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# Campaign Finance & Online Oversight

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# Campaign Finance & Online Oversight

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*A Historical Analysis of  
Landmarks in Campaign  
Finance Reform, the Role  
of the Internet within that  
History, and the  
Permissibility of applying  
that History to the Internet  
in the Form of Regulation*

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American Jurisprudence touts the notion that citizens of the United States of America have certain freedoms: the most substantial of these is choice. The American electorate, in particular, prides itself on having the ability to view all options when exercising their right to vote and, as a result, being confident that their decision is well grounded. All individuals in this country are created equal, yet individual politicians are not on equal grounds with regard to financing their campaigns for political office. Even before regulation was considered a necessity, corruption in politics and the pervasive influence of money was an issue. When George Washington entered the White House affluence was the key to the oval office door (Urofsky, 2005, p.4).

Reform efforts have focused on limiting the influence of money in campaigns in order to place candidates on equal ground. Money has a corrupting influence because it gives greater leverage to one candidate over another. For instance, money can be used to fund massive grassroots campaigns and the potential success of a candidate may be contingent on the size of a his or her campaign bank account. Candidates with more campaign money are more likely to win elections. Money is the oxygen that the political arena breathes in and depends upon. This dependency has generated the problems that campaign finance reforms have tried to address.

The Justices of the United States Supreme Court, however, in their campaign finance case law, have employed one phrase in particular to describe the inherent problems associated with campaign finance law: “Money, like water, will always find an outlet” (McConnell v. Federal Election Commission, 2003, V). In other words, despite the efforts of reformers to limit the influence of money, the Justices concede that money will always find a way to be inserted into the campaign in a manner that does not level the playing field.

Moreover, the proposals, laws, and arguments that have been made to limit corrupting influences, such as money, on campaigns share one issue in common that has plagued attempts to regulate campaign finance law: whether campaign finance laws violate citizens' First Amendment right to freedom of speech. Expenditures and contributions of money are considered forms of political speech. The Supreme Court holds political speech in the highest regard because of its focus on issues of public importance. Thus, the high status assigned to political speech necessitates that it be assigned the highest protection (Urofsky, 2005). As a result, attempts to regulate that type of speech may be deemed impermissible absent a compelling governmental interest.

Media used for campaign related activities, such as television and radio, have been subject to regulation. One medium, however, has not been exposed to that degree of regulation. The Internet is a new technology that raises many issues for campaign finance reform because of its status as a medium that provides users with a forum where they may easily express their views at a low cost. In recent years, with regard to Presidential elections, the Internet has become an essential tool for engineering a successful campaign. According to Dube (2009), campaigns spent more than \$110 million in the 2008 election. The Internet has become one of the primary means through which the voting public obtains information in order to make decisions about the Presidential candidate they wish to vote into office.

One online activity that has grown in popularity and has raised questions about campaign finance during political campaigns is the viral video advertisement. These are often created by individuals who then post them on the Internet, on such online venues as YouTube.com. A viral video advertisement is content designed to inform the electorate on an issue and/or promote the election or defeat of a candidate. The "viral" nature of these advertisements differentiate them

from television advertisements in that they can be rapidly transported across the nation and duplicated numerous times on different video sharing websites or websites where one can embed a video, such as Facebook. These videos are not subject to the regulations that online advertisements paid for by a campaign are in that they are not required to make disclosures regarding who created the advertisement. Online advertisements paid for by a campaign are subject to the Internet regulations devised by the FEC following a Supreme Court decision, *Shays v. Federal Election Commission* (2004), demanding that the commission create a regulatory framework for the Internet. Viral videos, however, are not subject to these rules and this could pose a dangerous problem for campaign finance reformers and existing legislation. It is a goal of campaign finance reform to avoid corruption, or the appearance of corruption, and to diminish the corrupting effect that money can have on campaigns. It is true that Internet viral videos posted by unpaid individuals are viewed positively because of their low cost to generate. It is possible, however, that the negative effects associated with money in campaigns have transferred onto viral videos posted on the Internet. The corrupting influence of money on campaigns, in general, is that it gives certain individuals an unfair advantage above other candidates. The corrupting influence of money may be analogous to the corrupting influence of the unlimited distribution of viral videos on the Internet because one particular individual's advertisement may have a highly pervasive influence on the electorate, regardless of whether the information presented is accurate and accounted for.

It is unclear whether viral videos constitute the kind of political speech that addresses public policy issues, and does not undermine the goals of campaign finance, or if the videos are intended to advocate for the election or defeat of a candidate. This is unclear because traditional uses of express statements indicating a concrete approval or disapproval of a candidate are not



always present. In place of those tactics are subtle indications of advocacy for the election or defeat of a particular candidate. What is clear, however, is that anyone can create an advertisement on their home computer, put a candidate's name and insignia on it, and put it on a video sharing website, such as Youtube, for the world to see. Thus, these individuals have the ability to circumvent campaign finance laws while generating content that expressly advocates the election or defeat of a candidate. In an age when it is difficult, especially on the Internet, to discern what is genuine from what is not, the dangers associated with the unfettered posting of video advertisements by unpaid individuals might necessitate a decision for how, or whether, they should be regulated.

The vulnerability of video sharing websites on the Internet that facilitate the posting of viral video advertisements, to manipulation heightens the need to address the risks posed by them. The foregoing characterization of campaign finance law in the context of the Internet clearly justifies the need for the Federal Election Commission to continue to monitor campaign related activities online with a particular focus on viral video advertisements. The question of how this can be done in a constitutional manner is one that the Supreme Court has yet to grapple with. Despite the lack of precedent dealing with the precise issue of regulating viral videos, it can be concluded from existing precedent that viral videos should be narrowly regulated to require disclosure of the video's creators.

The subsequent analysis will investigate the complex history of campaign finance laws and the question of where the Internet fits in that context. In Part I, the relevant history regarding campaign finance law will be described. Specific judicial opinions will be utilized to show how campaign finance reform has progressed under legal scrutiny prior to the formation of the Bipartisan Campaign Reform Act (BCRA). The purpose of this historical narrative is to place

the current state of campaign finance regulations in the context of campaign activities that are conducted on the Internet.

In Part II, the BCRA, as well as the Supreme Court case associated with the act, McConnell v. Federal Election Commission (2003), will be examined in order to highlight the respective views with regard to campaign finance reform, in general, and the BCRA in particular.

In Part III, the BCRA's exemption of the Internet from government regulation will be examined in the context of *Shays v. Federal Election Commission* (2004), the Supreme Court case that addressed the issues associated with the exemption. The range of views that existed with regard to the exemption of the Internet are varied and must be understood in order to comprehend the positive and negative aspects associated with regulating the Internet. The Federal Election Commission's response to the Justices' decision to remand the portion of the BCRA that excluded the Internet from "coordinated communication regulations" will be discussed as well to portray the current status of Internet regulations (Shays v Federal Election Commission, 2004).

In Part IV, the two sides of the debate, with regard to the regulations that have been applied to the Internet, will be mentioned. Although some believe that it is necessary to regulate corporations and exempt unpaid individuals from any FEC oversight, others believe that unpaid individuals posting viral videos constitute a threat to the goals of campaign finance and, as a result, should be regulated.

In Part V, I will expand upon my own beliefs with regard to what the real issue is when applying campaign finance laws to the Internet and whether the FEC regulations need to be tightened or loosened. It is my contention that only narrow regulations can be put in place in order to satisfy both sides of the issue. It is true that exempting individuals, posting online viral

videos, from regulation is ideal because of the celebrated use of the Internet as a medium to freely express one's political views. It is also significant, however, to note the Internet's pervasive influence and rapid dissemination of information that makes it unlike any other medium that the voting public is exposed to. The FEC regulations do not take into consideration the dangers associated with viral videos posted by individual citizens, and their lack of oversight, could pose a substantial threat of circumvention of campaign finance laws in future Presidential elections. Thus, some type of regulation must be considered if we want to engage in an effective balancing act between individual freedoms and governmental interests.

Part VI continues the analysis and describes the balancing act that the government must engage in when attempting to decide whether the legislative and executive branches of government are creating regulatory measures that attach to a narrowly tailored, compelling governmental interest.

Part VII discusses the development of the Internet in the political world and why it was such a sensational addition to politics. A detailed description of the development of YouTube in general and its development in the context of politics in particular, is provided. Two YouTube videos that were highly popular during the 2008 presidential election are focused upon. The "Vote Different 1984" and "Yes We Can" videos are used to help determine whether videos like these, that are uploaded by users onto YouTube, can be regulated. Questions such as whether they constitute electioneering communications or express advocacy are posed but it is ultimately concluded that these questions do not matter when considering the precedent of the United States Supreme Court, outlined in Part XIII. After the relevant jurisprudence is detailed, Part IX outlines the most recent decision that was handed down in 2010, *Citizens United v. Federal Election Commission*.

Using the rationale from the 2010 case, Part X demonstrates why the Supreme Court Justices would vote against regulating individual YouTube users for political messages in the form of videos.

Part XI considers what the dissenting Justices might say if a question regarding the constitutionality of regulating YouTube videos were to be presented to the Court.

These considerations help to form the suggestions in Part XII stating that some type of regulatory measures, in particular disclosure requirements, should be applied to YouTube videos. Although time will only tell how, or whether, regulations such as those could be imposed in the context of the internet, there is no doubt that the Supreme Court would not permit content based regulation of user generated YouTube Videos. The Justices would neither tolerate that type of insult to the freedoms that are enshrined by the Bill of Rights nor permit such an undercutting of the basic liberties that we are guaranteed

## I. Campaign Finance Law: A Slowly Progressing Movement toward Reform

The history of campaign finance has been detailed by Melvin Urofsky, a legal historian who describes the efforts that were advanced towards reforming the campaign finance system and the Supreme Court opinions that shaped those legislative attempts. He presents a well organized and neutral view of the history of campaign finance reform, the pieces of legislation that were proposed, and the legal actions that were taken against those legislative initiatives that were enacted. Throughout the subsequent analysis, Urofsky's findings will be utilized to provide a historical context in which to discuss the application of campaign finance laws to the Internet.

The notion of Campaign Finance Reform was neither prevalent nor a concern of candidates and their parties prior to the Civil War era (Urofsky, 2005). The majority of the electorate and those individuals running for office assumed that viable candidates were going to be wealthy and well known individuals. Although there may have been a need for reform and a desire among citizens to act against the imbalance that was fueled by wealthy individuals, no one wanted to challenge the system over which wealthy politicians had an unfettered amount of control: the political system (Hoover Institution, 2009). There were fleeting attempts at legislation, such as laws that attempted to curb food and drink costs taken on by campaigns. Most of these laws, however, were ultimately ignored by candidates who were given control over how much money they spent and what they spent it on. Ultimately, there would be steps taken to address the notion that candidates could not be permitted to conduct their campaigns unfettered and immune from regulation. Until that time, however, four prevalent issues highlighted the need for campaign finance reform: the increasing importance of the candidate's character; the increasing costs to run an effective campaign; the increasing dependency of campaigns on

corporate contributions; and the obvious corruption that had plagued the nation with regard to candidates running for office.

