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Preserving the Potential for Politics Online:
The Internet's Challenge to Federal Election Law

Ryan P. Winkler*

Jesse Ventura's candidacy for Minnesota governor demonstrated, among other things, that the Internet has great potential for shaping electoral politics. With a small budget and staff, the political outsider relied heavily on the Internet to help him reach a new audience and draw previously uninvolved citizens to the voting booth. Ventura spent a total of $600 on his online activities, but was able to use the Internet to solicit significant campaign donations while also organizing and instructing his followers to appear at key events during the final days of the campaign.¹ His website was, in keeping with his candidacy, not particularly smooth, artistic, or articulate,² but it did play a significant role in helping him win the election.

Ventura is not alone. Around the country, online campaigning is becoming increasingly important in candidates' efforts to gain a winning edge, and many observers agree that the Internet has great potential as a political tool.³ Internet campaigning, however, raises significant issues for federal election law that must be addressed. Specifically, policy-makers must determine whether current election law can adequately resolve questions raised by the new technology. If the current law is inadequate, campaign finance legislation must address this problem and develop a regulatory system that will allow the Internet to reach its potential as a medium for strengthening democratic communities.

2. See id. Ventura's own system administrator noted that the campaign "didn't have any of the bells and whistles" on its website, implying that "content is the point of the Web." Id.
3. See infra notes 11-19 and accompanying text.
This Note will address these issues and determine how election law should be shaped to regulate Internet politics. Part I reviews the ways in which the Internet is changing the political system, presents the statutory background of current federal election law, and examines the constitutional limitations placed upon this body of law by the Supreme Court. Part II examines current election law and concludes that it is inadequate to clearly and consistently address the issues raised by online campaigning. Part II then proposes a new approach for regulating Internet political activities. The Note concludes that because online campaigning is still in its developmental stage, and has the potential to significantly improve the political system, it should remain largely unregulated and free from burdensome interference.

I. THE CURRENT STATE OF FEDERAL ELECTION LAW AND ONLINE CAMPAIGNING

The Internet has become an important tool in politics. Though it has not yet reached its full potential, its decentralization and low access cost could bring important and beneficial changes to electoral politics. The current election finance system has been around since the 1970s and consists primarily of the Federal Election Campaign Act and the Supreme Court decision in Buckley v. Valeo.

A. POLITICAL ACTIVITY ON THE INTERNET

The Internet is distinct from all other forms of mass communication for two reasons: it is easily accessible and it is decentralized. No one central body organizes or controls the Internet and anyone can access it with a personal computer and a modem, provided they can connect to an Internet service provider (ISP). Even the Supreme Court has acknowledged that “[t]he Internet is ‘a unique and wholly new medium of worldwide communication.’” Since its inception, the Internet

6. See Maureen A. O'Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 MINN. L. REV. 609, 618 (1998). At its most basic level, the Internet is an electronic connection that allows individuals to share computer files with other networks and users. The World Wide Web is one method by which these masses of computer files have been organized so that users can more easily find the information they are seeking.
has experienced enormous growth. In 1981, fewer than 300 computers were connected to the Internet. By 1996, that number had exploded to 40 million computers, and estimates for 2000 range from 100 million to 200 million.

Most observers agree that the Internet offers tremendous potential to change electoral politics. For the public, one of the great advantages it offers is that they no longer need to rely on a few centralized sources for information about politics. In this sense, the Internet is perhaps the most egalitarian communications medium in history because it enables people to form their own groups, attract followers, and participate in the political process without raising large sums of money.

(Quoting American Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

8. See id.

9. See id. The Internet presents a wide variety of options for users. E-mail, newsgroups, chatrooms, and the World Wide Web are the primary tools, and users can transmit text, sound, video, and pictures using all of them. See id. at 851. E-mail is one of the most important tools because it permits direct communication with an unlimited number of people at virtually no cost. See id. With such a huge variety of functional options and millions of people currently online, the Supreme Court acknowledged that "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." Id. at 852 (quoting American Civil Liberties Union, 929 F. Supp. at 842).


12. One example of this potential is a parody website targeting George W. Bush. The site, www.gwbush.com, features mock campaign stickers, reports some of his more embarrassing public statements, and even includes letters sent by prisoners accusing the Texas governor of hypocrisy in his drug policy. See Clive Thompson, Anti-Bush Website Shows the Power of Parody, NEWSDAY, Jan. 22, 2000, at B15. A thirty-year-old computer consultant maintains the site, and after the Bush campaign threatened suit, he raised money to mount radio and television ads mocking Bush further. See id. Reaching such a wide audience through traditional communication channels would clearly require considerably more money or access to media outlets, which demonstrates the potential power of the Internet to create a more democratic political system. Indeed, even in the 1996 election, USA Today reported that more than 2,000 political sites were operating, and most were not run by powerful political or media organizations. These sites focused on both major and minor issues, ranging from the presidential election to advocacy of local ballot measures. See Gary W. Selnow, Electronic Whistle-Stops: The Impact of the Internet on American Politics 107 (1998) (citing Martha T. Moore, Beginning Today, Clinton and Dole Clash on Internet, USA TODAY, July 10, 1996, at A7). In short, the web "gives all candidates, coalitions, and citizens the same public forum to make their voices heard, to become their own publishers and broadcasters, and to air their personal positions on public issues."
other advantage offered by the Internet is that it does not require citizens to learn completely new communication methods. Websites contain pictures, text, and audio for their users, all of which are traditional modes of political communication. In addition, the kinds of information found on websites are fairly traditional: candidate biographies, position papers, and favorable news articles. Thus the huge number of people connecting to the Internet and the decentralized, free-ranging nature of its structure, combine to create tremendous potential for citizens looking for new ways to connect with their political communities.

Political candidates and campaigns are well aware of this potential, and for them, the Internet seems to offer almost unlimited opportunities. Low cost is one of the chief virtues of Internet campaigning for candidates. Compared to the high price of traditional media campaigns (television, radio, newspapers), the cost of building and maintaining a website is minimal. Another advantage an Internet campaign offers is direct access to voters. Rather than having to use the media to reach citizens, candidates can do so directly, and with more substance than a thirty second television commercial can provide. The content of Internet campaigns is also familiar to candidates. Campaign professionals do not have to learn dra-

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13. See SELNOW, supra note 12, at 81.
14. See id.
15. As of October 1998, 63% of local, state, and federal campaigns across the country were using the Internet, and 20% more expected to be online by election day a month later. See Miller & Schrader, supra note 11, at A1.
16. See SELNOW, supra note 12, at 79.
17. See id. The low-budget campaign of Victor Morales, Democratic candidate for Senate in Texas, is one example of this. In addition to driving around the state in his own dusty, white pickup truck, Morales ran an inexpensive website. See id. He paid $49.50 per month for the site, which was run by three volunteers. See id. Despite the low cost, the “site had photos, facts and figures, speeches, news articles, downloadable brochures, even a link to a page about the Morales pickup truck.” Id. He did not win the election, but his ultra-low-cost web page had all the features of a standard candidate site. See id.
18. Direct access to voters is important because reporters do not filter the information, and the candidates can deliver their message without interference from the press. Reporters interpret the news they hear, so once the candidate has expressed his views, the message sent to voters is beyond his control. See id. at 90. Reporters also have a tendency to look for angles in stories, and as a consequence they may emphasize the most controversial issues rather than what the candidate was hoping to communicate. See id. at 90-91.
matically different forms of communication because the websites typically contain traditional campaign components (e.g., fact sheets, issue papers, biographies, etc.). For candidates, the Internet is a cheap and easy way to communicate with millions of people, and it remains free from any editorial revision. Because of these factors, the Internet's value as a political and democratic tool will continue to increase.

