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I. INTRODUCTION

Written letters, public postings, and print media provided a vehicle for political speech in America for nearly three centuries.[1] One of the first American newspapers, the New England Courant, published a letter in 1722, in which the author commented: "whoever would overthrow the Liberty of a Nation, must begin by subduing the Freeness of Speech."[2] The tone and medium of political speech have changed, but free speech remains one of America's most cherished fundamental rights.[3] The advent of the Internet created a new populist forum for political speech, replacing historical speech vehicles like Franklin's

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1 Randolph E. Schmid, *U.S. Postal Service Survey Reveals Personal Letters at Record Low*, HUFF. POST (Oct. 3, 2011, 12:46 PM), http://www.huffingtonpost.com/2011/10/03/postal-service-annual-survey-personal-letters_n_992432 (statement of Prof. Webster Newbold) ("Letters were the prime medium of communication among individuals and even important in communities as letters were shared, read aloud and published.").

2 Letter no. 8 from Silence Dogood to the Author of the New-England Courant (July 9, 1722), *in* 49 THE NEW-ENGLAND COURANT, http://www.masshist.org/online/silence_dogood/img-viewer.php?item_id=645&img_step=1&tpc=&pid=&mode=small&tpc=&pid=#page1.

3 Elec. Frontier Found. & Ctr. for Dem. & Tech., Comment Letter on Advanced Notice of Proposed Rulemaking on Aggregate Biennial Contribution Limits at 2 (Jan. 15, 2015), [hereinafter EFF & CDT Comments], https://www.eff.org/files/2015/01/15/eff_and_cdt_comments_re_internet_regulations_jan._15_2015.pdf ("Furthermore, the United States has a long tradition of anonymous political speech, dating back as far as Thomas Paine's "Common Sense" and many of the Federalist Papers.").

letter or Thomas Paine's "Common Sense" pamphlet.[4]

The Internet has created an unparalleled forum for First Amendment expression, where any and all speakers can drive the marketplace of social ideas, opinions, and conscience.[5] The technology of the Internet is unique among forums for disseminating political speech content because one Internet user may instantaneously share political speech with a massive audience.[6] Any citizen has the potential to influence a large audience with political speech content using only an Internet connection and a desire to participate in the debate.[7] Now in 140 characters or less, Twitter users offer political opinions, "retweet" the comments of others, get real-time news updates, and use "hashtags" to identify the discussion of common topics and interests.[8] On Facebook, members "follow" the conversations and whereabouts of people who interest them, give "likes" to those they agree with, and occasionally study opposing viewpoints.[9]

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[4] *See generally The Rise of the Internet,* IBM 100, http://www-03.ibm.com/ibm/history/ibm100/us/en/icons/internetrise/impacts (last visited Oct. 30, 2015) ("The Internet has transformed how people live, work, shop and communicate. Its impact on business, research, global politics and communication cannot be overestimated.").

[5] *See* THE FRONTIER LAB, WATCHING YOU: PRIVATE GIVING AND THE FIRST AMENDMENT 4 (2015), http://thefrontierlab.org/wp-content/uploads/2015/02/TFL_Watching-You_020615_Final_72.pdf ("Respondents consistently remarked that they felt Free Speech, as a whole is not threatened and in fact is thriving. As evidence they cited the Internet and its creation of a more robust channel for information exchange, including a way to voice dissent."); *see also* Lee E. Goodman, *Online Political Opinions Don't Need Regulating*, WALL ST. J., Jan. 2, 2015, at A15 [hereinafter Goodman, *Online Political Opinions*] ("Millions of citizens are now empowered to speak widely as commenters, bloggers, podcasters, YouTube posters and Facebook supporters, while new technologies have facilitated a record number of new political communities at a fraction of historical costs.").

[6] *See Viral Video*, TECHOPEDIA, http://www.techopedia.com/definition/26863/viral-video (last visited Mar. 1, 2015) (defining viral videos as a video clip that is rapidly spread online).

[7] Derek Willis, *Coming to Your Facebook Feed: More Political Videos*, N.Y. TIMES (Feb. 4, 2015), http://www.nytimes.com/2015/02/05/upshot/coming-to-your-facebook-feed-more-political-videos.html?_r=0&abt=0002&abg=0 ("Although "red-meat" ads might generate likes or shares among a candidate or party's base — a valuable outcome — it can be hard for them to gain wider traction online and take advantage of a social network, where ideas and images move from user to user.").

[8] *See FAQs about Retweets (RT)*, TWITTER, https://support.twitter.com/articles/77606-faqs-about-retweets-rt (last visited Mar. 1, 2015) (stating that a Retweet is a "re-posting of someone else's Tweet," done to immediately share with all of your followers, and that a Tweet that begins with "RT" indicates that it is re-posting someone else's content); *see also* Elizabeth Kricfalusi, *The Twitter Hashtag: What Is It and How Do You Use It?*, TECH FOR LUDDITES (Aug. 2, 2015), http://techforluddites.com/the-twitter-hashtag-what-is-it-and-how-do-you-use-it/ (noting that a hashtag is signified by the "#" symbol preceding a word or phrase and is used as a method "for people to search for tweets that have a common topic").

[9] *What does it mean to follow someone?* FACEBOOK, https://www.facebook.com/help/279614732052951 (last visited Aug. 26, 2015).

The Internet is also increasingly competing with fee-based television, radio, and print mass media to become the dominant venue for political communication in America.[10] Countless blogs contribute to the discussion of news stories with a never-ending stream of opinion pieces, reporting, and analysis.[11] Another genre of websites, commonly called "news aggregators,"[12] post a selection of current news stories and opinion pieces from sources collected across the Internet and from around the world.[13] YouTube has become especially prominent in the world of politics.[14] Streaming video clips of interviews, videoblogs, educational segments, and documentaries are posted and subject to their own viewer commentary on YouTube.[15]

For example, free videos posted on YouTube by Barrack Obama's 2008 presidential campaign were watched for a total of 14.5 million hours.[16] According to statistics from Blue State Digital, the Obama campaign's online efforts included the creation of more than 400,000 blog entries, organizing 45,000 volunteer groups online, and posting over 1,000 YouTube videos supporting the candidate.[17] Despite being a dynamic and egalitarian venue for pure First Amendment political speech, proponents of expanding campaign finance laws want to limit the content and quantity of speech on the Internet.[18]

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[10] LEE E. GOODMAN, LAW AND ELECTION POLITICS: THE RULES OF THE GAME 50-51 (Matthew J. Streb ed., 2d ed. 2013) [hereinafter GOODMAN, LAW & ELECTION POLITICS].

[11] *See*, *e.g.*, Frank Vyan Walton, *Some [More] Policy Suggestions for #BlackLivesMatter*, DAILY KOS (Aug. 23, 2015, 7:47 AM), http://www.dailykos.com/story/2015/08/23/1413975/-Some-More-Policy-Suggestions-for-BlackLivesMatter; Andrew Stuttaford, *The War on Drugs Backfires Again*, RICOCHET (Aug. 23, 2015), https://ricochet.com/war-drugs-backfires/; ACE OF SPADES HQ, http://ace.mu.nu (last visited Aug. 23, 2015); HUFFPOST POLITICS: THE BLOGS, http://www.huffingtonpost.com/politics/the-blog (last visited Aug. 23, 2015). *See also* Chris Cillizza, *The Fix's best state based political blogs – extended edition!,* WASH. POST (Mar. 12, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/12/the-fixs-best-state-based-political-blogs-extended-edition (providing an extensive list of reader nominated political blogs in all 50 states, although West Virginia submitted no entry).

[12] *See* Kimberly Isbell, *The Rise of the News Aggregator: Legal Implications and Best Practices* 2 (Berkman Ctr. for Internet & Soc., Res. Pub. No. 2010-10, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670339.

[13] *See, e.g.,* DRUDGE REPORT, www.drudgereport.com (last visited Aug. 24, 2015); HUFF. POST, http://www.huffingtonpost.com (last visited Aug. 24, 2015); SAYFIE REVIEW, http://www.sayfiereview.com (last visited Aug. 24, 2015); REAL CLEAR POLITICS, http://www.realclearpolitics.com/?state=nwa (last visited Aug. 24, 2015).

[14] *The Youtube-ification of Politics: Candidates losing control*, CNN.COM (Jul. 18, 2007, 7:42 AM), http://www.cnn.com/2007/POLITICS/07/18/youtube.effect/index.html?eref=rss_tech.

[15] *About YouTube*, YOUTUBE, https://www.youtube.com/yt/about/ (last visited Aug. 23, 2015).

[16] GOODMAN, LAW AND ELECTION POLITICS, *supra* note 10, at 49-50.

[17] *Id.* at 50.

[18] Statement of Reasons, Vice Chair Ravel at 1-2, MUR 6729 (Checks and Balances) [hereinafter SOR, Vice Chair Ravel, MUR 6729].

In response to these advances in technology and the recent holdings of the Supreme Court, the Federal Election Commission ("FEC" or the "Commission") issued an Advanced Notice of Proposed Rulemaking ("ANPRM") on October 17, 2014.[19] Based on subsequent Commission activity, three Commissioners issued a statement on October 29, 2014, seeking to clarify the scope of the ANPRM's inquiry by encouraging the public to comment on the FEC's treatment of online activity.[20] The public responded with roughly 5,000 comments weighing in on the merits of regulating Internet-based political speech.[21]

The Commission's inquiry into regulating free Internet-based political speech should resolve that such proposals misunderstand current laws and fundamentally undervalue the importance of unfettered political speech. Speech cannot be regulated merely because advancements in communications technology might increase the reach and influence of political commentary on the Internet. Utilizing the tools of the Internet to voice political speech does not create the appearance or the actuality of corruption. In the absence of *quid pro quo* corruption, the FEC does not have statutory authority, nor is there a constitutional basis, to regulate free speech. Imposing restrictions on cost-free Internet content would create a chilling effect on an incredible forum for disseminating political ideas and opinions. Ultimately, the policy of regulating free political Internet content uses conjectures of corruption to justify a regulatory remedy that is not needed.

Part I of this Note provides a brief overview of free speech doctrine as it has been developed in response to various government efforts to restrict political speech. Part II examines the FEC's 2006 Internet rules and responds to recent calls to reevaluate them. Part III argues that the FEC lacks the statutory authority to effectuate further restrictions on free political Internet content. Part IV argues that restricting political speech on the Internet through disclosure and disclaimer requirements is facially unconstitutional and would chill political speech. Finally, Part V asserts that even if the FEC maintains statutory and constitutional authority to regulate free political speech on the Internet, doing so would be a misguided hindrance to democracy.

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[19] Aggregate Biennial Contribution Limits, 79 Fed. Reg. 62,361, 62,361 (Oct. 17, 2014).

[20] *Id.*

[21] *See* Colby Itkowitz, *FEC deluge: Thousands Comment On the Issue of Money In Politics*, WASH. POST. (Jan. 27, 2015) (stating that approximately 75 percent of the people who weighed in were in favor of greater regulation from the FEC); *see also* Press Release, Fed. Election Comm'n., FEC Hears Wide Public Comment on the McCutcheon v. FEC (Feb. 11, 2015) (on file with author) (noting that specifically over 32,000 people from across the country participated in the public commenting process).

II. THE ABC'S OF REGULATING POLITICAL SPEECH: FROM ALIEN ACTS TO BUCKLEY AND CITIZEN'S UNITED

The right to free political speech is foundational to the concepts of liberty and democracy in America.[22] American citizens have exercised this right since the Founders announced, "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."[23] Since our Declaration of Independence, there has been a tug-of-war between assertions of governmental authority to limit the influence of speech,[24] and speakers who challenge the government's power to moderate political speech.[25]

A. Free Speech for All...As Long as the Government Approves

Twenty years after the United States was formed in rejection of the unquestionable authority of the British Monarchy, the *Alien and Sedition Acts* outlawed even the intent to oppose any measure of the government.[26] Other less egregious attempts to control speech content include indirectly limiting politi-

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22 Floyd Abrams & Burt Neuborne, *Debating 'Citizens United'*, THENATION.COM, (Jan. 13, 2011), http://www.thenation.com/article/157720/debating-citizens-united (describing the decision of *Citizens United* as rooted in the well-established legal proposition that "political speech, especially political speech about whom to vote for or against, is at the core of the First Amendment").