#### A. Character

The formation of political parties was the first step towards the significance of not only the issues that the candidate cared about, but also the candidate's party label and personality (Urofsky, 2005). As time went on, the selling of the presidential product became more of a factor when developing campaign strategy. When meeting members of the voting public, it was important, and it still is important, for candidates to look their best in order to ensure that he appeared confident and was admired. Even today, the physical appearance of a Presidential candidate is of the utmost importance. The vast number of technologies through which the candidate can be viewed by the public emphasizes how significant a candidate's physical appearance is. For instance, during the 1960 election cycle, a debate between John F Kennedy and Richard Nixon sealed that particular debate for John F Kennedy because of his physically attractive qualities (Urofsky, 2005). These debates highlighted the sudden importance of sex appeal and television in the context of Federal elections (Urofsky, 2005, p.25). The character and qualities of a candidate, beyond the issues that are promoted by his or her campaign, have always been of supreme importance to the electorate. Their early significance was a factor in the rationale behind campaign finance reform because of the fact that running a campaign was becoming increasingly competitive and potentially unjust.

#### B. Costs

There were other factors besides physical attraction that had great significance with regard to a candidate's chances of success in his or her campaign. In order to market themselves effectively, certain memorabilia such as campaign buttons, banners and signs were needed to make the candidate known to the public. Campaign paraphernalia and many other aspects of running a campaign cost money. From the beginning of the Presidency, there were always campaign costs. As the bar that determined whether a candidate's campaign was successful became higher, the amount of money required to win was set higher. The increasing expenses subsequently narrowed the pool of individuals who could have the option of running for President available to them. By the mid 19<sup>th</sup> century, according to Urofsky (2005), it cost close to \$4000 to be a contender in a congressional race, the equivalent of \$79,000 today, and, in 1830, a Kentucky race cost close to \$15,000, the equivalent of approximately \$247,000 today. These figures make a clear showing that campaign expenses would not be eliminated and were becoming increasingly necessary. Thus, some form of regulation was needed to avoid the corrupting influence of money and to provide equal opportunities to all contenders.

### C. Corporate Contributions

As the expenses that one could expect to incur as a result of running their campaign became higher, candidates began to realize that they could not fund their campaigns depending solely on their personal monetary supply. During the mid 19<sup>th</sup> century, corporations became a key component of campaign financing (Urofsky, 2005). As the country became more industrialized, the corporate world and the government world became intertwined. The government financed the railroads and made efforts to protect U.S. industrial companies from the

competition presented to them in Europe. As the relationship between government and industry became closer, monetary contributions made by corporations became the essential fuel for running a well oiled political campaign. By the early 20<sup>th</sup> century, the Democratic Party and the Republican Party depended upon individuals that made contributions of approximately \$1000 for a large majority of their campaign funds. (Urofsky, 2005).

Urofsky (2005) provides an example of Marcuz Alonzo Hanna, a man who derived his wealth from coal, iron, and oil, financed almost the entirety of William McKinley's campaign when he made a donation of \$100,000. Approximately 73% of Theodore Roosevelt's campaign was financed by donations from corporations. In particular one fourth of those donations were made by "four men alone—J.P. Morgan, John D. Archbold of Standard Oil, George Gould of the Missouri Pacific Railroad, and Chauncey Depew of the New York Central Railroad"( p.11).

The financial contributions made to campaigns were helpful in their ultimate success. Those contributions, however, were not given unconditionally and the donors had certain expectations of candidates. In particular, if a certain influential and wealthy donor supplied a candidate's campaign with money, it would be expected that, if the candidate were to win the election, the candidate would keep the desires of that particular donor in mind when making Presidential decisions. These expectations would prove to be a substantial issue when efforts in campaign finance reform would begin to take place.

#### D. Corruption

During the Civil War era, Abraham Lincoln, then President of the United States, asserted that



as a result of the war corporations have become enthroned, and an era of corruption in high places will follow. The money power of the country will endeavor to prolong its rule by preying upon the prejudices of the people until all wealth is concentrated in a few hands and the republic is destroyed (Lincoln's letter of 21 Nov. 1864, quoted in Birnbaum, *The Money Men*, p. 26 as cited in Urofsky, 2005, p.7).

If only President Lincoln knew then how correct his prediction would be. The notion of campaign corruption is the same today as it was in 1864: corporate contributions do not come cheaply. The candidate is indebted to the contributor if he is successful and, as a result, caters to the interests of the donors when making certain presidential decisions. The danger there is the prevalence of the "you scratch my back, I'll scratch yours" mentality. The notion of power being concentrated in the hands of the few and the wealthy constituted a risk of corruption and deceit in the political arena. The president no longer answered solely to the American electorate but to the hands that fueled his machine throughout the campaign years. That threat takes away a substantial amount of legitimacy from the system of politics that this country is grounded upon and, as a result, the need for regulation of campaign financing came to be the paramount issue that Congress was faced with.

## E. Why Reform: The Interests at Stake

With regard to the initial efforts and continuing efforts in the present day to regulate campaign finance practices, a balancing act between the interests of the electorate and the interests of the government had to take place.

The government had, and continues to have, a substantial interest in “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office” (Buckley v. Valeo, 1976, B.1.a). Furthermore, the government looked to prevent the “the eroding of public confidence in the electoral process through the appearance of corruption” as well as to provide the voting public with sound information (McConnell v. FEC, 2003, 1.a). These interests were significant because fulfilling them meant shielding the political system from the fate of becoming a tool reserved for use only by the well off and well funded American citizens.

The needs of the citizens had to be viewed in the context of the government’s interests when attempting to generate measures of reform for campaign financing. In particular, the notion that campaign contributions constituted a form of speech became a concern and acted as an obstacle for reform efforts to overcome. Political speech has always had a special place in the heart of the first amendment (Urofsky, 2005). Thus, this idea begged the question of whether certain expression—namely that expression made through donations—could be regulated in order to implement effective measures toward reform.

## F. Taking the Scenic Route: The Bend on the Road toward Buckley

Prior to the breakthrough Supreme Court case in Buckley v. Valeo (1976), many attempts at reform were made. Various measures were taken to address the increasing influence of corporations. At first, some states tried to ban contributions altogether but these efforts proved to be futile (Urofsky, 2005). The Tillman Act was proposed in 1907 and constituted the first piece of legislation that prohibited corporate contributions to political campaigns. Its focus, however, was narrowly placed on federally chartered corporations that constituted a small portion of contributions (Urofsky, 2005). Although this was the first effort at reform, and may have seemed sound theoretically, it did not have any practical effect on campaign financing.

The Publicity Act, passed in 1910, was somewhat more effective than the Tillman Act (Urofsky, 2005). The act proposed reporting requirements in House races that would require campaigns to report all contributions exceeding \$100 (Urofsky, 2005). Furthermore, the proposal placed caps on spending in House races and Senate races. Despite its precedential efforts at imposing disclosure requirements, the Publicity Act failed.

The Tillman Act and the Publicity Act failed to achieve their stated goals, as well as subsequent efforts at reform, such as the Federal Corrupt Practices Act of 1925, the Hatch Act of 1939, the Smith-Connally Act of 1943, the Taft-Hartley Act of 1947, and the Long Act of 1966, (Urofsky, 2005). They failed because of the lack of enforcement mechanisms, the ease with which loopholes could be found to get around the laws, and first amendment free speech issues.

As a whole, Congress continued to hesitate in their efforts at reforming the campaign finance system and did not make substantial strides toward that goal despite the efforts of certain senators. Many committees in the House of Representatives expressed disapproval because of

the proposed laws' excessive limits on contributions and expenditures that would invite circumvention of the law (Urofsky, 2005). The costs of running an effective campaign were too high to meet the limitations imposed by the current legislation regarding campaign finance. The Hennings Bill constituted a response to this issue and proposed raising the limitations on the spending of candidates and organizations (Urofsky, 2005). This version of the bill did not reach the Senate after its approval in the House. Senator Hennings attempted to strengthen the bill and got it passed in the Senate but not in the House. The Hennings bill ultimately died along with any desire by other Senators to take Senator Hennings place as the advocate for campaign finance reform (Urofsky, 2005).

Reform may have been a desire of many politicians but there was not a large number of measures being taken. Many Presidents, such as John F. Kennedy and Lyndon B. Johnson, made strides toward reform. Other than those efforts, however, very little else was being considered (Urofsky, 2005). Republicans tried to establish an "independent Federal Election Commission...[and to propose drastic reductions in] the money spent by political action committees sponsored by unions representing employees of federal contractors" ( Urofsky, 2005, p.33). Despite these efforts, however, Congress failed to engage in campaign finance reform efforts for the remainder of the 1960s.

The most substantial change that the political world was confronted with existed in the invention of the television. This useful tool became the single most significant factor in the heightened costs of executing a successful campaign (Urofsky, 2005). Because new technologies like the television facilitated advertising and, as a result, were employed by campaigns with millions of dollars to throw into this useful medium, Congress began to see the benefits of imposing limits on contributions and spending (Urofsky, 2005).

The main idea behind proposals that Congress deemed worthy of review was to limit campaign contributions and expenditures and counter the effect of those limitations with public funds (Urofsky, 2005). Two measures, in particular, were passed by Congress—the Revenue Act of 1971 and the Federal Election Campaign Act (FECA) of 1971.

The Revenue Act created a general fund for vice presidential and presidential candidates to use and also allowed citizens to contribute a dollar to the fund when filling out their tax forms (Urofsky, 2005). FECA aimed to strengthen reporting requirements and limit the money that was spent on advertising. It also adjusted the definitions of what contributions and expenditures are to include any costs or contributions that were campaign related. In addition, limits were imposed on the candidates' spending of their own money to fund the campaign—“\$50,000 for presidential or vice presidential elections, \$35,000 for senators, and \$25,000 for representatives” (Urofsky, 2005, p.41).

The Federal Election Campaign Act was subject to certain changes when the Watergate scandal involving President Nixon fueled the fire of the American public with regard to the fundraising tactics used by his campaign. This motivated efforts to amend FECA and, in 1974, specific amendments were added. Enforcement mechanisms were imposed when the Federal Election Commission was established. In addition, limits were placed on contributions at no more than \$1000 for a candidate in a primary, runoff or general election. Tightened regulations were placed on candidate expenditures, and they were prohibited from spending more than ten million dollars in the primaries and twenty million dollars in the general election. Provisions for public funding and disclosure requirements were also implemented. The amendments to FECA met the desires of reform advocates who had been trying to get them met for 20 years (Urofsky, 2005). Despite the positive views that were espoused with regard to the amendments, the

implications with regard to the first amendment and political speech motivated the lawsuits that were brought in response to FECA. The overall conflict that was present in these lawsuits was that between supporters of campaign finance reform who believed that FECA and the 1974 amendments helped to limit the corrupting influences that had been filtered into the political process, and opponents who believed FECA represented an unconstitutional limitation on free speech, the most prominent of all the rights given to Americans (Urofsky, 2005).

Major criticisms of FECA were outlined in the case of *ACLU v. Jennings*. The act's limitation on candidates of what they could spend; its chilling of independent speakers through limitations on the amount of money a person could give; its invasion of privacy due to the disclosure requirements; and, most importantly, its violation of the 1<sup>st</sup> amendment in its limitations on political speech, justified the notion that FECA violated the First Amendment (Urofsky, 2005). In past Judicial opinions, the Court has characterized the importance of political speech when stating that its protection is

crucial to each citizen's ability to perform civic obligations, and although the content of that speech may at times be offensive, in the final analysis the people in their collective wisdom will choose the better ideas and discard the less useful. Rather than stifle "bad" or unpopular speech...the remedy is more speech, and the result will be an informed citizenry and a vibrant democratic society. (Urofsky, 2005, p.53)

If reformers wished to stand by this contention regarding political speech, as well as their other criticisms of the campaign finance laws in place, they would have to hope that the government did not exhibit a compelling interest in limiting the political speech of individuals and candidates (Urofsky, 2005). Opponents to FECA chose to take the current campaign finance

laws to Court and the breakthrough campaign finance law case of *Buckley v. Valeo* (1976) was born. It began in the District Court for the District of Columbia, where a confusing and complex ruling was set down by the three judge panel, upholding all provisions of FECA except the provision requiring issue advocacy groups to disclose their contributors and the amount of money they received. The Supreme Court of the United States granted *certiorari* and agreed to hear oral arguments in the case.