B. FEDERAL ELECTION LAW AND PROPOSALS FOR CHANGE

Federal election law, in its modern form, was created by the Federal Election Campaign Act of 1971 and subsequently limited by the Supreme Court's decision in Buckley v. Valeo. The law permits unrestricted expenditures of money on political activities, but limits the amounts of money that people may contribute to campaigns. Campaign finance reform proposals for federal election law have generally attempted to limit the corrupting influence of money on the political process and have sought to close many of the finance loopholes.

1. The Statutory Foundation of Modern Federal Election Law

The basis of current election law lies in the Federal Election Campaign Act (FECA). Enacted in 1971, FECA and its 1974 amendments established a broad series of reforms for campaign finance in federal elections. FECA limited the amount of money that an individual or political action committee (PAC) could contribute to any candidate or campaign, and

19. See id. at 81.
22. The Act limits individuals or groups to contributions of $1,000 per candidate for federal office in each election cycle. See 2 U.S.C. § 441a(a)(1)(A) (1994). The statute defines a campaign contribution:
   (B)(A) The term "contribution" includes—
   (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
   (ii) the payment by any person of compensation for the personal
completely banned contributions from labor unions and foreign nationals. FECA also established expenditure limits for candidates, individuals, and groups promoting campaigns, specifically limiting individuals and groups to $1,000 expenditures on behalf of clearly identified candidates. It also placed a ceiling on the total expenditures made by candidates for federal office. It scaled these expenditures by level of office and tied them automatically to the Consumer Price Index.

service of another person which are rendered to a political committee without charge for any purpose.

Id. § 431(8)(A). The statute excludes from its definition of contribution the value of services provided by volunteers, the costs incurred by hosts for fundraising activities, the value of lost profit for vendors charging less than retail prices at campaign events, the value of volunteers' travel expenses, and the costs that state and local political parties incur in grass-roots campaigning for candidates. See id. § 431(B). FECA limits PAC and party organization contributions to $5,000 per federal candidate in each election cycle. See id. § 441a(a)(2). Finally, FECA limits the total contribution of individuals to all federal candidates to $25,000 per election cycle. See id. § 441a(a)(3).

23. See id. § 441b.
24. See id. § 441e.
25. See Pub. L. No. 93-443, § 101(a), 88 Stat. 1263, 1263 (creating 18 U.S.C. § 608 (1974) (partially repealed 1976)). The independent expenditure limits have since been overruled by the Supreme Court. See infra notes 41-46 (discussing the constitutional restrictions on expenditure regulations). The statute defines an independent campaign expenditure:

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

(ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. § 431(9)(A) (1994). The statute makes a number of exceptions to this definition of expenditure, excluding media news stories, nonpartisan activity designed to encourage individuals to vote, candidates' costs in soliciting funds, volunteers' service, fundraising hosts' costs, lost profits for vendors charging less than retail prices at campaign events, volunteers' travel expenses, and state and local political parties' costs incurred in grass-roots campaigning for candidates. See id. § 431(9)(B).

28. Campaigns for individuals seeking their party's nomination for the office of President of the United States could only spend a total of $10 million; campaigns could spend an additional $20 million once the candidate had earned the party nomination. See 2 U.S.C. § 441a(b)(1)(A)-(B) (1994). Candidates for their party's nomination in Senate elections could spend the greater of $100,000 or 8 cents multiplied by the voting age population. See Pub. L. No. 93-443, § 101(A), 88 Stat. 1263, 1264 (amending 18 U.S.C. § 608(c)(1)(C) (1974)). Candidates for the Senate could spend the greater of $150,000 or 12
FECA's final expenditure restriction limited the total amount of personal wealth a candidate could spend on her own behalf in any federal election. 29

FECA's disclosure requirements were strict. It required campaigns to publicly disclose contributions and expenditures and to submit a detailed financial report to the federal government. 30 The statute also required campaigns to disclose any contribution by an individual or group over $200 31 and to disclose all contributions by PACs. 32 In addition, the Act required campaigns to disclose in detail all of their expenditures of any amount over $200. 33

Finally, FECA created an oversight body, the Federal Election Commission (FEC), which was charged with administering the Act's provisions. 34 The FEC had the power to require financial reports, 35 make rules necessary to carry out the statute's provisions, 36 render advisory opinions, 37 conduct investi-
naments, and bring civil actions for damages and injunctions to enforce the limitations on contributions and expenditures.

2. Constitutional Restrictions on Federal Election Law

In 1976, the Supreme Court ruled on the constitutionality of FECA’s provisions in *Buckley v. Valeo*. The Court held that contribution and expenditure limitations did not constitute restrictions on conduct, but rather were limitations on protected speech. Because FECA limited important political speech, the Court applied strict scrutiny to the restrictions on contributions and expenditures. Consequently, the Court held that both contribution and expenditure limits impinged on First Amendment freedoms to some degree, but distinguished between them based on the degree to which they inhibited speech. The Court held that this distinction between contributions and expenditures justified striking down FECA’s expenditure limits and upholding the contribution limits. The expenditure limits were not permissible because they served as “substantial rather than merely theoretical restraints on the quantity and diversity of political speech.” Conversely, the Court reasoned

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38. *See id.* § 437d(a)(3).
41. *See id.* at 16.
42. *See id.* at 19. The Court proceeded through three steps of analysis to reach this holding. First, it inquired whether FECA regulated conduct or speech and concluded that campaign expenditures and contributions were speech. *See id.* at 16. Second, it inquired whether the limitation was a time, place, or manner restriction and concluded that it was not. *See id.* at 17-18. Finally, the Court inquired whether the limitations restricted the quantity of political speech. *See id.* at 18. The Court held that a “restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression” because money is essential to modern political activity. *Id.* at 19. The Court therefore held that such limitations on the quantity of speech faced strict judicial scrutiny. *See id.* at 58-59.
43. *See id.* at 29.
44. *See id.* at 58-59.
45. *See id.* at 58. The Court held that limits on contributions survived a “closest scrutiny” standard because they served a “constitutionally sufficient” purpose of limiting “the actuality and appearance of corruption.” *Id.* at 25-26. Contribution limits were held to be necessary to preserve “the integrity of our system of representative democracy” after the “disturbing examples” from the 1972 election. *Id.* at 26-27.
46. *Id.* at 19. The Court’s reasoning was that limiting independent expenditures on behalf of candidates would serve to limit effective expression to candidates, parties, and the institutional press because FECA permitted only
that contribution limits only marginally limited one's ability to "engage in free communication." The Court upheld the disclosure requirements of FECA and did little to change the substantive provisions for the FEC. It did, however, overturn limitations on campaign and independent expenditures, and limitations on expenditures of a candidate's personal wealth on her own behalf.

