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Ryan L. Blaine

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Election Law and the Internet: How Should the FEC Manage New Technology?

INTRODUCTION

By the 2000 election year and continuing into the 2002 election year, most legitimate political candidates, whether in national or local elections, had a Web site.[1] Virtually every politically active person, group, committee, union, association, and corporation relied on the Internet to provide and receive everything from election information

1. George W. Bush, Al Gore, Bill Bradley, and John McCain all had Web sites in support of their 2000 presidential campaigns. *See* http://www.politicalinformation.com (last visited Nov. 21, 2002) (on file with the North Carolina Law Review) (providing a search engine for Web sites for national, state, and local candidates). Even local candidates post campaign information on the Internet. For example, Danny Long, candidate for Pender County, North Carolina Sheriff, and Cameron DeJong, candidate for Beaufort County, North Carolina Commissioner, had Web sites promoting their 2002 campaigns. http://www.longforsheriff.com (last visited Oct. 28, 2002) (on file with the North Carolina Law Review); http://votecam.org (last visited Nov. 21, 2002) (on file with the North Carolina Law Review).

to campaign money.[2] Governments used the Internet for direct voting.[3] Individuals used the Internet to make their positions on elections and political issues known, in some cases for the first time.[4] Political campaigns used the Internet to advertise positions on campaign issues, to communicate directly with core constituents, to attract new supporters, to communicate via e-mail, and, most importantly, to raise money.[5] New technology created questions regarding the applicability of federal election law to Internet activity. Most of the emerging issues center on whether a candidate or political party, through the Internet activities of others, receives something of value.[6] Secondary questions consider how to determine that value, when to report Internet activities, and what responsibility the candidate or party has upon receipt of benefits.[7] This Comment takes the position that Internet activities impart value to political candidates even if the "value" cannot be easily defined or calculated like monetary contributions. Furthermore, this Comment argues that difficulty in calculating value should not be used by the federal government as an excuse for failing to reform the current campaign finance rules.

First, this Comment discusses the current campaign finance laws in general.[8] Second, this Comment reviews the original approach of the Federal Election Commission (FEC) to Internet regulation under the laws.[9] Finally, this Comment considers the constitutionality of the proposed FEC Internet rules and whether the rules properly regulate Internet activities by individuals, corporations, and labor unions.[10]

2. Trevor Potter & Kirk L. Jowers, *Election Law and the Internet*, 3, *at* http://www.brookings.edu/dybdocroot/gs/cf/sourcebk01/InternetChap.pdf (Nov. 2001) (on file with the North Carolina Law Review).

3. *Id.* at 1.

4. *Id.* For example, some Internet sites, such as AOL and Washingtonpost.com, provide moderated chat rooms for users. Vlae Kershner, *Finding Serious Political Discourse Among All the Online Illiteracy*, S.F. CHRON., Aug. 2, 2000, at A8. Web-surfers can also participate in online polls on elections and issues. *Id.* Some Internet companies collect public information and sell those databases directly to the campaigns and corporations. Rebecca Fairley Raney, *For-Profit Web Sites Give New Meaning to Campaign Financing*, N.Y. TIMES, Jan. 10, 2000, at C4. Some individuals also use the Internet to learn about political issues and election positions. A survey by George Washington University found that one-fourth of the U.S. population receives political campaign information from Web sites. *Id.*

5. Potter & Jowers, *supra* note 2, at 1.

6. Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360 (proposed Nov. 5, 1999) (to be codified at 11 C.F.R. pt. 100, 102–04, 106–07, 109–10, 114, 116).

7. Potter & Jowers, *supra* note 2, at 3.

8. *See infra* notes 11–34 and accompanying text.

9. *See infra* notes 35–78 and accompanying text.

10. *See infra* notes 79–193 and accompanying text.

This analysis as a whole will lead to the ultimate conclusion that FEC involvement is necessary.

I. BACKGROUND ON ELECTION LAW DEALING WITH CAMPAIGN FINANCE

A. *Current State of the Law*

In order to level the playing field in federal elections, Congress passed the Federal Election Campaign Act of 1971 (FECA).[11] FECA is designed to accomplish this by limiting contributions to national candidates and parties and by restricting the contributions and expenditures of corporations, labor unions, and other politically motivated groups.[12] Under FECA, "contribution" is defined to specifically include dollar donations and other items clearly coming under the umbrella of "contributions."[13] FECA goes further, however, by also including "anything of value" given to a federal candidate or committee in the definition of contribution.[14] The broad definition gives the FEC, the agency in charge of enforcing the statute,[15] extensive regulatory authority in this area.[16] Under FECA's contribution definition, limits on direct financial contributions, loans, loan guarantees, in kind contributions of office space and equipment, and payment of fundraising expenses or salaries to a candidate's workers are all covered activities that the FEC has the power to regulate.[17]

FECA granted the FEC the power to regulate the contributions of both individuals and corporations. FECA limits individual

11. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 U.S.C. §§ 431–42 (2000)).

12. The primary purpose of FECA is "to limit the actuality and appearance of corruption resulting from large individual financial contributions." Buckley v. Valeo, 424 U.S. 1, 26 (1976). FECA represents a total revision of prior law because previous reporting requirements were inadequate to keep the electorate informed as to the source of political campaign money. *See* Pichler v. Jennings, 347 F. Supp. 1061, 1062–63 (S.D.N.Y. 1972).

13. 2 U.S.C. § 431(8)(A)(i) (2000).

14. § 431(8)(A)(i)–(ii). A contribution is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." *Id.*

15. *Id.* § 437c(b)(1).

16. *See* § 431(8)(A) (defining "contribution" broadly); *see also* Trevor Potter, *Where Are We Now? The Current State of Campaign Finance Law*, *in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK 5, 5–8 (Anthony Corrado et al. eds., 1997) (listing items considered contributions under the broad FECA definition), *available at* http://www.brookings.edu/gs/cf/sourcebk/chap1.pdf [hereinafter CAMPAIGN FINANCE REFORM].

17. § 431(8)(A).

campaign contributions by regulating the dollar amount that can be donated per year and per election.[18] For corporations, however, the restrictions cover a broader range of activities. The main prohibition is that a corporation cannot use corporate funds in connection with a federal election.[19]

A corporation may engage in a number of permissible activities. It can use corporate funds to communicate its political views via e-mail, newsletter, or bulletin board with its restricted class[20] at any time on any subject, including partisan politics.[21] A corporation may also establish a Political Action Committee[22] ("PAC") or a "Separate

18. Individuals can give $1,000 to a candidate to support her election campaign. *Id.* § 441a(a)(1)(A). In addition individuals can donate $20,000 per year to the federal account of a national party committee and $5,000 per year to any other multi-candidate federal political group including a Political Action Committee (PAC). § 441a(a)(1)(B)–(C). All contributions are subject to a $25,000 aggregate limit per calendar year. § 441a(a)(3). These limits have recently increased with the passage of House Bill 2356, but the new limits did not take effect until after the 2002 election. Trevor Potter & Kirk L. Jowers, *Summary Analysis of Bipartisan Campaign Finance Reform Act Passed by House and Senate and Sent to President*, *at* http://www.brookings.org/dybdocroot/gs/cf/headlines/FinalApproval.htm (last visited Nov. 21, 2002) (on file with the North Carolina Law Review).

19. Potter & Jowers, *supra* note 2, at 4.

20. This class includes paid members of the Board of Directors, salaried administrative personnel who have policymaking, professional, managerial, or supervisory responsibilities, shareholders in the company, and the families of these individuals. Definitions, 11 C.F.R. § 114.1(j) (2002). The corporation cannot contact employees represented by unions, outside professionals, and attorneys retained by the company. Disbursements for communications beyond the restricted class in connection with a Federal election, *Id.* § 114.3.

21. § 114.3(c).