#### G. *Buckley v. Valeo*: a step towards McConnell

Prior to *Buckley v. Valeo* (1976), the Courts had avoided addressing the First Amendment issue with regard to campaign finance regulation. Although in two cases, the dissenting Justices had strong opinions on First Amendment grounds,

...the majority of the Court did not seem to equate campaign finance regulation with speech. Rather, the majority opinions emphasized the concern of Congress with maintaining the integrity of the political system by preventing corruption through large donations. (Urofsky, 2005, p.126)

*Buckley* represented the first time that the Courts took into consideration the conflict between the interests of the government and First Amendment protections of speech with regard to campaign finance regulation. The decision that came down from the *Buckley* court consisted of eight parts. In short, the first part upheld the ceilings that FECA placed on individual contributions, stating that they did not violate the First Amendment. Under strict scrutiny, the Court rationalized that the government had a compelling interest in avoiding or the appearance of corruption. Thus, this justified the limits that the government placed on speech.

The Court struck down, however, the ceilings on individual and group expenditures, holding them to be unconstitutional because they imposed significant burdens on political speech. Political speech, it was held, exists at “the core of our electoral process and of the first amendment”(Urofsky, 2005, p.128). The Court addressed limits on private party’s spending money for political use. They ruled that these limits violated the first amendment because political speech, under the condition that the speech was not done in an effort to conduct actual campaigning, could not be regulated. The Court in *Buckley* put together a list of words that, if they were present in an advertisement, that advertisement would be considered a campaign advertisement subject to regulation. These words included “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or “reject”(Urofsky, 2005, p. 129). As long as these words were not present in an advertisement, the ad would be exempt from regulation.

The Court struck down limits on what the candidate could spend with their own money and rationalized that it got in the way of their constitutional rights to free speech. The disclosure rules, however, were upheld by the Courts because congress was deemed to have a compelling interest that was narrowly tailored to its purposes. The requirements provided people with information regarding where the candidate got his or her money; reduced the risk of corruption; and were necessary in order to obtain this information that the public had a right to see (Urofsky, 2005).

The remaining rulings dealt with the process of choosing members of the FEC and public financing. As with many Supreme Court decisions, critics lined up to make their arguments. Overall, the main concern was with the rulings that upheld certain limits on spending. People felt that, regardless of the governmental interest, individuals could not freely engage in political



speech when that speech was limited through regulations (Urofsky, 2005). Proponents of the decision fired back, stating that, to preserve democracy, some of the measures taken by the Court were necessary.

Despite its precedential status, critics of the Buckley Court's decision felt that "one good—freedom of expression—[was being placed] over every other virtue, allowing those who can provide large amounts of money [to do so], the very undue influence that the Court decried in Buckley" (Urofsky, 2005, p.132). Others believed that the anticorruption interests that the Court found compelling in upholding contribution limits was not enough to constitute the burden on political speech (Urofsky, 2005). A major issue was that the "Court made the mistake of treating the system as an ideal, what it *should be*, rather than a reality, *what it is*" (Urofsky, 2005, p.133). These individuals believed that the political marketplace, although very important to the First Amendment and American citizens, does not exist in a vacuum and, in order for it to run smoothly, it should be subject to some form of regulation.

#### H. Post-Buckley and Further Disarray

Although, in the Post-Buckley world, FECA was amended twice, these changes had little influence on campaign financing (Urofsky, 2005). Between 1974 and the early 1990s, Political Action Committees (PACs) had a major monetary influence on elections, and incumbents possessed an advantage in that they received much of the money that was raised. Because costs for campaigning continued to soar, campaigns had to find ways to raise money, and this was done through soft money and PACs, the two villains in the Campaign Finance saga (Urofsky, 2005).

PACs were groups formed for a specific purpose and collected monetary donations that would be given to a particular candidate that they supported. PACs did not have as much influence prior to 1974 as they do today. A 1979 FECA amendment eliminated limits to donations made to PACs as long as they were not added to a candidate's budget and were related to party building activities, such as grassroots or get out the vote efforts. This provided a convenient loophole for individuals to bypass the original intent of FECA to prevent the corruption that could result from substantial amounts of money being donated to campaigns. Therefore, PACs became more of an integral component in campaign financing because individuals who were limited in how much money they could contribute directly went through PACs that would support the candidate that the donor approved of.

Unregulated, soft money donations made to PACs heightened the costs of running a campaign because the bar was now set higher for the requisite amount of money to run a successful campaign. Although hard money was constituted as federal funds subject to the regulations of FECA, soft money was considered to be nonfederal funds with no regulation requirements imposed upon them. Soft money donations had no limits as long as the money was not used to fund a particular candidate's budget and that it was used primarily for party building activities. People, however, could simply label soft money as being used for party building activities and use it to finance the candidate's campaign. As a result, reporting on soft money expenditures could not be trusted (Urofsky, 2005). Soft money's role in the total budget of a campaign went from 8% in 1980 to 42% in 2000 (Urofsky, 2005).

Although it was not permissible to use soft money to finance a campaign, it was indeed used to finance campaigns. Advertisements were being paid for with soft money because they were so-called issue advocacy advertisements and, therefore, did not explicitly support or oppose

a candidate. If they did, they would be considered express advocacy advertisements. This distinction, however, was neither clear nor concise. An advertisement promoted as issue advocacy could be an express advocacy advertisement that did not use “magic words”. It was clear that wealthy individuals who wanted to support their favored candidate could now do so. They simply funneled their money through to campaigns in some other manner and, subsequently, circumvented the regulations of FECA (Whitaker, 2004).

By the mid 1990s, it had become clear that soft money constituted a direct contradiction to the goals of FECA (Urofsky, 2005). The foregoing issues, especially those surrounding the soft money problem, piqued Congress’ interest in creating a new campaign finance regulatory scheme. After a barrage of proposals and bills were introduced and killed, John McCain and Russell D. Feingold’s bill was signed into law by President Bush in 2002. It would not be long, however, before legislation was brought against the newly implemented Bipartisan Campaign Reform Act on First Amendment grounds, resulting in the next groundbreaking Supreme Court opinion of campaign finance jurisprudence: *McConnell v. Federal Election Commission* (2003).

## II. The Bipartisan Campaign Reform Act and McConnell v. Federal Election Commission

The Bipartisan Campaign Reform Act was created with specific goals in mind—eliminating the corrupting influence of soft money, redefining what a campaign advertisement is, limiting the amount of money that individuals could contribute, and imposing stricter rules regarding disclosures and reporting (Urofsky, 2005).

A major component of the act was its ban on soft money donations to national political parties and the prohibition of soft money's presence in the party's accounts (Urofsky, 2005). Simultaneously, however, the Act increased limits on hard money donations under the condition that hard money would be subject to more stringent reporting requirements. The limit was raised from \$1000 to \$2000 with regard to how much an individual could give to a PAC. The limits imposed on PACs for how much they could contribute to a candidate remained at \$5000 per candidate, per election (Urofsky, 2005).

Another provision that was a target for First Amendment litigation was the prohibition on "corporations, trade associations, and labor organizations from paying for "electioneering communications" within 60 days of a general election and 30 days of a primary using "treasury money"" (Urofsky, 2005, p.112). The BCRA defined an electioneering communication as an advertisement that clearly identifies a candidate that is broadcast to that candidate's state or district (Urofsky, 2005). An additional change was brought on when including the provision that brought creators of advertisements out of the shadows and enforced identification regulations that required a candidate to "indicate that they had approved ads run by the committees they controlled" (Urofsky, 2005, p.112).

#### A. First Stop—the District Court

The first judicial stop for the BCRA was in the District Court where the Bipartisan Campaign Reform Act was attacked by the ACLU as a violation of the First Amendment. Senator Mitch McConnell, as well as many interest groups, joined this effort to challenge the law. Everything about this case, at the District Court level, was disorganized and confusing. The

most important policy debate at issue was the extent to which Congress “could attempt to control campaign financing related to federal offices, including the political speech that makes up those campaigns, in order to prevent corruption or its appearance” (Urofsky, 2005, p.151).

Each provision of the BCRA was disputed. Title I outlawed soft money, and it was argued that it constituted a violation of the First Amendment. In particular, it prohibited, among other activities, political parties from using soft money to support activities that may have an effect on federal elections; it prohibited “parties from soliciting for and donating funds to tax-exempt organizations that spend money in connection with federal elections”; and it prevented the creation of a loophole by political parties with its prohibition on “state and local candidates from raising and spending soft money to fund advertisements and other public communications that promote or attack federal candidates” (Whitaker, 2004, p.12).

Title II imposed limits on electioneering advertisements that came before the primaries and general elections, and this restriction was attacked for preventing speech from being uninhibited and free. Of all the arguments, those aimed at Title II were the most intense. Titles III, IV, and V related to what broadcast media could charge candidates for air time, issue advocacy advertisements, and disclosure requirements. A major argument regarding issue advocacy was that an issue advocacy ad could not be distinguished from the BCRA’s conception of an advertisement about a national legislative issue.

In their respective briefs to the Court, the two sides presented wholly different views. One side, consisting of Senator McConnell and his co-petitioners, took the view that it would be unreasonable, as a general proposition, to undermine the protection that the First Amendment provides to political speech. They stressed the need to cleanse the political system of the abuse it had endured for years and to do away with corruption in the political world but not at the

expense of First Amendment freedoms. They believed that the BCRA placed unreasonable and impermissible limits on political speech.

The other side, consisting of the Federal Election Commission, as respondents, emphasized that their interests in limiting corruption or the appearance of corruption was compelling because of the resulting threat to the political system that came from corruption (Urofsky, 2005). The government asserted that substantial evidence existed to show the need for regulation of the campaign finance system and that Congress should be permitted to regulate it due to the compelling interests at stake. They held the belief that the need to rid the political system of loopholes and corrupt practices would be met if regulation were permitted to the extent that it was in the BCRA.

The District Court handed down a 774 page opinion. The decision as a whole, however, was too complex and confusing that a stay was sought so that the decision would not take effect until the Supreme Court heard oral arguments. The judges in the District Court were so divided in the decision that it is difficult to discern any particular rationale. Overall, ten sections of the BCRA were deemed unconstitutional by the District Court. Despite this, the opinions of these judges would be inconsequential because the Supreme Court was bound to hear this case and hand down a decision differing in many respects from that of the lower court. The Supreme Court accepted the case, *McConnell v. Federal Election Commission*, right before they were scheduled to convene for the summer.

## B. Next Step—The United States Supreme Court

The main question at issue when *McConnell v. Federal Election Commission* (2003) came to the Supreme Court was whether the Bipartisan Campaign Reform Act, and its limitations on political party activities, constituted a violation of the United States Constitution. In a case handed down prior to *McConnell*, the Court stated that the First Amendment does not necessarily overcome the government's interest in eliminating or reducing the corrupting effects of corporate money on the political system (Urofsky, 2005). This was considered to be a slight indication of how the Court would decide the challenge to the BCRA.