The Supreme Court has consistently upheld its distinction between campaign contributions and expenditures in its post- cases. Limiting the appearance or actual presence of corruption remains the justification for limiting contributions, while the Court has acknowledged no such justification for limiting expenditures. The Court has increased the number of financial activities it considers expenditures, while it has reduced the number of activities it considers contributions.

In these groups to spend significant amounts of money on political expression regarding a campaign. See id.

47. Id. at 20-21. The Court held that the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." Id. at 21.

48. See id. at 64. The Court applied an "exacting scrutiny" test for disclosure laws, based on case law that held that anonymity was an important part of free speech protection. Id. The Court required a "relevant correlation" or a "substantial relation" between a legitimate government interest and the disclosure requirement. Id. The three legitimate government interests were promoting the public's ability to evaluate candidates based on knowing their contributors, avoiding the appearance of and actual corruption, and enforcing the contribution restrictions. See id. at 66-68.

49. See id. at 143. In fact, the only issue the Court addressed regarding the FEC was the appointment procedures for its members. See id.

50. See id.

51. See Schultz, supra note 21, at 52 (coming to this conclusion with a discussion of the cases cited infra note 53).

52. See case cited infra note 53.

53. See Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 618 (1996) (plurality opinion) (holding that money spent by the Colorado Republican Party to oppose reelection of a United States Senator was an independent expenditure because the party had no candidates of its own with which to coordinate); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 659 (1990) (holding that a Michigan law that prevented corporations from using their general treasury funds for independent political expenditures was constitutional because it was a narrowly tailored means of preventing corporations from using their large resources to distort political debate); Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 263-64 (1986) (holding that a nonprofit corporation was exempt from the requirement of having a segregated political expenditure account because these special corporations would not have an immense war chest with which they could distort the political process); Federal Election Comm'n v. Na-
its most recent decision on campaign finance laws, the Court declined to overrule *Buckley*. Indeed, it once again upheld the contribution/expenditure distinction as well as the corruption or appearance of corruption rationale for limiting political contributions.\(^5\)

Another constitutional consideration for online politics is the Supreme Court's protection of First Amendment anonymity. The Supreme Court has held that certain restrictions on anonymous campaign activities face strict scrutiny under the First Amendment.\(^5\) Anonymity is an important First Amend-

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54. *See Nixon v. Shrink Missouri Gov't PAC, 120 S. Ct. 897, 901 (2000), rev'g Shrink Missouri Gov't PAC v. Adams, 161 F.3d 519 (8th Cir. 1998).* The Court reversed an Eighth Circuit holding that a Missouri law limiting contributions for state races from $275 to $1,075 was unconstitutional because the state had not articulated an adequate rationale for the bill and because inflation had increased the constitutional maximum for contribution limits. *See id.* at 909-10. The Supreme Court specifically held that the Eighth Circuit's holding regarding inflation was flawed. *See id.*

55. *See id.* at 907.

56. *See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).* In 1988, Ohio resident Margaret McIntyre distributed leaflets at a public meeting at a public school. *See id.* at 337. Many of these leaflets were unsigned, but expressed the writer's dissatisfaction with the local school board's attempts to pass a local election levy. *See id.* Nothing in her leaflet was false, misleading, or libelous. *See id.* A school official warned Ms. McIntyre that because her leaflets were unsigned they did not conform to Ohio election law, and eventually, the Ohio Elections Commission fined her $100. *See id.* at 338. The Court reasoned that because the restriction interfered with one of the core categories of protection under the First Amendment (discussion of candidates for political office and debate of public issues), the Ohio law would face strict scrutiny. *See id.* at 347. In so holding, the Court partially relied on *Buckley* (“Of course, core political speech need not center on a candidate for office. The principles enunciated in *Buckley* extend equally to issue-based elections such as the school tax referendum that Mrs. McIntyre sought to influence through her handbills.”). *Id.; see also Buckley v. American Constitutional Law Found., 525 U.S. 182, 200 (1999) (plurality opinion)* (holding invalid a state law requiring circulators of petitions for ballot initiatives to wear an identification
ment liberty, the Court has reasoned, because individuals may fear official or economic oppression for their political views, or may believe that due to their personal unpopularity, the public will prejudge their message.\(^5\) Electronic anonymity over the Internet is likely to fall under this category of protection, but because the Supreme Court has not determined the degree to which the First Amendment protects anonymity in political speech, regulations which impose some minimal disclosure requirements on the Internet may remain within constitutional bounds.

3. Administrative Interpretations of Federal Election Law

FECA established the Federal Election Commission as the administrator and enforcer of federal election law.\(^5\) Congress, however, severely limited its enforcement power and did not give the FEC sufficient authority to affect the substance of federal election law.\(^5\) Indeed, Congress, to ensure that the FEC's power would be limited, wrote its own detailed set of regulations into FECA, thus restraining the commission's ability to establish rules independent of congressional influence.\(^6\) Despite its limited power to shape election law, the FEC has established some regulations where FECA does not address a particular issue.\(^6\) The most significant regulation the FEC has created permits state party organizations to accept unlimited

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57. See McIntyre, 514 U.S. at 342. The Court cited the creation of the Federalist Papers as the leading example of the importance of anonymity in political speech. See id. at 343 n.6.

58. See supra notes 34-39 and accompanying text.

59. Some commentators have questioned the FEC's ability to effectively regulate campaign financing and cite Congress's limitation on the commission's ability to act independently as a reason. See William C. Oldaker, Of Philosophers, Foxes, and Finances: Can the Federal Election Commission Ever Do an Adequate Job?, ANNALS AM. ACAD. POL. & SOC. SCI., July 1986, at 132-36. Oldaker points out that every "enforcement action against a member of Congress is an enforcement action against the commission's boss—a limitation that must be painfully omnipresent to all those at the FEC." Id.

60. In addition, the FEC is patrolling perhaps the most sacred of all congressional activities—reelection—while Congress controls the commission's budget, can amend FECA, and can reject any proposed regulations. See id. Thus developments in election law necessarily face close scrutiny by Representatives and Senators who will be mindful of their own best interests.

