

## Campaign Finance Regulation of Online Political Speech: Background and Implications of the FEC's Latest Ruling

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### Abstract

*The Federal Election Commission faces a paradox when regulating political speech on the Internet. On the one hand, Reno v. ACLU established that Internet content should be largely free of regulation, and it generally has been. However, many political actors use the Internet to disseminate content that would be regulated under campaign finance statutes if distributed through other media. This paper examines the FEC's resolution of this tension up to this point. Following passage of the Bipartisan Campaign Reform Act of 2002, the FEC attempted to exempt all Internet communication from regulation. After a federal appellate court ruled that at least some Internet communications must be regulated under the statute (Shays v. FEC), the commission issued a ruling in 2006 that exempted all Internet communications except paid advertising. The effect is to give the Internet a nearly complete exemption analogous to the blanket exemption given to media outlets. The FEC's rules raise larger questions about the Constitutionality of campaign finance laws. As new technologies make political activism more accessible to private citizens, it may be necessary to reexamine the effects of finance regulation on political speech.*

The 2004 presidential election may have marked a turning point in American electoral politics as, for the first time, the Internet was an integral part of the election process. While rudimentary Internet technology was used for political campaigning at least as early as 1992,<sup>2</sup> the 2004 election marked the first time that the Internet was widely used by major party candidates to mobilize volunteers, raise funds, and get voters to the polls.<sup>3</sup> As the Internet has developed as a tool of candidates and other political elites, it has also been recognized as a tool that ordinary citizens can use to influence the political process without going through traditional media or political channels, particularly through tools such as Web logging software that allows users to produce content very inexpensively.<sup>4</sup> While few would argue with the proposition that giving citizens increased power over the

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<sup>2</sup> See Kenneth L. Hacker, Lori Howl, Max Scott & Robert Steiner, *Uses of Computer-Mediated Political Communication in the 1992 Presidential Campaign: A Content Analysis of the Bush, Clinton and Perot Computer Lists*, 13 COMM. RES. REP. 138 (1996).

<sup>3</sup> Steve Davis, *Presidential Campaigns Fine-tune Online Strategies*, 6 JOURNALISM STUD. 241 (2005).

<sup>4</sup> See, e.g., JEROME ARMSTRONG & MARKOS MOULITSAS ZUNIGA, *CRASHING THE GATE* (2006); GLENN REYNOLDS, *AN ARMY OF DAVIDS* (2006).

political process is consistent with the American ideal of democracy,<sup>5</sup> lawmakers and regulators have struggled to adapt laws that are largely based on outdated assumptions about the distinction between citizens, media, and political actors.<sup>6</sup> This difficulty is evident in the struggles of Congress and the Federal Election Commission (FEC) to adapt campaign finance statutes and regulations to the age of online politics.

The United States has long faced a paradox in its regulation of political campaigns. While political speech is often identified as the expression that is most deserving of the First Amendment's protection, lawmakers have identified a need to closely regulate financial donations made to candidates for federal office in order to avoid corruption in the political system.<sup>7</sup> These regulations have largely survived constitutional scrutiny because of the government interest in preventing corruption and because they primarily regulate the money used by campaigns to create and disseminate political messages rather than the messages themselves.<sup>8</sup> Additionally, these laws are based on an assumption that any tangential effect they have on political speech will only affect speech made by powerful political actors who have no difficulty being heard, rather than private citizens engaged in political activism.

However, early attempts to adapt campaign finance regulations to the online world showed that these regulations can, in fact, stifle the political speech of private citizens. For instance, in 1998 the FEC advised a Connecticut man that he was in violation of federal law for failing to report the cost of his computer, domain registration fee, and the utilities used to operate his computer while designing a website critical of President Bill Clinton's impeachment.<sup>9</sup> This extremely restrictive approach to regulating online political speech led some commentators to worry that the FEC would prevent the Internet from achieving its potential as a tool for political involvement.<sup>10</sup>

Following its 1998 advisory opinion, the FEC tended to address issues of online speech on a case-by-case basis without developing any new overarching

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<sup>5</sup> Glyn Davis, *Alexis de Tocqueville and the Internet*, 2 HARV. INT'L J. PRESS/POL. 120 (1997).

<sup>6</sup> Trevor Potter & Kirk L. Jowers, *Election Law and the Internet*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 243 (Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz & Trevor Potter eds., 2005).

<sup>7</sup> BRADLEY A. SMITH, UNFREE SPEECH (2001).

<sup>8</sup> E.g., *McConnell v. FEC*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>9</sup> Including Disclaimer on Website, AO 1998-22, FED. ELECTION COMMISSION REC., Jan. 1999, at 16, available at <http://www.fec.gov/pdf/record/1999/jan99.pdf>. While the FEC's advisory opinions do not have the full force of law, the requesting party has a strong incentive to abide by the commission's opinion, as good faith compliance with the opinion exempts anyone engaged in the activities addressed by the opinion from penalties imposed by the FEC. Federal Election Campaigns, Disclosure of Federal Campaign Funds, 2 U.S.C.S. § 437f (October 26, 2006); Federal Elections, 11 C.F.R. § 112.5b (January 1, 2006). This advisory opinion was expressly overturned by the April 12, 2006 FEC ruling discussed below.