22. Under FECA,

> The term "political committee" means—
> (A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or
> (B) any separate segregated fund established under the provisions of section 441b(b) of this title; or
> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

2 U.S.C. § 431(4). PACs are political committees that qualify for multi-candidate committee status under 11 C.F.R. § 100.5(e)(3) (2002). These committees are allowed to contribute more per candidate, per election. PACs may be either independent or connected to a corporation or labor organization. *See* Affiliated committee, 11 C.F.R. § 100.5(g)(2) (2002) (stating all corporate and union PACs are "affiliated"); § 100.5(e)(1)–(5) (listing types of PACs). Corporate connected PACs are limited to soliciting contributions from their restricted class. Potter & Jowers, *supra* note 2, at 5 (stating that a

Segregated Fund" to enable it to engage in political activity otherwise prohibited by federal law.[23] A corporation may solicit voluntary contributions from certain employees for use by the PAC, which can in turn be used by the PAC for federal political purposes.[24]

FECA created the FEC specifically to administer and enforce the provisions of the Act.[25] The FEC is statutorily authorized to "seek to obtain compliance with" and "formulate policy with respect to" the provisions of FECA.[26] The FEC has the power to initiate court actions, order testimony, render advisory opinions, conduct hearings, and make rules to enforce FECA (and various other provisions of the United States Code).[27] However, the creation of the FEC does not remove or impede any of the authority of the U.S. Congress, or any of its committees, with respect to federal election law.[28]

Federal election law is broadly written to cover all money spent in connection with or "for the purpose of influencing" federal elections.[29] But the Supreme Court narrowed the scope of FECA in *Buckley v. Valeo*.[30] While upholding the constitutionality of the limits on campaign contributions imposed by FECA,[31] *Buckley* invalidated provisions limiting campaign expenditures.[32] According to *Buckley*, any activity restricted by federal election laws must be narrowly and clearly defined so it cannot "chill" speech protected by the First Amendment of the United States Constitution.[33] Furthermore, clear policy statements regarding federal regulation must give speakers

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corporation is permitted to make only two written solicitations per calendar year of employees not in the restricted class and that such solicitations are rare because they are burdensome and often unsuccessful).

23. These funds are established pursuant to 2 U.S.C. § 441b(b)(4)(B).

24. § 441b.

25. *Id.* § 437c(a)(1), (b)(1).

26. § 437c(b)(1).

27. § 437d(a)(1)–(9). The advisory opinion process has been instrumental in the formulation of FEC policy with regard to the Internet. Any time a person submits a written request to the FEC seeking a declaration of FECA's applicability with respect to a specific activity, the FEC must render an advisory opinion within sixty days (or twenty days for federal candidates). § 437f(a)(1)–(2). Thereafter, any party to the transaction or any other person acting under the exact same facts may rely on that decision, and act according to the decision, so long as he or she does so in good faith. § 437f(c).

28. § 437c(b)(2).

29. *Id.* § 431(8)(A) (providing the definition of "campaign contribution" for purposes of the Act).

30. 424 U.S. 1 (1976).

31. *Id.* at 29.

32. *Id.* at 58–59.

33. Potter, *supra* note 16, at 5.

adequate notice to ensure that they are able to comply with requirements prospectively.[34]

The main effect of *Buckley* is the limitation of the scope of the statutory language of FECA. The limitations on political activity and the definitions of covered activities in the language of FECA are extremely broad; *Buckley* serves to narrowly tailor the federal election laws so as not to restrict protected speech. The limitations provided by *Buckley* create the framework for discussing campaign finance regulation including the Internet regulations considered hereafter.

B. Campaign Finance Laws That Affect Internet Politics

1. General U.S. Position on Regulation of the Internet

According to the U.S. Congress, the Internet and other interactive computer services should remain unfettered by federal or state regulation to preserve the competitive free market that exists there.[35] The notion is that the Internet, in order to reach its full capability as a medium for information transfer, must be free from all obstruction.[36] Most federal agencies have adhered to the congressional directive when considering regulations.[37] The Internet, for the most part, has thus remained free of encumbrances.[38]

In *Reno v. American Civil Liberties Union*,[39] the Supreme Court agreed with the general federal policy towards the Internet: Government interference should be limited in order to help maintain advancement of the Internet as an informational and commercial avenue.[40] The Court characterized the Internet as "a unique and

34. 424 U.S. at 76–77, 79–80.

35. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 230(b) (2000)). Congress noted that the developing array of Internet services increased the availability of educational resources for U.S. citizens, and created a forum for diverse political, cultural, and intellectual discourse, and that these services flourished because of minimal government interference. 47 U.S.C. § 230(a) (2000).

36. Potter & Jowers, *supra* note 2, at 2.

37. *Id.*

38. *See, e.g.*, FEDERAL COMMUNICATIONS COMMISSION, REPORT ON BROADBAND INTERNET ACCESS, BROADBAND TODAY 41 (1999) ("The Commission [should] forbear from imposing regulation[s] and continue to resist the urge to regulate prematurely."), *available at* http://www.fcc.gov/ Bureaus/Cable/Reports/broadbandtoday.pdf.

39. 521 U.S. 844 (1997).

40. *See id.* at 868–69 (noting that other broadcast media have specific attributes that justify regulation whereas the Internet does not have these attributes).

wholly new medium of worldwide human communication"[41] with no single individual or organization in control.[42]

In striking down the Communications Decency Act of 1996 ("CDA")[43] on First Amendment grounds,[44] the Court confirmed that Internet communications deserve a higher level of First Amendment protection than television or radio communications. The reasons for extensive regulation of broadcast media, specifically the history of regulation, scarcity of space available for transmission, and invasive nature of the medium, are not present in the Internet context.[45] Unlike broadcast media where a finite number of networks determine the content sent over the frequency, the Internet is more akin to a group of individuals sitting in a room talking; anyone with a computer and modem can put a message online. The *Reno* Court firmly held that because the Internet is like a worldwide soapbox where any person with a phone line can spread his message to the masses, First Amendment protections are absolutely essential.[46] Unlike television and radio, there is no basis for qualifying the level of First Amendment protections with regard to the Internet.[47] The Court held that the broad coverage of the CDA "unquestionably silences some speakers whose messages would be entitled to constitutional protection."[48]

The holding in *Reno* has undoubtedly shaped the federal government's policy towards the Internet. By providing the Internet with the utmost First Amendment protection, the Court has ensured that very little congressional or agency regulation can constrain the content found online. The FEC must abide by this mandate in its attempts to regulate Internet political activity in accordance with FECA.

41. *Id.* at 850 (quoting Reno v. ACLU, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

42. *Id.* at 853.

43. The CDA prohibited displaying or transmitting obscene messages to minor persons and was enacted as part of the Telecommunications Act of 1996. 47 U.S.C.A. § 223(a), (d) (2002).

44. *Reno*, 521 U.S. at 874–75 (stating that the CDA lacks the precision required by the First Amendment when a statute regulates free speech).

45. The Court held that the Internet is not as invasive because affirmative steps are required after turning on one's computer before any content is seen on the screen. Furthermore, users seldom encounter content by accident. *Id.* at 868–70.

46. *Id.* at 870.

47. *Id.* at 868–69.

48. *Id.* at 874.

2. FEC Approach to Internet Regulation

In contrast to other federal government entities, the FEC has taken an active approach to the applicability of existing election laws and regulations to Internet activities. Most candidates in federal elections now have Web sites to provide information and receive contributions from supporters.[49] In addition, many individuals create and maintain politically motivated Web sites to advocate issues that are close to their hearts. The FEC, in response, has been required to determine to what extent these activities constitute "things of value" bringing FECA into play.[50] The FEC, until recently, looked at these issues in a series of advisory opinions,[51] but had not made or even proposed a uniform rule or regulation dealing with Internet activities. The problem with using the advisory opinion process to create a body of federal Internet election rules is that it is difficult for individuals and groups to know prospectively whether or not they are acting in compliance with FECA. Because advisory opinions only make determinations on cases with specific facts, considerable uncertainty exists as to how the law will be applied in future similar cases.

To combat the problem of uncertainty in the law, the FEC issued a "Notice of Inquiry"[52] followed by a "Notice of Proposed Rulemaking"[53] outlining its approach to dealing with the new technology.[54] There are, however, still no regulations defining the role of the Internet community in political activities as of the 2002 election cycle.[55]

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49. Potter & Jowers, *supra* note 2, at 3; *see supra* notes 1 and 5 and accompanying text.

50. *See* 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) (to be codified at 11 C.F.R. pt. 100, 114, 117) (stating that Internet activity in federal elections has raised issues about the applicability of FECA).

51. *See infra* notes 64–78 and accompanying text.

52. Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360, 60,360 (proposed Nov. 5, 1999) (to be codified at 11 C.F.R. pt. 100, 102–04, 106–07, 109–10, 114, 116).

53. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations, and Labor Organizations, 66 Fed. Reg. at 50,358.

54. The FEC's approach targets three of the most common areas of political activity on the Internet. These areas are individual Internet activity, corporate hyperlinks, and corporate press releases. The FEC, with only slight variation in each specific rule, adopts a uniform approach to these three areas: a general rule of no regulation with narrowly drawn exceptions. *See id.* at 50,362, 50,364–65.