61. Examples include regulations regarding officials borrowing private jets, see 11 C.F.R. §§ 114.9(e), 9034.7 (1999), and regulations restricting a political party's ability to host debates for its own candidates for nomination, see 11 C.F.R. §§ 100.7(b)(21), 110.13 (1999).
contributions and to then funnel those funds to candidates for federal office. This decision is frequently cited as an example of the FEC's inability to make sound regulatory decisions and indicates that, even when the FEC has the latitude to make decisions, it is either unwilling or unable to place serious restrictions on candidates.

Thus far, the FEC's attempts to issue rulings on Internet campaigning have resulted in confusion. In June 1999, the FEC ruled that credit card contributions on the web could count for federal matching funds in the presidential campaign, after coming to the opposite conclusion in 1995. In 1996, the FEC ruled that a House candidate who had linked his campaign website to his business's website should have compensated his company for the link. Just one year later, the FEC approved the Secretary of State of Minnesota's plan to provide links to candidates' websites from her agency's website. The FEC has also ruled that a PAC may not place its list of endorsed candidates on its website if the site is funded by the group's corporate organization, yet the FEC permits corpora-

62. This is a widely criticized ruling that reformers cite as one of the primary deficiencies in the current campaign finance system because it creates a loophole allowing large donors to funnel money to candidates despite the contribution restrictions. See BROOKS JACKSON, BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED 42-43 (1990). Jackson criticizes the FEC, arguing that "the cause of the soft-money calamity...began with a policy reversal of the FEC in 1978," and notes that the commission "refused—despite criticism, lawsuits, and court orders—to do anything about it." Id.

63. See id.

64. See Amy Keller, Bush Campaign Wants Commission to Clarify Internet Election Guidelines, ROLL CALL, July 15, 1999. The FEC's decision came at the request of the Bradley for President campaign. See id. The commission's initial concern was the legitimacy of these contributions because they would not include a signature, which was required for the traditional method of contribution. See id. This new policy reversed a 1995 FEC ruling in favor of Lamar Alexander's campaign. The 1995 ruling permitted him to raise money online, but such contributions were not eligible for federal matching funds. See Amy Keller, Experts Wonder About FEC's Internet Savvy: Regulating Web Is a Challenge for Watchdog Agency, ROLL CALL, May 6, 1999 [hereinafter Keller, Experts Wonder About FEC's Internet Savvy].

65. See Keller, Experts Wonder About FEC's Internet Savvy, supra note 64. The FEC's general council argued that although the link cost nothing, "the added exposure...for the campaign was 'tantamount to advertising,' and that 'the mere fact that something is ordinarily provided free of charge does not alone answer the question of whether it has value.'" Id.

66. The FEC ruled that because the Secretary intended to include all candidates for office, her action was not an impermissible contribution, but rather an activity "designed to encourage individuals to vote or to register to vote." Id.
tions and labor unions to hold press conferences announcing their list of endorsed candidates. The current state of rules for campaigning on the Internet is therefore unclear, a situation which is consistent with the FEC's historical failure to effectively regulate politics.

4. Proposals for Reforming Campaign Finance

Considering Congress's history of limiting the FEC's ability to act independently, the existence of campaign finance reform bills specifically designed to regulate the Internet is not surprising. No clear approach for regulating campaigns on the Internet, however, has yet garnered majority support. One of the most comprehensive campaign finance reform bills put forward in Congress is the Shays-Meehan Bill. Among other things, the Shays-Meehan Bill would specifically apply federal election law to the Internet, and would therefore permit the FEC to continue its process of retrofitting federal election law to online campaigning. Taking the opposite approach, Representative Tom DeLay proposed an unsuccessful amendment to the Shays-Meehan Bill that would have exempted the Internet from certain campaign regulations. DeLay has also an-

67. See id. This particular discrepancy highlights the difficulty for the FEC created by the incompatibility between current Internet technology and twenty-five year-old election law.

68. Some commentators have argued that the FEC is ill-equipped to deal with these issues since it has little technological understanding. A former FEC Chairman, Trevor Potter, argues that "the agency is walking around in a minefield, created by the FEC's evolving regulation of Internet politics, without adequate information or understanding of how the Internet works." FEC Offline, ROLL CALL, May 6, 1999.


70. See H.R. 417.

71. H. Amend. 458, 106th Cong. (1999). DeLay's amendment caused some controversy among campaign finance reform commentators. Common Cause, a campaign finance reform advocacy group, called DeLay's amendment an attempt to "repeal major portions of the existing federal campaign finance laws as they apply to Internet-related campaign activities." Amy Keller, DeLay Wants Web Exempted from Reform Bill, ROLL CALL, Sept. 9, 1999. The New York Times called DeLay's bill a "smokescreen to weaken existing laws and introduce new channels for use of unlimited campaign funds." Id. (citing an editorial article, Mr. Delay's New "Killer" Tactic, N.Y. TIMES, Sept. 7, 1999). DeLay's aides countered these allegations by stating that the amendment would not apply to online fundraising, despite the fact that e-mail, websites, and chatroom conversations would not be subject to regulation as a result of this amendment. See id.
nounced plans to offer a comprehensive bill to address how the FEC may regulate the Internet.72

C. APPLYING THE FIRST AMENDMENT TO THE INTERNET

In addressing new legal issues created by the Internet, the courts have not created a body of law distinct from standard First Amendment jurisprudence. Indeed, the primary challenge facing judges in this area is determining how they can use existing law to answer new questions raised by the Internet.73 Recent First Amendment decisions regarding the Internet have followed this trend. For example, the courts have generally held that the Internet creates neither special protection nor special liability for defamation suits.74 Rather, traditional defamation law applies to Internet controversies.75 In one case, a federal district judge held that Internet service providers are not liable for allegedly defamatory comments distributed to its customers.76 The court ruled that if comments written by another information provider are not subject to editorial revision, and if the service provider took no role in writing or creating the material, then the server cannot be held liable for them.77 This was a straight application of existing

72. See id.

73. See generally JONATHAN ROSENOR, CYBERLAW: THE LAW OF THE INTERNET (1997). Rosenoer examines several areas of law and how they apply to the Internet, including copyright, trademark, defamation, privacy, torts, criminal law, and civil rights. See id. at xi-xiii. The author's approach is to present the legal background for each of these areas, and then explain how courts and legislatures have adjusted the law to fit Internet development. See id.