<sup>10</sup> BRADLEY A. SMITH, UNFREE SPEECH 8-9 (2001); George Will, *Unfree Speech: "Reforms" to the Campaign Finance System will Stomp on Cherished Rights*, PITTSBURGH POST-GAZETTE, Mar. 12, 2001, at A15.

regulations. The passage of a new campaign finance statute in 2002 further complicated the issue by enacting a host of new regulations without specifically addressing how they would apply to the Internet.<sup>11</sup> Finally, in 2006 the FEC issued a ruling that exempted the vast majority of online content from campaign finance regulations.<sup>12</sup> The purpose of this paper is to examine how campaign finance laws currently apply to Internet communication and what implication those regulations have for campaign finance laws in other contexts.

### Literature Review

The 2006 FEC opinion regarding campaign finance regulation of Internet speech is too recent to have been addressed in the scholarly literature. However, a number of earlier sources addressed Internet regulation in other contexts and how they could affect campaign finance law. This previous literature provides a strong background for understanding how the new rules were developed and what questions might remain unanswered.

#### *Regulation of the Internet*

Scholars have long noted that the United States government has tended to take a laissez-faire approach to regulation of the Internet. Attorney and marketing graduate student Don Lloyd Cook traced a series of court cases regarding regulation of the Internet in the 1990s and argued that these cases established a precedent that the Internet should have the highest level of First Amendment protection.<sup>13</sup> Cook wrote that most of the attention on these cases focused on the courts' invalidation of laws prohibiting indecent material on the Internet. However, Cook used the rationales from several of these decisions to argue that the First Amendment protection granted to the Internet went beyond the right to post indecent material. He argued that under the court precedents set in the 1990s, communications such as advertising that have only limited Constitutional protection in other media may enjoy greater protection online.

Some scholars have argued that the Internet will require a reevaluation of the ways in which older media are regulated. Journalism professor Andrew Calabrese argued that the Federal Communications Commission (FCC) has already started applying the rules of the Internet to older media.<sup>14</sup> Calabrese stated that the unregulated nature of the Internet has provided justification for deregulation of

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<sup>11</sup> Federal Election Campaigns, Disclosure of Federal Campaign Funds, 2 U.S.C. §§ 431-455.

<sup>12</sup> Internet Communications, 71 Fed. Reg. 70, 18589 (April 12, 2006).

<sup>13</sup> Don Lloyd Cook, *Earthquakes and Aftershocks: Implications for Marketers and Advertisers in Reno v. ACLU and the Litigation of the Communications Decency Act*, 17 J. PUB. POL'Y & MARKETING 116 (1998).

<sup>14</sup> Andrew Calabrese, *Stealth Regulation: Moral Meltdown and Political Radicalism at the Federal Communications Commission*, 6 NEW MEDIA & SOC'Y 106 (2004). See also Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L. J. 587 (2004).

other media. FCC commissioners have justified the relaxation of broadcast media regulations, such as ownership rules, by citing the new competition these old media face from new media. Calabrese questioned the validity of the FCC's argument, noting that the audiences of other media tend to be tied to specific geographical areas and therefore are not directly competing for the Internet's global audience.

Communication and journalism scholar Lyombe Eko showed that the libertarian approach to the Internet exhibited in the United States is almost unique in the world.<sup>15</sup> Eko argued that this approach is rooted in the same emphasis on individual autonomy that inspired the First Amendment and that few nations in the world are likely to adapt such a permissive model because their cultural perspectives are less individualistic than that of the United States.

Overall, previous scholarly literature indicates that the United States government has been hesitant to impose regulations on citizens' use of the Internet. Regulation of the new medium has been characterized by a "hands off" approach that is similar to the government's approach to regulating print media and the spoken word, in contrast to the more restrictive regulations imposed on broadcasting content. Thus, any restrictions placed on Internet speech must reflect the high level of First Amendment protection such speech enjoys.

#### *Campaign Finance Regulation and the Internet*

The Internet's unregulated nature provides a sharp contrast to the tightly regulated world of contemporary political campaigns. As legal scholar and former FEC chairman Bradley A. Smith has pointed out, virtually all aspects of the American political system are tightly controlled by the FEC under the guidance of federal campaign finance statutes.<sup>16</sup> This control is ostensibly rooted in the desire of lawmakers to avoid corruption, or the appearance of corruption, in the electoral process. Laws prohibit corporate or union donations to federal candidates, limit how much individuals can donate to campaigns, and greatly restrict political activities during the months just prior to a federal election by groups not affiliated with a campaign.<sup>17</sup> However, Smith and others have argued that this tightly controlled regulatory environment does not effectively serve the purpose of preventing corruption and that it is inconsistent with the First Amendment.<sup>18</sup>

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<sup>15</sup> Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. & POL'Y 445 (2001).

<sup>16</sup> BRADLEY A. SMITH, UNFREE SPEECH (2001).

<sup>17</sup> See Leading Case, *Campaign Finance – Bipartisan Campaign Reform Act*, 118 HARV. L. REV. 364 (2004) (summary of recent changes to campaign finance law).