23 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

24 *See e.g.,* Tillman Act of 1907, 34 Stat. 864 (1907) (prohibiting corporations from making money contributions in connection with political elections); *see also* Labor Management Relations (Taft-Hartley) Act of 1947 § 304, Pub. L. No. 80-101, 61 Stat. 136, 159-60 (1947) (codified at 29 U.S.C. 186(c)(5)) (prohibiting labor unions from making monetary contributions in connection with political elections); *see also* Lee E. Goodman, *The Feds Flirt With Reining in TV Talk*, WALL ST. J ., Feb. 4, 2014, at A17 [hereinafter Goodman, *Feds Flirt With TV*].

> History is rife with government efforts to disrupt, investigate and even silence dissenting published opinion. From early colonial times when royal governments punished and shuttered printers critical of royal governors, to film-review-board censorship, attempts to enjoin the printing of the Pentagon Papers and, more recently, government preying into journalists' telephone records, government power has proved to be a dangerous threat to freedom of the press.

Id.

25 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.") (citing United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000)); *see also* George Will, *Policing Political Speech*, NAT'L REVIEW (Apr. 19, 2014, 8:00 PM), http://www.nationalreview.com/article/376018/policing-political-speech-george-will (commenting on Susan B. Anthony List v. Driehaus which addressed an Ohio election law regulating the "false statements" made in political campaigns, "[t]hese developments are not coincidental. Government's increasing reach and pretensions necessarily become increasingly indiscriminate.").

26 *See* Sedition Act of 1798, 1 Stat. 596 (Jul. 14, 1798) (this law was one of four laws known collectively as the Alien and Sedition Acts).

cal speech by moderating "fairness" in public debate,[27] and governmental determinations of which content is "critical" to the free exchange of ideas.[28] Congress recently asserted a view on the permissible influence of political speech, when 48 Senators voted to rewrite the First Amendment of the U.S. Constitution.[29] Likewise, retired Justice John Paul Stevens suggested that the First Amendment should be modified to reflect his beliefs on the proper allocations of influence for political speech.[30]

B. The FEC's Constitutional Authority is Discovered Two Hundred Years After the First Amendment is Authored

The Supreme Court is frequently called upon to resolve differing interpreta-

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[27] *See* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 1-3 (2011), https://fas.org/sgp/crs/misc/R40009.pdf (providing the Federal Communication Commission's ("FCC") policy between 1949 and 1987 known as the "Fairness Doctrine," as the requirement that broadcasters identify issues of public importance, cover those issues, and afford representatives of opposing viewpoints the opportunity to present their case to the community; and, the FCC's conclusion that the policy likely violated the First Amendment); *see also* General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (Aug. 8, 1985) (discussing the FCC's analysis of the unconstitutional chilling effect of the Fairness Doctrine).

[28] *See* SOC. SOLUTIONS INT'L INC., RESEARCH DESIGN FOR THE MULTI-MARKET STUDY OF CRITICAL INFORMATION NEEDS 2 (2013), https://transition.fcc.gov/ bureaus/ocbo/FCC_Final_Research_Design_6_markets.pdf (defining goals and a research design plan for identifying and understanding the "Critical Information Needs" ("CIN") of the American public); *but cf.* Ajit Pai, *The FCC Wades Into the Newsroom*, WALL ST. J., Feb. 10, 2014, at A14 (stating the opinion of FCC Commissioner Ajit Pai that the CIN study improperly pressures media organizations to cover categories of news that the FCC has selected); *see also Truthy: Information diffusion research at Indiana University*, INDIANA.EDU, http://truthy.indiana.edu (last visited Feb. 17, 2015) (featuring a highly controversial study federally funded by the National Science Foundation ("NSF") on how information, known as "memes," spread on social media); *see also* MIKE GONZALEZ, THE HERITAGE FOUND., ISSUE BRIEF NO. 4287, CONGRESS MUST STOP YET ANOTHER ATTEMPT TO MUFFLE FREE SPEECH 1-2 (2014), http://thf_media.s3.amazonaws.com/2014/pdf/IB4287.pdf (arguing that the NSF seeks to constrain free speech to detect political smears, astroturfing, misinformation, and other social pollution on social media and "mitigate the diffusion of false and misleading ideas, detect hate speech and subversive propaganda, and assist in the preservation of open debate") (internal quotations and footnotes omitted).

[29] *See* S. J. Res. 19, 113th Cong. § 1 (2014) (proposing an amendment to the Constitution that allows Congress and the States to "regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.").

[30] *See* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 79 (2014)

> I therefore propose this amendment to the Constitution: Neither the First Amendment nor any other provisions of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns.

Id.

tions of the government's ability to limit speech.[31] The Court has consistently affirmed the people's right to an "unfettered" exchange of ideas for bringing about political and social change.[32] Included in the Court's First Amendment jurisprudence is the inherent right to make political contributions and expenditures to support an idea, a candidate, or target a particular audience.[33] However, the Court's interpretations of applying these axioms continue to evolve.[34]

The FEC was created by an act of Congress in 1974[35] to be a watchdog for

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[31] *See, e.g.,* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2338 (2014) (challenging an Ohio statute that prohibits certain "false statements" during the course of a political campaign on the grounds that the petitioner sufficiently established standing to make a pre-enforcement challenge justiciable); *see also, e.g.*, Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 609-10 (1967) (striking down as unconstitutional, a New York law that required state university employees to certify that they were not members of the Communist party, or if they had ever been, requiring the employees to notify the university's president); *see also, e.g.*, United States v. Cong. of Indus. Orgs., 335 U.S. 106, 121-23 (1948) (holding that the prohibition of any "expenditure in connection with any election" as applicable to the Labor Management Relations Act of 1947, could not be interpreted to prohibit organizations from publishing periodicals advising their members, stockholders or customers, about the danger or advantage of particular measures, or electing candidates who support those measures); *see also, e.g.*, Schenck v. United States, 249 U.S. 47, 52-53 (1919) (finding that the distribution of leaflets using language in opposition of the draft was not protected by the First Amendment right to free speech).

[32] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. (internal quotation omitted).

Id.

[33] *See* Citizens United, 558 U.S. at 314 ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech."); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 355 (1995) ("Nonetheless, even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation."); *see also* Buckley v. Valeo, 424 U.S. 1, 19 (1976)

> [V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id.

[34] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1436 (2014) ("The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Congress may regulate…"); *see also* Citizens United, 558 U.S. at 310.

[35] Federal Election Campaign Act Amendments of 1974 § 310(a)(1), Pub. L. No. 93-443, 88 Stat. 1263, 1280-81 (1974).

the actuality and appearance of corruption in federal elections. In 1976, *Buckley v. Valeo* held that the FEC's power to prevent corruption extended to limit speech by a dollar amount.[36] The Court divined that when an individual or group contributed in excess of $1,000 to a political candidate, the contribution amounted to the actuality and appearance of corruption.[37] Various state and federal laws enacted since *Buckley* have attempted to codify the view that spending money to have a political voice be heard must be constrained by amount, [38] restricted by the classification of speakers,[39] subject to broad disclosure requirements,[40] or counteracted by public funding,[41] to prevent real or perceived corruption in the exchange of ideas.

C. All *Citizens* Enjoy the Right to Political Speech

More recently, in *Citizen's United,* the Court clarified the distinction between corruption and influence by restating the essential premise of the First Amendment: political speech is a venerated right for which few government interests suffice to justify speech limitations on any class of speaker.[42] Four years later, *McCutcheon v. Fed. Election Comm'n* declared individual aggre-

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[36] Buckley, 424 U.S. at 26 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation.").

[37] *Id*.

[38] *See e.g.*, McCutcheon, 134 S. Ct. at 1434 (addressing the Federal Elections Campaign Act's (FECA) aggregate limit on candidate contributions and other contributions to party committees).

[39] *See* Citizens United, 558 U.S. at 310 (challenging regulatory limits on campaign spending by organizations); *see also* Fed. Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 449 (2007) (challenging the Bipartisan Campaign Reform Act's ("BCRA") prohibition on the use of corporate funds to finance "electioneering communications" during pre-federal-election periods).

[40] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 93 (2003) (challenging several provisions of the BCRA regarding "soft money," donations to tax-exempt organizations, and the constitutional validity of several definitions within the Act) *overruled by* Citizens United, 558 U.S. at 310.

[41] *See* Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2806 (2011) (challenging the constitutionality of an Arizona law that matched every dollar spent by a privately-funded candidate with public funds for their publicly-funded opponents); *see also* Davis v. Fed. Election Comm'n, 554 U.S. 724, 724 (2008) (challenging provisions of the BCRA that involved coordinated campaign spending from party committees for opponents of self-financed candidates).

[42] *See* Citizens United, 558 U.S. at 365 ("We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

gate contribution limits as unconstitutional because the speech of individuals may not be limited "simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others."[43] The constitutional right to free political speech can be traced from the nation's founding to the present day, but new methods of exercising free speech bring new interpretations of the First Amendment.[44]

III. INTERNET SPEECH REGULATIONS? YEAH, WE'VE GOT THAT: FEC CHAIR PROPOSES REEVALUATING COST-FREE POLITICAL SPEECH ON THE INTERNET

During the 2012 election cycle, a nonprofit group called Checks and Balances for Economic Growth ("Checks and Balances"), posted two YouTube videos that challenged comments made by President Obama and Senator Sherrod Brown about the coal industry.[45] The videos became controversial when a nonprofit legal activist organization, called Citizens for Responsibility and Ethics in Washington ("CREW"),[46] filed a complaint with the FEC, alleging that the Checks and Balances' YouTube videos violated the Federal Election Campaign Act ("FECA" or "Act").[47] The FEC reviewed the complaint and failed to reach a majority vote necessary to enforce a violation against Checks and Balances.[48] In response to the 3-to-3 deadlocked vote on these YouTube videos,[49] FEC Chairwoman Ann M. Ravel[50] issued a statement calling for an

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43 McCutcheon, 134 S. Ct. at 1441.

44 *See, e.g., id.* at 1438 ("The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.")

45 checks Balances, *TV Ad: Why Would You Lie*, YOUTUBE (Oct. 14, 2012), https://www.youtube.com/watch?v=9oE1O38-IIE; checks Balances, *TV AD—The War on Coal: Sherrod Brown vs. Ohio Coal Miners*, YOUTUBE (Oct. 19, 2012), https://www.youtube.com/watch?v=PgPkQYc0O5k.

46 *About Us*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, http://www.citizensforethics.org/pages/about (last visited Aug. 27, 2015) ("CREW uses high-impact legal actions to target government officials who sacrifice the common good to special interests.").

47 MUR 6729 (Checks and Balances), Compl. at 1 (Apr. 4, 2013), http://eqs.fec.gov/eqsdocsMUR/14044363701.pdf; *see also* Carl Franzen, *Online Political Ads Are More Secretive Than TV Ads*, THE VERGE (Oct. 27, 2014, 4:45 PM), http://www.theverge.com/2014/10/27/7079329/fec-democrats-want-to-investigate-online-political-ads.

48 *See* First Gen. Counsel's Rpt. at 1, MUR 6729 (Checks and Balances) ("First GCR") http://eqs.fec.gov/eqsdocsMUR/14044363793.pdf (noting that the Deputy Secretary's reported on the deadlocked 3-3 vote reflecting that the Commission failed to find reason to believe Checks and Balances violated the provisions of the FECA as alleged).

49 *See id*.