When the decision was handed down, the Justices dealt separately with the 5 titles of the BCRA. With the use of a less strict standard of review, the closely drawn scrutiny, the Court upheld all provisions under Title I as constitutional because they were closely drawn to a compelling governmental interest. The ban on “political party committees at any level soliciting funds for, or making direct contributions to, non-profit groups” was upheld because no evidence had been shown that these bans would have an effect on First Amendment rights in practice (Urofsky, 2005, p.209). Although they qualified for non-profit status, the court reasoned that these groups were not politically neutral. The Court also upheld “the ban on federal officeholders or candidates from soliciting soft money in connection with a federal election and the ban on state and local candidates or officeholders from using soft money to fund ads promoting or attacking federal candidates”(Urofsky, 2005, p.210).

Although, technically, the ban on soft money in Title I could be seen as negatively affecting First Amendment rights, the Court asserted that there was insufficient evidence to show that this would actually happen. The Court, by using a less rigorous standard of review, showed

deference to congressional judgment because of the corrupting influence that soft money has on political parties.

The Court then addressed Title II, which pertained to electioneering speech, reporting requirements, time controls, and issue advertisement identification. Opponents of the BCRA asserted that the limits on issue ads were unconstitutional because, if they did not contain the magic words outlined in *Buckley*, then they were exempt from regulation. The Court, however, rejected this assertion and held that “the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad” (McConnell v. Federal Election Commission, 2003, 5.a). The Court asserted that the First Amendment does not prohibit regulation of electioneering communications even though they do not always contain express approval or disapproval of a candidate (Whitaker, 2004). The Court qualified their approval of the Title II provisions by stating that the BCRA is not an overall ban on expression but a simple regulation (McConnell v. Federal Election Commission, 2003). The regulation was found not to be overbroad because most advertisements broadcast in the days prior to a general election or a primary election are broadcast with the purpose of influencing the election (Whitaker, 2004, p.15). The Court’s view was that Title II addressed the issue of soft money being used by corporations and unions to fund a “virtual torrent of televised election-related ads” (McConnell v. Federal Election Commission, 2003, IV, 4). The Court recognized a compelling governmental interest and upheld the portions of Title II that referred to electioneering communications.

The “Stand-By-Your-Ad” provision, requiring that candidates state that they have authorized a particular advertisement broadcast by that candidate’s campaign, was also upheld as constitutional. The Court asserted that this regulation furthered the important governmental



interest of opening up campaign financing to the public and was, therefore, permissible (McConnell v. Federal Election Commission, 2003).

Although these rulings represented a major win for proponents of campaign finance regulation, the Justices made a statement foreshadowing the possibility of future corruption, despite their opinion:

We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how congress will respond, are concerns for another day. In the main we uphold BCRA's two principal, complementary features: the control of soft money and the regulation of electioneering communications. (Urofsky, 2005, p.215)

The dissenting Justices in the case made familiar arguments that pertained to the lack of evidence that overt corruption had occurred and the obvious violation of the First Amendment guarantee of free speech. Justice Scalia called the decision "a sad day for the freedom of speech" and cited three flaws in the majority opinion: "1) money is not speech, 2) pooling money is not speech and 3) speech by corporations can be abridged" (Urofsky, 2005, p.226). Justice Scalia asserted that it was clear that, in politics, money buys expression and to limit it is to limit expression.

Negative reactions to the court's decision ensued and people believed that the Court was not valuing the First Amendment and giving too much discretion to Congress. Supporters, however, now felt confident that they had a campaign finance regulation scheme with teeth.

### C. Failures of the Bipartisan Campaign Reform Act and McConnell

The McConnell Court failed to acknowledge the unrealistic nature of the belief that a system can function without soft money filtering into the mix. Soft money is not necessarily exempted from use simply because the Bipartisan Campaign Reform Act prohibits its use. In every stage of campaign finance reform, it has been the favored activity of politicians to find the loophole. Soft money can be used under the radar and through various means. In particular, its use for the creation of express advocacy advertisements, while prohibited by the BCRA, can go unnoticed if done correctly. Soft money could pay for advertisements that disguise themselves as issue advertisements when instead they are better characterized as electoral advocacy advertisements that should be subject to regulations.

From the Court's ruling in *McConnell*, it seems that issue advocacy advertisements were left relatively untouched because they did not bear a relationship to the effect of unregulated express advocacy advertisements. The location of the line that separates issue advocacy and express advocacy advertisements, however, is blurry. Can the Court regulate certain issue advocacy advertisements if they do not contain obvious signs of express advocacy for or against a candidate? Can the effect of soft money, that justified its use being banned, come about through another medium? Moreover, can the Court regulate so called issue advertisements if they occur on a medium that bears the potential to have the same effect that soft money has? What if that medium is the Internet, a new and novel technology that affords many individuals the opportunity to engage in expression freely? Does the Internet have the same effect that soft

money does in that its unfettered use for supposed issue advertisements could constitute the kind of corruption that Congress seeks to prevent? These questions were left unanswered by the Court in *McConnell* but would not disappear from the campaign finance jurisprudence. In the case of *Shays v. Federal Election Commission* (2004), questions such as these were addressed when legislative action was taken against the BCRA's exemption of the Internet from the definition of a "public communication" subject to FEC regulations.

### III. Shays and the BCRA Internet Exemption

The Bipartisan Campaign Reform Act required all political parties or political candidates use federal funds, or hard money that would be regulated, to finance "public communications" that constituted a promotion or attack of a specific candidate that is clearly identified in the communication (FEC, BCRA Campaign Guide Supplement, 2003, p. 4). Congress defined the term "public communication" as "a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising" (FEC, BCRA Campaign Guide Supplement, 2003, p.14). This definition effectively exempted all Internet activities from those activities that would fall under regulation, giving free reign to Internet users advocating the election or defeat of a candidate. On October 21, 2005, however, The District Court for the District of Columbia deemed this exemption unconstitutional.

The Court held that, under the current BCRA regulatory scheme, communications occurring over the Internet cannot be characterized as coordinated communications under the FEC regulatory framework (Shays v. Federal Election Commission, 2004). This exclusion was

asserted to have gone against the intentions of Congress when it was created. There were many reasons provided for excluding the Internet such as difficulties in enforcement of a vast medium. Congress did not specifically include Internet under the definition of a public communication but it did include “the phrase any other form of general public political advertising” (Shays v. Federal Election Commission, 2004, 4.iii.b). The Court contended that at least some Internet activities should fall under that definition. The Court asserted that excluding every aspect of the Internet permits political parties to take advantage of advanced technology that will only serve to re-create the negative effects of soft money (Shays v. Federal Election Commission, 2004). The Internet bears substantial similarities to other forms of communications that are regulated due to its capability to support certain forms of political advertising (Shays v. Federal Election Commission, 2004). The Court stated that it has always been a precept of campaign finance law that expenditures made “in cooperation, consultation, or concert, with or at the suggestion of a candidate” are considered contributions and, therefore, subject to regulation in order to avert the formation of loopholes around certain regulations (Shays v. Federal Election Commission, 2004). To permit unregulated use of the Internet for campaign activities would allow unfettered circumvention of the law and, as a result, facilitate corruption or its appearance (Shays v. Federal Election Commission, 2004). The Court remanded this regulation to the Commission, stating that they should take into consideration the issues regarding the Internet and carefully create regulations, specifying the scope of the BCRA’s coverage with respect to the Internet.

#### A. The Special Significance of the Internet

As the *Shays* Court stated, the Internet bears a unique importance to politics and a debate exists over whether that significance is a threatening or a democratizing one. In general,

however, the Internet is deemed to be a useful device because of its widespread nature and its ability to permit individuals to reach each other in a short amount of time. It is a medium that is open to everyone, usually at a low cost, and not controlled by a single entity (Center for Democracy and Technology, 1999). The Internet is interactive in that individuals can engage in dialogue with other users, despite whether they have similar views, and they can choose which content they would like to view with the click of a button. Thus, whereas individuals may not have a choice with regard to their exposure to television advertisements, the interactive nature of the Internet gives a user options. All individuals have access to an ongoing dialogue that they are not only active participants in but have control over with regard to what dialogues they wish to be exposed to (Center for Democracy and Technology, 1999). The Internet, with the foregoing characteristics attached to it, has the potential to act as a democratizing force with its ability to increase citizens' participation in politics.

This medium also has the potential, however, to be used as a tool for circumvention in that individuals can post election related content that bears signs of express advocacy without being accountable for the content and subject to regulation. This possibility is part of the rationale behind the determination made by the Shays Court that some Internet regulations were necessary.

#### B. The Federal Election Commission's Response to the Shays Court

The Federal Election Commission, when forming the Internet regulations, made sure to meet two goals: avoiding any regulation of blogs that were run by individual citizens; and, addressing the issue of Internet users spending vast amounts of money to engage in certain election activities for a candidate. The latter group was one that the FEC decided should be

subject to limited regulations (Whitaker & Cantor, 2005). The question went unanswered, however, of how to place a value on a particular communication occurring over the Internet and whether the proposed regulations could be applied to future technologies or developments on the Internet (Whitaker & Cantor, 2005). Among the imposed regulations were provisions regarding the definition of a public communication, disclosure requirements, coordinated communications, the status of the press online and, most importantly, prohibitions regarding individuals or volunteers engaging in political activities online.

The new regulations for the Internet, in addition to those communications already laid out in the original definition, included *paid for* communications posted on another individual's website. *Paid for* communications is content generated by individuals who are paid to post it in a particular location. These communications were considered "general public political advertising" and therefore, under the new definition, were "public communications". Those Internet communications that were unpaid such as "blogs, email and a person's website" were not subject to regulation (FEC, Party Guide Supplement, 2007, p.25).

The rules for disclaimers, requiring statements of attribution of campaign advertisements, applied to the Internet in that, for instance, unsolicited emails sent using address books of 500 or more names in a period of 30 days needed to have a disclaimer in it (Whitaker & Cantor, 2005). Furthermore, paid Internet advertisements on another person's website needed some kind of attribution as well. No disclaimers, however, were required on an individual's blog and only the candidate, if they paid a blog to post certain material, needed to make a disclosure of that payment (Whitaker & Cantor, 2005).

In addition, Internet ads that were placed on another person's website and coordinated with a campaign were considered coordinated communications and contributions to a candidate

and, therefore, subject to regulation (Whitaker & Cantor, 2005). Media activities, such as those conducted by bloggers, were not explicitly exempted, but the FEC was satisfied in asserting that any actions taken by the media that currently fell under the media exemption would continue to be exempt in the context of the Internet (Whitaker & Cantor, 2005).

Finally, the proposed regulations exempted from the definitions of contribution or expenditure those unpaid activities intended to influence a federal election engaged in by an individual or volunteer with their own computer and Internet service (Whitaker & Cantor, 2005). Thus, these activities were not subject to regulation.

These regulations addressed the issues with regard to the Internet in a fashion that seemed to be in accordance with the *Shays* ruling. The debate raged on, however, over whether regulations on the Internet were permissible on their face and whether it was more regulation or less regulation that was needed. Although some believe there should be no regulations due to the nature of the Internet as a medium for free speech, others feel that the consequences of unregulated advertisements, even those posted by individuals, could be in opposition to the goals of campaign finance reform. Thus the debate boils down to two sides: one for no regulation and one for more stringent regulation than the current regulatory scheme.