<sup>18</sup> E.g., BRADLEY A. SMITH, UNFREE SPEECH (2001); Patrick M. Garry, Essay, *Confronting the Changed Circumstances of Free Speech in a Media Society*, 33 CAP. U. L. REV. 551 (2005); but see, e.g., E. Joshua Rosenkranz, Commentary, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867; see also Daniel R. Ortiz, *The First Amendment and the Limits of Campaign Finance Reform*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 243 (Anthony Corrado, Thomas E.

The rise of the Internet as a major medium of political communication emphasizes the tension that exists between First Amendment jurisprudence and campaign finance law. Former FEC chairman Trevor Potter and campaign finance attorney Kirk L. Jowers argued that the FCC and FEC have found themselves in conflict over regulation of the Internet.<sup>19</sup> While the FCC has avoided all but the most minimal regulation of the Internet,<sup>20</sup> the FEC has had to work out how online political speech fits into the regulatory framework of campaign finance laws. Potter and Jowers argued that the FEC has often been inconsistent in its rulings. While early rulings, such as the 1998 advisory opinion cited above, were highly restrictive, other FEC statements went to the other extreme by essentially exempting all Internet communication from campaign finance regulations.

Several scholars have noted that the lack of clarity that existed before the FEC's latest ruling on Internet communication made it difficult for bloggers and other producers of online political content to know how those laws applied to them. Law student Matthew Fagan argued that the FEC's early attempts to exempt Internet speech from campaign finance law actually raised more questions than they answered.<sup>21</sup> Fagan noted that the lack of clarity led the sponsors of the most recent federal campaign finance statute to sue the FEC over what they saw as insufficient enforcement of the law.<sup>22</sup>

Legal scholar and blogger Richard L. Hasen argued that confusion over online political speech is not just a logistical point of confusion for those using the Internet for political activities, but that it also raises broader conceptual issues regarding campaign finance laws themselves.<sup>23</sup> Hasen argued that bloggers, as authors of frequently published political commentary, should be considered journalists for purposes of campaign finance law. However, he noted that many bloggers are also members of other groups that are governed by different rules. For instance, a blogger may be part of a candidate's paid staff or may blog on behalf of a corporation or union that is prohibited from making donations to candidates. Hasen

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Mann, Daniel R. Ortiz & Trevor Potter eds., 2005) (summarizing both sides in the debate over the constitutionality of campaign finance laws).

<sup>19</sup> Trevor Potter & Kirk L. Jowers, *Election Law and the Internet*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 243 (Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz & Trevor Potter eds., 2005).

<sup>20</sup> Potter and Jowers argued that the FCC has been discouraged from regulating the Internet by directives from Congress and the White House. The policy of the Executive and Legislative branches has been to preserve the Internet as a largely unregulated free market.

<sup>21</sup> Matthew Fagan, Legal Update, *The Federal Election Commission and Individual Internet Sites After Shays and Meehan v. FEC*, 12 B.U. J. SCI. & TECH. L. 159 (2006).

<sup>22</sup> This lawsuit and its outcome will be discussed in the body of this paper.

<sup>23</sup> Richard L. Hasen, *Lessons from the Clash between Campaign Finance Laws and the Blogosphere*, 11 NEXUS 23 (2006); see also Lindsay Powell, Note, *Getting Around Circumvention: A Proposal for Taking FECA Online*, 58 STAN. L. REV. 1499 (2006); 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 (2004).

argued that the FEC could strike the best balance between free speech on the Internet and supporting campaign finance statutes by requiring that bloggers include prominent disclosures on their blogs of any connections they have to candidates, corporations, or unions.

Law student Ryan Z. Watts argued that early FEC advisory opinions erred in including hardware and utility costs in calculating the amount of expenditures involved in creating a political Web site.<sup>24</sup> He compared the FEC's actions to forcing a citizen who makes a bumper sticker promoting a candidate and puts it on his or her car to report the cost of the car as an expenditure for the candidate. Watts argued that the FEC should carve out a general exemption for Internet speech or, failing such a broad exemption, should limit the reportable costs of a Web site to those costs that are directly incurred in the creation of the site, such as domain registration fees. Such fees would rarely reach the \$250 threshold to require reporting as an independent expenditure, thereby effectively exempting the Internet from independent expenditure disclosure regulations.

This review of the literature shows that campaign finance regulation of the Internet illuminates the tension that exists between the general tendency to avoid regulation of the Internet and the increasingly strict regulations imposed on political speech in order to reduce political corruption. In an effort to update and expand on previous research on campaign finance and the Internet, the rest of this paper will further explicate this area of the law, especially focusing on recent developments that have not yet been analyzed in the scholarly literature.

### **Research Questions and Methodology**

This paper will address the following research questions:

RQ1: How have regulations of Internet communications evolved under current federal campaign finance law?

RQ2: How do federal campaign finance laws currently apply to Internet communications?

RQ3: What implications do current regulations of political communications on the Internet have for broader campaign finance law?