74. See id. at 112-16.

75. See id.


77. See id. at 51-52. The case arose from the distribution via the Internet by America Online, Inc., (AOL) of the accusations made in the Drudge Report about Assistant to the President Sidney Blumenthal. See id. at 46. Despite the fact that AOL retained the right to “remove content that AOL reasonably determine[s] to violate AOL’s then standard terms of service,” the court held that AOL had no editorial control over the report. Id. at 47. The district court was interpreting a provision of the Communications Decency Act (CDA) which creates a federal immunity for any cause of action against ISPs operating with a third-party user of the service. See 47 U.S.C. § 230(c)(1) (Supp. III 1997). Although the Supreme Court struck down much of the CDA in a prior Supreme Court case, the Court did uphold this section of the CDA. See Reno v. American Civil Liberties Union, 521 U.S. 844, 897 (1997). Therefore service providers currently are not subject to defamation suits as long as they do not exercise editorial control of the information distributed through their service. However, before passage of the CDA, a New York court came to a different
defamation law to the Internet, and the new technology required no change in the court’s reasoning.78

Further, the Supreme Court has ruled that First Amendment protections extend to the Internet the same degree of protection that traditional print media enjoys. In Reno v. American Civil Liberties Union, the Court held that sections of the Communications Decency Act (CDA) were invalid infringements on First Amendment liberties.79 This 1996 act prohib-

78. Some commentators, however, do point to the significant differences between the Internet and other forms of communication and argue that these differences could result in substantively distinct applications of law. The Internet’s First Amendment implications are powerful because it “represents a brave new world of free speech,” and because the “number of people regularly using the Internet is expected to grow to 100 million by the year 2000.” Sanford & Lorenger, supra note 10, at 1141. Further, the Internet is “fundamentally different from traditional forms of mass communication” because it “is capable of maintaining an unlimited number of information sources,” it has “no ‘gatekeepers’” (e.g., publishers or editors) controlling “the distribution of information,” and the “users of Internet information are also its producers” so that “every person who taps into the Internet is his own journalist.” Id. at 1141-42.

79. See Reno, 521 U.S. at 864. The primary reason for the Court’s holding was that much of the language of the statute was too broad. The Court held that “the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech” because in “order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right” to see and send. Id. at 874. Such a burden is “unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” Id. Thus, the Court applied a strict scrutiny analysis to this limitation on First Amendment liberty. The Court then examined some technological aspects of the Internet and determined that the CDA’s restrictions were overbroad. See id. at 876-77. It examined the district court’s record and cited the fact that no reliable technology existed to limit viewing of indecent material to minors, and so “[t]hese limitations must inevitably curtail a significant amount of adult communication on the Internet.” Id. at 877. The Court also concluded that other less restrictive means had been proposed for keeping indecent materials away from minors, “such as requiring that indecent material be ‘tagged’ in a way that facilitates parental control of material coming into their homes.” Id. at 879. In other words, the Court was not convinced that technology could not provide less burdensome ways of producing the same results sought by the CDA. In this instance, therefore, the Court did examine technological solutions to new constitutional issues raised by the
ited any person from using a "telecommunications device" to make or solicit "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent." Though this language applied generally to communications media, the restriction was clearly directed towards the Internet. By striking down this statute, the Supreme Court established that the First Amendment offered the same protection for the Internet as for any other method of communication. This decision should permit reformers to propose new regulations for online campaigns that rely on existing First Amendment decisions without the concern that the Court will overturn their policies based on new constitutional law created for the Internet.

II. THE FUTURE OF ONLINE CAMPAIGNING UNDER FEDERAL ELECTION LAW

Federal election law is an inadequate vehicle for limiting the potential abuses of online campaigning and ensuring the continued development of the medium as a democratic tool. This deficiency could be eliminated by limiting cash contributions online while permitting open political communication restricted only by requiring disclosure of all funding sources. This approach would limit the corrupting potential of money in online politics and provide the freedom necessary for the Internet to reach its full political potential.

A. CURRENT ELECTION LAW SHOULD NOT APPLY TO THE INTERNET

Applying federal election law to the Internet creates significant difficulties. Determining the value of electronic communications and policing the distinction between online contributions and expenditures would be problematic, and the FEC is unlikely to meet these challenges successfully. These problems are significant enough to ensure that regulation of the Internet based on current election law would be significantly flawed.

1. Valuing Political Communications on the Internet Is Difficult and Could Restrict New Modes of Communication

Directly applying FECA to the Internet raises difficult issues. FECA does not explicitly include the Internet in any of

Internet.

its regulatory provisions, so any attempt to restrict Internet campaign practices according to current election law requires new interpretations of the statute.\^1\footnote{81. Congress originally drafted FECA in 1971 when the Internet was in its elementary stages. \textit{See supra} notes 8, 21 and accompanying text. Subsequent amendments have not addressed this particular issue, though other campaign finance reform efforts have attempted to do so. \textit{See supra} notes 69-72 and accompanying text.} FECA imposes limits on the dollar amount individuals and PACs can contribute to candidates for federal office.\^2\footnote{82. \textit{See supra} note 22 and accompanying text.} Determining whether contributors exceed these amounts when they engage in political activities on the Internet requires estimating the fair market value of these activities since FECA regulates both monetary and in-kind donations.\^3\footnote{83. \textit{See supra} note 22 and accompanying text. FECA includes in the definition of “contribution,” any “gift subscription, loan, advance, or deposit of money or anything of value.” 2 U.S.C. § 441(a)(1) (1994). The statute excepts from its definition the value of services provided by volunteers and various other in-kind contributions, \textit{see id.}, suggesting that other non-monetary contributions fall within the contribution limitation.} Although the FEC has not yet made these determinations, business economists have started to examine the value of websites, links and e-mails to companies,\^4\footnote{84. \textit{See} William L. Norton, Jr., Norton Bankruptcy Law & Practice, § 151:25, at 28 (2d ed. 1999); Alfred M. King, \textit{What Is the Value of Your Website}, Strategic Fin., Mar. 1999, at 49-51; Matei P. Mihalca, \textit{The Web-Surfing Enlightenment}, Asian Wall St. J., Aug. 13, 1999, at 8.} and their approaches can shed some light on the political value of Internet campaign activities.

Determining the financial or economic value of a website is easier than doing so for other forms of Internet communication. Websites can be divided into three different categories: the portal or gateway type, the electronic commerce type, and the public relations type.\^5\footnote{85. \textit{See} King, \textit{supra} note 84, at 50. The Lycos and Yahoo sites best exemplify the portal or gateway type of website because they serve as an index to convey users to other sites. \textit{See id.} E-Trade and Amazon.com typify the electronic commerce sites, in which users can purchase merchandise presented online by using a credit card. \textit{See id.}} Political websites best fit into the third category because they present the candidate’s image to the public by providing both descriptive and persuasive information much like a typical corporate website.\^6\footnote{86. \textit{See id.}} Determining the value of this type of website is “both easy and impossible."\^7\footnote{87. \textit{Id.}} It is impossible in the sense that measuring the effect of public
goodwill for a business is impossible. The site clearly has value to the business, but the amount of that value is unclear.\textsuperscript{88} The cost of creating and maintaining a website, however, is easy to determine,\textsuperscript{89} and is analogous to measuring the value of television advertising because the cost of production and airtime in broadcasting is similar to the cost of creating and maintaining a website.\textsuperscript{90} Thus, determining the value of a website could require a fairly straightforward application of current election law.