55. Potter & Jowers, *supra* note 2, at 3 (noting that the Internet is currently regulated via a patchwork system of FEC advisory opinions).

II. CORE ISSUES IN THE FEC'S PROPOSED RULES

The Internet as an informational medium allowing mass communication of political speech presents a complex puzzle for the FEC. When enforcing the federal campaign finance laws on the Internet, many of the realities common to political contribution do not apply. For example, the Internet is unique in that there is generally no incremental cost to keystrokes, e-mail, Web sites, and hyperlinks.[56] Without identifiable costs of communication, the FEC has nothing to measure under current law.[57] Limits on individual and corporate activities on behalf of candidates are extremely hard to interpret in the Internet context.[58] In addition, the system for disclosing political expenditures fails to consider the value of such costless activities.[59]

The FEC's original stance was that, at least on their face, Internet activities do have a cost that can be quantified and should be considered something of value.[60] Therefore, the creation and use of Web sites for conveying political speech, or providing a link to a candidate's Web site, would be regulated under FECA.[61] However, complete coverage of Internet activities under FECA proved to be an unworkable solution that did not properly account for the variety of Internet activities.[62] Thus, the FEC's current stance does not attempt to completely cover Internet activities, but rather regulates the Internet only to the extent deemed necessary to adhere to the

56. Incremental costs are also called marginal cost. Marginal cost is the change in total cost brought about by changing output by one unit. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 9 (5th ed. 1998); *see* Potter & Jowers, *supra* note 2, at 6 (explaining the problems with measuring the cost of Internet-related activities, such as e-mailing and typing).

57. The FEC experiences difficulties because FEC regulation has presumed that there are identifiable costs to purchasing advertising. Potter & Jowers, *supra* note 2, at 6. Also, the FEC has been operating on the assumption that money can only be contributed by check, a tangible medium, with a unique signature. *Id.*

58. Potter & Jowers, *supra* note 2, at 6.

59. *Id.*

60. Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360, 60,360 (proposed Nov. 5, 1999) (to be codified at 11 C.F.R. pt. 100, 102–04, 106–07, 109–10, 114, 116).

61. Potter & Jowers, *supra* note 2, at 7.

62. "The combination of open access and relatively low cost threatens to undermine the rationale behind the campaign finance regime." David M. Mason, *Anonymity and the Internet: Constitutional Issues in Campaign Finance Regulation*, *in* PRACTISING LAW INSTITUTE, CORPORATE POLITICAL ACTIVITIES 1999: COMPLYING WITH CAMPAIGN FINANCE, LOBBYING AND ETHICS LAWS 11, 18 (1999).

purpose of FECA.[63] In conjunction with this approach, the FEC made a number of decisions related to Internet political activities.

A. *The Advisory Opinion Approach*

Prior to 2001, the FEC determined Internet-related campaign finance issues through advisory opinions dealing with specific cases.[64] This process requires the FEC to apply federal rules and definitions to a variety of activities by individuals and groups.[65] The results of these advisory opinions, read together, provide an overview of FEC regulation of the Internet.

While nonpartisan activities were outside of FECA's scope, some individuals learned through FEC opinions that their advocacy of specific candidates on the Web was a federally regulated activity. Corporations and labor unions, entities traditionally subject to FECA's provisions, found that providing certain Internet services was not a permissible activity. PACs also utilized the opinion process to gain answers on previously unanswered questions with respect to soliciting contributions.

1. Nonpartisan and Individual Political Web Sites

The FEC has already declared that some nonpartisan political activity is not a contribution.[66] So long as a Web site does not expressly advocate[67] the defeat or election of a federal candidate nor solicit contributions for her political activities, it is not subject to federal election laws.[68] In addition, offering a free link to a candidate's Web site does not rise to the level of a contribution, so

63. Karl Sandstrom, ... *And the Internet*, WASH. POST, Sept. 5, 1999, at B7 ("In regulating the Internet, we should seek to unleash its promise. Only such regulation as is absolutely necessary to achieve the core purposes of the law is merited.").

64. 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) (to be codified at 11 C.F.R. pt. 100, 114, 117).

65. *Id.*

66. Opinion for Trevor Potter, Op. Fed. Election Comm'n No. 1999-25, *at* http://herndon3.sdrdc.com/ao/ao/990025.html (Oct. 29, 1999) (on file with the North Carolina Law Review) [hereinafter Trevor Potter Opinion].

67. The FEC construes any attempt by a Web site to select information skewed towards emphasizing one campaign or party to the exclusion of others as express advocacy. *Id.*

68. Opinion for Leo Smith, Op. Fed. Election Comm'n No. 1998-22, *at* http://herndon3.sdrdc.com/ao/ao/980022.html (Nov. 20, 1998) (on file with the North Carolina Law Review) [hereinafter Leo Smith Opinion]. Note that even if subject to federal election law, the federal requirements may be as minimal as providing a disclaimer and identifying to the FEC costs associated with maintaining the site. *Id.*

long as the site owner does not normally charge a fee for a site link.[69] An individual can spend as much as he wants creating a Web site to discuss political issues, legislative issues, or public policy without being subject to any federal election laws.[70] However, if an individual coordinates her activities with a federal candidate's campaign, she is making a contribution.[71] In this situation, the costs of creating the Internet site are considered when determining the individual's annual limit.[72]

2. Corporations and Labor Unions

Federal election law prohibits contributions from corporations and labor unions. Neither group can gratuitously provide Internet services normally provided for a fee nor post candidate endorsements on its Web site.[73] A corporation that is a news entity carrying out a legitimate press function may publish campaign material and post such information on the Internet since federal election law does not concern itself with these activities.[74] Lastly, a corporation engaging in the business of assisting a campaign or PAC with its Internet activities may continue to do so as long as the current safeguards, like charging usual rates for services, are met.[75]

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69. Opinion for Benjamin L. Ginsberg, Op. Fed. Election Comm'n No.1999-17, *at* http://herndon3.sdrdc.com/ao/ao/990017.html (Nov. 10, 1999) (on file with the North Carolina Law Review). The FEC has since confirmed that these rules apply equally to non-profit political groups and nonpartisan activities by for-profit companies. Opinion for Election Zone, Op. Fed. Election Comm'n No.1999-24, *at* http://herndon3.sdrdc.com/ao/ao/990024.html (Nov. 15, 1999) (on file with the North Carolina Law Review). The important factor, therefore, is not the economic status of the group engaging in Internet political activity but rather the true nonpartisan nature of the information provided. Trevor Potter Opinion, *supra* note 66.

70. Potter & Jowers, *supra* note 2, at 9.

71. *Id.*

72. Leo Smith Opinion, *supra* note 68. Campaign volunteers are subject to different rules regarding their Internet activities. Generally, if a volunteer incurs personal costs by using the Internet for campaign activity those costs are not considered contributions so long as the campaign does not control the specific volunteer activity. Potter & Jowers, *supra* note 2, at 9.

73. FEC Advisory Use of Merchant ID Number to Collect Internet Contributions Submitted for Matching Payment, Op. Fed. Election Comm'n No. 1999-22, *at* http://herndon3.sdrdc.com/ao/ao/990022.html (Sept. 24, 1999) (on file with the North Carolina Law Review) [hereinafter Use of Merchant ID Opinion]; Transmitting Endorsements to Restricted Class Via Internet, Telephone and Voice Mail, Op. Fed. Election Comm'n No. 1997-16, *at* http://herndon3.sdrdc.com/ao/ao/970016.html (Sept. 19, 1997) (on file with the North Carolina Law Review) [hereinafter Transmitting Endorsements Opinion].

74. Defining a News Entity, Op. Fed. Election Comm'n No. 1996-16, *at* http://herndon3.sdrdc.com/ao/ao/960016.html (May 23, 1996) (on file with the North Carolina Law Review).