These questions will be answered through in-depth analysis of one statute, two cases, and an FEC ruling. The analysis will begin with a reading of the Bipartisan Campaign Reform Act (BCRA) of 2002,<sup>25</sup> which amended the Federal Election Campaign Act (FECA).<sup>26</sup> The BCRA represents the ideal place to start, as it significantly changed the nature of campaign finance regulation and all of the

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<sup>24</sup> Ryan Z. Watts, *Independent Expenditures on the Internet: Federal Election Law and Political Speech on the World Wide Web*, 8 COMMLAW CONSPECTUS 149 (2000).

<sup>25</sup> Pub. L. No. 107-155, 116 Stat. 81.

<sup>26</sup> Federal Election Campaigns, Disclosure of Federal Campaign Funds, 2 U.S.C.S. § 431-455 (1971).

current regulations of online political speech were developed within the overall regulatory framework established by that statute. Next, this analysis will focus on two court cases: *McConnell v. FEC*, in which the Supreme Court ruled that most of the BCRA was Constitutional,<sup>27</sup> and *Shays v. FEC*, in which a district court and an appellate court ruled that the FEC could not exempt all Internet communications from the provisions of the BCRA.<sup>28</sup> Finally, this paper will examine the FEC's April 2006 ruling on Internet speech.<sup>29</sup> These analyses will provide a history of the development of laws regarding campaign finance regulation of the Internet, show how the law currently addresses this issue, and identify the implications of Internet regulation for campaign finance laws more generally.

### Legal Analysis

This analysis will begin with a short history of recent campaign finance laws as they apply to the Internet, followed by a summary of the FEC's current regulations, and ending with a discussion of the Constitutional implications for campaign finance laws raised by the FEC's regulations of the Internet.

#### *Development of Internet Campaign Finance Laws*

Federal elections have been regulated to some extent since the 1860s,<sup>30</sup> but passage of the FECA in 1971 ushered in the current era of strict regulation.<sup>31</sup> As amended numerous times,<sup>32</sup> the FECA limits contributions to federal candidates, requires contributions and independent expenditures made to advocate for or against federal candidates to be publicly disclosed, and forbids unions and corporations from contributing or spending money for any campaign messages (except messages directed to their own members).<sup>33</sup>

The Bipartisan Campaign Reform Act of 2002 enacted a number of further amendments to the FECA designed to reduce corruption and the appearance of corruption in federal election campaigns.<sup>34</sup> Among the most notable reforms, the Act raised the limit on individual contributions to federal candidates from \$1,000 per

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<sup>27</sup> 540 U.S. 93 (2003).

<sup>28</sup> 337 F. Supp. 2d 28 (D.C. Dist. 2004), *aff'd*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

<sup>29</sup> Internet Communications, 71 Fed. Reg. 70, 18589 (April 12, 2006).

<sup>30</sup> See *McConnell v. FEC*, 251 F. Supp. 2d 176, 271-81 (D.C. Dist. 2003) (Henderson, J., dissenting) for an overview of campaign finance law's history.

<sup>31</sup> Federal Election Campaigns, Disclosure of Federal Campaign Funds, 2 U.S.C.S. § 431-455.

<sup>32</sup> The most sweeping amendments passed in 1974 in response to charges of corruption against the administration of former President Richard Nixon and in 1976 in response to the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which invalidated some of the earlier amendments on Constitutional grounds. See Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 243 (Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz & Trevor Potter eds., 2005).

<sup>33</sup> Federal Election Campaigns, Disclosure of Federal Campaign Funds, 2 U.S.C.S. § 431-455.

<sup>34</sup> Pub. L. No. 107-155, 116 Stat. 81 (amending 2 U.S.C.S. § 431-455).

election (primary or general) to \$2,000 per election.<sup>35</sup> It also restricted donations from or expenditures by political parties and political action committees<sup>36</sup> and communication messages funded by corporations, unions, or individuals by broadening the range of communications subject to spending limits beyond those communications that expressly advocate for the election or defeat of a specific candidate.<sup>37</sup>

Interestingly, despite the fact that the Internet had, by 2002, started to become an important component of political campaigns, the BCRA makes no mention of whether expenses used to disseminate campaign messages on the Internet are subject to regulation. The only mentions of the Internet are in regards to the FEC making records available to the public online.<sup>38</sup> The act does not explicitly include Internet communications among those messages that are regulated, nor does it explicitly exclude them. It says only that its regulations apply to all “federal election activity,” which includes, among other things, “a public communication that refers to a clearly identified candidate for federal office ... and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.”<sup>39</sup> A *public communication* is defined as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank, *or any other form of general public political advertising.*”<sup>40</sup> The exclusion of any explicit reference to Internet communications, while still leaving open the possibility that such communications could be covered under the “other form of general public political advertising” clause, led to a great deal of confusion regarding how Internet communications were to be regulated under the BCRA.