#### IV. To Regulate or Not To Regulate? When is it Enough?

Opponents of regulating the Internet believe that the nature of the Internet as an open medium for anyone to use calls for no regulations to be imposed on individuals engaging in political speech through the Internet. They argue that the goals of campaign finance would not

be served with the implementation of regulations. Moreover, regulating the Internet will lead to a slippery slope and all future technologies may be will be regulated if they bear some threat to campaign finance goals.

Opponents of regulation strongly believe that applying campaign finance laws to the Internet would limit its potential to democratize the political arena, discourage citizens' involvement in politics, and dampen the prospects of having a democracy that is truly by the people and for the people (Testimony of Vice Chairman Michael E. Toner, 2005). The interactive nature of the Internet makes campaign finance laws inapplicable because "campaign finance regulation assumes a single entity creating and disseminating a message and controlling its content" (Sandler, 1999, p.2). Opponents of regulation have likened the Internet to a virtual soap box upon which people can freely stand and express their political views (Alliance for Justice, 2005).

A further argument of opponents asserts that campaign finance laws are inapplicable to the Internet because the goals of campaign finance would be better satisfied with no regulations. A major goal of campaign finance law is to diminish the effect that money has on campaigns. With regard to the Internet, however, its ability to place all users on equal footing with one another and its nature as an inexpensive medium precludes the possibility that regulating the Internet would reduce the effects of money on campaigns (Center for Democracy and Technology, 1999).

Another goal of campaign finance is to prevent corruption or the appearance of corruption in the political arena. In particular, the corrupting influence of corporations was what was most troubling to the FEC. The Internet, however, does not constitute a substantial increase



in the campaign's monetary expenses because of its characterization as a medium that does not require a large amount of money for its use (Center for Democracy and Technology, 1999).

A final goal of campaign finance is to enhance the value of the political arena. The Internet satisfies this goal without regulation because of its characterization as a democratizing force that permits individuals to engage in the political debate with equal access (Center for Democracy and Technology, 1999).

Another factor in the argument that the Internet should not be regulated is the possibility that regulating the Internet could lead to future technologies being regulated in fear that the goals of campaign finance law will be compromised. The new technology of the television was new at one point, as well, but was subject to regulations. The opponents of regulation believe that "campaign finance laws will once again be used to control and neuter a technology that threatens the political status quo" (Samples, 2005, p.2). Thus, a threat to free speech and, more importantly, political speech, is present and those freedoms must be protected.

On the opposite side of the debate, supporters of regulations believe that, from a realistic standpoint, the online nature of the political content does not change its underlying effect that makes that content a candidate for regulation. Supporters of regulation believe that the risks posed by the Internet's use as a tool for circumvention of campaign finance laws makes regulation necessary. The regulations placed on the Internet disregard the blurred line between issue advertisements and express advocacy advertisements, making it difficult to determine which advertisements posted online require regulation. As a result, corruption could ensue because advertisements that currently do not, yet should, fall under the current regulatory framework go unnoticed and continue to have an influence on the election.

Supporters assert that the fact that the political speech that is expressed is online as opposed to being on television does not automatically exempt the Internet from all regulation (Rushing, 2002, p.83). Proponents of regulation believe that, although the Internet is a useful medium in that it has the potential to democratize the system, its potential to cause widespread circumvention of campaign finance laws justifies its regulation. The Internet, by its own characterization as a medium that can be used without many limits, provides another method by which “political operatives seek new ways to reach voters and skirt soft-money rules” (Zack, 2002, p.1). The endless amount of money that can be poured into the Internet for campaigning purposes defeats the purpose of the regulations placed on soft money. Essentially, the Internet acts as a bottomless pit where candidates and individuals can throw their resources to generate political content that goes unregulated. Interest groups looking to use unlimited resources to advocate against a candidate before an election without having to go through the regulatory processes can simply look to the Internet without fear of FEC oversight (Zack, 2002).

Proponents of regulation believe that the current Internet regulatory scheme, and its lack of consideration for the negative effect of soft money being used online, will only enhance the corrupting influence of money in campaigns. As a result, individuals, or even corporations posing as individuals, can bypass campaign finance laws and generate content with an unlimited amount of resources. This content may or may not be a candidate for regulation but it is clear that the distinction between content that constitutes issue advocacy and content that constitutes express advocacy becomes blurry when it occurs on the Internet. The exemptions for content posted by individuals will be exploited eventually and proponents believe this danger enhances the potential of the Internet to have a corrupting influence on elections.

## V. What is Really Needed? More Regulation or Less Regulation?

As the foregoing analysis has established, without question the Internet is a unique medium that permits individuals across the country to engage freely in political speech. The Internet, in and of itself, demands some form of protection from government interference. The line between what the government has a compelling interest in regulating and what the government has no compelling interest in regulating, however, is somewhat blurry. It is difficult, through a regulatory framework, to distinguish between online videos that are express advocacy and those that are issue advocacy. Despite this difficulty, it may be necessary to regulate these videos in some way that would address its vulnerability to abuse.

The current regulatory scheme for the Internet, established as a response to the *Shays* opinion, ignores the implications of videos posted online by unpaid individuals. It is not certain that the individual is indeed an individual that is not being paid for their efforts. It is also uncertain whether the content they post is not characterized better as content that expressly advocates for the election or defeat of a candidate.

Because of these uncertainties, the Internet continues to present a troubling dilemma for campaign finance reform. The ruling presented by the Supreme Court in *Buckley v. Valeo* (1976) prompted certain proponents of regulation to make the assertion that the system cannot be justifiably treated as an ideal or as it should be. The system should be treated as it is in reality: one that is highly vulnerable to abuse, manipulation, and corruption. This argument is applicable to the Internet, and the medium cannot simply be viewed as one that solely preserves and promotes democracy, at least where unpaid individual posters of viral videos are concerned.

## VI. The Scales of Justice: A Necessary Balancing Act

To truly preserve democracy, it may be necessary that some regulatory measures be imposed upon specific posters of content on the Internet. The manner by which the Federal Election Commission and Congress can do this, or whether they can do this in any form, will need to be determined. Most often, the executive branch of the Federal government can look to the judicial branch, in particular the opinions of the Supreme Court, to gain guidance as to whether a proposed regulation would be constitutionally plausible. The United States cherishes its freedoms and will take the requisite time to engage in the delicate balancing act of individual, basic freedoms and the interests of the government. In any context regarding the constitutionality of a particular provision, this balancing act must be engaged in. As a result of this balancing, it is clear that the Supreme Court has shown a desire to keep individual citizens free from regulation. The prerequisite to investigating the precedent of the Supreme Court is to discover the true meaning of the Internet, and what it has represented for the political arena, so that we may understand why the Justices' want to shield individuals from regulation and why dissenters disagree.

## VII. The Internet Goes to Washington: The Rise of the YouTube Election

Over the past 20 years, the Internet has changed the way we think, act, and function in our daily lives. A revolution for how individuals engage with one another in the world of politics has commenced because of the applications running through the Internet, such as web browsers and video sharing websites. As a result, political campaigns have placed more emphasis on Internet politics. Today, candidates are on social networking websites such as Facebook and MySpace, and are creating their own personal web sites for their supporters to both gather information and donate money to the candidate.

The subsequent initiation of blogging, social networking websites, and user generated content caused a major shift in the notions surrounding what constituted effective devices to influence the electorate. In a positive sense, the Internet gave candidates and citizens a chance to communicate freely and knock down the theoretical barrier between Washington and the rest of the country. Furthermore, it made, and continues to make, citizens feel that they have more of an influence on the political process (Turkheimer, 2007).

The risks associated with the various applications running through the Internet, however, are evident in that the system has the potential to be used as a tool to negatively impact a candidate's chances of winning an election. Thus, the issue with the communicative devices available on the Internet is not only a question of what tools a candidate can use to execute a successful campaign. It is, more importantly, a question of what the consequences of those tools are and how they can be used against the candidate (Turkheimer, 2007).

The rapid development of the Internet from its birth to the present has highlighted the various ways in which candidates' have lost control over what the electorate is exposed to. Although the issue of control has always permeated political campaigns, the communication technologies channeled through the Internet have made that loss of control more obvious.

Moreover, with the widespread reach of these technologies over the Internet, the task of spreading information, whether negative or positive, has become very easy (Turkheimer, 2007). One website in particular has stirred up the political process in that many occurrences that campaigns would prefer to shield from public scrutiny are revealed. The website that has made substantial contributions to shaking up the political world is the video sharing website entitled YouTube.

Anyone is permitted to upload content to YouTube, give it any name they desire, and ‘tag’ it with specific words that will make searching for the video an easier task (Turkheimer, 2007). With YouTube, candidates have no control over the content that is posted, when it is posted, or how it is perceived by its viewers (Turkheimer, 2007). The medium of YouTube is unlike television in that neither candidates nor any Federal agency can exercise control over the content that is distributed through the website, unless that content violates intellectual property rights (Turkheimer, 2007). Although candidates use the website to upload their own advertisements and announcements to their supporters, user-generated content can present many difficulties for presidential candidates due to their potentially viral nature. ‘Viral videos’ that are posted on YouTube are referred to as ‘viral’ because of their high speed dissemination to millions of viewers with free access as well as their ability to have a substantial influence on the outcome of an election (Wallsten, 2009). These videos are described as ‘user generated’ in that they are not, on the surface, created by a political campaigns or corporations. They are created by individual citizens with a message. The issue of viral videos became relevant during the 2008 Presidential campaign.

During the campaign process, from the primaries to the general election, YouTube played a substantial role in the lives of all individuals involved in the political process. User-

generated political viral videos spread quickly and the candidates did not have a say in how or whether this content could be presented, no matter how negative its impact was. Although these videos are an expression of the views that American citizens hold with regard to presidential candidates, and should therefore not be considered dangerous, the potential that viral videos have to destroy a presidential contender's chances at the White House is something to consider. Two cases in point that demonstrate the time and effort that can go into the process of creating and disseminating viral videos, as well as their ultimate effect, are the "Vote Different 1984" YouTube video and the will.i.am "Yes We Can" YouTube video. These videos will further act as illustrations of the fact that YouTube viral videos, in particular, would not be permissibly regulated according to the precedent of the Supreme Court of the United States.

#### A. Vote Different 1984: a Mac Masterpiece

The "Vote Different 1984" advertisement was released on March 5, 2007, and was a testament to the fact that many citizens, through the use of YouTube, can have a loud voice in the political arena (Kurtz & Vargas, 2007). The video was created by Philip De Vellis, who at first chose to be anonymous for fear of losing his job at "Blue State Digital, an Internet company that provide[d] technology to several presidential campaigns, including" current President, Barack Obama's campaign (De Vellis, 2007, p.1). De Vellis used his video editing software and Adobe Photoshop on his Mac laptop to create the mash-up advertisement of the famous 1984 Apple advertisement that was aired during the Super bowl (Turkheimer, 2007). According to De Vellis, the process of creating the advertisement was inexpensive and easy. The advertisement depicts an Orwellian universe, where nameless individuals march in line with one

another and blankly stare at a large screen where Hillary Clinton, depicted as Big Brother, is speaking to them. An athletic woman runs down the center aisle where the ‘drones’ are seated, throws a large hammer-like object at the screen, and destroys the image of Clinton. A message comes up to culminate the video and it states that “On January 14<sup>th</sup>, the Democratic primary will begin. And you’ll see why 2008 won’t be like “1984””(De Vellis, YouTube, 2007). The final image on the video shows the web address for Barack Obama’s website. Just two weeks following its release, “the video had received 1,055,627 and the following week, just six days later, the video had generated 1,592,946 new page views” (Turkheimer, 2007, p.77). To date, the ‘Vote Different’ advertisement received almost 6 million views on YouTube, and this does not include views of the video that occurred on blogs and other video sharing websites. De Vellis stated that he created the “ad because he ‘wanted to express [his] feelings about the Democratic primary, and because [he] wanted to show that an individual citizen can affect the process””(Turkheimer, 2007, p.45).