75. Use of Merchant ID Opinion, *supra* note 73.

3. PACs

Because PACs are entities created specifically for influencing politics and elections, they have their own set of specially crafted rules. PACs not connected to a corporation or labor organization may solicit contributions from the general public over the Internet.[76] They may also post political information that expressly advocates the election or defeat of a candidate as long as the expenses are registered with the FEC.[77] A corporate PAC can also engage in political speech over the Internet, but must pay for the expense out of contributed funds.[78]

B. The Proposed Rules

Using the advisory opinion system to regulate issues of political activities on the Internet creates a number of problems. First, the scope of an advisory opinion is specifically limited to the factual situation presented in each particular case.[79] Therefore, it is very difficult for an individual or group to make a prospective decision on whether an activity will be permissible in the eyes of the FEC unless they present a situation identical to one previously examined.[80] Second, it is not efficient for the FEC to take on individual cases when the Internet presents such a broad range of issues. Tackling every possible election-related activity on the Internet on a case-by-case basis would require substantial time and effort on the part of the FEC. Because of these problems, the FEC recently proposed a set of rules specifically designed to deal with campaign finance and other political activities on the Web. The proposed rules purport to reduce

76. Operating a Political Committee in Cyberspace, Op. Fed. Election Comm'n No. 1995-9, *at* http://herndon3.sdrdc.com/ao/ao/950009.html (April 21, 1995) (on file with the North Carolina Law Review).

77. Opinion for Michael J. Panetta, Op. Fed. Election Comm'n No. 1999-37, *at* http://herndon3.sdrdc.com/ao/ao/990037.html (Feb. 11, 2000) (on file with the North Carolina Law Review).

78. Potter & Jowers, *supra* note 2, at 10.

79. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,360, 50,360 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pt. 100, 114, 117).

80. While unpredictability may exist in any court decision, the advisory opinion system may cause some individuals to refrain from engaging in protected speech. Because the Supreme Court has unequivocally held First Amendment protections apply both to campaign contributions and Internet activities, it makes sense for the FEC to provide a predictable guideline for individuals and groups to follow so that speech is not unnecessarily obstructed. *See* Reno v. ACLU, 521 U.S. 844, 877 (1997) (discussing First Amendment protections for the Internet); Buckley v. Valeo, 424 U.S. 1, 44–45 (1976) (noting that First Amendment protections for campaign contributions require close scrutiny of regulators).

the uncertainty as to which Internet activities constitute contributions. The rules address three specific areas: (1) individual Internet activities; (2) hyperlinks on corporate or labor organization Web sites; and (3) press releases by corporations or labor organizations announcing endorsement of a candidate.[81] Because the FEC has proposed no rules with respect to PACs and nonpartisan Web sites, the FEC will likely continue to use the advisory opinion process for these areas.

1. Individuals

After reviewing the many comments it received in response to its Notice of Inquiry, the FEC proposed a change to the current rule with respect to individuals.[82] Under the proposed rule, no contribution would result "where an individual, without receiving compensation, uses computer equipment, software, [or] Internet services ... [or] engage[s] in Internet activity for the purpose of influencing any election to federal office."[83] The rule goes on to state that this exception applies even if the individual's activity is coordinated with a candidate, party, or campaign.[84] This ruling is in stark contrast to the previous FEC stance that exempted only nonpartisan activities from federal election regulations.[85] The proposed rule exempts from federal regulation only activities conducted on personally owned equipment, which includes Web browsing and hosting services from an Internet service provider pursuant to an agreement, not activities conducted on public equipment, employer owned equipment, or equipment owned by any other person. Pursuant to the rule, any costs incurred by the individual or efforts made by the individual would not count toward contribution limits to candidates or parties.

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81. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg at 50,361.

82. *See id.* at 50,362.

83. *Id.* Note that "personally owned" Internet services include Web hosting and Internet connection services provided to the individual through an ISP. *Id.*

84. *Id.*

85. Under previous opinions, partisan activities of individuals were deemed contributions. *See supra* note 68 and accompanying text (explaining that advocacy for the defeat or election of a federal candidate or solicitation of campaign contributions through the Internet subjects an individual to federal election laws). One limitation on the FEC's contribution rule, in contrast with previous FEC regulations, is that individuals lose the benefit of this exception if they use any equipment, services, or software owned by their employer, even if the individual is using them as part of a volunteer activity. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. at 50,362.

According to the FEC, the reason for this change is to allow individuals to "engage in a significant amount of election-related Internet activity" without being subject to FECA.[86] Because these activities do not count as contributions, they would not count toward an individual's contribution limit, disclosure would be unnecessary, and no disclaimer would be required.[87] This regulatory shift appears to be in line with the general federal point of view that the Internet should continue to develop unobstructed.[88] However, the rule still must be analyzed in light of *Reno v. ACLU*[89] to determine whether it creates other First Amendment issues.

The first step in analyzing the FEC's proposed rule regarding individuals is to determine if it meets the constitutional mandate announced in *Reno*. In general, the FEC rule seems to raise little issue when it comes to constitutionality. *Reno* requires a "hands-off" approach to the Internet, and the FEC rule with respect to individuals provides a complete exemption from the definition of contribution for Internet activities, which complies with this mandate.[90] A problem arises, however, when looking more closely at the rule. The rule only exempts activities of individuals who use their own equipment and software.[91] This limitation means that an individual can only engage in political activity on the Internet if he can afford to own a computer and pay for Internet service. It also precludes the use of libraries and other publicly available Internet sources.[92] For the Supreme Court to hold that the unqualified First Amendment

86. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. at 50,362.

87. *Id.*

88. *See* 47 U.S.C. § 230(b) (2001) (stating that the free market on the Internet should remain "unfettered by Federal and State Regulations"). Congress found that the rapid development of the Internet is likely because of the hands-off approach of the government. § 230(a)(4).

89. 521 U.S. 844 (1997).

90. *See id.* at 870 (stating that First Amendment protections for the Internet are unqualified); The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. at 50,362 (explaining which individual activities are exempt from FECA's contribution definition).

91. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed Reg. at 50,362.

92. *See* Letter from Laurence E. Gold, Associate General Counsel, AFL-CIO, to Rosemary C. Smith, Assistance General Counsel, Federal Election Commission 2 (Dec. 31, 2001) (stating that the proposed rule implies that individual use of the Internet on library, community center, or learning institution equipment does not fit within the exception to "contribution"), *available at* http://www.fec.gov/pdf/nprm/use_of_internet/internet_rule_comments/aflcio.pdf (on file with the North Carolina Law Review) [hereinafter AFL-CIO Comment].

protection stated in *Reno*[93] is subject to an economic exception is unlikely.

In addition, the proposed FEC rules except from the non-contribution policy any activities conducted on an employer's equipment.[94] This exception again seems to contradict the holding in *Reno* that the Internet receives full First Amendment protection. This provision of the rules may be saved, however, by looking at the rationale of the Supreme Court in *Reno*. The crux of the Court's decision was that the Internet is not like radio or television.[95] If an employee is using company equipment to engage in Internet activities, that use and Internet content is most likely monitored by the company.[96] This is analogous to a television network. Once the individual submits to the directives of an employer, her speech on the Internet is less like a person talking to others in a room, and more like a television program that has been approved by the network.

Notwithstanding the possible constitutional problems surrounding the rule, the FEC's approach to Internet regulation creates other difficulties for individuals wishing to engage in political speech. If we assume that the rule is constitutional, and that some individual activity is going to be reported to the FEC, the federal regulation has taken away one of the basic aspects of the Internet—anonymity. The Internet medium disrupts current mechanisms requiring adequate information identifying a political speaker's identity.[97] Authors have many valid reasons for writing anonymously, including avoiding retaliation and ostracism and maintaining privacy.[98] Internet speakers tend to be diverse individuals who often have no notice that federal election laws extend to their activities.[99] By requiring Internet activists to report expenditures or

93. *Reno*, 521 U.S. at 870.

94. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. at 50,362.

95. *Reno*, 521 U.S. at 868–69.

96. *See* Editorial, *Give Workers a Warning . . . You Have (Monitored) Mail*, SAN JOSE MERCURY NEWS, Sept. 11, 2000, at 10B (citing American Management study that found that over half of employers monitor Internet use) (on file with the North Carolina Law Review).

97. Potter & Jowers, *supra* note 2, at 6.

98. Center for Democracy and Technology, Comment on Proposed Rulemaking, *Square Pegs & Round Holes: Applying Campaign Finance Law to the Internet; Risks to Free Expression & Democratic Values* 17, *at* http://www.cdt.org/speech/political/campaignfinance.pdf (Oct. 1999) (on file with the North Carolina Law Review) [hereinafter CDT Comment] (responding to the FEC's notice of proposed rulemaking).