In fact, this vague approach to Internet communication was one of a number of challenges raised against the Act’s Constitutionality by United States Senator Mitch McConnell (Republican from Kentucky) and others who challenged the law in court.<sup>41</sup> McConnell, along with two Congressional representatives, several private citizens, and a number of political organizations, sued the FEC alleging that their

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<sup>35</sup> Pub. L. No. 107-155, § 304, 116 Stat. 81, 97 (2002) (amending 2 U.S.C.S. § 441a(a)(1)(A)). The Act also allowed for that limit to be increased with inflation every odd-numbered year. The limit is currently \$2,100. FEDERAL ELECTION COMMISSION, CONTRIBUTIONS (2005), available at [http://www.fec.gov/pages/brochures/contributions\\_brochure.pdf](http://www.fec.gov/pages/brochures/contributions_brochure.pdf).

<sup>36</sup> Pub. L. No. 107-155, § 101, 116 Stat. 81, 82-86 (2002) (codified at 2 U.S.C.S. § 441i).

<sup>37</sup> Pub. L. No. 107-155, §§ 201a, 116 Stat. 81, 88 (2002) (amending 2 U.S.C.S. § 434). This particular provision explicitly applies only to “broadcast, satellite, or cable communication[s],” presumably exempting Internet and print communications. It is mentioned here only to give the reader a sense of the scope of the BCRA.

<sup>38</sup> Pub. L. No. 107-155, § 306, 308, 501, 502, 116 Stat. 81, 102, 104, 114-115 (2002) (amending 2 U.S.C.S. § 431-455).

<sup>39</sup> Pub. L. No. 107-155, § 101b, 116 Stat. 81, 85-86 (2002) (amending 2 U.S.C.S. § 431).

<sup>40</sup> Pub. L. No. 107-155, § 101b, 116 Stat. 81, 85-86 (2002) (amending 2 U.S.C.S. § 431) (emphasis added).

<sup>41</sup> *McConnell v. FEC*, 124 S.Ct. 619 (2003).

First Amendment rights were violated by the FEC's enforcement of the BCRA.<sup>42</sup> Among a number of objections to the BCRA, the *McConnell* plaintiffs argued that the parts of the law dealing with the use of corporate and union funds were underinclusive because they applied only to broadcast and cable media while exempting print and online messages. The Supreme Court rejected this argument, stating,

The records developed in this litigation and by the Senate Committee adequately explain the reasons for this legislative choice [to exempt print and online media]. Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to stanch that flow of money.<sup>43</sup>

This is the only time, other than when citing Internet sources as support for their own arguments, that any of the justices mention the Internet. Since the Court does not refer to the Internet as a campaign tool, the *McConnell* case does not offer any specific guidance on the question of how the BCRA applies to Internet communication. Following the case, Internet campaigning remains neither explicitly included nor excluded by the regulations.

While the *McConnell* Court failed to directly address the regulation of expenditures for Internet communications, it did explicitly uphold those sections of the BCRA that limit the amount of money that can be spent by groups who are not directly affiliated with any candidate. The Court argued that in earlier versions of the FECA, contribution “limits restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other *noncoordinated* expenditures.”<sup>44</sup> Therefore, when earlier Supreme Court decisions explicitly upheld limits on contributions to political parties or committees that gave money directly to candidates,<sup>45</sup> the logic behind those decisions was not dependent on the fact that money given to those organizations would eventually be given to candidates.

The Court argued, “If indeed the First Amendment prohibited Congress from regulating contributions to fund [unaffiliated groups], the otherwise-easy-to-remedy exploitation of parties as pass-throughs (*e.g.*, a strict limit on donations that could

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<sup>42</sup> See *McConnell v. FEC*, 251 F. Supp. 2d 176, 176-83 (D.C. Dist. 2003) (per curiam) for a complete list of parties in the case.

<sup>43</sup> 124 S.Ct. 619, 697 (2003).

<sup>44</sup> 124 S.Ct. 619, 665 (2002) (emphasis added).

<sup>45</sup> *E.g.* *California Medical Association v. FEC*, 453 U.S. 182 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976).

be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.”<sup>46</sup> In other words, there would be no need to limit contributions to political groups if the only justification for such a limitation was preventing citizens from making indirect contributions in order to circumvent limits on contributions directly to candidates. Rather, previous precedents establish, implicitly, that there is an inherent government interest served by limiting any contributions to political groups, whether they give money directly to candidates or not.<sup>47</sup> Under this justification, any limitation on contribution to political parties or committees passes Constitutional scrutiny.

This decision on the part of the Court presented a troubling possibility for individuals and groups who are not affiliated with political campaigns but who use the Internet to disseminate political messages. It left such groups wondering what, if any, of the operating expenses for their websites needed to be reported as “federal election activity” to the FEC. The FEC responded by including in its rules on the enforcement of the BCRA that Internet communications were completely excluded from all campaign finance regulation.<sup>48</sup> In response to this ruling (and several other FEC rulings made to enforce the BCRA), the BCRA’s primary sponsors in the U.S. House of Representatives, Republican Christopher Shays of Connecticut and Democrat Martin Meehan of Massachusetts, sued the FEC in federal court.<sup>49</sup> The plaintiffs alleged that the FEC had failed to fulfill its statutory requirement to fully implement the regulations of the BCRA. They argued that they were injured by the prospect of having to compete in an upcoming election that would be regulated by rules that were inconsistent with the intent of the BCRA. The Washington, D.C. Federal District Court found in favor of the plaintiffs and the United States Court of Appeals for the District of Columbia Circuit affirmed the decision.<sup>50</sup>

In regards to Internet communications, the courts found that the FEC incorrectly read the exclusion of explicit references to Internet campaigning in the BCRA as an indication that Internet communication did not fall under the scope of the Act. The District Court argued, and the Appeals Court agreed, that, in regards to the “general public political advertising” clause of the BCRA,

While all Internet communications do not fall within this descriptive phrase, some clearly do. Consequently, it is difficult to argue that the statutory terms evidence Congressional intent for the Internet, or any

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<sup>46</sup> 124 S.Ct. 619, 665 (2002).