#### B. ‘Yes We Can’: Viral Hope

The YouTube sensation entitled “Yes We Can” was produced by recording artist will.i.am and Mike Jurcovac, and was directed by Jesse Dylan (Marketwire, 2008). The video Barack Obama’s speech after his loss in the New Hampshire primary and sets it to music and lyrics that are performed not only by will.i.am, but many other famous celebrities including Scarlett Johansson, John Legend, Nick Cannon, Nicole Scherzinger, and Tatyana Ali. The celebrities and other individuals involved in the creation of the video offered their help in the name of inspiration, not profit, and in 48 hours, they created this video (Adams, 2008). At the



end of the video, a series of words is presented that say “Hope” and “Vote”. Its original posting date was February 2, 2008, during the presidential primaries (Marketwire, 2007). The YouTube video quickly became a viral sensation and, to date, it has received over 20 million views on YouTube. In a matter of three days, there were close to 50 different websites hosting the video (Wallsten, 2009). will.i.am stated that the ‘Yes We Can’ speech that Barack Obama presented in New Hampshire inspired him to reflect on what being a leader truly means. The recording artist believed that Obama’s words were powerful and moving and he wanted to share his own feelings with the rest of the world (Adams, 2008).

C. “Vote Different” and “Yes We Can”: Poster Children *for* Regulation or *Against* Regulation?

There are important questions to ask with regard to these videos and whether they could be constitutionally regulated under the Bipartisan Campaign Reform Act (BCRA). As stated earlier, the BCRA prohibits “corporations, trade associations, and labor organizations from paying for ‘electioneering communications’ within 60 days of a general election and 30 days of a primary using ‘treasury money’” (Urofsky, 2005, p.112). The BCRA defined an electioneering communication as an advertisement that clearly identifies a candidate that is broadcast to that candidate’s state or district (Urofsky, 2005). This definition may be applicable to online viral videos in that, if these videos are electioneering communications that engage in express advocacy, where it advocates for the election or defeat of a specified candidate, they may be eligible for regulation due to a compelling government interest in avoiding corruption.

It is relevant to ask whether the “Vote Different” video and the “Yes We Can” video can properly be referred to as electioneering communications. It is clear that both videos are advocating for Barack Obama with the images that are presented and the words that are depicted. The use of the statement at the end of the “Vote Different” video, as well as the series of words at the end of the “Yes We Can” video, could be understood as advocating for Obama. In conjunction with the videos themselves, the words that come at their completion can be reasonably inferred as statements of advocacy in favor of Obama.

Overall, it is important to ask whether these videos represent something positive or negative. In an era of rapidly developing technology, the Internet has given citizens the opportunity to become increasingly involved in the political process and to express their views on a particular candidate. As it was evidenced earlier, those in opposition to regulatory measures view the Internet as a public forum, the equivalent of standing on a soap box in Central Park. The proponents for regulation, however, view the use of YouTube by citizens as a negative expression of political views and might say that the “Vote Different” video “is just the latest attempt by outside activists to influence political campaigns -- or the newest way for campaigns to anonymously attack their opponents” (Marinucci, 2007, p.1). These individuals would likely view the “Yes We Can” video as presenting a risk to political campaigns due to its potential to emotionally affect viewers and, as a result, sway their vote in a different direction.

#### D. Electioneering Communication? Express Advocacy? Does it Matter?

Ultimately, the two videos can be viewed as electioneering communications in that they clearly identify a candidate and are broadcast in that particular candidate’s district (Federal

Election Commission, 2003). Through the Internet, the videos are available all over the world so it is not in doubt that they would be available in the identified candidate's district. Furthermore, these videos constitute express advocacy in that they expressly advocate for the election or defeat of a candidate. These videos could be seen as simply refraining from explicitly endorsing or opposing a candidate but still intending to affect an election (FEC v. Wisconsin Right to Life, 2007).

The most important question to ask, however, is not whether these videos are electioneering communications, whether they are express advocacy, or whether they are positive or negative. It is tantamount to ask whether the answers to these questions truly matter with regard to online viral videos similar to "Vote Different" and "Yes We Can". The BCRA regulations and the activities of the Federal Election Commission (FEC) in regulating certain political content are governed by the decisions of the United States Supreme Court. Thus, it must be determined, based on their precedent, how the Justices would rule if presented with the question of whether online YouTube viral videos, such as "Vote Different" and "Yes We Can", can be constitutionally regulated by the FEC and the BCRA.

By examining the precedent of the Supreme Court and, most importantly, the recent campaign finance law decision that was released on January 21, 2010, it is clear that neither YouTube videos nor any other user generated content posted online can be constitutionally regulated by the FEC. Regulating the two videos mentioned in the foregoing analysis, or any other user generated content online, would constitute a violation of the First Amendment right to free speech. Whether they can be characterized as express advocacy or not, the Supreme Court, with their 2010 decision, has given a clear signal that online user generated material of any sort, including viral videos, cannot be regulated for their content. Distinguishing express advocacy

videos from those videos that neutrally discuss the relevant issues would result in allowing only those speakers that do not voice an express opinion regarding a particular candidate to post viral videos. A result such as this would constitute an impermissible content based regulation on speech. The Justices', with regard to regulating YouTube videos that engage in political speech, would side with those in opposition to regulation and hold their beliefs to be true.

### VIII. The Court and Online Content: A Precedential Road to No Regulation

The Court first addressed the permissibility of regulating online content in 1997, when it sought to answer the question presented to them in *Reno v. American Civil Liberties Union* (1996) of whether the 1996 Communications Decency Act violated the First Amendment. The provisions of the act that were at issue made criminal the purposeful transmission of “obscene or indecent” messages and information illustrating “sexual or excretory activities or organs” in a way that is “offensive” according to the standards of society (Reno v. ACLU, 1996, p.1). These provisions were put in place with the intention of shielding minors from inappropriate material online. The Court in *Reno* held that the provisions violated the First Amendment and stated that they constituted a content-based overall constraint on free speech. A content based restriction is a “regulation on speech that prohibit[s] some categories of expression while allowing others” (National Coalition Against Censorship, 2010, p.1). To be justified, governments must overcome a judicial review based on strict scrutiny, the highest form of review that demands the most compelling governmental interest. The Court noted the particular importance of the Internet as a means through which “...any person with a phone line can become a town crier with a voice that resonates farther than it could from the soapbox” (Reno v. ACLU, 1996, sec.3).

Thus, it can be reasonably inferred that the Court equated the Internet with a public forum, and any governmental regulations in a public forum must be justified by a compelling interest and pass strict scrutiny review. In this case, there was no governmental interest asserted that the Court deemed compelling enough to override the individual interest against regulations that have a chilling effect on free speech.

Eight years later, a lower court, the U.S. District Court for the District of Columbia, revisited the Internet in the context of political campaigns. In particular, the Court was presented with a question regarding the permissibility of the BCRA's exemption of the Internet from any regulation by the government when it heard the case of *Shays v. Federal Election Commission* (2005). Although this is a lower court ruling, it is important to consider it a piece of the jurisprudence that supports the conclusion that YouTube videos and other user generated content online cannot be regulated. As stated in earlier descriptions of this case, the Court ruled that at least some Internet activities should fall under the definition of electioneering communications. The Court asserted that excluding all parts of the Internet would create a loophole that would spread the negative effects of soft money (*Shays v. Federal Election Commission*, 2004). Permitting unregulated use of the Internet for campaign purposes would be equivalent to permitting unfettered circumvention of the law and, as a result, would foster corruption or its appearance (*Shays v. Federal Election Commission*, 2004). Upon remand, the Federal Election Commission took the opinion into consideration as it revised the regulations of the Internet. In the foregoing sections, these adjustments have been outlined. In short, however, the FEC targeted users that utilized large amounts of money to conduct various campaign activities online while continuing to leave individual users untouched.

Shortly after the opinion in *Shays*, the Supreme Court handed down a decision in 2007, holding that the BCRA's prohibition on the use of corporate treasury funds for advertisements aired in the 60 days prior to election was unconstitutional in its application to advertisements that did not constitute an explicit endorsement of, or opposition to, a candidate (Federal Election Commission v. Wisconsin Right to Life, 2007). In *FEC v. Wisconsin Right to Life* (WRTL), the Court rejected the state's contention that the advertisements constituted "sham issue advertisements", which it stated were advertisements that did not explicitly endorse or oppose a candidate but were still created with the intention of affecting the election (Federal Election Commission v. Wisconsin Right to Life, 2007, III). The Court held that *McConnell v. FEC* did not support the assertion that an advertisement that was intended to effect an election, and subsequently had that effect, constituted an express advocacy advertisement. The Court purported that a definition such as that would ultimately lead to the chilling of speech due to its vague nature. The Court chose to adopt the test that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" (Federal Election Commission v. Wisconsin Right to Life, 2007, 1.c). The Court also held that the governmental interests in avoiding corruption by regulating advocacy ads did not apply to issue ads and the Court asserted that the ads broadcast by Wisconsin Right to Life were genuine issue advertisements. The Court stated that the goal was to promote speech over censorship in the absence of any compelling governmental interest.

Taken together, the opinions show a general preference for free speech with regard to the Internet and the use of funds not directly connected to a campaign. These opinions, however, show that the Court has been careful to distinguish corporations from individuals in the context

of political campaigns. From the foregoing rulings, the question of whether or not an advertisement constituted express advocacy, in general, is shown to be important to the analysis of whether certain content should be subject to regulation. Although these opinions, and others, focus on corporations' rights with regard to producing advertisements during an election, the rationale from these opinions may be applicable to individual speech. The overall implications of *Reno*, *Shays*, and *WRTL* do not necessarily exempt express advocacy advertisements generated by individuals during an election when there is a compelling government interest at hand. On January 21, 2010, however, the Supreme Court released a decision that, although centered on the free speech rights of corporations with regard to advertisements of any kind, contains rationale that justifies the notion that user generated YouTube videos online, whether they constitute express advocacy or issue advocacy, cannot be constitutionally regulated.

#### IX. Citizens United v. Federal Election Commission: A Break in the Case of the Regulation Question

Melvin Urofsky, the author of the 2005 book *Money & Free Speech: Campaign Finance Reform and the Courts*, closed his book by stating that perhaps faced with a case involving a real governmental restriction on political speech, the justices will recognize that, as Louis Brandies pointed out many years ago, in a democracy the cure for allegedly bad speech is not regulation, but more speech. One can only hope (p 250).