Determining the cost of a link or an e-mail is more difficult than determining the value of a website. Some analysts calculate the value of a website by counting the number of links connecting to it,\textsuperscript{91} but they have not developed an approach for determining a link's value. Individuals can create links to other websites at almost no cost, and yet doing so could be of enormous value to a campaign.\textsuperscript{92} The FEC has already determined that under current election law, providing a link from a corporate site to a campaign site constitutes an illegal contribution.\textsuperscript{93} Thus, given that links constitute contributions, determining their fair market value would be necessary for regulating links from individuals.\textsuperscript{94}

Sending e-mail raises similar concerns. If an individual sends a bulk e-mail on behalf of a candidate, doing so likely constitutes a contribution because the candidate would not have access to these individuals through other means. Therefore, estimating the value of this e-mail would be necessary for determining whether the individual exceeded the contribution limits created by FECA.

Both links and e-mails have potential value as contributions high above the cost of creating them, a situation different from that of websites. The FEC has already indicated that the

\textsuperscript{88} See id.

\textsuperscript{89} See id.

\textsuperscript{90} In other words, determining the cost of designing a site and maintaining it is as easy as determining the cost of producing a commercial and purchasing airtime during which to run it.

\textsuperscript{91} See Mihalca, supra note 84, at 8.

\textsuperscript{92} For example, if a well-known Internet activist included links to her favorite candidates from her website, she would be connecting a potentially huge number of people to the campaign, but the minimal cost of programming the link would be the only cost to her.

\textsuperscript{93} See supra note 65 and accompanying text.

\textsuperscript{94} This is necessary because election law limits contributions to campaigns. See supra note 22 and accompanying text.
value of Internet communications may extend beyond the cost of creating them, but determining this excess value is difficult. These types of Internet communications are not analogous to traditional forms of political communication and therefore raise awkward new questions for election law.

In order for current election law to apply to Internet politics, these issues must be addressed. The true value of websites, links, and campaign e-mails lies in their ability to provide easy, cost-effective communication with voters so that campaign managers can put their communications budgets to other uses. Any attempt to restrict the ability of campaigns or individuals to engage in these kinds of activities, even if analysts could find an adequate method of determining their fair market value, could limit this type of open communication. These problems in determining the value of Internet communications thus hinder the FEC's efforts to determine whether FECA's campaign contribution limits have been reached.

2. Separating Contributions from Expenditures Is More Difficult Online

The distinction between contributions and expenditures under current election law would be especially difficult to police on the Internet. Though FECA originally limited both contributions and expenditures on behalf of candidates, the Supreme Court in Buckley struck down the independent expenditure restriction. Thus, while individuals and PACs may spend an unlimited amount of money on behalf of any one candidate, they may only directly contribute a limited amount. In certain instances, determining whether a supporter made an expenditure independently of the campaign can be difficult.

95. *See supra* note 65.

96. One possibility for e-mail is to determine the number of people receiving the message and calculate what would be the cost of sending a direct mailing to that number of people. Using this approach, however, would have the effect of basing the value of Internet communications on the value of more traditional media, which would therefore use these traditional forms as a benchmark. The Internet could, however, become the new primary means of political communication, and tying its regulation to traditional media would then become anachronous.

97. *See supra* notes 22-27 and accompanying text.

98. *See supra* notes 40-50 and accompanying text.

99. *See supra* notes 40-50 and accompanying text.

100. Specifically, individuals and groups may only contribute $1,000 to a single campaign. *See supra* note 22 and accompanying text.
For example, if a labor union or trade association runs a series of television or newspaper advertisements on behalf of a particular candidate, they must show that they did so without coordination with that candidate or campaign.\textsuperscript{101} FECA does not permit any agreement between the parties, and if they make one, however informally, it becomes a campaign contribution subject to regulations limiting the amount spent.\textsuperscript{102}

Candidates engaging in illegal or unethical campaign coordination with outside donors online will be more difficult to catch, and therefore policing them under the current system will be largely ineffective. One reason is that individuals may easily engage in Internet activities that could reach a large audience, without making large expenditures or carefully coordinating activities.\textsuperscript{103} Campaign funding resources are limited and therefore candidates want to exercise as much control over expenditures as possible. As a result, campaigns have an incentive to accept these funds as contributions rather than leaving supporters to spend money independently. An individual advocating for or against a candidate on the Internet, however, can do so with relative ease and little expense, which therefore conserves the campaign's limited resources.\textsuperscript{104} As a result, a campaign manager, for example, could induce an outside individual to conduct an extensive smear campaign with one untraceable communication, and not only would she not be risking scarce resources with this type of activity, but such an

\textsuperscript{101} See supra note 25. The definition of coordinated expenditure in FECA includes a "written contract, promise, or agreement to make an expenditure." See supra note 25. Thus, coordination between a candidate and an individual for an advertising campaign would constitute a "promise" or an "agreement."

\textsuperscript{102} See supra note 25. The Supreme Court has upheld this determination. It held in \textit{Colorado Republican} that though the Colorado Republican Party spent money for the sake of defeating a particular candidate, it was making an independent expenditure because it had not yet endorsed any candidates with which it could coordinate. See \textit{Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n}, 518 U.S. 604, 613-14 (1996) (plurality opinion).

\textsuperscript{103} See supra note 12 and accompanying text.

\textsuperscript{104} Issue advocacy groups are already targeting specific candidates online. For example, People for the Ethical Treatment of Animals (PETA) has purchased a banner ad on an online magazine to criticize Vice President Al Gore during his presidential campaign. See Amy Keller, \textit{Shop Talk}, \textit{ROLL CALL}, May 17, 1999. PETA claims not to be advocating the defeat of Gore, but it could easily have done so. See id. In Connecticut, a private citizen created a website advocating the electoral defeat of United States Representative Nancy Johnson. See Amy Keller, \textit{Shop Talk}, \textit{ROLL CALL}, Oct. 1, 1998. The citizen had to show that he did not coordinate with the candidate's opponent when the FEC began an investigation of his activities. See id.
effort would require little of the coordination that increases the chances of detection. Thus, the low cost of Internet activities would permit an individual to run a coordinated advocacy campaign that exceeds campaign contribution limits in a nearly undetectable manner.

Another reason that policing the contribution/expenditure distinction online may be difficult is that the Internet is so decentralized and extensive that neither regulatory agencies nor campaigns may be aware of all online political activity. If, rather than purchasing a banner ad in an online magazine, an advocacy organization began sending e-mails criticizing a candidate to a restricted group of people, the damaged candidate might never learn of it. Policing the Internet, moreover, would be particularly difficult for a regulatory agency. Due to the Internet's decentralization, regulating activities on it would likely depend upon campaigns complaining about unfair treatment. Requesting an investigation of an independent advocate or opposing candidate could quickly become a preferred campaign tactic. The ease and low-cost of Internet advocacy could result in a huge number of such campaigns, and the calls for investigations would quickly become overwhelming to a regulatory agency. With a potentially huge number of investigations to conduct, determining whether a particular online advocate had coordinated with a political campaign in a very limited way would be extremely difficult. Attempting to enforce current election law's limitations on coordinated expenditures on the Internet therefore would become very difficult.