<sup>47</sup> See, e.g., *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *California Medical Association v. FEC*, 453 U.S. 182 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976)

<sup>48</sup> See *Shays v. FEC*, 337 F. Supp. 2d 28, 65 (D.C. Dist. 2004) for a summary of the FEC’s ruling.

<sup>49</sup> *Shays v. FEC*, 337 F. Supp. 2d 28 (D.C. Dist. 2004), *aff’d*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

<sup>50</sup> *Shays v. FEC*, 337 F. Supp. 2d 28 (D.C. Dist. 2004), *aff’d*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

other forms of communications that constitute “general public political advertising,” to be excluded wholesale from its definition of “public communication.”<sup>51</sup>

Furthermore, the court found that the FEC’s exclusion of Internet communications from the BCRA’s provisions undermined the Act’s ability to serve its purpose of reducing corruption in the political system. The court said,

To permit an entire class of political communications to be completely unregulated irrespective of the level of coordination between the communication’s publisher and a political party or federal candidate, would permit an evasion of campaign finance laws, thus unduly compromising the Act’s purposes, and creating the potential for gross abuse.<sup>52</sup>

While the court did not specify the extent to which Internet communications needed to be regulated,<sup>53</sup> it invalidated the FEC’s rules as overly permissive and therefore inconsistent with the BCRA.

The legal understanding of how campaign regulations apply to Internet communications has evolved alongside other aspects of campaign finance law since the passage of the BCRA. The *Shays* ruling determined that some types of Internet communications were included among the “public communications” regulated by the BCRA. This ruling still gave the FEC broad discretion to determine what specific Internet communications would be considered “general public political advertising,” setting the stage for the FEC ruling that currently governs the use of the Internet in political campaigns.

#### *Current Regulation of Internet Communications*

The FEC issued its new rules on April 12, 2006, after soliciting comments on the issue for about a year.<sup>54</sup> This ruling exempted all Internet communications except online advertising from regulation under the BCRA. The Commission made it clear that expenditures made for Internet communications should not be regulated to the same extent that expenditures for communications in other media due to the unique nature of the medium. The FEC noted that it is easy and inexpensive to use the Internet to disseminate political messages and to read the political messages of others. This characteristic makes the Internet “the most

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<sup>51</sup> *Shays v. FEC*, 337 F. Supp. 2d 28, 67 (D.C. Dist. 2004).

<sup>52</sup> *Shays v. FEC*, 337 F. Supp. 2d 28, 70 (D.C. Dist. 2004) (quotations omitted).

<sup>53</sup> *Shays v. FEC*, 337 F. Supp. 2d 28, 70 (D.C. Dist. 2004).

<sup>54</sup> *Internet Communications*, 71 Fed. Reg. 70, 18589, 18589 (April 12, 2006). This document and the comments received by the FEC are available at [http://www.fec.gov/law/law\\_rulemakings.shtml#Internet05](http://www.fec.gov/law/law_rulemakings.shtml#Internet05) (last visited November 21, 2006).

accessible marketplace of ideas in history”<sup>55</sup> Furthermore, the Commission noted that “the same unique characteristics of the Internet that make it so widely accessible to individuals and small groups also makes [sic] it more likely that individuals and small groups whose web activities generally are not regulated by FECA might engage in activities that unintentionally trigger Federal regulations.”<sup>56</sup> In singling out the Internet as a medium that should be minimally regulated, the FEC acknowledged the potential for the Internet to encourage a new level of citizen involvement in politics and the need to carefully craft regulations that will not discourage such involvement.

The Commission further argued that “there is no record that Internet activities present any significant danger of corruption or the appearance of corruption, nor has the Commission seen evidence that its 2002 definition of ‘public communication’ has led to circumvention of the law or fostered corruption or the appearance thereof.”<sup>57</sup> They also noted that the vast majority of the comments they received from the public on the issue argued for as little regulation of Internet communication as possible. Therefore, the FEC ruled that campaign finance regulations should apply only when a political Internet communication involves “the placement of advertising on another person’s website for a fee [including] all potential forms of advertising, such as banner advertisements, streaming video, pop-up advertisements, and direct search results.”<sup>58</sup>

The FEC argued that the inclusion of paid advertising as the sole regulated class of Internet content was consistent with the text of the BCRA, both because it satisfies the literal description of “general public political advertising” and because it is the only type of Internet communication that compares to the media that are specifically cited in the Act.<sup>59</sup> According to the Commission, “The forms of mass communication enumerated in the definition of ‘public communication’ ... including television, radio, and newspapers, each lends itself to distribution of content through an entity ordinarily owned or controlled by another person.”<sup>60</sup> This is analogous to paying someone else to include advertising content on his or her website. By contrast, “a communication through one’s own website is analogous to a communication made from a soapbox in a public square,”<sup>61</sup> the epitome of speech that is generally thought to be protected by the First Amendment.