99. *Id.* In contrast, before the Internet, speakers were generally large, well-organized groups, campaigns, parties, or candidates that were all familiar with election laws.

contributions, thereby disclosing their identities,[100] the FEC may inhibit certain individuals from engaging in political speech. In the case of Web sites operated by individuals, identification of a contributing author will do very little in helping visitors understand the content of the site.[101] By revoking the anonymity of individuals, and thereby reducing the number of individuals engaging in political debate on the Internet, the FEC's proposed rule actually contradicts many of the goals of federal election law—equalizing political influence, improving and diversifying political debate, and increasing the competitiveness of elections.[102]

By compromising an individual's ability to make political speech by revoking anonymity, the FEC has run afoul of the Supreme Court's mandate regarding federal election laws announced in *Buckley*. *Buckley* upheld contribution limitations because restrictions on amounts donated, while restraining political expression evidenced by outward support of a political party or candidate, do not deprive individuals of the freedom to discuss candidates or the issues.[103]

Further, in *McIntyre v. Ohio*[104] the Supreme Court held that it is unconstitutional to force anonymous speakers to reveal their identities.[105] The Court stated that the name associated with a piece of constitutionally protected speech is of the same nature as any other statement contained in that speech.[106] With respect to both, the author has the freedom to include or not include in protected First Amendment speech whatever information he or she desires.[107]

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100. *See* Lee Smith Opinion, *supra* note 68.

101. CDT Comment, *supra* note 98, at 18.

102. *Id.* But in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court specifically rejected these rationales of the campaign finance laws. *Buckley* stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 649.

103. *Buckley*, 424 U.S. at 28–29. The Supreme Court went on to state that contribution ceilings adversely affect campaigns by restricting political associations with individuals and groups. *Id.* at 39. The Court held, however, that the contribution limitations did not reduce the amount of money available to candidates, but merely required candidates to raise funds from a greater number of people. *Id.* at 39–40. The Court held that since persons who wished to donate amounts in excess of the contribution ceilings could spend that money on direct political speech, their First Amendment freedoms were not unduly restricted. *Id* at 29.

104. 514 U.S. 334 (1995).

105. *Id.* at 357. The Court held that the state did not have a sufficiently compelling interest in either producing relevant election-related information or decreasing fraudulent and libelous material to allow abrogation of the First Amendment. *Id.*

106. *Id.* at 348.

107. *Id.*

Consequently, an FEC rule that may require individuals to disclose biographical information violates the reasoning in *McIntyre*. The FEC's interest in making the names associated with political expression public is not sufficiently compelling to allow the basic premise of the First Amendment to be undermined. In *McIntyre*, the Court held that no public interest in having an author's name disclosed is sufficient to outweigh the benefit of having those ideas enter the marketplace.[108] While *McIntyre* specifically spoke of books, pamphlets, and other literary works,[109] there is no reason to find an exception for the Internet, even though Internet publication is electronic. Especially in the political arena, where one is dealing with controversial issues that invoke the passions of the masses, one may often find it important to remain nameless. For example, James Madison, John Jay, and Alexander Hamilton, writers of the Federalist Papers, found it necessary to write under the name "Publius" when advocating for the passage of the United States Constitution.[110] While publishing these essays in New York newspapers, Madison, Jay, and Hamilton kept their identities a well-guarded secret.[111] Anonymity was required for "Publius" to effectively fulfill his political purpose—to speak to the small audience of established, powerful men to convince them of the need for governmental change.[112] Madison, Jay, and Hamilton felt their audience might not listen if their names affixed to the message.[113]

As the previous discussion regarding the rules for individual Internet activity illustrates, it appears that the FEC's proposed rules run afoul of the First Amendment.[114] In addition, the rules for individuals seem to contradict many of the reasons for the existence of campaign contribution regulation. First, the Internet allows individuals without money to contribute in support of their candidates and to participate in shaping the issues for the next

108. *Id.* at 342. The Court stated that some authors fear economic retaliation, social ostracism, and possible government retaliation that could cause an author to not publish her ideas if publication required attaching her name. Limitations on free expression could therefore occur in violation of the First Amendment. *Id.* at 341–42.

109. *Id.* at 341.

110. *See* Robert Scigliano, *Editor's Introduction* to THE FEDERALIST, at vii–ix (Robert Scigliano ed., 2000).

111. *Id.* at viii.

112. *Id.* at viii–ix.

113. Clinton Rossiter, *Introduction* to THE FEDERALIST, at ix (Clinton Rossiter ed., 1961) (discussing Hamilton's political efforts and how writing the papers anonymously supplemented his bullying style).

114. *See supra* notes 90–96 and accompanying text (discussing how rules violate *Reno*'s hands-off approach to the Internet by putting qualifications on individual use).

election. These activities can level the playing field between well-financed candidates and those without considerable financial backing.[115] Second, allowing individuals to post information on the Internet will increase the diversity of the information on candidates and political parties available to the public. Increasing information may improve the quality of the electoral debate and require candidates to answer, even if informally, to a wider section of the population. Finally, by allowing individuals to be heard on the Internet, participation in federal elections is likely to increase as more people get involved and as more information becomes available.[116]

2. Hyperlinks on Corporate or Labor Union Web Sites

Because FECA generally prohibits corporations and labor unions from publicly advocating on behalf of any federal candidate, Web sites of these entities cannot post that type of information.[117] But as the Notice of Inquiry stated, providing a hyperlink to a candidate, PAC, party, or the like may also be something of value that would be limited by FECA's contribution requirements.[118] The problem with attempting to regulate hyperlinks, according to both the FEC and various commentators, is that the cost of providing a hyperlink, which in turn would be the "value" of the contribution, is often de minimis or non-existent.[119] Furthermore, it is difficult to see how a hyperlink contains any substantive content. Some commentators argue that hyperlinks merely "present an option" for online traffic that does not advocate the substance of the target site.[120] Without substantive content, a hyperlink may not be a contribution

115. Terry M. Neal, *Candidates Hang Hopes on Electronic Hustlings*, WASH. POST, Apr. 26, 1999, at A3 (discussing the evolution of the Internet in political campaigns). Jesse Ventura's win in the 1998 race for governor of Minnesota is the most notable case of the Internet turning the tide of an election. Ventura used the Internet to mobilize 3,000 votes in the last 72 hours of his campaign which helped him win the election. *Id. But see supra* note 104 (discussing how *Buckley v. Valeo* held that equalizing the relative voices in the marketplace is an impermissible purpose for campaign finance laws).

116. Esther Dyson, *Release 3.0 Polls Make Strange Webfellows*, L.A. TIMES, Sept. 4, 2000, at C3 (stating that the Internet will help more people get involved in government just like it helped people get involved in business).

117. Potter & Jowers, *supra* note 2, at 10.

118. *See* Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,362 (proposed Nov. 5, 1999) (to be codified at 11 C.F.R. pt. 100, 102–04, 106–07, 109–10, 114, 116).

119. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358, 50,363 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pt. 100, 114, 117).

120. *Id.*

or expenditure and would also not be express advocacy by the corporation or labor union in support of a candidate.[121]

To address the issue of hyperlinks, the FEC's proposed new section 117.2 of the Code of Federal Regulations states that providing a hyperlink to a candidate or party Web site by a corporation or labor union would not be considered a contribution or expenditure under FECA.[122] In order to be exempt, however, the hyperlink must meet three criteria: (1) the corporation or union charges no or only a nominal fee to provide the link; (2) the hyperlink is not coordinated with general political communication under FEC rules; and (3) a hyperlink anchored to visual material cannot expressly advocate for a party or candidate.[123]

At first glance, it may appear that FEC regulation of corporations is unconstitutional for the same reasons as the rules regarding individuals.[124] By placing qualifications on a corporation's ability to have a hyperlink on its Web site, the FEC rules restrict speech on the Internet, which is prohibited under a broad reading of *Reno*. *Reno*, however, was concerned with the possibility that Internet regulation would in essence be gagging individuals, thus prohibiting free exchange of ideas.[125] The *Reno* Court took issue with the CDA because it silenced some speakers whose messages were protected by the First Amendment.[126] In the case of political speech by corporations, however, it has already been established that corporate speech, through contributions or otherwise, advocating for a candidate or party may be limited by federal law.[127] The reason for

121. *Id.*

122. *See id.* at 50,363.

123. *Id.* In addition, any text surrounding the hyperlink is forbidden from expressly advocating on behalf of a candidate or party. *Id.* Note also that the text of a URL (the textual address for an Internet Web site) is not limited by the express advocacy prohibition. *Id.*

124. *See supra* notes 89–96.

125. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997) (holding that the CDA suppressed some speech that is protected by the First Amendment).