50 *About the FEC*, FED. ELECTION COMM'N (Aug. 27, 2015), http://www.fec.gov/members/ravel/ravel_bio.shtml. Ravel was elected to the Commission in

update to the Commission's regulation of political content on the Internet.[51]

A. The Genesis of the 2006 Internet Freedom Rules

Chairwoman Ravel's analysis of the Checks and Balances vote, was that the regulations issued to address Internet communications in 2006 were deficient for the FEC's purpose.[52] However, the regulations that created an exemption for cost-free Internet speech were the product of a decade of lessons learned—going back to the 1990's—from the Commission's attempts to regulate political content on the Internet. In 1995, the FEC tried to regulate websites as "public communications" like radio or television advertisements.[53] In practice, this method of broadly imposing traditional regulations on Internet communications included substantial challenges, such as, assigning a monetary value to emails and websites.[54] As a result, the FEC altered its approach by attempting to regulate Internet communications on a case-by-case basis, resulting in ill-fitting solutions and regulatory schizophrenia.[55]

What the Commission ultimately designed in 2006 represents a thoughtful balance of the anti-corruption values of traditional campaign finance regulations and protection of the low-cost populist participation in democracy facilitated by the Internet.[56] The Commission defined "Internet activities" as including, but not limited to, "[s]ending or forwarding electronic messages; providing a hyperlink or other direct access to another person's website; blogging; creating maintaining or hosting a website; paying a nominal fee for the use of another person's website; and any other form of communication distributed over the Internet."[57] Consistent with campaign finance restrictions on other forms of communication, these regulations require that compensated Internet communications must be disclosed by the political committee or campaign

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2013, served as Vice Chairwoman in 2014 and serves as the Chairwoman in 2015. *Id.*

51 *See* SOR, Vice Chair Ravel at 1, MUR 6729.

52 *See id*. at 1-2; *see also* Internet Communications, 71 Fed. Reg. 18,589.

53 GOODMAN, LAW & ELECTION POLITICS, *supra* note 10, at 51 (citing FEC Advisory Op. 1995-1999).

54 *Id*.

55 *Id*. at 51-52.

56 *Id*. at 52.

> The question the FEC continued to face was whether the Internet and its low-cost technologies had eclipsed a complex cobweb of laws and regulations conceived for the high-cost media-centered politics of the late twentieth century. An informed answer to that question required a thorough consideration of competing democratic values – the anti-corruption values justifying the old restrictions versus the populist democratic participation facilitated by the new technologies.

Id.

57 11 C.F.R. § 100.155(b) (2014).

paying for the communication.[58] Uncompensated Internet communications do not require reporting or disclaimer where the content is distributed for free and only on the Internet.[59]

Traditional campaign finance regulations require disclosure reports, in part, based on expenditures for production and dissemination costs.[60] The FEC examined the role of expenditures and contributions for bloggers when promulgating the 2006 rules, and determined that individuals and groups of individuals should be free to engage political speech on the Internet without counting each political communication as a contribution.[61] Therefore, cost-free Internet communications do not require reporting because they are subject to a broad "Internet exemption," which the Commission intended to "make clear, appropriately so, that individuals and groups engaging in unfettered political discourse over the Internet using their own computer facilities or those publicly available are not subject to regulation under the campaign finance laws."[62] The Internet freedom rules recognize that the Internet creates an open and level playing field for all speakers because there are no dissemination costs for political commentary posted on Twitter, blogs, or YouTube.[63]

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[58] *See* Internet Communications, 71 Fed. Reg. at 18,602; *see also* 52 U.S.C. § 30104(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29(a) (defining "electioneering communications" to include broadcast, cable, or satellite communications as subject to reporting or disclaimer requirements); *see also* Statement of Reasons, Chairman Goodman & Comm'rs Hunter & Petersen at 1, MUR 6729 (Checks and Balances) [hereinafter SOR, Chairman Goodman & Comm'rs Hunter & Petersen, MUR 6729].

[59] *See* 11 CFR §§ 100.94, 100.155 (establishing uncompensated Internet activity that is not considered a contribution or expenditure, respectively).

[60] *See* 52 U.S.C. § 30104.

[61] *See* Internet Communications, 71 Fed. Reg. at 18,602 ("The Commission agrees that the Act does not require a disclaimer when a blogger or other person accepts payment from a Federal candidate."); *see also* GOODMAN, LAW AND ELECTION POLITICS, *supra* note 10, at 58 ("The FEC concluded that individuals and groups of individuals should be free to engage in voluntary and independent Internet speech and should be free to post electoral messages on the Internet without counting such communications as quantifiable "contributions" or "expenditures" subject to regulation").

[62] SOR, Chairman Goodman & Comm'rs Hunter & Petersen at 3, MUR 6729.

[63] GOODMAN, LAW AND ELECTION POLITICS, *supra* note 10, at 57 ("This deregulation applies even to online postings that cost significant sums of money to produce. The production costs simply do not count as a regulated expenditure because the cost of public dissemination is free."); *see also* Melissa Quinn, *The Threat to Political Speech Online: Q&A With Former Elections Chief Lee Goodman,* THE DAILY SIGNAL (Jan. 3, 2015), http://dailysignal.com/2015/01/03/future-political-speech-online-qa-fec-chairman-lee-goodman/ (statement of Former FEC Chairman Goodman).

> [E]ach video would have to carry a disclaimer at the bottom indicating who paid for it and whether it was authorized by a political candidate. Second, BarelyPolitical.com would have to file expenditure reports with the Federal Election Commission disclosing the first date on which they post each YouTube video and how much they spent on the production.

Id.

Additionally, the 2006 regulations recognize the ubiquitous nature of cost-free Internet speech content makes it almost impossible to regulate.[64] To enforce disclosure of every political comment posted online would require the FEC to constantly troll Internet content to verify registrations or subpoena expenditure information from individual content generators.[65] Any failure of comprehensive enforcement could support concerns of selective, politically motivated enforcement.[66] Such a granular review of every Internet speaker voicing his or her political comments would not be an efficient use of Commission resources.[67]

Even if the FEC could design a workable review process for determining how to identify violations, the same issues in calculating expenditures that existed prior to the 2006 rules would plague that process today.[68] Without the Internet exemption, the FEC would have to evaluate each commenter's ex-

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[64] *Id*. (statement of Former FEC Chairman Goodman) ("I cannot imagine how the Federal Election Commission will begin to regulate hundreds of thousands of blogs, YouTube videos, chat rooms, emails and links, and all sorts of Internet-based political discussion because of how vast political discussion on the Internet currently is."); Jamie Williams, *Tell the FEC Not to Amp Up Internet Regulations,* ELEC. FRONTIER FOUND. (Jan. 12, 2015), https://www.eff.org/deeplinks/2015/01/tell-fec-not-amp-internet-regulations ("[W]e do not have confidence that a politically appointed government board will be able to draw a line that separates the individual blogger or YouTuber from deep-pocketed special interest groups without damaging free speech.").

[65] Quinn, *supra* note 63 (statement of Former FEC Chairman Goodman).

> [T]o establish an Internet review board where a room full of government bureaucrats sit on a daily basis and troll the Internet for political commentary — to identify online commentators who did not register or report their expenses in connection with their website, and to issue subpoenas seeking information about their expenditures. I know of no other way that the FEC could regulate the hundreds of thousands of posts on the Internet, absent such a review process.

Id.

[66] Hans A. von Spakovsky, The Heritage Found., Testimony before the Fed. Election Comm'n (Feb. 11, 2015) (transcript available at http://www.heritage.org/research/testimony/2015/advance-notice-of-proposed-rulemaking-on-aggregate-biennial-contribution-limits) ("[R]equiring…thousands of online bloggers, websites, commenters, podcasters, and kitchen table journalists and reports would…invariably lead to the charge of selective, politically motivated enforcement.").

[67] *See* Factual & Legal Analysis at 4, MUR 6795 (CREW) ("F&LA").

[68] Ronald D. Rotunda, *Targeting Political Speech for the Next Election*, WALL ST. J., Nov. 4, 2014, at A19 (noting the former CFPPC Commissioner's practical concerns for calculating expenditures).

> If someone's tweet includes a hyperlink to a political website, what is the value that this person must report? How does one deal with negative tweets—for example, "you can't believe what Joe's website is advocating today"? Would there be disclosures if a candidate—or someone who engages in independent expenditures for or against a candidate—later buys an advertisement on a blog, or increases blog traffic by commenting on the blog?

Id.; see also EFF & CDT Comments at 2.

penditures to include costs like software used to generate content, an Internet connection, domain registration costs, or even the cost of a personal computer.[69]

B. Testing the 2006 Rules

Chairwoman Ravel's Statement of Reasons in *Checks and Balances* offered few particulars on why free Internet content should be regulated differently.[70] In light of the visceral response to her current and prior efforts to regulate political Internet content,[71] it is unlikely that advanced details for a plan will be released.[72] However, the trajectory of proposals to regulate Internet speech can be gleaned from Chairwoman Ravel's votes in recent matters before the Commission and her past record. In *Checks and Balances*, Ravel called on the Commission to reevaluate the 2006 Internet communications policies based on the general implication that changes in technology necessarily increase corruption, improper influence,[73] and produce a nefarious lack of transparency in the democratic process.[74]

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[69] *See* Advisory Op. 1998-22 (Leo Smith) at 2, 5 ("AO 1998-22") (noting that a pre-Internet exemption existed that called for calculating expenditures based on actual costs incurred by an individual to publish and maintain political website content).

[70] SOR, Vice Chair Ravel at 1, MUR 6729 ("Some of my colleagues seem to believe that the same political message that would require disclosure if run on television should be categorically exempt from the same requirements when placed on the internet alone.").

[71] *See* Rudy Takala, *Federal Election Commission to Consider Regulating Online Political Speech*, CNSNEWS.COM (Feb. 11, 2015, 10:15 AM), http://www.cnsnews.com/news/article/rudy-takala/federal-election-commission-consider-regulating-online-political-speech (noting the responses of Commissioners Goodman, Hunter, and Peterson).

[72] *See* Laurel Rosenhall, *Ann Ravel Describes Backlash to Comments On Online Political Communication*, THE SACRAMENTO BEE (Nov. 22, 2014 7:07 AM), http://www.sacbee.com/news/politics-government/capitol-alert/article4053844.html ("Ravel said the point she initially made in written comments late last month generated a storm of backlash after Goodman did a television interview mischaracterizing her position"); s*ee also* Letter from Ann M. Ravel, Fed. Election Comm'n Vice Chair, to Editor, Wall St. J. (Nov. 5, 2014) (declaring her Statement of Reasons in Checks and Balances had been mischaracterized); *see also* Stephen Spaulding (@SpauldingCC), TWITTER (Feb. 11, 2015, 8:21 AM), https://twitter.com/SpauldingCC/status/565546214276743169 ("#FEC Chair @AnnMRavel explains that there is no proposal to 'regulate the internet' vis-a-vis politics - to say otherwise is blatantly false").

[73] *Compare* SOR, Vice Chair Ravel at 1-2, MUR 6729 (Checks and Balances) ("In doing so, the Commission turned a blind eye to the Internet's growing force in the political arena.") *with* SOR, Chairman Goodman & Comm'rs. Hunter & Petersen at 5, MUR 6729 ("Regrettably, the 3-to-3 vote in this matter suggests a desire to retreat from these important protections for online political speech – a shift in course that could threaten the continued development of the Internet's virtual free marketplace of political ideas and democratic debate.").

[74] Ann M. Ravel, *How Not to Enforce Campaign Laws*, N.Y. TIMES, Apr. 2, 2014, at

The FEC recently addressed the issue of political Internet activity independently conducted by individuals associated with campaigns or political committees.[75] A complaint filed with the FEC alleged that an independent contractor to a political committee violated the FECA for failing to report a website he created to advocate the candidate he worked for.[76] The Commission voted unanimously to dismiss the complaint, reasoning that the independent contractor was not authorized to generate web communications on behalf of the political committee.[77] Further, the Commission found that the total cost associated with creating his site ($135), exceeded neither the threshold to qualify as political committee activity ($1,000), nor the independent expenditure disclosure threshold ($250).[78]

However, Commissioner Lee E. Goodman, then-Chairman of the FEC, emphasized in a Statement of Reasons accompanying the dismissal of that action, that the Commission did not need to reach those threshold questions because of the 2006 Internet freedom rules.[79] Goodman's statement provided a clear legal analysis of the Act and its derivative regulations that exclude uncompensated services and cost-free Internet activity from the broader reporting requirements.[80] Goodman's conclusion was that collateral affiliations to a campaign or political committee do not alter an individual's First Amendment right to engage in cost-free, independent speech posted on the Internet.[81]

In December 2014, the Commission voted unanimously to dismiss another

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A27 ("This transparency is vital to our democracy, and even more so after the Supreme Court yesterday struck down aggregate limits on political contributions."); *see, e.g.,* Dave Levinthal, *New FEC Chief On 'Dark Money' Mission,* CTR. FOR PUB. INTEGRITY (Dec. 17, 2014), http://www.publicintegrity.org/2014/12/17/16527/new-fec-chief-dark-money-mission (statement of Ann M. Ravel) ("Dark money is a broader problem...My passion is transparency."); M.D. Kittle, *'Activist At Heart' Ann Ravel Takes Gavel at FEC*, WATCHDOG.ORG (Jan. 15, 2014, 4:00 AM), http://watchdog.org/193057/ann-ravel-fec-campaign-finance/ (statement of Ann M. Ravel) ("I understand that disclosure is a complicated topic and that in some ways disclosure of small donors may not be significant because what we want to know is who is influencing the elections so that we can make thoughtful decisions.").