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<sup>55</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18590 (April 12, 2006).

<sup>56</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18591 (April 12, 2006).

<sup>57</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18593 (April 12, 2006).

<sup>58</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18594 (April 12, 2006).

<sup>59</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18594 (April 12, 2006).

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<sup>61</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18594 (April 12, 2006).

Among the online communications that are expressly identified as being beyond the scope of BCRA or FECA regulation by the FEC are blogging,<sup>62</sup> sending mass emails,<sup>63</sup> producing videos to post online,<sup>64</sup> and posting electronic versions of a candidate's campaign materials online,<sup>65</sup> as long as all of these activities are done in a way that does not constitute advertising. Moreover, the Commission made it clear that it is the person or organization paying for the advertising that is responsible for making sure that such expenditures are consistent with campaign finance regulations, not the operator of the website featuring the advertising.<sup>66</sup> Additionally, the Commission explicitly stated that bloggers who are paid by candidates, political parties, or political committees are not required to disclose such payments unless the payment is made for an advertisement placed on the blog.<sup>67</sup> This provision allows even individuals who work for campaigns to use the Internet to speak freely on political issues.

Finally, it is worth noting that the FEC addressed the issue of whether an online communication qualifies as a "news story, commentary, or editorial by the media,"<sup>68</sup> which is specifically exempted from all campaign finance regulations by the BCRA. The Commission acknowledged that this media exemption applies to the websites of "The Washington Post, New York Times, CNN and other newspapers and broadcast news sources [who] maintain an online presence in addition to their traditional means of distribution and dissemination."<sup>69</sup> The FEC further ruled that the exemption "applies with full force" to sources such as "Salon.com, Slate.com, and Drudgereport.com [that] operate exclusively online."<sup>70</sup>

The media exemption is more ambiguous when applied to websites that do not resemble traditional media so closely. However, the Commission ruled that the unique features of Internet communications, such as the ability to update a Web site frequently and sporadically, do not make Internet communications ineligible for the media exemption. The FEC argued that "the term 'periodical' within the meaning of the Act's media exemption ought not be construed rigidly to deny the media exemption to entities who update their content on a frequent, but perhaps not fixed, schedule. Nor can 'periodical publication' be restricted to works appearing

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<sup>62</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18595-18596 (April 12, 2006).

<sup>63</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18596-18597 (April 12, 2006).

<sup>64</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18597 (April 12, 2006).

<sup>65</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18599-18600 (April 12, 2006) (linking to or reposting campaign materials does not constitute republication).

<sup>66</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18595 (April 12, 2006).

<sup>67</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18602 (April 12, 2006). The candidate, political party, or political committee is required to publicly disclose such a payment along with all other expenditures.

<sup>68</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18607 (April 12, 2006).

<sup>69</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18609 (April 12, 2006).

<sup>70</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18609 (April 12, 2006).

in a bound, pamphlet form.”<sup>71</sup> The Commission stopped short of classifying all Internet communications as exempted media content. Instead, it ruled that a Web site, blog, or other online source is eligible for the exemption as long as it includes frequently updated news reporting or commentary.

The FEC’s response to the *Shays* decision represents an important affirmation of the potential for the Internet as a tool for citizen political involvement. The ruling exempts all Internet communications except paid advertising from campaign finance regulations. By essentially leaving online political communication unregulated, the Commission demonstrated the importance of allowing such communication to flourish as an essential part of contemporary public discourse.

*Implications of Internet Regulations for Broader Campaign Finance Law*

The FEC is careful to demonstrate the consistency of its rules with the text of the BCRA. However, despite the superficial consistency between the approaches of the Commission and Congress, the ruling raises some questions that may require a different approach to campaign finance regulation in future years.

First, the strong deference to First Amendment ideals displayed by the FEC<sup>72</sup> echoes concerns that have been raised by a number of scholars, judges, and lawmakers concerning whether many campaign finance laws pass Constitutional scrutiny. A full First Amendment analysis of campaign finance laws is well beyond the scope of this paper. However, it is worth noting the implications the new FEC rules have for First Amendment analysis of campaign finance regulations. In the *McConnell* case, four Justices wrote dissenting opinions challenging large sections of the BCRA on First Amendment grounds.<sup>73</sup> One Justice argued,

This is a sad day for the freedom of speech. Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon such inconsequential forms of expression as virtual child pornography, tobacco advertising, dissemination of illegally intercepted communications, and sexually explicit cable programming, would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government[?] <sup>74</sup>

Although the majority of the BCRA was upheld by the *McConnell* Court, the strongly worded dissents from a near majority of justices indicate that concerns

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<sup>71</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18610 (April 12, 2006).

<sup>72</sup> See especially Internet Communications, 71 Fed. Reg. 70, 18589, 18590-18594 (April 12, 2006).