126. *Id.*

127. *See* 2 U.S.C. § 441b (2000) (prohibiting federally chartered banks and corporations from making political contributions); Corporate and Labor Organization Activity, 11 C.F.R. § 114.2(a) (2002) (prohibiting contributions by banks and corporations with federal charters in connection with federal, state, or local elections and prohibiting contributions by any corporation or labor union in a federal election). The constitutionality of a federal statute prohibiting unions from making contributions to federal campaigns has been upheld. U.S. v. Boyle, 482 F.2d 755, 764 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973). However, these bans are unconstitutional when applied to not-for-profit non-stock corporations. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986).

these restrictions was stated in *Buckley v. Valeo*,[128] where the Supreme Court held that limiting "the actuality and appearance of corruption resulting from large individual financial contributions"[129] was a compelling state interest justifying contribution limitations and other advocacy restrictions.[130]

The preceding discussion is not meant to imply that corporations do not enjoy any First Amendment protections; corporations do enjoy freedom of speech.[131] Corporations are allowed to expend money for the purpose of affecting the outcome of a vote on any issue before voters.[132] Therefore, the hyperlink restrictions are most likely protected only if the FEC can maintain them as restrictions on direct contributions to candidates or parties.

Many commentators on the FEC's proposed rules have maintained that hyperlinks are not subject to contribution restrictions because they are not "anything of value."[133] The commentators mainly argue that because a corporation does not generally spend any money to place a hyperlink on a corporate Web site, the hyperlink is not a gift of value.[134] Furthermore, the placement of a hyperlink on a corporate Web site does not necessarily increase the value of the linked site.[135] The proposed FEC regulations implicitly accept this argument by only restricting hyperlinks in limited situations.

While placing a hyperlink on a Web site does not necessarily result in dollar expenditures, the link may still have value to both the corporation and the linked site in an economic sense. The economic value of something is measured in terms of how much someone is *willing* to pay for it, not by how much it actually costs.[136] The true meaning of "value" is especially significant when defining

128. 424 U.S. 1 (1976).

129. *Id.* at 26.

130. *Id.* In a later case, the Supreme Court identified the compelling state interest as preventing corruption stemming from the influence of corporate political war chests. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659 (1990).

131. *See* Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776–77 (1978). (holding that nothing in the First Amendment stands for the proposition that speech loses First Amendment protection simply because it came from a corporation).

132. *See id.* at 793–95 (rendering unconstitutional a state statute prohibiting corporate expenditures for the purpose of influencing a public vote on a question not materially affecting the business).

133. *See* The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358, 50,363 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pt. 100, 114, 117) (noting that thirty commentators believed hyperlinks do not add value to a Web site).

134. *Id.*

135. *See id.*

136. POSNER, *supra* note 56, at 12.

contribution because FECA specifically enumerates monetary expenditures but also contains "anything of value" as a catch-all.[137] If FECA was only meant to cover dollars spent, there would be no reason to include the "anything of value" language. A hyperlink to his or her campaign Web site is something that a candidate would find highly desirable and would likely pay measurable dollar amounts to have.[138] Likewise, the corporation expects to benefit by increased traffic to the campaign Web sites of the candidates that it supports, increasing the likelihood of success on election day. Because the corporation expects to benefit from the election of the candidates it supports,[139] the link has significant economic value.

How the FEC would enforce hyperlink restrictions as a practical matter is not clear. The FEC will be forced to rely on the same tools employed to enforce the other provisions of FECA. These tools include audits of political campaigns (to ensure compliance with FECA) and complaints alleging violations.[140] Apparently, the FEC believes it can monitor hyperlinks on the Internet, as monitoring is necessary to supervise compliance with the restrictions on hyperlinks.[141] Whether the FEC is monitoring its proposed restrictions or enforcing a ban on corporate hyperlinks (as this Comment argues) the FEC must police the Internet to some extent—

137. 2 U.S.C. § 441b(b)(2) (2000) (defining the term "contribution" with respect to corporations and labor unions).

138. A hyperlink will increase the number of hits a Web site gets because of the ease with which the Web site is accessed. The Internet user does not have to expend any energy actually locating the site because free transportation to the site is given by merely clicking on the link.

139. The fact that corporations expect to derive benefit from the election of the candidates they support is the basis for FECA's prohibitions against corporation activity. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659–60 (1990). In *Austin*, the Supreme Court construed Michigan's campaign finance act similarly to FECA. *Id.* Applying strict scrutiny, the Court upheld the act, again finding that corporate wealth, when used for campaign contributions or expenditures, can unfairly influence elections. *Id.* The Supreme Court held that the possibility of corruption of our political system through corporate contributions and expenditures in federal elections is a compelling interest sufficient to abrogate corporations' freedom of expression. *Id.* at 659.

140. *See* Trevor Potter, *Enforcing Spending Limits in Congressional Elections: Can the FEC Do the Job?*, *in* CAMPAIGN FINANCE REFORM, *supra* note 16, at 332, 333 (arguing the FEC does not have the resources necessary to enforce FECA successfully).

141. Many commentators argue that the FEC, in its current form, is not capable of adequate enforcement of any of FECA's provisions. *See* Brooks Jackson, *Fixing the FEC: Suggestions for Change: Fulfilling the Promise*, in CAMPAIGN FINANCE REFORM, *supra* note 16, at 315, 315–22; Brooks Jackson, *The Case of the Kidnapped Agency: Wayne Hays and 'Scared Rats': Designed to Fail*, *in* CAMPAIGN FINANCE REFORM, *supra* note 16, at 281, 281–89; Potter, *supra* note 142, at 332–34; Trevor Potter, *With Changes the FEC Can Be Effective*, *in* CAMPAIGN FINANCE REFORM, *supra* note 16, at 323, 323–26. The adequacy of the FEC as a governmental agency is outside the scope of this Comment.

an arduous task. While it may be easier from an enforcement point of view to have no regulation of hyperlinks, simplicity alone cannot counter the argument that providing a link is a valuable service that corporations should not be allowed to contribute to political campaigns under FECA.

Because hyperlinks have significant economic value, they do in fact fit within the code definition of a contribution or expenditure—they are something of value intended to influence a federal election.[142] Therefore, these Internet activities do in fact fall under the broad scope of FECA and the regulations of the FEC. The FEC can enact rules and make policy with respect to these Internet devices so long as it adheres to the constitutional limitations on FECA as set out in *Buckley v. Valeo* and subsequent cases.

3. Press Releases

FECA allows corporations and labor unions to endorse candidates.[143] The corporation or union is allowed to make a press release concerning an endorsement as long as the release is only distributed to members of the news media to which the corporation or union customarily releases information.[144] The new FEC regulation would also permit press releases concerning candidate endorsement on a corporate Web site so long as four conditions are met.[145] First, the corporation must generally make press releases available on its Web site.[146] Second, the press release must be limited to announcement of the endorsement and its supporting reasons.[147] Third, the press release must be made available in the same manner as other press releases on the Web site.[148] Fourth, the cost of making a press release available on the Web site must be de minimis.[149] This rule allows the press release to be made available to the general

142. *See* 2 U.S.C. § 431(8)(A)(i) (providing the definition of contribution with respect to individuals); § 431(9)(A) (providing the definition of expenditure with respect to individuals); *id.* § 441b(b)(2) (providing the definition of contribution with respect to corporations and labor unions).

143. Disbursements for communications beyond the restricted class in connection with a Federal election, 11 C.F.R. § 114.4(c)(6) (2002).

144. § 114.4(c)(6)(i).

145. The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358, 50,365 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pt. 100, 114, 117).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

public and not just the corporation's restricted class or members of the media.

The FEC rules respecting press releases are likely constitutional because they are less restrictive than the previously accepted regulations on providing information on candidate endorsement.[150] The new rules allow wide dissemination freely to the general public, and the four restrictions are merely content-neutral speech regulations that do not contradict the First Amendment. These neutral restrictions merely limit speech without regard to the content of that speech.[151] Content neutral restrictions can be anything from billboard restrictions and bans on loudspeakers to the limits on campaign contributions imposed by FECA.[152] The restrictions, however, can interfere with individuals' ability to speak freely. As this interference becomes more apparent, courts employ increasingly difficult standards of review to ensure that government regulations do not chill protected speech.[153] Just because the rules pass constitutional muster, however, does not force a conclusion that the rules adequately resolve the issue of Internet regulation under FECA.