The 2010 Supreme Court decision in *Citizens United v. Federal Election Commission* has answered Urofsky's wish and touted the notion of encouraging more speech rather than

censoring it when the activity is independent expenditures made by corporations. *Citizens United* sought to take preventive action and obtain an injunction against the application of the BCRA to their video entitled “Hillary: The Movie”, which contained narrative regarding whether Hillary Clinton was a suitable candidate for the Presidency. *Citizens United* wanted to make the movie an on demand video that individuals could watch at any time. The Court stated that the movie fell under the BCRA section 441b regulations regarding electioneering communications and that it constituted express advocacy (Citizens United v. Federal Election Commission, 2010). They asserted that “there is no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton” (Citizens United v. Federal Election Commission, 2010, p.15). With regard to the argument that the movie’s status as a video on demand justifies the notion that it should not fall under the BCRA regulations because of the “series of affirmative steps” that an individual must take to obtain it, the Court “declined to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker” (Citizens United v. Federal Election Commission, 2010, p.16).

The Court concluded that to generate a ruling applicable only to *Citizens United* would set a precedent for case by case determinations regarding the permissibility of restricting corporate political speech and, as a result, chill that speech (Citizens United v. Federal Election Commission, 2010). Therefore, the Justice’s decided to analyze the *prima facie* validity of the BCRA’s section 441b regulations, forcing the Court to reexamine “the continuing effect of the speech suppression upheld in” Austin v. Michigan Chamber of Commerce (Citizens United v. Federal Election Commission, 2010, p.12).

In *Austin*, the Court ruled that Michigan’s prohibition on the use of corporate treasury money to support or oppose a candidate in a state election did not violate the First Amendment.



The Court in *Citizens United* overruled *Austin* and held that the First Amendment prohibits the regulation of corporate funding of independent broadcasts in candidate elections (*Citizens United v. Federal Election Commission*, 2010). In doing so, the Court asserted that political speech was being banned based on a speaker's identity. They stated that the government cannot limit corporate independent expenditures and, on its face, section 441B constitutes a censorship and a ban on speech.

The Court rationalized their rulings by stating that restrictions cannot be imposed on individuals simply because it is a certain disfavored speaker. Restrictions such as those are content based and impermissible absent a compelling government interest, which the Justices denied the existence of such an interest. The importance of political speech to the electorate, no matter who its source, was stressed in the opinion. The disclosure and disclaimer requirements on corporate speech were permissible and the Court noted that these requirements "may burden the ability to speak, but they...do not prevent anyone from speaking" (*Citizens United v. Federal Election Commission*, 2010, p.51). The dissenting Justices argued that the speech rights of corporations are not equivalent to those of the members of society. Furthermore, the dissent believed that there were compelling government interests in avoiding corruption and distortion.

The implications of the decision in *Citizens United* for *WRTL* and *Shays* are clear. With regard to *FEC v. WRTL*, it can be reasonably inferred that *Citizens United* overruled that decision because of the Court's assertion that, regardless of whether the advertisement is express advocacy, it cannot be regulated when corporations have made independent expenditures to produce it. With regard to *Shays v. FEC*, although there is no explicit mention of the Internet, it can be reasonably inferred that corporations will be able to make independent expenditures online as well, thus effectively overruling *Shays*. The Court's refusal to draw lines based on the

type of medium, as well as the Court's statement that, "with the advent of the Internet...the line between the media and others who wish to comment on political and social issues becomes far more blurred" gives reason to infer that *Shays v. FEC* has been overruled (*Citizens United v. FEC*, 2010, p.36). The inferences regarding the rulings in *Shays v. FEC*, *FEC v. WRTL*, as well as the ruling in *Citizens United v. FEC*, beg the question of what they mean with regard to individual use of the Internet and, in particular, YouTube, to advocate for the election or defeat of a particular candidate.

#### X. The Likely Holding of the Honorable Justices

Based on their precedent, it is clear that the Supreme Court would hold the regulation of user generated YouTube advertisements, including those that constitute express advocacy and electioneering communications, to be a direct violation of the First Amendment and, therefore, unconstitutional. There are specific reasons for why this would be their holding: the underlying values of the First Amendment; the characterization of the Internet as an open public forum; the rationale underlying the creation of the constitution; the lack of any applicable government interest to regulate individual users; and, the Internet's facilitation of counter speech, all combine to form the clear indication that the Supreme Court would not approve of regulatory measures aimed at individual Internet users.

The First Amendment is so substantial because it upholds the values that we, as American citizens, depend upon to thrive in a free society. It is not a question of whether we must silence ourselves in order to remain with the majority of society. It is a question of whether we must silence ourselves under pain of government penalization if we do not. As it was so

eloquently stated in the 1943 case of *West Virginia v. Barnette*, the essence of the First Amendment is its assurance that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or force citizens to confess by word or act their faith therein" (1943, sec. 4). In all First Amendment cases, the right to free speech has been held as the pinnacle of a free society where individuals can engage openly in debate on issues that are of particular importance to them. The crucial thrust of the First Amendment is to enforce the protection of political speech and the Courts have been bold in their belief that speech concerning the actions of the government goes beyond mere expression. Political speech is the epitome of democracy (Rushing, 2002). The first three words of the Constitution are 'We the People', not 'some of the people', and the freedoms that are enshrined in the Bill of Rights apply to all American citizens, especially the First Amendment. Thus, the use of the Internet to engage in political speech cannot be prohibited for certain speakers with disfavored views. This would be at odds with the values that we, as a Nation, hold in the highest regard.

The notion of the marketplace of ideas has been held as one of the primary reasons that the First Amendment is significant. The Court in *Reno v. ACLU* described the Internet as a "vast democratic fora" and a "new marketplace of ideas," that "provides relatively unlimited, low-cost capacity for communication of all kinds," and its growth "has been and continues to be phenomenal" (*Reno v. American Civil Liberties Union*, 1997, sec. 3). The Internet is indeed the new soapbox for the American citizen to articulate his or her views from and, therefore, it is a wholly different medium from television or radio. The difference lies in this new soapbox's ability to send that person's message far beyond the limits of the average individual, who protests his or her views only up to the borders of the area they have confined themselves to,

such as Central Park. The vast audience that is available to the Internet user who wishes to engage in political speech is a First Amendment gold mine that need not be dug up and regulated.

As the Court in *Reno v. ACLU* (1997) stated so eloquently

[I]f the goal of our First Amendment jurisprudence is the individual dignity and choice that arises from putting the decision as to what views shall be voiced largely into the hands of each of us, then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig (sec. 4).

The Internet is too decentralized, low in cost, and dependent on the affirmative choices that are made by its users to be muddied into another free speech zone that has been cordoned off with regulations and red tape.

The notion that the Internet is equivalent to an open public forum points to its significance as a medium that allows individuals to be active participants in a presidential election. The Internet's characterization as a traditional public forum means that it is open to all types of expression that are guaranteed to us under the First Amendment. Thus, any content based or identity based restrictions on that forum must have a compelling governmental interest that is narrowly tailored enough to meet only that interest. A content based restriction is one that regulates speech based on its subject matter. Thus, if the government were to ban all public demonstrations on abortion, while permitting those regarding gun control, that would be a content-based restriction (Webster's New World Law Dictionary, 2010).

Our founding fathers distrust of governmental control prompted the creation of the First Amendment and its protection against governmental efforts to disfavor specific speakers or

viewpoints (Citizens United v. Federal Election Commission, 2010). Although there are certain cases where certain speakers were regulated, those regulations were justified by the interest of the government in performing its essential functions (Citizens United v. Federal Election Commission, 2010). Using the rationale of our founders, the Court in *Citizens United* was against regulating corporate political speech that is executed through the use of individual contributions. Thus, it is clear that if the Justices' will not approve regulation of corporate speech, they will not approve of regulating individual citizens' political speech that occurs, in particular, through the one medium that seems to be heading in the direction of another revolution of the political process: the Internet. The Court has, with this ruling, equated corporations to individuals endowed with basic freedoms. Therefore, it is reasonable to believe that the Court would find no governmental interest that would make the regulation of citizens' political speech, in the form of YouTube videos, permissible. Such a finding would go against the underlying values that the First Amendment was meant to uphold.

The government, if it were to create regulations, would likely target those videos that expressly advocate for the election or defeat of a particular, specified candidate. In other words, this would be a content-based restriction because it allows some types of videos to be created but not others. Traditionally, the government has asserted an interest in addressing "the corrosive and distorting effects of immense aggregations of wealth" and in "equalizing the relative ability of individuals and groups to influence the outcome of elections" (Citizens United v. Federal Election Commission, 2010, p.12). The traditional interests of the government in regulating political speech are not applicable to the Internet in the way that they are, traditionally, to media such as the television. These interests could not be applied to the realm of the Internet because of its expansive size, the range of opinions that it contains, and its inexpensive nature (The

Campaign Legal Center, 2005). While money is still needed to generate an effective web based campaign, the effects of large amounts of money are not present on the Internet to the same degree that they are on television. Moreover, the Internet itself facilitates the equalization of individuals' ability to participate in governmental affairs to a greater extent than the one way medium of television. This enhanced equality exists because the single contribution of the video's creator need not be the only contribution made to the debate. As early as *Buckley v. Valeo*, the Court purported the notion that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" (*Buckley v. Valeo*, 1976, p.49). With any type of regulation on YouTube videos and, subsequently, on the political speech of individual citizens, there would be a restriction on some speech to enhance the speech of others. This would be at odds with the rationale that the Court has set forth numerous times and the traditional interests of the government cannot justify the content based regulation of speech in the traditional public forum that is the Internet.

The Internet's facilitation of counter speech further justifies the notion that the Supreme Court would not permit regulations on user generated YouTube videos. YouTube has proven to be a forum where individuals can not only post original content to generate political speech but also can create "response or dialogue videos to already posted content" (Turkheimer, 2007, p.78). The remedial measures that the government executes must fall in line with the First Amendment and the Supreme Court has asserted, time and again, that "more speech, not less, is the governing rule" (*Citizens United v. Federal Election Commission*, 2010, p.52). Moreover, if that is the ideal that governments look to achieve then, according to the Supreme Court, what will result is "an informed citizenry and a vibrant democratic society" (Urofsky, 2005, p.53). The use of counter speech has been demonstrated with the "1984 Vote Different" video and it shows that

allowing more speech, as opposed to regulating individual speech, is the ideal that the government should aspire to attain.

The response to the “Vote Different” video came in the form of a video entitled “Barack 1984”, which was placed on YouTube about two weeks after the Vote Different video was posted, on March 18, 2007. The video garnered 459,263 views. The YouTube user simply swapped the image of Hilary Clinton speaking with that of a clip from Barack Obama’s Monday night football video. The ending line denounced Barack Obama, as opposed to the original “1984 Vote Different” video that supported him, and read, “The Bears Lost, So Will Obama...Clinton for President” (Turkeheimer, 2007, p.78). This video is just one example of the many illustrations of counter political speech that occur on YouTube each day. The anti-Obama vote different video illustrates the notion that user generated content on YouTube makes the democratic process more accessible. Moreover, it gives individuals a forum to voice their opinions and a means for communication that is not merely one-sided but two-sided, three-sided, four-sided, and beyond.

#### XI. Dissenters Cite Dangers

It is reasonable, however, to assume that there would be justices on the Supreme Court, in particular the dissenters of the *Citizens United* decision, who would believe that there are dangers inherent in permitting the unregulated use of the Internet for political speech in the form of YouTube videos. The dissenting justices to a question of whether user generated YouTube videos can be constitutionally regulated might contend that allowing the videos to go unregulated would be the equivalent of turning a blind eye to the obvious loopholes that would result from a

medium that is so open to abuse. Thus, these loopholes would allow the use of unregulated funds, or soft money, to generate YouTube videos, or pay individual citizens to do so, and no Federal agency would know. The dissenting Justices of *Citizens United v. Federal Election Commission* (2010) rationalized that

Political parties are barred under BCRA from soliciting or spending “soft money,” funds that are not subject to the statute’s disclosure requirements or its source and amount limitations. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates...thus dramatically [enhancing] the role of corporations and unions—and the narrow interests they represent...and the broad coalitions they represent...in determining who will hold public office (Dissenting Opinion, J.Stevens, p.20).