<sup>73</sup> The dissenting justices were Scalia, Thomas, and Kennedy, JJ. and Rehnquist, C.J. Stevens, Ginsburg, and Breyer, JJ. also joined in a dissenting opinion, but that opinion dissented on a part of the BCRA that the Court had struck down as unconstitutional. *McConnell v. FEC*, 124 S.Ct. 619 (2002).

<sup>74</sup> *McConnell v. FEC*, 124 S.Ct. 619, 720 (2002) (Scalia, J., dissenting).

about the consistency of campaign finance laws with the First Amendment have a significant influence among the Supreme Court Justices. It is impossible to know how the current Court, with two new Justices since *McConnell*, will rule on the Constitutionality of future campaign finance laws. Suffice it to say that the advent of the Internet makes the First Amendment implications of campaign finance laws more salient because it shows how such laws can affect private citizens in addition to political elites. Campaign finance regulations have typically been aimed at “the political potentialities of wealth and their untoward consequences for the democratic process.”<sup>75</sup> Thus, any infringement of free speech rights was seen as insignificant because it only affected powerful individuals who were in little danger of losing their voices in the political process. However, as technology allows more visible participation in the process by individuals, campaign finance regulations more clearly affect participants at all levels of the process.

The FEC’s recent ruling offers a temporary solution to the problem of protecting citizen speech on the Internet from the potential chilling effects of campaign finance regulations. However, as technology continues to change it will be more difficult to separate online political speech from other forms of mediated political communication. The Commission specifically avoided singling out any one Internet technology, such as blogs, for special protection, saying that

while at present blogs might be readily distinguished from other Web sites based on particular software used to generate the blog, that software is likely to change. Moreover, ... other forms of communication, such as peer-to-peer “podcasting,” may soon replace blogs as the ubiquitous format for low-cost Internet discussion and debate.<sup>76</sup>

Technology increasingly allows for better quality audio and video content to be disseminated through the Internet. These technologies allow users to view content traditionally associated with a variety of other media through the one medium of the Internet. This trend could continue in a direction that will eventually result in the integration of Internet media with more traditional media, allowing private citizens to influence the content of traditional media outlets more directly. This trend raises questions as to whether campaign finance regulations of all media will need to be reevaluated in order to protect the First Amendment rights of citizens.

The FEC’s ruling suggests an approach to regulating campaign communications that may become increasingly applicable as new technologies complicate the media landscape. The ruling distinguishes between regulated and

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<sup>75</sup> *McConnell v. FEC*, 124 S.Ct. 619, 643 (2002) (quotations omitted).

<sup>76</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18595-18596 (April 12, 2006) (paraphrasing public comment).

unregulated Internet communications based on whether the producers of the messages disseminate them personally or they pay someone else to do so. Finance regulations are applicable only in situations in which the producer of a message “must ordinarily pay an intermediary (generally a facility owner) for access to the public through that form of media each time he or she wishes to make a communication.”<sup>77</sup> Rather than basing regulations on the medium used to disseminate a message, Congress and the FEC may need to shift to a regulatory scheme based on how the medium is used. Messages disseminated by individuals or organizations through their own access to media will be largely unregulated, while messages disseminated by other media actors in exchange for payment would be regulated. This approach would be consistent with most of the provisions of the FECA and the BCRA, but it would offer clarity to individuals and groups who are engaged in the political process and need a clear understanding of how their activities are regulated.

The issue of campaign finance regulation of the Internet raises questions that extend beyond that specific technology. As the media landscape becomes more complex, it will be necessary for Congress, the courts, and the FEC to vigilantly monitor campaign finance regulations to ensure that the potential for citizen involvement offered by new technologies is not undermined by overly restrictive regulations.

### Conclusion

The advent of the Internet as a tool of political discourse offers a challenge to proponents of strict campaign finance regulation. Unlike the broadcast media, which have traditionally been regulated by the government, or the print media, which are informally regulated by journalistic norms and market forces, the Internet has no regulatory tradition, and the government has generally hesitated to impose one on it. As the Internet has become an important source of political information and tool for political involvement for many Americans, the government has had to reconcile the medium’s unregulated tradition with the complex and often restrictive regulatory scheme imposed on campaign finances.

Since the passage of the BCRA in 2002 and its interpretation by the Supreme Court in *McConnell v. FEC*, the FEC has attempted to reconcile the competing traditions of the Internet and campaign finance law. After the *Shays* court invalidated the FEC’s initial attempt to completely exempt Internet communications from regulation, the Commission has developed a regulatory scheme that protects the vast majority of Internet expression from regulation while still regulating online ads. This approach resolves the tension between free

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<sup>77</sup> Internet Communications, 71 Fed. Reg. 70, 18589, 18594 (April 12, 2006).

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expression on the Internet and campaign finance regulation. However, as media technologies continue to evolve, new questions will arise that may warrant a reevaluation of campaign finance laws in general. The FEC's ruling on Internet political communications represents both a resolution of the immediate issue and the beginnings of a reevaluation process that may change the assumptions of campaign finance law in upcoming years.