75 *See* Judson Berger, *FEC Backs Off Flirtation With Regulating Internet*, FOXNEWS.COM (May 22, 2015), http://www.foxnews.com/politics/2015/05/22/fec-backs-off-flirtation-with-regulating-internet/ (indicating that Chairwoman Ravel had backed a motion to exclude "political activity on the internet" from any new regulations regarding contribution limits).

76 MUR 6578 (Doug LaMalfa Committee, *et al.*), Compl. at 1, (May. 16, 2012).

77 Factual & Legal Analysis at 9-10, MUR 6578 (Doug LaMalfa Committee, *et al.*) ("F&LA").

78 *Id*.

79 Statement of Reasons, Chairman Goodman at 3-5, MUR 6578 (Doug LaMalfa Committee, *et al.*) [hereinafter SOR, Chairman Goodman, MUR 6578].

80 *Id*.

81 *Id*. at 7.

complaint that alleged FECA violations stemming, in part, from Internet activities.[82] This complaint alleged that the Internet activities of CREW, a non-profit group, including four press releases posted on the group's website, an article appearing on a blog, and a mass email soliciting donations based on advocacy against a particular political candidate, violated the FECA for reporting failures.[83] Three commissioners found the 2006 Internet exemption did not apply, but in this instance, it was inappropriate to dig into the minutia of dollars and cents spent in the course of participating in political discussion online.[84] Chairwoman Ravel and two of her colleagues concluded that further information regarding the total cost of expenditures relating to these activities might be available, but that an inquiry into such matters in this case would be an inefficient pursuit of the Commission's purpose.[85] This type of subjective application of prosecutorial discretion is precisely what critics of regulating free political Internet content fear and which is eliminated by the Internet freedom rules.[86]

Concurring in the dismissal of the complaint against CREW, Commissioners Goodman and Caroline C. Hunter asserted the basis for applying the Internet exemption.[87] Their statement noted the alleged violation created by email solicitations, posting press releases, and third party blog posting of CREW's messages, involved activities squarely within the 2006 regulation's definition of Internet activities.[88] The concurrence also acknowledged the record showed no compensation paid to CREW for posting these political comments,[89] no compensation paid by CREW to have its commentary posted,[90] and the associated expenditures reported for these activities did not reach the $1,000 threshold,[91] which would subject CREW to treatment as a political committee.[92]

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82 *See* Factual & Legal Analysis at 1-2, MUR 6795 (CREW) ("F&LA") (showing that the committee had decided not to pursue the complaint any further).

83 MUR 6795 (CREW), Compl. at 5 (Dec. 17, 2014).

84 *See* F&LA at 1, 4-5, MUR 6795 (identifying possible instances where the exception most likely would not have applied while indicating that the commission had no intention to prosecute the matter).

85 Statement of Reasons, Chair Ravel, Comm'rs Walther & Weintraub at 1-2, MUR 6795 (CREW) [hereinafter SOR, Chair Ravel, Comm'rs Walther & Weintraub, MUR 6795] (stating the position that the nature of the low-cost communications involved, a non-exhaustive factual record, and efficiency, led the Commission to "exercise its prosecutorial discretion to dismiss this matter.").

86 *See supra* notes 72-73.

87 Statement of Reasons, Comm'rs Goodman & Hunter at 4, MUR 6795 (CREW) [hereinafter SOR, Comm'rs Goodman & Hunter, MUR 6795].

88 *Id*.

89 *Id*.

90 *Id*. at 5-6.

91 *Id*. at 6-7.

92 *See Id*. at 6 (indicating that certain expenditures like administration fees, salary, production, and overhead were not counted toward the $1000 threshold for political committee

The separate statements of reasons issued by the Commission present two views on the regulation of political speech. On the one hand, an objective application of traditional anti-corruption goals to the Internet, and on the other, a subjective enforcement of violations based on the prerogative of any four-person majority at the time of the FEC's review. The prospect of *ad hoc* enforcement by subjective review is especially alarming when considering what some commissioners envision as the proper extent of regulated transparency.

C. If it Ain't Broke, Why Fix It?

The motivation behind Chairwoman Ravel's assessment that the relative production quality of some political internet content demands increased reporting requirements, is informed by her work in California.[93] While serving as a commissioner on the California Fair Political Practices Commission ("CFPPC"),[94] Ravel's belief that advancements in technology create *de facto* impropriety in the democratic election process was evident when she pushed for increased rules governing political content on blogs, Twitter, Facebook, YouTube, and other websites.[95] The rules approved by CFPPC in 2013 and the federal rules that require campaigns to disclose payments made for posting political Internet content are essentially the same.[96] However, the rules Ravel

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status).

93 *See* SOR, Vice Chair Ravel at 2, MUR 6729 ("Since its inception, this effort to protect individual bloggers and online commentators has been stretched to cover *slickly-produced ads aired solely on the Internet* but paid for by the same organizations and the same large contributors as the actual ads aired on TV.") (emphasis added).

94 Kittle, *supra* note 74 (statement of Ronald Rotunda, Former Commissioner of the CFPPC) ("When she talks about 'dark money' what she's really talking about is trying to regulate the Internet, and she's talked about it a lot."); *but see* Rosenhall, *supra* note 72 (statement of Ann M. Ravel) ("[A]ll I said was, 'We need to be informed by the technologists and others, and then talk about it.' That got turned into my colleague saying on Fox News that... I was trying to regulate the Internet.").

95 *See* CAL. CODE REGS. tit. 2 § 18421.5 (2015) (stating that additional reporting must be made to the public when a candidate or ballot measure pays for favorable or unfavorable reporting on a blog site or social media); *see also* Patrick McGreevy, *New California Rules Aim for Transparency In Online Campaign Material*, L.A. TIMES (Sept. 19, 2013), http://www.latimes.com/local/la-me-web-campaigns-20130920-story.html (indicating that the purpose of this new regulation was to better inform the public and to allow the public to evaluate the messages they receive on blogs and elsewhere online).

96 *See* CAL. CODE REGS. tit. 2 § 18421.5; Internet Communications, 71 Fed. Reg. at 18,602; *see also* Reid Wilson, *California Campaigns Must Report Paying Bloggers,* WASH. POST (Sept. 20, 2013) https://www.washingtonpost.com/blogs/govbeat/wp/2013/09/20/california-campaigns-must-report-paying-bloggers/ (emphasizing that payment for the opinion of a candidate or ballot measure on a blog or social media not the nature of the opinion is essential for determining whether it must be disclosed).

proposed—which the CFPPC declined to adopt— are significant because they would require bloggers to carry the reporting burden for posting compensated political content.[97]

Compensated content posted through any medium requires disclosure under the law.[98] Imposing new regulations that create a shared burden of disclosure for individuals that post free political content on the Internet would be a departure from both the 2006 FEC Internet exemption and traditional anti-corruption campaign finance regulations.[99] Such a broad reaching enforcement system creates substantial compliance burdens for individual Internet users.[100] In fact, Chairwoman Ravel's personal experiences with campaign contributions exemplify how difficult the implementation of dual-disclosure transparency can be in practice.[101]

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[97] *See* Patrick McGreevy, *California ethics czar urges disclosure of payments to Web pundits*, L. A. TIMES (Apr. 20, 2012) [hereinafter McGreevy, *California Ethics Czar*], http://articles.latimes.com/2012/apr/20/local/la-me-blogs-20120420 (explaining that a bloggers anonymity would not exclude them from the law requiring disclosure of payment); *see also* Douglas McAlarney, *Are Political Bloggers Weakening the Democratic Election Process by Being Paid to Give You Their "Unbiased" Opinions*, 41 FLA. ST. U.L. REV 511, 533-34 (2014) (indicating that only one party—either the campaign or the blogger—is required to state that the blogger was paid to endorse or criticize a ballot measure or candidate); *see also* Wilson, *supra* note 96 (explaining that the rule passed by California's state watchdog committee required the reporting of campaigns paying for favorable touting or slamming of a ballot or candidate).

[98] *See* 52 U.S.C. §§ 30101, 30104.

[99] *See* Internet Communications, 71 Fed. Reg. at 18,602 ("To require more of bloggers when others who receive payments from campaigns are not subject to similar disclosure requirements would not be fair."); *see also* Quinn, *supra* note 63 (statement of Former FEC Chairman Goodman).

> If my organization wants to take out a banner ad or place an Internet video on a commercial website and pay a fee for that advertising space, the FEC regulates that expenditure just like it would a TV ad or radio ad. However, if an organization places content for free on the Internet, there is no expenditure to regulate because the dissemination cost is free.

Id.

[100] *See* Quinn, *supra* note 63.

> We would have to have a regulation prescribing what is described in production costs. The software that you purchased — and by the way, that goes for individual bloggers, too — up to computer, the software you purchased, your monthly Internet access charge. The FEC would have to get into this granular level of prescriptive regulation to tell people what to include in their expenditure reports to the FEC.

Id.

[101] *See, e.g.,* Kittle, *supra* note 74 (discussing a 2006 campaign contribution made by Chairwoman Ravel, for which disclosure reports listed Ann Miller, her maiden name, and the generic profession of "attorney" was listed instead of her proper title of Santa Clara County Counsel at the time. Conceding that it was legal, but nonetheless controversial, under Santa Clara laws for Ravel to simultaneously supply legal counsel to an incumbent elected official while making financial contributions to his campaign opponent, Ravel maintains that the campaign was solely responsible for misattributing her contribution); *see also* Robert Wilde, *Erroneous Government Ethics Document Filed After FEC Chairman Ann*

New political speech regulations are unnecessary because the 2006 Internet exemption established a fair and transparent forum for political speech. The impractical enforcement issues created by new rules also show that the only solution may be the current rules.[102] Recent enforcement votes and the call for new regulations exhibit a refusal to acknowledge the proper scope of the 2006 Internet freedom rules.[103] However, the FEC's ability to compel more disclosure on the Internet exemplifies a broader disagreement over the legal extent of speech restrictions.[104]

IV. THE FEC LACKS STATUTORY AUTHORITY TO REGULATE FREE INTERNET CONTENT

Without the current Internet freedom rules, Twitter, Facebook, blogs, chat rooms, user-modified animated content like "Jib Jab," and even the "Obama Girl" videos on YouTube, would be subject to FEC reporting requirements.[105]

Ravel Takes Lavish Weekend Trip, BREITBART.COM (Feb. 11, 2015), http://www.breitbart.com/big-government/2015/02/11/ann-ravel-and-the-fec/ (highlighting a disclosure error Ravel made to the Office of Government Ethics, incorrectly listing a two-day trip made in her capacity as Chairwoman, as a ten-day trip. Adding to the irony that the chief watchdog for campaign finance disclosure compliance - and a self described champion of transparency - erroneously filed an ethics document, is the fact that Ravel received a total travel subsidy of $1,417.37 for the two-day trip; which included a rental car valued at $160 a day, roughly seven times the area average of $19-$25 per day, and which was paid for by the California Political Attorney Association ("CPAA") while one or more of the CPAA's attorneys were representing clients involved in hearings before the FEC).

[102] von Spakovsky, *supra* note 66.

> There is no question that requiring government registration and reporting by the thousands of online bloggers, websites, commentators, podcasters, and kitchen table journalists and reporters would not only burden their First Amendment right to speak freely, but would be entirely impractical for the FEC. It simply does not have the resources or time to regulate such voluminous activity—it is unfeasible, and would invariably lead to the charge of selective, politically motivated enforcement.

Id.

[103] SOR, Comm'rs Goodman & Hunter at 5, MUR 6795.