3. The Federal Election Commission Is Ill-Equipped To Regulate Internet Campaigns

Current election law is also inadequate for regulating the Internet because it depends upon the Federal Election Commission for enforcement. Unfortunately, the FEC as currently constituted cannot effectively perform this task. Indeed, the FEC's current decisions on applying election law to the Internet indicate that it may not even understand the issues involved in this process. It has changed its position on the issue of whether online credit card donations can count for Presidential matching funds and has fined a candidate for providing a link between his corporation and his campaign website while permitting the Minnesota Secretary of State to provide links to federal

105. *Cf. supra* note 12 and accompanying text.
candidates. Perhaps the most blatant example of the FEC's lack of clarity is the agency's decision to prohibit corporations from posting endorsed candidates on its website while simultaneously permitting them to announce their endorsements in a traditional press conference format. This failure to see the ways in which Internet campaigning is analogous to traditional politics indicates that the agency is not up to the task of determining how to apply established law to new political practices.

The FEC's failure to make consistent, forward-looking decisions on issues raised by the Internet stems from specific agency problems. First, some commentators suggest that the FEC lacks understanding of the Internet itself. Without an understanding of how campaigns use the technology, the Commission is incapable of seeing how the Internet fits into the current election law picture. The FEC has indeed demonstrated technological ignorance and has not emphasized the Internet as much as it perhaps should in its own operations. For example, interested individuals cannot access the FEC's decisions, advisory opinions, or meeting agendas online, and although the commission posts campaign finance disclosure reports online, it takes weeks to do so. Former FEC Chairman Trevor Potter has argued that the agency simply lacks sufficient technical knowledge to address the issues raised by online campaigning. Without a basic understanding of how the Internet works, the commission will continue to have an extremely difficult time addressing important new issues, which could impair the Internet's development as an effective new political tool.

Another problem the FEC faces in regulating online politics is its inability to respond rapidly to new issues. This inertia explains its failure to maintain its technical savvy and significantly reduces its ability to effectively regulate the fast-developing Internet. A number of institutional factors explain

106. See supra notes 64-66 and accompanying text. In each case, the campaigns requested clarification from the FEC on whether they could engage in particular practices. When campaigns are taking the initiative in getting rulings on campaign law, the rules necessarily will be of an ad hoc nature, which does not permit developing a systematic, forward-looking approach to new issues.

107. See supra note 67 and accompanying text.

108. See supra note 68.

109. See FEC Offline, supra note 68.

110. See id.

111. See supra note 68.
why the FEC cannot move quickly to resolve new legal issues. One problem is that the FEC has only limited personnel. The potentially huge amount of online political activity would require a large compliment of investigators to oversee it. Because the FEC has too few investigators to monitor current political activity, the additional burden of investigating all the potential requests for investigation would likely overwhelm the agency, even if it could update its technical ability. Another problem is that investigators operate only in Washington, D.C. They make phone calls and send letters, and every line of their communication requires approval from the politically-appointed commissioners. This extremely slow process would not be adequate for properly overseeing Internet political activity, where changes occur rapidly.

The FEC's ability to regulate online politics has been further limited by its budget constraints. Congress has regularly slashed the commission's operating budget, which has forced the FEC to cut back on many of its ordinary regulatory activities. The budget cuts have been so significant that during 1987 and 1988 the commission audited only nine Senate and House candidates. With such severe fiscal constraints, the FEC is completely incapable of making the necessary investments to become technically adept and to adequately investigate political activity on the Internet.

The elemental problem with these restraints and all of the limitations on the FEC's ability to regulate online politics stems from the fact that the commission charged with investigating political fundraising must submit to political over-

112. See Jackson, supra note 62, at 7. The commission has many lawyers and financial auditors, but this staff is likely to have only limited ability to perform Internet investigations. See id.
113. See id.
114. See id.
115. See id. The commissioners are political appointees, and they have been wary of maintaining a large staff of investigators, fearing that they will accumulate too much information on political allies. See id. at 9. Thus, the FEC is unlikely to add the additional investigators necessary to fully oversee the Internet because of political considerations that would only change if the method of selecting the commission changed.
116. See id. at 18-20. The commission reached its maximum size in 1979. See id at 19. Since then, Congress has managed to make this division of the federal government a model of limited government and fiscal constraint. See id. at 19-20.
117. See id. at 19.
sight. One critic has noted that even when the FEC has tried to perform its job effectively, it has been “faced with the stark fact that some of those it investigated controlled its lifeline,” which has resulted in the commission losing “more and more of the tools it needs to do its job.” As long as the commission answers directly to Congress, it will likely lack the investigators and financial resources to adequately apply current election law to the Internet. Unless Congress is willing to relinquish some of its control, the state of election law in this area will likely remain unclear and ineffective.

B. A CAMPAIGN FINANCE REFORM PROPOSAL FOR INTERNET POLITICS

Any effort to police online campaigning must recognize the unique opportunities and challenges presented by the Internet and should correct the inadequacies of the current regulatory scheme. Election law should free the Internet from all regulatory burdens that will distort its growth as a political medium, and should limit the most corrupting influences on candidates and officeholders. If reform efforts achieve these goals, the Internet could become a tool that will substantially improve the democratic community.

1. Election Law Should Place Only Modest Restrictions on Internet Campaigning

In order to ensure that the Internet can develop as a political tool, campaign finance law should leave online political communication largely free of restrictions. Some limitations are, however, necessary to promote the goals of reducing the presence and appearance of corruption.

a. Election Law Should Limit Direct, Online Monetary Contributions

The most important restriction to apply directly to the Internet is the ceiling on direct financial contributions to candidates. Direct financial contributions are substantially the same on the Internet as they are in traditional politics, and have essentially the same effect: informing the candidate that a particular individual has provided them financial support. Any effort at campaign finance reform should simply apply the fi-
financial contribution restrictions of current election law directly to the Internet. The one basic form of online financial support is credit card donations made at a candidate's website. The contributor enters the credit card information and amount of donation, and the campaign has the technology to process this information and collect the donation. This method is not substantially different than when an individual sends a personal check through the mail to the campaign office and receives a receipt in return. Any system of regulation for Internet politics should apply current election law's restrictions, and Congress has wisely resisted attempts to exempt the Internet from these limitations.

b. Independent Expenditures on the Internet Should Remain Unregulated

Independent online expenditures, however, should remain exempt from all election law restrictions. The Supreme Court has already struck down such restrictions in Buckley, and this is also the best policy decision. Thus if an individual or corporation wants to provide a link to a candidate's website from their corporate website, or purchase a banner ad on an online magazine, he should not face any restrictions. Further, independent expenditures should be more broadly defined to include any money spent by an individual or an organization that is not a direct contribution. Thus, even if a candidate coordinates an ad campaign funded by an individual, election law

120. See supra notes 22-24 and accompanying text (discussing FECA contribution limitations); supra notes 30-33 (discussing FECA disclosure requirements); supra notes 44-55 (discussing the Supreme Court's analysis of FECA contribution limitations).

