposed requirement is a critical step toward striking the appropriate balance between free speech and accountability.