[104] Jan Baran, Comment to *Symposium: McCutcheon and the Future of Campaign Finance Regulation*, SCOTUSBLOG (Apr. 4, 2014 2:59 PM), http://www.scotusblog.com/2014/04/symposium-mccutcheon-and-the-future-of-campaign-finance-regulation ("[T]here are those who seek to minimize government intrusion into political speech and those who believe considerable government regulation is necessary to safeguard democracy and prevent corruption.").

[105] *See* Paul Bedard, *Dems on FEC Move to Regulate Internet Campaigns, Blogs, Drudge*, WASH. EXAMINER (Oct. 24, 2014, 8:26 PM), http://www.washingtonexaminer.com/dems-on-fec-move-to-regulate-internet-campaigns-blogs-drudge/article/2555270 ("FEC Chairman Lee E. Goodman, a Republican, said if regulation extends that far, then anybody who writes a political blog, runs a politically active news site or even chat room could be regulated. He added that funny internet campaigns like "Obama Girl," and "Jib Jab" would also face regulations.").

The Federal Election Campaign Act of 1971 ("FECA") as amended, charges the Commission with administering compliance and enforcement as well as formulating policies consistent with the Act.[106] The Act also explicates that Congress' authority supersedes the scope of the FEC's authority to oversee any aspect of federal elections.[107] The lower federal courts have repeatedly stated that the FEC is an agency of limited jurisdiction without the authority to make extra-statutory rules or assert a "roving plenary power" in the likeness of Congress.[108] Any new internet-related rule promulgated by the FEC must fit clearly within the confines of the FECA, yet the October 2014 ANPRM on Aggregate Biennial Contribution Limits suggest that the Commission would consider modifying existing rules or adding new rules in response to *McCutcheon*.[109] Ironically, the text of the ANPRM cites language from the *McCutcheon* opinion that declares Congress as the proper authority to impose constitutionally valid alternative measures to prevent circumvention.[110]

A. The Statutory Media Exemption and the Advent of the Kitchen Table Journalist

The Commissions' broader definition of "Internet activity" and the Internet exemption were born of out necessity and designed to reconcile a new communications medium while honoring First Amendment speech rights. The "media exemption" is explicitly presented in the Act,[111] and wholly consistent

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106 52 U.S.C. § 30106(b)(1) ("The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of Title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.").

107 52 U.S.C. § 30106(b)(2) ("Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.")

108 The FEC is an agency of limited jurisdiction, and lacks any sort of roving plenary power to pass extra-statutory rules. To the extent that other avenues of constitutional regulation exist, it is up to Congress- and Congress alone-to initiate such inquiries and collecting cases where the courts have defined the limited jurisdiction of the FEC. *See, e.g.*, EMILY's List v. FEC*,* 581 F.3d 1 (D.D.C. 2009) (stating that for the FEC to have any power the money spent must be used for the "purpose" of influencing an election); *see also, e.g.*, Unity'08 v. FEC*,* 596 F.3d 861 (D.C. Cir. 2010) (holding that draft groups are outside of the scope of the FEC and therefore the FEC does not have the power to regulate); *see also, e.g.*, FEC v. Machinists Non-Partisan Political League*,* 655 F.2d 380 (D.C. Cir. 1981)

109 Aggregate Biennial Contributions Limits, 79 Fed. Reg. at 62,362.

110 *Id*. ("Although it held the aggregate limits to be unconstitutional, the Supreme Court indicated that there are multiple alternatives available to Congress that would serve the Government's interest in preventing circumvention while avoiding 'unnecessary abridgment' of First Amendment rights.") (quoting *McCutcheon,* 134 S. Ct. at 1458) (internal quotation omitted).

111 52 U.S.C. § 30101(9)(B)(i) ("The term 'expenditure' does not include—any news

with First Amendment jurisprudence.[112] However, it remains unsettled as to whether or not blogging and related social media activities qualify as journalism.[113] For now, blogging is generally considered exempt from the purview of the FEC because it falls into either the Internet exemption or the "media exemption."[114] Without the 2006 Internet freedom rules, the Commission would have to determine if each blog with political commentary is subject to reporting and disclaimer requirements, or if it qualifies as a press entity subject to the media exemption.

Regulating blogs as media creates a great challenge because the Internet has effectively given a printing press to anyone with access to a computer.[115] Scores of political bloggers, commentators, podcasters, and independent journalists utilize the Internet from the comfort of their kitchen table.[116] Bloggers

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story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate…"); *see also* 52 U.S.C. § 30104 (f)(3)(B)(i) (*"*The term 'electioneering communication' does not include a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate.").

[112] *See* First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 781 (1978) (emphasizing "the special and constitutionally recognized role of that institution informing and educating the public, offering criticism, and providing a forum for discussion and debate"); *see also* Lovell v. City of Griffin, Ga*.,* 303 U.S. 444, 452 (1938).

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Id.

[113] *Compare* Agnes Poirer, *Blogging is Not Journalism*, THE GUARDIAN, (Mar. 21, 2006, 5:43 AM), http://www.theguardian.com/commentisfree/2006/mar/21/blogisnotjournalism (contending that blogging is a habit and journalism is a profession that requires research) *with* Robinson Meyer, *U.S. Court: Bloggers Are Journalists: Even When They're Libeling You*, THE ATLANTIC, (Jan. 21, 2014, 11:45 AM), http://www.theatlantic.com/technology/archive/2014/01/us-court-bloggers-are-journalists/283225/ (explaining that bloggers are journalists when it comes to their first amendment rights, and it is difficult to make a distinction between "journalists" that are "media respondents" and "non –institutional respondents").

[114] *See Internet Communications and Activity*, FED. ELECTION COMM'N (Jun. 2007), http://www.fec.gov/pages/brochures/internetcomm.shtml#press ("Whether covered by the media exemption or the individual activity exemption, blogging will generally not be subject to FEC regulation.").

[115] *See* Quinn, *supra* note 63 (statement of Former FEC Commissioner Goodman) ("The Internet has placed a printing press in the hands of every citizen in America. and many small groups and individuals have started political commentary pages or websites on their kitchen tables and have grown those blogs into being significant daily publications").

[116] von Spakovsky, *supra* note 66.

and podcasters that focus on political content serve an indistinguishable purpose from the role of the press as the Supreme Court has defined it; bloggers seek to inform and educate the public, offer criticism, and provide a forum for discussion and debate.[117]

To justify the view that these contributions to the discussion are inapposite to the constitutionally protected role of the press, proponents of regulating cost-free political Internet content rely on conjectures of the corruptibility of bloggers.[118] Yet, the alleged undisclosed *quid pro quo* payments for favorable blogging coverage would already violate the Act if they could be proved.[119] Publishing free Internet content that aims to influence political discussion presents no evidence of corruption as defined by the Act, therefore there is no basis for the FEC to regulate such content without universally rejecting the journalistic role of Internet commenters and obscuring the protections of the media exemption.

The second justification for regulating blogs separately from traditional media relies on the false notion that any influence is an improper influence.[120] The FECA includes no provision limiting the scope of a journalist's influence, and the Commission and the courts have repeatedly enforced the intent of Congress that any and all forms of media enjoy the unfettered right to cover and comment on political campaigns.[121]

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[117] Bellotti, 435 U.S. at 781 ("The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.").

[118] *See* Rotunda, *supra* note 68 (describing Ravel's persistent allegations that "dark money" is influencing political Internet content, despite her inability to cite a single example following CFPPC hearings that found no evidence to justify regulating bloggers potential connections to policies or politicians they support); *see also* McAlarney, *supra* note 97, at 527-31 (leaving the question presented in the article's title unanswered with mere suggestions and unconfirmed allegations that influential bloggers receive payment for favorable coverage).

[119] 52 U.S.C. § 30101(8)-(9).

[120] *See* McGreevy, *California Ethics Czar, supra* note 97 (stating Ravel's intent to regulate an anonymous blogger that "draws attention to criminal charges pending against Los Angeles City Councilman Richard Alarcon"); *see also* McAlarney, *supra* note 97, at 533 (citing the opinion of founder and publisher of the Daily Kos, that left-leaning bloggers were invited to a breakfast at the Democratic National Convention in order to get the party's message directly to its constituents and potential constituents).

[121] Advisory Op. 2014-06, (Ryan for Congress) at 2-3 ("AO 2014-06").

> The legislative history of the media exemption indicates that Congress did not intend to limit or burden in any way the First Amendment freedoms of the press and of association. The exemption assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns. Consistent with the Act's legislative history, the Commission and courts have recognized media covered by the exemption to include magazines, newsletters, cartoons, cable television, the Internet, webcasts, satellite broadcasts, documentary films, radio talk shows, and even rallies staged and broadcast by a radio talk show. The Commission

It is unsurprising that certain Commissioners seek to regulate putative media content on political blogs and podcasts given that three current FEC members may not recognize the validity of the statutory press exemption at all.[122] A complaint filed with the FEC during the 2012 elections alleged that a Boston news station violated the Federal Election Campaign Act by making an illegal campaign contribution equal to the amount of programming production costs, when it invited two candidates to participate in a televised 30 minute debate during regular Sunday morning news programming.[123] The complaint alleged that the violation existed because the television broadcasting network, WCVB, failed to invite a third-party candidate.[124] The Commission unanimously dismissed the complaint for lack of a violation, but there was no consensus in their underlying analysis.[125] Three commissioners voted to dismiss the complaint based on an analysis of FEC regulations, including the objectiveness of the television station's criteria for limiting the debate.[126] The remaining three commissioners issued a Statement of Reasons that confronted the complaint as a jurisdictional matter, finding that the FEC did not have authority to regulate editorial decisions made by journalists.[127] As a broadcasting television station,

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> has not limited the press exemption to traditional news outlets, but rather has applied it to 'news stories, commentaries, and editorials, no matter in what medium they are published.

Id. (internal quotations, alterations and footnotes omitted).

122 *See* Certification at 1, MUR 6703 (WCVB-TV) (reflecting the votes of Commissioners Ravel, Walther, and Weintraub to disregard the press exemption in the Commission's analysis and conclusion that there was no FECA violation); *see also Are FEC Commissioners Rethinking The Scope of the Media Exemption?*, HOLTZMAN, VOGEL, JOSEFIAK, PLLC., (Jan. 19, 2011), http://www.hvjlaw.com/2011/01/are-fec-commissioners-rethinking-the-scope-of-the-media-exemption/ (discussing the view of a law firm specializing in election law and compliance on a 2011 FEC enforcement matter in which a TV and Radio personality solicited campaign contributions for a candidate by email. Commissioners Walther and Weintraub, who remain on the Commission in 2015, voted to pursue enforcement of the alleged violation because they did not find that the emails fell under the media exemption, which allows media figures to solicit contributions).

123 MUR 6703 (WCVB-TV), Compl. at 2-3 (Nov. 28, 2012).

124 *See id*. (explaining that the channel that hosted the debate did nothing improper by requiring a fundraising minimum to be in the debate, even though a third party candidate had not reached that minimum); *see also* Goodman, *Feds Flirt With TV, supra* note 24 (discussing the Commission's internal disagreement on this enforcement matter as symptomatic of a larger debate on regulatory overreach).

125 *See* Certification at 1, MUR 6703 (WCVB-TV) (reflecting the votes of Commissioners Ravel, Walther, and Weintraub to disregard the press exemption in the Commission's analysis and conclusion that there was no FECA violation).

126 *See* Factual & Legal Analysis at 6, MUR 6703 (WCVB-TV) ("F&LA") (indicating that the commissioners did not believe that the criteria for the debate was done in a way to purposely exclude one of the candidates).

127 *See* Statement of Reasons, Vice Chair Goodman, Comm'rs. Hunter & Petersen at 3-4, MUR 6703 (WCVB-TV) [hereinafter SOR, Vice Chair Goodman, Comm'rs. Hunter & Pe-

WCVB is a press entity by precedent and the plain language of the statute, and the Act does "not define the issues permitted to be discussed or the format in which they are to be presented under the 'commentary' exemption nor do they set a time limit as to the length of the commentary."[128]

If the journalistic contributions of political content on the Internet are properly recognized within the media exemption, the Supreme Court's statement that "[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations," should protect the journalistic commentary of bloggers and podcasters.[129] The distinctions barring regulation of format and content noted in the Vice Chair's WCVB statement[130] are logically applicable to blogging or podcasting political Internet content, where myriad forms and issue focuses are posted at the editorial discretion of the commenter. Thus, to review Internet political commentary on the merits of its content and format is a complete disregard for the statutory protection of the role of the media as provided by the Act.