The proposed rules do not go far enough in protecting the core principles of FECA: reducing the impact of money on political campaigns, preventing corruption and undue influence in the election process, and improving the quality and competitiveness of the election process.[154] In contrast, the aggregate effect of the hands-off approach by the FEC is to allow increased corporate contribution to the campaigning of federal election candidates. This result is in direct opposition to the purpose of FECA which is to reduce the appearance of corruption in federal elections.[155]

C. *Proposed Rules: Not Enough to Properly Restrict Corporate and Labor Union Activity*

Most of the opposition to the FEC rule relating to hyperlinks in its proposed form is based on the premise that a hyperlink is cost-free

150. Prior to proposed 11 C.F.R. § 117.3, the FEC only allowed candidate endorsements to be posted on a corporation's Web site if access to that endorsement was limited to the corporation's restricted class using a password or other method. *See* Transmitting Endorsements Opinion, *supra* note 73. The proposed regulation permits release of the endorsement to the general public on the Web site, which is a significantly less restrictive provision.

151. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1234 (Aspen 4th ed. 2001).

152. *Id.*

153. *See id.* at 1364.

154. *See* CDT Comment, *supra* note 98, at 10–11.

155. *See supra* note 12.

to provide and therefore is not something of value.[156] According to the AFL-CIO, "[a] link is inherently cost-free to provide, access and use, in contrast to other website content" that requires "measurable design costs and personnel resources."[157] The AFL-CIO argues that a link is nothing more than giving a candidate's address to an individual.[158] Likewise, the Chamber of Commerce of the United States, a group advocating for American businesses, describes the Internet as a forum where "speech is cheap" and posting only "involves minimal costs."[159] These interest groups believe that when the costs of using an informational medium are nearly insignificant, the government's role in preventing corruption (one main goal of election laws) also becomes insignificant.[160]

These commentators argue that the rules are a step in the right direction—towards deregulation—but do not go nearly far enough.[161] The commentators urge the FEC to adopt a totally hands-off approach that will not raise "numerous practical difficulties for corporations."[162] The commentators thus are apparently not concerned as much with the FEC's goal of providing fair elections as with possible hindrances to corporate advocacy. These commentators are also concerned with the FEC's ability to enforce these regulations based on the overwhelming number of Web sites and the constantly changing nature of the Internet.[163] If the FEC is constantly tracking information on the Web, the commentators fear that enforcement power will be reduced in all other areas, allowing some illegal activity to go unnoticed and unpunished.[164]

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156. *See, e.g.*, AFL-CIO Comment, *supra* note 92, at 3 (providing reasons why a hyperlink does not constitute anything of value).

157. *Id.*; *see also* Letter from Jan Witold Baran, Counsel to Chamber of Commerce of the United States, Wiley Rein & Fielding, LLP, to Rosemary C. Smith, Assistant General Counsel, Federal Election Commission 8–9 (Dec. 3, 2001) [hereinafter Chamber of Commerce Comment], *available at* http://www.fec.gov/pdf/nprm/use_of_internet/internet_rule_comments/us_chamber_of_commrc.pdf (on file with the North Carolina Law Review).

158. AFL-CIO Comment, *supra* note 92, at 3.

159. Chamber of Commerce Comment, *supra* note 157, at 8 (quoting The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358, 50,362 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pt. 100, 114, 117)).

160. *Id.* at 9.

161. *Id.* at 10–11.

162. *Id.* at 11.

163. *See* AFL-CIO Comment, *supra* note 92, at 6. The AFL-CIO also fears that enforcement of Internet activities will create incentives to file frivolous complaints simply for harassment purposes since the dollar amounts at issue are relatively small. *Id.*

164. *Id.*

With respect to the rules restricting corporate press releases, the commentators find similar problems. The AFL-CIO argued that corporations and unions should be free to post Internet press releases (as the FEC's proposed rules allow) without the "unduly restrictive" qualifications of the proposed regulation.[165] The basis of their argument, again, is that the cost of Internet posting is "typically negligible at most."[166] Because corporate and union Web sites are almost exclusively used to post non-election related content, only the minimal incremental costs of putting the press release online should be counted under the application of FECA.[167] The AFL-CIO analogizes the situation to FEC approved rules that allow corporations and unions to hold press conferences[168] or candidate appearances[169] to announce endorsement of a candidate for a federal election. Because these permissible activities produce "potentially far-reaching and potent communication," they are similar to an Internet posting of the endorsement information which should likewise be free of any conditions precedent.[170]

The analogy presented by the AFL-CIO, however, is not the proper analogy. The press release and press conference regulations only allow members of a corporation's restricted class and the media to be present. In order for the endorsement to become a "far-reaching potent communication" the media must first determine that the endorsement is a newsworthy event—public knowledge is shaped by how the media decides to cover the event.[171] The Internet, in contrast, provides the corporation unfiltered access to the public, a wholly different situation, of which the FEC should be (and probably is) far more concerned. So long as the Internet election regulations on corporations and unions are deemed constitutional, the FEC

165. *Id.* at 4.

166. *Id.*

167. *Id.*

168. *See* Disbursements for communications beyond the restricted class in connection with a Federal election, 11 C.F.R. § 114.4(c)(6)(i) (2002). Notice of a press conference must be limited to the corporation or union's customary press list for other purposes and the cost of the conference must be de minimis. *Id.*

169. *See* Disbursements for communications to the restricted class in connection with a Federal election, 11 C.F.R. § 114.3(c)(2) (2002). If the event is open to the press, all news media representatives must be given equal access. § 114.3(c)(2)(iv). Generally speaking, a candidate may only appear before the restricted class of the union or corporation. *See* § 114.3(c)(2)(i).

170. AFL-CIO Comment, *supra* note 92, at 5.

171. *See* Richard Davis, *Supreme Court Nominations and the News Media*, 57 ALB. L. REV. 1061, 1072–73 (1994) (arguing that media coverage shapes the Supreme Court nomination process).

should not feel compelled to relax its stance on this issue. In this case, the arguments supporting a completely unregulated approach do not withstand close scrutiny.

Unlike the rules with respect to individuals, the FEC's proposals do not go far enough in controlling corporate and labor union Internet activities. The current FEC approach, as noted by the Chamber of Commerce of the United States, presents a "piece-meal approach," which "leaves many questions about corporate and labor union Internet-based political activity unanswered."[172] In contrast to the Chamber's suggestion that the FEC adopt a comprehensive deregulation policy towards the Internet,[173] a strong argument exists that the FEC's rules do not go far enough in enacting campaign finance reform.

In constructing this argument, it should first be noted that regulation of the Internet by FEC rules respecting corporate regulation will likely not result in hindering the development of the Internet as an information medium. Hindering Internet development was one of the main concerns expressed by the Supreme Court in *Reno*. Since it does not appear that FEC regulation in this area is unconstitutional,[174] hindrance of Internet development seems to be the only remaining rationale for obstructing the FEC's campaign finance rulemaking. In the present case, corporations cannot maintain Web sites advocating for a candidate, or place content on their own Web sites advocating for a candidate.[175] Additional rules, therefore, will only restrict links between corporate information available on the Internet and campaign information. The amount of content available to the public will not be increased or diminished regardless of the FEC's approach. Therefore, when dealing with corporation and union activity, the FEC should not be limited in how it chooses to attack this new medium of information.

The commentators opposing the FEC's role in regulating the Internet only point to the marginal cost (in dollars), not the actual value to the candidate of a corporation advocating on its behalf.[176] As

172. Chamber of Commerce Comment, *supra* note 157, at 1–2.

173. *See id.*

174. *See supra* notes 124–30 and accompanying text (noting that corporate speech in the political arena can be restricted).

175. *See* Use of Merchant ID Opinion, *supra* note 73; Transmitting Endorsements Opinion, *supra* note 73.

176. *See* The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg., 50,358, 50,363 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pt. 100, 114, 117) (summarizing comment that FECA only prohibits "measurable monetary sums" and that the Internet

previously discussed, this is not an accurate way to depict whether or not Internet activities have "value" under FECA.[177] In addition, there are two reasons why these commentators fail to accurately depict the value of these Internet activities and the need for FEC involvement: the value of all Internet activity together is greater than the costs to create and maintain it and this value depends on the corporation engaging in the activity.