Applying this rationale to user generated YouTube videos, dissenting Justices might assert that permitting individuals’ use of the website for express advocacy advertisements to go unregulated would permit the use of unregulated means directed at ensuring a specific candidate wins.

Overall, it would seem reasonable to believe that the Internet could create an unjustifiable loophole for campaigns or corporations posing as average citizens creating viral videos at a low cost. Just as Phillip De Vellis, a worker for the Obama campaign, did when creating the “Vote Different” video, it is likely that anybody could hide their identities, circumvent campaign finance laws and post excessively negative ads that are not only at odds with the underlying values of campaign finance law but are also lacking any type of disclosure. The danger of this is that it infringes upon the need of the public to gather as much information as possible, a need that the Supreme Court, in *Buckley v. Valeo*, described as a substantial one (Welle, 2008). Regardless of whether a campaign is involved in user generated online political speech, they



continue to make considerable gains from their use of the Internet without any accountability (Welle, 2008).

## XII. Conclusion: Is There an Available Avenue of Regulatory Action?

The foregoing rationale is important and must be addressed. There must be some means of regulation that will not engage in the content based discrimination that the Supreme Court has deemed impermissible. Unregulated YouTube advertisements, while they are important for a democratic society, continue to run the risk of leaving viewers with the misconception that the source of the video is the campaign for which it provides support (Welle, 2008). The creator of the advertisement conceals their identity and circumvents evaluation for their reliability, resulting in divesting the electorate of necessary information (Welle, 2008).

The BCRA's disclosure requirements were upheld as constitutional in the opinion of *Citizens United*, and they should be applied to YouTube videos that engage in political speech of any kind. The Court specifically rejected the notion that "disclosure requirements must be limited to speech that is the functional equivalent of express advocacy" (*Citizens United v. Federal Election Commission*, 2010, p.54). The Court mentioned other circumstances where this was permissible such as requiring disclosure requirements to be applied to lobbyists, even though lobbying itself could not be banned. It is the same situation in the case of regulating YouTube videos that engage in political speech. The electorate has an interest in knowing who the creator of an advertisement is that speaks about a particular candidate (*Citizens United v. Federal Election Commission*, 2010). By enforcing disclosure requirements on YouTube videos such as the "1984 Vote Different" advertisement and the "Yes We Can" advertisement, the First

Amendment rights of citizens will continue to be upheld and the concerns of opening up loopholes for corporations to hide their identities and generate online content will be addressed. Citizens will be able to look at a particular YouTube video, for instance the “Yes We Can” video, and see that it was created by will.i.am, a supporter of Obama. This might incline them to search further, by their own means, to see if they believe Obama is as inspiring as the video makes him out to be. Although will.i.am chose to disclose who the creators were, he was not required to. Requiring disclosure of a user’s identity will enforce a transparency that will allow citizens to make informed choices and give the appropriate deference to different creators and their messages (Citizens United v. Federal Election Commission, 2010).

The question of how this could be done is a concern that is likely to be at the forefront of such a complex legislative endeavor as enforcing disclosure requirements on YouTube videos that engage in political speech. The Internet is a vast medium where videos can be tagged, saved, uploaded to different websites, and shared with others through blogs and social networking websites. It might be virtually impossible to address all instances where user generated YouTube videos regarding a particular election appear. If, however, legislatures are diligent in their efforts, it is possible, with our level of technology and what it is likely to be capable of in the future, to enforce such a requirement. This is a hurdle that Washington needs to focus on rising above in order to continue engaging in the delicate balance that our constitution mandates. This will require the government to generate legislation that not only allows speech to flourish, as the liberties we are endowed with intend it to do, but also protects the interest in having a society where corruptive influences cannot permeate and an informed electorate can prosper.

## Works Cited

- Adams, W. (2008). Why I recorded Yes We Can. *The Huffington Post*. Retrieved February 5<sup>th</sup>, 2010 from [http://www.huffingtonpost.com/william/why-i-recorded-yes-we-can\\_b\\_84655.html](http://www.huffingtonpost.com/william/why-i-recorded-yes-we-can_b_84655.html)
- Alliance for Justice. (2005, June 3). Comments to proposed rulemaking on Internet communications. Retrieved October 18, 2009 from <http://www.campaignlegalcenter.org/attachments/1389.pdf>.
- Buckley v. Valeo, 424 U.S. 1, (1976).
- Center for Democracy and Technology. (1999, October). Square Pegs and Round Holes: Applying the Campaign Finance Law to the Internet. *Center for Democracy and Technology*. Retrieved September 3, 2009, from <http://www.cdt.org/speech/political/financereport.shtml>.
- Citizens United v. Federal Election Commission, 558 U.S. \_\_\_\_ (2010).
- De Vellis, P. (2007). I Made the 'Vote Different' Ad. *The Huffington Post*. Retrieved January 24<sup>th</sup>, 2010 from [http://www.huffingtonpost.com/phildevellisakaparkridge/imadethevotedifferen\\_b\\_43989.html?p=2](http://www.huffingtonpost.com/phildevellisakaparkridge/imadethevotedifferen_b_43989.html?p=2).
- De Vellis, P. (Producer). (2007, March 05). Vote Different 1984 [Video File]. Retrieved January 24<sup>th</sup>, 2010 from <http://www.youtube.com/watch?v=6h3G-IMZxjo>
- Dube, W. (2009). *The Effect of New Media on Political Advertising: Television Ads and Internet Ads in the 2008 Presidential Primary*. Rochester Institute of

Technology. Retrieved October 18, 2009 from

<https://ritdml.rit.edu/dspace/bitstream/1850/9697/1/WDubeThesis05-11-2009.pdf>.

Federal Election Commission. (2003). BCRA Campaign Guide Supplement. *Record*, 29. Retrieved September 3, 2009, from <http://www.fec.gov/pdf/guidesup03.pdf>.

Federal Election Commission. (2007). Party Guide Supplement. *Record*, 33. Retrieved November 20, 2009, from [http://www.fec.gov/info/PartyGuide/party\\_guide\\_supp.pdf](http://www.fec.gov/info/PartyGuide/party_guide_supp.pdf).

Federal Election Commission. (2005, September 22). Testimony of Vice Chairman Michael E. Toner Regarding Regulation of On-Line Political Speech. Retrieved October 3, 2009 from <http://www.bryancave.com/files/Publication/4840f738-84ed-4b1c-b2e3-7edb34a12387/Presentation/PublicationAttachment/58710d9c-6817-4d33-b497-1870c8895db4/Toner-CTestimony-9-22-05.pdf>.

Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449, (2007).

Hoover Institution. (2009). *Campaign Finance: Reform attempts at the federal level*. Retrieved from February 15<sup>th</sup>, 2010 <http://www.campaignfinancesite.org/history/reform1.html>.

Kurtz, H. & Vargas, J.A. (2007). A Brave New World of Political Skulduggery: Anti Clinton Video Shows Ease of Attack in the Computer Age. *The Washington Post*. Retrieved January 24<sup>th</sup>, 2010 from <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/22/AR2007032201995.html>.

- Marinucci, C. (2007). Political Video Smackdown: Hillary 1984. *The San Francisco Chronicle*. Retrieved January 24<sup>th</sup>, 2010 from [http://articles.sfgate.com/2007-03-18/news/17236233\\_1\\_politics-and-new-media-political-advertising-generational](http://articles.sfgate.com/2007-03-18/news/17236233_1_politics-and-new-media-political-advertising-generational).
- Market Wire. (2008). will.i.am's "Yes We Can Song" Video Awarded Emmy for New Approaches in Daytime Entertainment. Retrieved January 24<sup>th</sup>, 2010 from <http://www.marketwire.com/press-release/williams-Yes-We-Can-Song-Video-Awarded-Emmy-New-Approaches-Daytime-Entertainment-869064.htm>.
- McConnell v. Federal Election Commission, 540 U.S. 93, (2003).
- National Coalition Against Censorship. Art Law Library: Glossary. Retrieved on March 1, 2010 from <http://www.ncac.org/art-law/glossary.cfm>.
- Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).
- Rubbergash (producer). (2007, March 18). Barack 1984 [Video File]. Retrieved March 5<sup>th</sup>, 2010 from <http://www.youtube.com/watch?v=dycbAsB9-ps>.
- Rushing, J. M. (2002). Vote Swapping and Free Speech: Voice, Politics, and Choice. *Texas Journal on Civil Liberties & Civil Rights*, 7(1), 73.
- Samples, J. (2005, November 2). A Vote for Free Speech. *Cato Institute*. Retrieved September 3, 2009, from [http://www.cato.org/pub\\_display.php?pub\\_id=5159](http://www.cato.org/pub_display.php?pub_id=5159).
- Sandler, J. E., & Reiff, N. P. (2005). New Campaign Finance Rules and the 2004 Elections. *Campaigns & Elections*, 26(1), 35-36.

Shays v. Federal Election Commission, 340 F.Supp.2d 39, (2004).

The Campaign Legal Center. (2005, June 3). Alliance for Justice Comments. Retrieved February 2, 2010 from <http://www.campaignlegalcenter.org/attachments/1389.pdf>.

Turkheimer, M. (2007). *A YouTube Moment in Politics*. Los Angeles, CA: Urban & Environmental Policy Institute (UEPI).

Urofsky, M. (2005). *Money and free speech: Campaign finance reform and the courts*. Lawrence, Kansas: University Press of Kansas.

Wallsten, K. (2009). "Yes We Can": How Online Viewership, Blog Discussion and Mainstream Media Coverage Produced a Viral Video Phenomenon. Retrieved January 24<sup>th</sup>, 2010 from <http://www.strangelove.com/blog/2009/04/online-viewership-blog-discussion-mainstream-media-coverage-produced-viral-video-phenomenon/>.

Webster's New World Law Dictionary. (2010). Content Based Restriction. Retrieved March 1, 2010 from <http://www.yourdictionary.com/law/content-based-restriction>.

WeCan08 (Producer). (2008, February 02). Yes We Can [Video File]. Retrieved January 24<sup>th</sup>, 2010 from <http://www.youtube.com/watch?v=jjXyqcX-mYY>.

Welle, A. (2008). Campaign Counterspeech: a new strategy to control sham issue advocacy in the wake of *FEC v. Wisconsin Right to Life*. *Wisconsin Law Review*, 4, 795-844.

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Whitaker, L. P., & Cantor, J. E. (2005). *Campaign Finance Reform: Regulating Political Communications on the Internet*. Retrieved August 16, 2009, from <http://fpc.state.gov/documents/organization/53777.pdf>.

Whitaker, L. P. (2004). Campaign Finance Law: A Legal Analysis of the Supreme Court Ruling in *McConnell v. FEC*. *Library of Congress, Congressional Research Service*. Retrieved September 4, 2009 from <https://www.policyarchive.org/handle/10207/1946>. Zack, I. (2002, February 26). Congress' Gift To The Internet. *Forbes*. Retrieved October 3, 2009 from <http://www.forbes.com/2002/02/26/campaignfinance.html>.