B. The *Quid Pro Quo* Corruption Defined by the Act does Not Exist in Pure Political Speech

The Commission's authority does not extend to policing the vast cost-free forum of political discussion on the Internet.[131] Rather, the FEC's statutory authority is limited to preventing *quid pro quo* corruption or the appearance of corruption.[132] Within the Act's definitions, "independent expenditure[s]" sub-

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tersen, MUR 6703] (stating that some commissioners believed they should not take on the issue due to the FEC's lack of subject matter jurisdiction).

128 *See id.* at 4 (explaining that the press is within its rights to use a debate format to convey information to the public).

129 Citizens United, 558 U.S. at 353; *see* Freedom Partners Chamber of Commerce & Freedom Partners Action Fund, Comment Letter on Advance Notice of Proposed Rulemaking on Aggregate Biennial Contribution Limits at 12 (Jan. 15, 2015), [hereinafter FPCC & FPAF Comments], http://sers.fec.gov/fosers/showpdf.htm?docid=313005 ("Ultimately, the so-called 'media exemption' is not simply a statutory carve out, provided simply by the benevolence of Congress.").

130 *See* SOR, Vice Chair Goodman, Comm'rs. Hunter & Peterson at 3-4, MUR 6703 (discussing how Commissioners Hunter and Peterson believed that the FEC has no legal authority to "regulate the editorial decisions of journalist").

131 *Cf.* Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)).

132 *See* Citizens United, 558 U.S. at 357 ("Limits on independent expenditures…have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question.").

ject to reporting are those made by an individual that expressly advocate "the election or defeat of a clearly identified candidate; and that [are] not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."[133] Therefore, mere allegations of issue advocacy, coverage that is favorable to a particular candidate by a putative Internet press entity, or a Commissioner's relative assessments of "slickly-produced ads,"[134] are not sufficient for the FEC to assert its authority without a showing of *quid pro quo* corruption.[135]

According to proponents of regulating free political Internet content, such corruption exists where unreported contributions and expenditures are made in exchange for control over political Internet content.[136] Yet—despite these arguments—even if contributions and expenditures made by political committees and campaigns could have the ability to create pervasive influence across political Internet content, the Act provides the proper scope of the FEC's authority to regulate such conduct.[137] Under the Act's provisions, independent expenditures that exceed $250 require an expenditure report by any individual that is not a political committee.[138] This means the Commission is congressionally authorized to oversee political Internet commentary by individuals who spend more than $250 to expressly advocate a candidate. Whether the $250 threshold is consistent with constitutional jurisprudence that calls for scrutiny of "large contributions" for the impact they may have in receiving return action in kind

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133 52 U.S.C. § 30101(17).

134 See SOR, Vice Chair Ravel at 2, MUR 6729 (indicating the Internet is a major source of political funding and has become the home of slickly produced political ads).

135 *See* Citizens United, 558 U.S. at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *see also* Davis, 554 U.S. at 741 (stating in an opinion that also struck the disclosure requirements of the so-called "Millionaires Amendment," the Court held that "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.") (internal quotations and alterations omitted).

136 Daniel W. Butrymowicz, *Loophole.com: How the FEC's Failure to Fully Regulate the Internet Undermines Campaign Finance Law*, 109 COLUM. L. REV. 1708, 1732-40 (2009).

137 *See* 52 U.S.C. § 30104(c)(1) ("Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person."); *See also* 52 U.S.C. § 30101(4)(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").

138 *See* 52 U.S.C. § 30104(c)(1).

is a separate issue.[139] Nonetheless, the Act is clear: if an individual spends less than $250 to advocate, criticize, or comment on a political candidate, the FEC has no authority to regulate that individual's conduct.

Without going full circle to the analysis which produced the Internet exemption, it suffices to say that any accounting evaluation of expenditures related to posting political Internet content, i.e. the *de minimis* costs of using YouTube, creating a blog, Tweeting, or even procuring Internet access would strain to reach the $250 bar in 2015.[140] Assuming *arguendo* that in 2015 individuals have free access to computers and the Internet as a result of unrelated needs or through public access, the FEC lacks authority to regulate activity for which an individual incurs no cost.[141] If the Commission expanded its cost analysis to include the purchase of a home computer, the table the commenter sits at, or the coffee she drinks while posting at all hours of the night, these line items would be wholly inconsistent with the Act's purpose of ferreting out large contributions prone to garner an in-kind response from political candidates.[142] Further, such analysis would break with the Commission's own interpretation of the Act over the last twenty years to include "personal volunteer activity" as exempt from regulation.[143]

The FEC was created to prevent corruption or the appearance of corruption in the democratic election process.[144] The Commission's statutory mandate is

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[139] Buckley, 424 U.S. at 26-27 ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.").

[140] *See* F&LA at 9, MUR 6578 (showing that the cost of creating a website did not come to the $250 minimum threshold for being required to be disclosed); *see also* AO 1998-22, at 5 (accounting an individual's costs related to publishing an unauthorized candidate advocacy website as less than $250).

[141] *See* 52 U.S.C. § 30101(17) ("The term "independent expenditure" means an *expenditure* by a person…" (emphasis added); *see also* SOR, Comm'rs. Goodman & Hunter at 5 n. 21, MUR 6795 ("For there to be an "independent expenditure" there must be an "expenditure" as defined by the Act and Commission regulations.").

[142] EFF & CDT Comments at 1, Aggregate Biennial Contribution Limits ("Unlike political advertisements in the offline world, the Internet is not merely a tool of the wealthy political elite. Ordinary individuals can purchase Internet ads, create YouTube videos, and post banners on their personal websites to express support for particular candidates or parties—all for little or no cost.").

[143] *See* Advisory Op. 1999-17 (George W. Bush for President) at 5 ("AO 1999-17"); *see also* 11 C.F.R §§ 100.74, 100.75, 100.79 (addressing individual volunteer contributions of time and the resources of homes and vehicles as exempt).

[144] Buckley, 424 U.S. at 26; *see* Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990), *overruled by* Citizens United, 558 U.S. 310 (providing a now abrogated governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," that is nevertheless wholly inapplicable to restricting individual political commentary on the Internet).

not—and has never been—to regulate speech for the sake of regulating speech.[145] Contributing to the political discussion by posting commentary on the Internet for free represents pure speech that is unquestionably protected by the First Amendment and uninhibited by the provisions of the Federal Election Campaign Act. To regulate free Internet content because it involves political commentary is outside of the FEC's authority, and any statutory provision that called for the FEC to compel disclosure and disclaimer of pure speech would violate the Constitution.

V. REGULATING PURE SPEECH CONTENT ON SOCIAL MEDIA AND BLOGS IS UNCONSTITUTIONAL

Calls to regulate political content on the Internet and the Commission's Advance Notice of Proposed Rulemaking on *McCutcheon's* abrogation of biennial campaign contribution limits are not coincidental.[146] The underlying premise of expanding campaign finance regulations is that financial resources are inherently corruptive and must be restricted wherever money may be present.[147] This premise was rejected by *McCutcheon*, which emphasized that mere conjecture is inadequate to carry a First Amendment burden.[148] The flaws of this premise are typically exposed by the specific identification of a particular group or viewpoint and the assumption that financial resources spent advocating that viewpoint, are alone, evidence of corruption outside the protections of the First Amendment.[149] The risks of accepting this premise in the context of

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[145] *See* Goodman, *Online Political Opinions, supra* note 5 ("[T]he FEC has no authority to regulate political speech for the sake of limiting speech, but only with regard to large monetary contributions and expenditures with corruptive potential.").

[146] *See* Aggregate Biennial Contribution Limits, 79 Fed. Reg. at 62,361; *see also* SOR, Vice Chair Ravel at 2, MUR 6729.

[147] *Compare* SOR, Vice Chair Ravel at 2, MUR 6729 ("[the Internet is] a major source of political advertising — dominated by the same political organizations that dominate traditional media."); *with* Rotunda, *supra* note 68.

> The theory behind limiting political campaign contributions is the fear that a contributor might secure special access to an officeholder or secure his, or his successor's, secret promise to vote for or against a piece of legislation. This fear does not apply when someone is arguing publicly for or against a law, regardless of who may or may not have paid him to do so.

Id.

[148] McCutcheon, 134 S. Ct. at 1452 ("[W]e 'have never accepted mere conjecture as adequate to carry a First Amendment burden.'" (quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 392 (2000))).

[149] *Compare* Levinthal, *supra* note 74 (statement of Ann M. Ravel on the issues of reporting and disclaimers) ("Dark money is a broader problem"), *an*d Ann M. Ravel (@AnnMRavel), TWITTER (Jan. 29, 2014, 7:51 AM), https://twitter.com/AnnMRavel/status/560827579486044162 (citing social media post by

an Internet speech rule arise from discretionary applications of the rule on a selective and highly partisan basis.[150]

The fundamental right of free speech is imperiled most where the government attempts to restrict speech purely on the basis of what is said and who says it.[151] As the Supreme Court recently recognized, disagreement with the content of political speech is irrelevant to speech rights.[152] The laws and regulations of campaign finance do not authorize the censorship of some to the benefit of others.[153] Stated differently, the FEC cannot enforce bare censorship because the government is not endowed to moderate the people's discussion of government.[154]

Would-be Internet speech regulators know this, and so they recast their interest as an effort to prevent corruption, but without consideration of the limiting principles recognized since *Buckley*.[155] Chairwoman Ravel's statement in Checks and Balances displayed her concern for "the Internet's growing force

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Chairwoman Ravel linking a story titled "How Dark Money Flows through the Koch Network"), *with* Kittle, *supra* note 74 (statement of Ronald Rotunda, Former Commissioner of the CFPPC) ("[W]hen she talks about 'dark money' what she's really talking about is trying to regulate the Internet, and she's talked about it a lot.").

150 *See* Chuck Ross, *FEC Democrats Opposed Republican's Appeal But Supported Democrats'*, THE DAILY CALLER (Feb. 11, 2015 10:31 AM), http://dailycaller.com/2015/02/11/fec-democrat-opposed-republicans-appeal-but-supported-democrats/; *see also* Goodman, *Feds Flirt With TV*, *supra* note 24 (describing recent examples of partisan enforcement application by the Commission over the past several years).

151 *Cf.* Citizens United, 558 U.S. at 340-41 ("As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content. . .[but] [t]he First Amendment protects speech and speaker, and the ideas that flow from each."); *see also* CHAIRMAN DARRELL ISSA, STAFF REPORT, H COMM. ON OVERSIGHT AND GOV'T REFORM, HOW POLITICS LED THE IRS TO TARGET CONSERVATIVE TAX-EXEMPT APPLICANTS FOR THEIR POLITICAL BELIEFS 2 (2014), http://oversight.house.gov/wp-content/uploads/2014/06/How-Politics-Led-to-the-IRS-Targeting-Staff-Report-6.16.14.pdf ("Freedom of speech . . . [is a right] so fundamental to American citizens that [it is] enshrined in the First Amendment of the Constitution's Bill of Rights (citation omitted).").

152 Citizens United, 558 U.S. at 340 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." (citing Bellotti, 435 U.S. at 784 (1978))).

153 *Id.*

154 *See* Bellotti, 435 U.S. at 777 n.12 ("speech concerning public affairs is more than self-expression; it is the essence of self-government" (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964))).

155 *See* Lachlan Markay, *FEC Republicans Vow to Fight Regulations on Online Political Speech*, WASH. FREE BEACON (Oct. 28, 2014, 5:00 AM), http://freebeacon.com/issues/fec-republicans-vow-to-fight-regulations-on-online-political-speech (statement of FEC Commissioner Goodman) ("The problem is that Ravel's approach to the issue contains "no limiting principle. . . In attempting to crack down on those "slickly-produced ads," the FEC could ensnare countless Internet users who simply communicate their political views online.").

in the political arena."[156] Although Chairwoman Ravel's voting record reflects an interpretation that rejects the FEC's Internet and Media exemptions,[157] the explicit rejection of *McCutcheon* in her statement cannot be dismissed as mere interpretation.[158] That political Internet commentary might influence elections or elected officials is not a sufficient governmental interest to impinge upon a constitutional right.[159]

Exercising pure speech at *de minimis* cost on the Internet presents no discernible threat as an "effort to control the exercise of an officeholder's official duties."[160] The projected corruption alleged by the influence of the Internet is uncorroborated by any evidence recorded by the FEC that the existing laws are inadequate, being circumvented, or that substantial compliance issues exist.[161] Absent evidence of this perceived or imagined corruption, the unlimited pursuit preventing influence as *de facto* corruption of elected officials and candidates has no constitutional basis.