First, when the benefits of a hyperlink and Internet press release are added together, the sum is greater than the cost of the parts. Taken together, these two Internet postings advocate for a candidate by the corporation or union, provide the address to receive information on the candidate, and transport customers to the virtual headquarters of the candidate where that candidate's positions are expressed in a partisan manner, just as if the candidate's Web site is embedded in the corporation's site. When viewed in this fashion, it is hard to argue that the value of these items is "de minimis." In contrast, the postings are a direct grant to the candidate of something with economic value, that is, something that a candidate would pay a significant price to receive. The provisions of FECA are designed to stop these types of contributions by corporations and labor unions.[178] For the FEC to meet its obligations under FECA, it must prevent this type of activity.[179]

Second, even if hyperlinks and press release postings involve no cost to the corporation providing them, they have independent value depending on the corporation conducting the activity. One of the reasons for campaign finance regulation is to help level the playing field so that large monetary contributions do not effect elections in a way that mutes the voices of the citizenry at large.[180] Preventing corporations from contributing to specific federal candidates is part of the system that tries to keep money from influencing elections as much as possible.[181] Corporation contributions are also prohibited because the Supreme Court believed that corporations that are able to donate large sums of money to a candidate will be able to unduly

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does not involve this type of sum). *See also id.* at 50,362–63 (summarizing comments that posting information on the Internet only involves minimal cost and that hyperlinks "cost next to nothing to create").

177. *See supra* notes 136–39 and accompanying text.

178. *See* 2 U.S.C. § 441b(a), (b)(2) (2000).

179. *See id.* § 437c(b)(1).

180. *See supra* note 102 and accompanying text (discussing the rationales for campaign finance laws and the Supreme Court's response to these rationales).

181. *See* 2 U.S.C. § 441b(a).

influence that candidate's activities in Washington.[182] Many commentators have argued that deregulation of Internet activities by corporations is therefore appropriate because big and small corporations can engage in Internet advocacy without expending large amounts of money.[183] The idea is that the Internet inherently levels the playing field for corporations. A simple example shows why this is not the case. In the fourth quarter of 2001, Amazon.com had roughly 43,240,000 unique visitors to its Web site.[184] Even other well-known retail chains cannot come close to that amount of traffic.[185] It is clear from this statistic that a hyperlink placed on Amazon.com, a giant Internet corporation, will be viewed, and likely used, more than a hyperlink on other corporate Web sites. Small, local, or regional business sites may not be visited as many times in their entire lifetime as Amazon.com is visited in one quarter. A candidate for federal election would therefore view a hyperlink from Amazon.com as a much more important gift to her campaign than a hyperlink from a smaller company. Not only does the hyperlink have economic value, but the value differs based on who is providing the link. The Internet is not the great equalizer that many of the commentators to the FEC have claimed it to be. Rather, the Internet is as unequal a playing field as any in corporate America.

The notion that Internet activities by corporations do not serve to enhance available election-related information is contrary to the earlier arguments with respect to individuals. Corporations, however, are fundamentally different from individuals and have been treated as such during the entire existence of FECA. Corporations are given state-created advantages like limited liability, perpetual life, and favorable asset accumulation and distribution treatment.[186] Corporations utilize these advantages to obtain favorable positions in the national economy.[187] These same advantages can be used to

182. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 25 (1976) (describing FECA as attempting to prevent corruption and the appearance of corruption that is spawned by the coercive influence of large financial contributions). A central purpose of FECA is to avoid this type of corruption. CDT Comment, *supra* note 98, at 10.

183. CDT Comment, *supra* note 98, at 10.

184. Michael Totty & Ann Grimes, *If at First You Don't Succeed . . .*, WALL ST. J., Feb. 11, 2002, at R6. Amazon.com is generally the benchmark for retail-based Web sites. *Id.*

185. For example, PotteryBarn.com only had 381,000 unique visitors in the fourth quarter of 2001. *Id.*

186. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658–59 (1990).

187. *Id.* at 659. Here, the Supreme Court cited its earlier holding in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The Court held in *Massachusetts Citizens* that resources in a corporation's treasury do not reflect popular support for that corporation's political ideas, but rather the economically motivated choices of investors

obtain unequal positions of influence in the political arena.[188] Therefore, the Supreme Court has found a compelling governmental interest in preventing corruption that warrants restriction of political organizations funded by corporations.[189] Large Internet corporations also use radio and television advertisements to increase the traffic to their Web sites. These advertisements help further solidify the placement of larger Internet corporations as the main attractions on the Web, and therefore the most desirable place for a candidate to place a hyperlink.

As the foregoing examples show, the Internet provides as many opportunities for corruption as traditional dollar contributions. Because the Internet can provide a similar ground for breeding corruption, the FEC cannot adopt a hands-off approach to Internet activities. The FEC needs to think prospectively. At some point in the future it is conceivable that phone, television, and Internet will all be integrated into a single medium.[190] Furthermore, the Internet is rapidly becoming not only a source of election-related information, but also a place to cast one's vote.[191] It will be much easier for the FEC to apply FECA's principles to the Internet at its infancy as opposed to embracing a *laissez-faire* policy and then being forced to interject itself in the future as the technology evolves. By adopting a regulatory policy now, as the Internet develops, the FEC will be able to alter its policy as changes in technology dictate.[192] To change

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and customers. *Id.* at 258. These resources, though not supporting a political position, make corporations formidable political forces, even though public support for those ideas is nonexistent. *Id.*

188. *Austin*, 494 U.S. at 659.

189. *Id.*

190. *See* Ariana Eunjung Cha & Peter S. Goodman, *The Latest Line on the Net: AOL and Other Firms Are Betting on Telephony*, WASH. POST, Feb. 26, 2000, at E1.

191. *See* Ben White, *The Cyber Stump; The Web Provides a Closer Link Between Candidates and Voters*, WASH. POST, May 17, 2000, at G18. In Arizona, binding primary elections have already occurred on the Web. *Id.*

192. It must be conceded that enforcement of a policy dealing with the Internet will be incredibly difficult. Tracking express advocacy on the Web will prove very costly for the FEC because of the infinite size and breadth of the Internet. AFL-CIO Comment, *supra* note 92, at 6. The AFL-CIO also fears the possibility that frivolous complaints could be lodged against corporations and labor unions merely to block their ability to engage in lawful political activity. *Id.* The economic response to this argument is that the FEC should make the penalty for violations so high that it would be irrational for a corporation to engage in any unlawful activity. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 75–86 (1989) (noting that economic models suggest such a policy will in fact deter some socially desirable activities). The FEC, however, has no independent authority to impose penalties. In order for Internet regulations to be properly enforced, FEC reform is absolutely necessary. Because this topic has been

corporate activity after the FEC had it allowed to persist for a significant period of time would prove much more difficult.[193]

CONCLUSION

The Internet will forever be a part of political activity and federal elections in the United States. This Comment argues that Internet activities easily impart value to political candidates, whether or not the amount of those activities is clearly measured in dollars and cents. Any difficulty in calculating value is not a proper excuse for ignoring the campaign finance rules.

The FEC, through its regulations, should provide maximum protection for election-related speech on the Internet. The free expression made possible by the Internet is a valuable tool for individuals to voice their opinions on issues and candidates. The Supreme Court has made clear that the Internet is a marketplace that receives full First Amendment protection.[194] Any regulations that make it more difficult (or impossible) to take part in this exchange of ideas violate the First Amendment.

The same is not true with respect to corporations, entities traditionally prohibited from contributing to federal campaigns.[195] Adopting a *laissez-faire* policy towards all Internet activities of corporations presents a dangerous situation. By accepting the fiction that Internet activity has no value, the FEC may allow unfettered corporate involvement in elections that may increase the possibility for undue influence. To the contrary, Internet activities by corporations have significant economic value, measured by the amount a candidate would be willing to pay for corporate aid, not how much it actually costs. The FEC should make its prohibitions on corporate contributions more stringent, or at least maintain them, in

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thoroughly discussed in other scholarly articles, this Comment will not consider this issue. For articles on FEC reform, see CAMPAIGN FINANCE REFORM, *supra* note 16, at 275–334.

193. Corporations are often extremely successful in getting Congress to ratify their positions with respect to their industry. For example, when Travelers/Salomon Smith Barney merged with Citicorp National Bank, it formed an illegal conglomerate under existing banking laws. Citigroup (the new company's name), instead of using its five-year grace period to divest itself of illegal holdings, successfully pushed Congress to adopt the Gramm-Leach-Bliley Banking Act, which allowed national banks to hold insurance companies and securities firms. Act of November 12, 1999, Pub. L. No. 106-102, 113 Stat. 1385; *see* Joseph J. Norton & Christopher D. Olive, *A By-product of the Globalization Process: The Rise of Cross-Border Bank Mergers and Acquisitions—The U.S. Regulatory Framework*, 56 BUS. LAW. 591, 624 n.147 (2001).

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

195. *See supra* notes 127–30.

order to help contain the political influence held by corporations at the top levels of government.

The FEC must adhere to the principles of FECA in order to ensure that elected officials fulfill their obligation to properly represent the interests of the American public.

RYAN L. BLAINE