Forcing disclosure of Internet-based political speech would also create substantial burdens to speakers, and therefore reduce speech.[162] The *Buckley* Court

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[156] SOR, Vice Chair Ravel at 1-2, MUR 6729 ("[T]he Commission turned a blind eye to the Internet's growing force in the political arena.").

[157] *See, e.g.*, Lee Goodman, *The FEC's Problems Aren't with the GOP*, POLITICO (May 10, 2015), http://www.politico.com/magazine/story/2015/05/the-fecs-problems-arent-with-the-gop-117798.html#.Vd-7MPlViko (citing instances of FEC Chairwoman Ann Ravel's recent voting history within the Commission).

[158] David A. Graham, *What Use Are Campaign-Finance Laws If They're Not Enforced?*, THE ATLANTIC (May 8, 2015), http://www.theatlantic.com/politics/archive/2015/05/what-use-are-campaign-finance-laws-if-theyre-not-enforced/392621/.

[159] McCutcheon, 134 S. Ct. at 1450-51.

> Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner "influence over or access to" elected officials or political parties … the Government may not seek to limit the appearance of mere influence or access.

Id.

[160] *Id*. at 1450.

[161] von Spakovsky, *supra* note 66.

> There is no evidence in the record that the current regulations are inadequate, that they are being circumvented, or that there are substantial problems with noncompliance. Without such evidence, any changes in the applicable regulations, particularly any further limiting of constitutionally protected political activity would be arbitrary and capricious, a clear and obvious violation of the *Chevron* standard.

Id.

[162] *Id*.

> It would create a huge group of violators who would have no idea that there was a reporting requirement, much less how to do it correctly. Such regulation could end up "seriously restricting participation in the democratic process," something the Supreme Court warned against in *McCutcheon*. It would raise the dire specter of a fed-

recognized the significant deterrent effect of compelled disclosure as the basis for requiring strict scrutiny where First Amendment rights are at risk.[163] In *Davis v. Federal Election Commission,* the Supreme Court restated its recognition of the significant consequences compelled disclosure have on privacy of association and belief.[164] Expanding Internet speech restrictions would require individuals to consider legal consequences, if not obtain counsel, before posting political commentary on social media.[165] The desire to voice a political opinion would suddenly be strangled by the uncertainty of a commenter's obligations and the fear of serious legal repercussions.[166]

Political speech regulations would also benefit wealthy donors, because they have the resources to establish tax-exempt 501(c) and 527 organizations.[167] Creating a non-profit entity to provide political advocacy is a daunting task and requires overcoming a significant barrier to the plain exercise of the First Amendment. [168] It is hard to imagine George Soros, Michael Bloomberg, or Sheldon Adelson vigorously typing away on their Twitter feed, "liking" a Facebook post, or having the inclination to make the "Obama Girl" YouTube video. But average citizens do participate in the political discussion in those

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eral agency monitoring everything that is being said on the Internet, something that should scare every American (footnote omitted).

Id.

[163] Buckley, 424 U.S. at 65 ("[E]ven if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." (citing NAACP v. Alabama, 357 U.S. at 461)).

[164] Davis, 554 U.S. at 727 ("[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment" (quoting Buckley, 424 U.S. at 64)).

[165] Coolidge-Reagan Found. & Conservative Action Fund, Comment Letter on Advanced Notice of Proposed Rulemaking on Aggregate Biennial Contribution Limits at 9 (Jan. 15. 2015), [hereinafter CRF & CAF Comments] ("Ordinary citizens would have to pore over technical regulations, consult with a specialized campaign finance attorney, or seek an advisory opinion from the FEC to determine whether their social media updates, blog postings, e-mails, or websites are legal, contain any necessary disclaimers, or trigger any additional disclosure requirements."); *cf.*, Citizens United, 558 U.S. at 324. ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day.").

[166] *See e.g.,* Goodman, *Feds Flirt With TV*, *supra* note 24 (describing the penalties for violating corporate contribution regulations, "people who make them face stiff fines, injunctions, and can even go to prison").

[167] *See generally* GREG J. SCOTT & ZAINAB S. SMITH, FED. ELECTION COMM'N, FEC CAMPAIGN GUIDE: POLITICAL PARTY COMMITTEES (2013), http://www.fec.gov/pdf/partygui.pdf#search=501%20c.

[168] *See* Jill Havlat, *How Much Money Do You Need to Start a Nonprofit*, NONPROFIT HUB, http://www.nonprofithub.org/starting-a-nonprofit/how-much-money-do-you-need-to-start-a-nonprofit/ (last visited Mar. 14, 2015) (explaining the process of setting up a nonprofit and the filing fees that are involved.).

ways.[169] Creating a barrier that enhances the speech of one segment of society by restricting others has been has roundly rejected by the Supreme Court.[170]

Additionally, restricting political Internet speech would shine a substantial light onto the personal lives of political Internet commenters. *McIntyre v. Ohio Elections Commission* announced the importance of anonymity inherent in the First Amendment, going so far as to assign it the "honorable tradition of advocacy and dissent…a shield from the tyranny of the majority."[171] Disclosure requirements would subject individuals to revealing their telephone number and address without a scintilla of corruption implicated by the desire to voice a political opinion online.[172] Therefore, increased regulation of political Internet activity is certain to cause less political Internet activity,[173] and as Justice Kennedy wrote in *Citizens United*, "political speech must prevail against the laws that would suppress it, whether by design or inadvertence."[174] The Internet demands exactly the breathing room the Court referenced in *NAACP v. Button*,

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[169] *See* Daniela V. Dimitrova et al., *The Effects Of Digital Media On Political Knowledge And Participation In Election Campaigns: Evidence From Panel Data,* 41 COMM. RES. 95, 96-97 (2014) (discussing the growth of social media in recent years and the importance that candidates utilize these tools to reach potential voters.).

[170] Buckley*,* 424 U.S. at 48-49 ("[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.").

[171] McIntyre, 514 U.S. at 357.

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority…It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.

Id.; *contra,* John Doe No. 1 v. Reed, 561 U.S. 186, 221 (2010) (Scalia, J. concurring) ("Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect.").

[172] EFF & CDT Comments at 2, Aggregate Biennial Contribution Limits ("The Commission should not force individuals to disclose sensitive personal information—such as an address or telephone number—without a clear need for the information in order to address an overt threat to the integrity of the campaign finance system.").

[173] *See* CRF & CAF Comments at 10, Aggregate Biennial Contribution Limits ("Mechanistically applying twentieth-century standards for paper, radio, and television communications to this fundamentally different medium threatens to strangle this crucial channel for political discourse, chill a tremendous amount of political speech by ordinary Americans."); *see also* Quinn, *supra* note 63.

> The specter of regulation of Internet political speech will discourage small groups and individuals from using the Internet to express their political opinions. If we regulate it, we will necessarily discourage it and get less of it. It's an axiom that if you regulate it, you will deter it and get less of it.

Id.

[174] Citizens United, 558 U.S. at 312.

and established by current FEC regulations.[175] The prospect of regulating free political Internet content does not overcome even statutory construction, let alone show a compelling government interest required by strict scrutiny.[176]

VI. TILTING AT WINDMILLS: THE FALSE PREMISE OF THE GOVERNING CLASS ENGENDERS FEAR TO INCREASE THEIR OWN AUTHORITY

The contradiction of regulating speech through money is that increasing the authority of regulators—especially unelected regulators—effectively creates an imbalance of influence to favor political speakers with the greatest resources. By imposing limits on all speech, individual speakers face greater costs and barriers to freely voicing opinions, while speakers with substantial resources maintain the necessary influence to steer the expanded bureaucratic authority or to afford the legal mechanisms of efficient compliance. This imbalance is amplified by the incentive of those in power to dictate the rules of the democratic contest in their own favor.[177]

A. Engendering Fear with The Corruption Windmill

Controlling speech by regulating free political Internet content has been observed as a "solution in search of a problem."[178] The accusation that dark mon-

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[175] *See* EFF & CDT Comments at 2, Aggregate Biennial Contribution Limits ("Political speech on the Internet demands substantial breathing space to ensure robust online debate. The Commission's current—and narrow—regulatory approach provides such breathing space and thereby ensures that campaign finance laws do not chill the online speech of the millions of ordinary people who communicate about politics online.").

[176] Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2738 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." (citing R.A.V., 505 U.S., at 395)).

[177] THE FEDERALIST NO. 10 (James Madison) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

[178] FPCC & FPAF Comments at 3, Aggregate Biennial Contribution Limits ("Equally troubling is the disingenuousness in the presentation of amounts spent in connection with elections, presumably to create a "problem" in need of a "solution."); *see also* Adam B, *California Starts Regulating Political Blogging. Why?*, DAILY KOS (Sept. 20, 2013, 9:34 AM), http://www.dailykos.com/story/2013/09/20/1240155/-California-starts-regulating-political-blogging-Why.

> What, exactly, is the problem that this is intended to solve? Has California state and local politics been overrun by covert, deceptive online activity? Are citizens bamboozled on a regular basis?... But it's still a solution in search of a problem. There are a lot of issues dealing with the role of money in politics which legislators and regulators ought to be addressing, with the goal of reducing the corrupting influence

ey and political speech expenditures corrupt democracy are not unique to the Internet. President Obama incorrectly predicted in his 2010 State of the Union address that a stampede of money would flood elections after *Citizens United*.[179] Chairwoman Ravel likewise misrepresents reality by alleging that dark money is flooding the political arena on the Internet.[180] The view that the money and influence of political organizations and large contributors represents *quid pro quo* corruption on traditional media and the Internet is factually incorrect.[181] Further, this claim has no standing as a violation of the First Amendment.[182]

According to the FEC, roughly $7 billion dollars was spent toward the 2012 election cycle[183] and nearly $4 billion was spent in 2014.[184] But the underlying numbers tell a different, more important story about the influence of anonymous donations. In 2012, only $300 million of the $7 billion was spent by nonprofit organizations.[185] Much like individuals who currently post free political

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of amassed wealth on elections. This wasn't one of them.

Id.

[179] Baran, *supra* note 104 ("In his 2010 State of the Union address, President Obama personally lectured members of the Court and predicted a "stampede" of money resulting from that decision…The amount of money spent in subsequent elections rose, although at a rate no higher than in preceding elections.").

[180] Levinthal, *supra* note 74 (statement of FEC Vice Chair Ann Ravel) ("Dark money is a broader problem…It's not a partisan question for me.").

[181] SOR, Vice Chair Ravel at 2, MUR 6729.

> But the Commission failed to take into account clear indicators that the Internet would become a major source of political advertising – dominated by the same political organizations that dominate traditional media. Since its inception, this effort to protect individual bloggers and online commenters has been stretched to cover slickly produced ads aired solely on the Internet but paid for by the same organizations and the same large contributors as the actual ads aired on TV.

Id.

[182] United States v. Int'l Union United Auto. Aircraft & Agr. Implement Workers of Am., 352 U.S 567, 597 (1957) ("Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group.").

[183] Tarini Parti, *$7 Billion Spent On 2012 Campaign, FEC says,* POLITICO (Jan. 31, 2013, 10:26 PM), http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-87051.html.

[184] *Estimated Cost of Election 2014*, OPEN SECRETS, https://www.opensecrets.org/overview/cost.php (last visited Aug. 26, 2015); *see also 2014 Election Overview*, OPEN SECRETS, https://www.opensecrets.org/overview/ (last visited Aug. 26, 2015); *see also* Parti, *supra* note 183 (each election becomes more expensive than the next, the total spent in the 2012 election was greater than the number of people on the planet – totaling about $7 billion spent by candidates, parties, and outside groups.).

[185] Press Release, Fed. Election Comm'n, FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle (Apr. 19, 2013), http://www.fec.gov/press/press2013/pdf/20130419release.pdf; *see also* FPCC & FPAF

Internet content, these non-profits are not obligated to disclose their donors and members.[186] This means that the rampant corruption and evils of "dark money," so often touted by "activists" like Chairwoman Ravel, accounted for roughly 4% of all contributions made during the 2012 presidential election.

These donations are distinct from pure speech posted online in that they do carry a "paid for by" disclaimer, but it does not change their comparative diminution among overall political expenditures.[187] A non-partisan study published in July 2014, found that states with aggregate or proportional contribution limits were arguably more corrupt than states without such limits.[188] Restricting cost-free political speech on the Internet and aggregate limits share a regulatory motivation, which is mislabeling political speech through money as corruption.[189] The existence of corruption justifiably stirs up public concern and provides regulators a reason to expand their own authority. Expanded authority allows those already in power to retain power and, ultimately, it allows those governing to limit the speech of the governed.[190]

Despite claims that individual voters are voraciously researching candidates and issues online in desperate reliance on unbiased facts to inform their vote,[191]

Comments at 3, Aggregate Biennial Contribution Limits.

[186] Don Kramer, *Is a Nonprofit Required to Report Anonymous Donors to the IRS?*, NONPROFIT ISSUES, (June 14, 2011), http://www.nonprofitissues.com/to-the-point/nonprofit-required-report-anonymous-donors-irs.

[187] FPCC & FPAF Comments at 3, Aggregate Biennial Contribution Limits.

[188] Matt Nese, *Aggregate and Proportional Limits in the States: Have they Reduced Corruption or Promoted Better Government?*, ISSUE ANALYSIS no. 9, July 2014, at 3, http://www.campaignfreedom.org/wp-content/uploads/2014/04/2014-07-08_Issue-Analysis-9_Aggregate-And-Proportional-Limits-In-The-States-Have-They-Reduced-Corruption-Or-Promoted-Better-Government.pdf.

[189] *Id.* at 1.

[190] *Hearing on S.J. Res. 19 Before The S. Comm. on the Judiciary*, 113th Cong. 1 (2014) [hereinafter *Hearing on S.J. Res. 19*] (statement of Floyd Abrams, Partner, Cahill, Gordon & Reindel, LLP)

> The description of the constitutional amendment [S.J. Res. 19] proposes states, in its text, that it "relate[s] to contributions and expenditures intended to affect elections." That's one way to say it, but I think it would have been more revealing to have said that it actually "relate[s] to speech intended to affect elections." And it would have been even more revealing, and at least as accurate, to have said that it relates to limiting speech intended to affect elections. And that's the core problem with it. It is intended to limit speech about elections and it would do just that.

Id.

[191] McAlarney, *supra* note 97, at 526 (relying on a single allegation of an unexecuted contract which provided a bonus for a blogger in Florida, if the blogger's negative stories about the candidate did not appear in the top thirty search results).

> Before voting, many people will conduct an Internet search using the name of a candidate for office utilizing a search engine, such as Yahoo! Or Google. The search engine produces several website links regarding the candidate. The results will produce the good, the bad, and the ugly stories. The goal of the paid political blogger is to crowd out the good stories listed in Internet search engine results and knock the

most individuals get their news and political information from sources that agree with a particular perspective.[192] This means conservatives watch Fox News and listen to Mark Levin, and liberals get their news from MSNBC and listen to their local NPR Station.[193] Just as impassioned partisan rants excite the homogenous demographics of these TV and radio shows, engendering fears of corruption is advantageous to regulators because it creates a sense of necessity for increased regulations. The intrusion of overreaching regulations upon interactions that would otherwise be sorted between the interested parties is the lifeblood of the bureaucratic administrative state.[194] If there is no identifiable need for third party government intervention—whether that need is efficiency, corruption, or resource allocation—there is no need for regulators. Following the precedent of *Buckley*, the rallying cry of regulatory overreach in the area of campaign finance is "corruption!"[195]

By the Supreme Court's acknowledgement, the Bill of Rights exists out of general distrust for government.[196] But the people's distrust of government can be manipulated by offering governmental remedies to nonexistent problems. Fear that a majority or opposing political view is advanced by corruption provides a demand for regulators to protect the voice of the minority. The most effective method of depriving the constitutional authority of people is to increase the people's reliance on government. This unconstitutional shift of power is achieved by incrementally enacting laws and regulations that expand the authority of the governing class.

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good stories off the first page of results and replace them with negative stories.). *Id.*

192 AMY MITCHELL & RACHEL WEISEL, PEW RES. CTR., POLITICAL POLARIZATION & MEDIA HABITS 1 (2014), http://www.journalism.org/files/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-7-27-15.pdf ("[T]he study finds that those with the most consistent ideological views on the left and the right have information streams that are very distinct from each other and from those of individuals with more mixed political views.").

193 *Id.*; *see also* Aaron Smith, Senior Researcher, Pew Res. Ctr., Pew Research Findings on Politics and advocacy in the social media era 43 (Jul. 29, 2014), (presentation slides available at http://www.pewinternet.org/files/2014/07/PAC-Aaron-Smith-Presentation.pdf).

194 Robert Higgs, *Government Growth*, LIBRARY OF ECON. AND LIBERTY, http://www.econlib.org/library/Enc/GovernmentGrowth.html (last visited Mar. 14, 2015), ("Superimposed on the century-long trend to bigger government—measured by size, scope, and power—are several episodes of extraordinarily rapid growth associated with crises, especially the two world wars and the Great Depression.").

195 Doug Kendall & Tom Donelly, *Citizens United, President Obama, and His Liberal Naysayers*, HUFF. POST (Jan. 2, 2013, 5:12 AM), http://www.huffingtonpost.com/doug-kendall/citizens-united-president_b_2064049.html.

196 Citizens United, 558 U.S. at 340 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints, and prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.").

B. Expanding the Role of Regulators

Our constitutional democracy has evolved and expanded in such a way that government is no longer a neutral independent party.[197] Rather, it is what the anti-Federalists feared: a government that grants itself authority to dictate the rights of the people.[198] The Federal Register lists 435 federal agencies that are authorized to regulate the administrative state.[199] Among these agencies, the FEC received 81,600 filed documents in 2013.[200] In that same year, the Commission closed 134 enforcement matters and settled 39 Alternative Dispute Resolutions for a total of roughly $770,000 in civil penalties.[201] Over a 13 year period beginning in 2000, the FEC reviewed 2,623 compliance matters and assessed roughly $375,000 in Administrative Fines per year for late or non-filing disclosure compliance.[202] If the reach of the FEC's authority is expanded to include free political Internet content, this figure would exponentially increase.

Data from the Pew Research Center shows that roughly 87% of Americans, or 277,405,638 people, use the Internet.[203] Of this group, 74%, or roughly 205 million individuals, use social media,[204] and political activity is high among social media users; of this group 38% like or promote political content; 35% encourage others to vote; 34% post their own comments on politics; 33% repost others' political content; 31% encourage others to take action; 28% post links to political articles; 21% belong to a political group; and 20% follow candidates or elected officials.[205] At the very minimum level of political partic-

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197 Dan Mitchell, *America's Ever-Expanding Regulatory Swamp*, UNITED LIBERTY (Sept. 4, 2014, 1:00 PM), http://www.unitedliberty.org/articles/18582-america-s-ever-expanding-regulatory-swamp (analyzing statistics on the broad impact of regulations on employment, economics and the associated costs needed to sustain them).

198 The Brutus No. 1; *but see* ANN WARD & LEE WARD, THE ASHGATE RESEARCH COMPANION TO FEDERALISM (Ann Ward & Lee Ward, 2009).

199 *Agency List*, OFF. OF THE FED. REG., https://www.federalregister.gov/agencies (last visited Mar. 14, 2015).

200 FED. ELECTION COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2013, at iii, 14 (2013), http://www.fec.gov/pages/budget/fy2013/FEC_Final_PAR_2013_121613.pdf.

201 *Id.* at 23 (assessing $730,390 in civil penalties from enforcement matters and $36,850 from Alternative Dispute Resolution).

202 *See id*.

203 MAEVE DUGGAN ET AL., PEW RES. CTR., SOCIAL MEDIA UPDATE 2014, at 2 (2015), http://www.pewinternet.org/files/2015/01/PI_SocialMediaUpdate20144.pdf; *cf. USA QuickFacts*, U.S. CENSUS BUREAU (Aug. 5, 2015, 8:59 AM), http://quickfacts.census.gov/qfd/states/00000.html.

204 *Social Networking Fact Sheet*, PEW RES. CTR., http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Aug. 26, 2015).

205 Smith, *supra* note 193, at 25.

ipation online, this means that more than 4 million individuals would now be subject to the FEC's review.[206] The supposed goal of these potential regulations is to prevent corruption in free Internet content, but it would monumentally expand the FEC's authority into the homes of millions of Americans.

C. The Ultimate Winners of Political Speech Restrictions are Incumbent Politicians

Limitations that restrict the quantity and content of political speech benefit incumbent office holders because these individuals are known to the public, more able to raise money, and are able to use the stature of their offices for self-promotion through legislative initiatives and news coverage.[207] Not satisfied with the benefits of incumbency, the Bipartisan Campaign Reform Act of 2002 (commonly known as *McCain-Feingold*)[208] attempted to "level electoral opportunities"[209] based on the personal wealth of candidates. The Court in Davis struck this measure for impermissibly granting Congress the authority held by the voters.[210] Similarly, the speech limitations struck down by *McCutcheon*, were the result of Congress' attempt to divine the amount of money and the number of candidates an individual could donate to before corruption arose.[211] Prior to the Court's decision, Congress decided that an individual could contribute $2,600 to 18 candidates, but the 19th would arbitrarily trigger the appearance or actuality of corruption.[212] An FEC regulation governing free Inter-

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[206] *Cf. id*. ("4 million" represents twenty percent of the 205 million social media users that follow candidates and elected officials on social media).

[207] George F. Will, *McCain-Feingold's Wealth of Hypocrisy*, WASH. POST (Nov. 22, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/21/AR2007112101859.html.

[208] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 and 36 U.S.C.).

[209] Davis, 554 U.S. at 741.

[210] *Id.* ("The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office"); *see also Hearing on S.J. Res. 19*, *supra* note 190 (statement of Floyd Abrams, Partner, Cahill, Gordon & Reindel, LLP).

> [Laws based on] the disturbing concept that those who hold office in both federal and state legislatures, armed with all the advantages of incumbency, may effectively prevent their opponents from becoming known to the public, by adopting legislation . . . limiting the total amounts they may raise and spend in an effort to do so.

Id.

[211] *See* George F. Will, *Supreme Court Can Rescue Another Freedom In a Campaign Cash Case*, WASH. POST (Oct. 4, 2013), http://www.washingtonpost.com/opinions/george-will-supreme-court-can-rescue-another-freeom-in-a-campaign-cash-case/2013/10/04/77bd9e42-2d23-11e3-97a3-ff2758228523_story.html.

[212] *See id*.

net content would not be the product of elected legislators, but it would serve the interests of the elected.[213] Limiting speech on the Internet would limit dissent, reduce investigation, and deprive our democracy of one of its greatest assets—free speech.

VII. CONCLUSION

The Internet is the most dynamic populist forum for political speech that we enjoy today. In the process of becoming the existential plane where more people spend their time, the Internet has also become the principal forum for political debate. The regulation of free political Internet content is not included in the FEC's current regulations, and for good reason. Abandoning the FEC's 2006 Internet rules would restrict the peoples' right to engage in the realm of political debate.[214] Additionally, the Federal Election Campaign Act of 1971 as amended does not authorize the FEC to regulate the type of cost-free pure speech that exists on the Internet. The Act does not authorize the FEC to do so, because it would be facially unconstitutional and it would chill speech.

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[213] *See id.* ("[A]ll laws regulating the competition for elective offices are written by occupants of such offices, people who have a permanent and powerful temptation to shape the political process to favor incumbents").

[214] *Hearing on S.J. Res. 19, supra* note 190 (statement of Floyd Abrams, Partner, Cahill, Gordon & Reindel, LLP).