121. See supra note 64 and accompanying text. Online contributions have already been an issue for the FEC. The commission currently applies the contribution limits required by FECA to online financial donations, so that individuals must adhere to the $1,000 limits and cannot avoid doing so by making their donations online. See supra note 64 and accompanying text. Thus this straightforward application of election law does not require any new legislation or rulings.

122. See supra notes 70-72 and accompanying text. To bolster his proposed amendment to the Shays-Meehan Bill, Representative DeLay claimed that his amendment would not exempt the Internet from financial contribution restrictions, but opponents of the bill argued otherwise. See supra note 71 and accompanying text. Either way, incumbents will always have an incentive to weaken contribution restrictions and create loopholes through which special interests can pass them large donations. Thus, reformers must carefully consider the language of any bill attempting to regulate Internet politics.

should not categorize these expenditures as a contribution, though the current regulatory scheme would. Election law should only restrict money donated directly to a campaign, and all other expenditures should be considered independent and remain unregulated.

c. Election Law Should Not Regulate Political Communication on the Internet

Federal election law should leave online political communication unrestricted. Current election law distinguishes between financial contributions and political communication, and leaves the latter largely free from regulation. Determining the difference between financial contributions and political communication is more difficult on the Internet, and for now the law should err on the side of leaving new practices unrestrained. Thus, just as the definition of independent expenditures online should include all money not directly contributed to a candidate, the definition of online communication should include all political activity on the Internet other than direct donations to a campaign. Sending e-mails on behalf of a particular candidate, providing a link to her website, creating a website promoting a particular candidate or advocating the defeat of another would qualify as a political communication, regardless of the monetary cost the individual incurred while engaging in this activity. Political communication, regardless of the form it takes other than direct contributions, should therefore remain free from all restrictions under any proposal for campaign finance reform.

One requirement should be imposed on online political communication: disclosure of the source of any funds over $200 used to support the activity. This would permit individuals and campaigns to assess any motivations that might make online messages distorted or inaccurate. The goals of disclosure—determining who is funding what message—could be accomplished without requiring a filing with the FEC. Rather, a simple message at the bottom of an e-mail or webpage could provide the required financial information, and the laborious

124. See supra notes 22-27, 45-47 and accompanying text. This is true as a matter of constitutional law; only limitations narrowly tailored to limit the appearance or presence of corruption survive strict scrutiny, which means that only direct contributions to campaigns or coordinated independent expenditures are subject to legal restrictions. See supra notes 45-47 and accompanying text.
process of preparing documents for the FEC need not be undertaken. Other candidates or groups could investigate the sources of information themselves, and if they had an objection, they could bring it to the attention of the FEC.\textsuperscript{125} If no problems were perceived, no FEC investigation would be required. Such a disclosure requirement would create a largely self-policing arena of political communication, well-suited to a free exchange of ideas.

This proposal follows current election law, which requires disclosure of any donation over $200.\textsuperscript{126} The Supreme Court upheld these requirements in FECA,\textsuperscript{127} but struck down an Ohio law banning anonymous political communications.\textsuperscript{128} Requiring disclosure of financial sources for Internet communications resembles the FECA requirement more than it does the Ohio law,\textsuperscript{129} therefore such a requirement is unlikely to raise First Amendment problems. Further, FECA's $200 floor on the disclosure requirement could be maintained for Internet communications without undermining the goals of disclosure because amounts less than $200 have little corrupting potential. The low cost of sending an e-mail makes it look less like a financial contribution and more like the anonymous political activity protected by the Court in McIntyre. Thus, though the cost of sending out a potentially damaging mass e-mail would be small, and doing so without a disclosure of who sent the information could be damaging, the Court's principle of protecting anonymity likely requires that election law maintain the $200 disclosure floor. A plan for regulating Internet politics that leaves communications unrestricted by requiring disclosure, and limits direct financial contributions, is a constitutionally sound and straightforward way to regulate online campaigning.

\textsuperscript{125} This would substantially limit the FEC's initial investigatory duties and permit the commission to focus on well-documented abuses. Such an approach, at least, would limit the effect of the FEC's inept attempts at enforcement.

\textsuperscript{126} See supra notes 31-33 and accompanying text.

\textsuperscript{127} See supra note 48 and accompanying text.

\textsuperscript{128} See supra notes 56-57 and accompanying text.

\textsuperscript{129} FECA requires disclosure of any donation over $200 while the Court has held that the First Amendment protects anonymous political activity. Thus to be constitutional, a disclosure requirement must seemingly be based on a financial contribution and not apply to all political advocacy.
2. Limiting Restrictions on Internet Campaigning Will Allow the Technology To Reinvigorate the Political Community

The primary goal of campaign finance law is to limit the corrupting potential of money in politics, and because the Internet has such a low cost of access, the corrupting potential of online campaigning is much less than in traditional media. Thus, leaving the Internet largely free of regulation will not interfere with reform efforts and should allow it to develop its full potential as a tool for democracy.

a. The Goals of Campaign Finance Reform Would Be Best Served by Limiting Only Direct Financial Contributions

Restricting direct financial contributions on the Internet is essential to the ends of campaign finance reform. The original goal of FECA was to curb the corrupting influence of large financial contributions on politics, and this remains the goal of campaign finance reform efforts today. The so-called "soft-money" loophole has served to undermine the best efforts at reform, and the prospect of additional loopholes created through the Internet would serve to further undermine the current system. Critics of current election law have pointed out that the public has grown increasingly distrustful of the political process and more likely to believe that big money exerts an undue influence on the system and distorts public discourse. To provide any additional channels through which large contributions could be directed to candidates would only worsen this problem and undermine efforts to limit the corrupting influence

130. See supra note 21 and accompanying text. The situation in the 1972 election was particularly grim, but opening up more loopholes for large contributions would increase the chance that the extreme abuses of the Nixon campaign and CREEP would reappear.

131. The Shays-Meehan bill seeks to close many of the loopholes that have opened since 1974, and in many ways the fight to "clean-up" politics is the same as it was twenty-five years ago. See Bipartisan Campaign Reform Act of 1999, H.R. 417, 106th Cong. §§ 2-5 (1999).

132. See supra note 62 and accompanying text.

133. See Schultz, supra note 21, at 93-94. Professor Schultz notes that since 1974 (when Congress adopted the last significant amendments to FECA), voter confidence in the integrity of the political system has continued to decline. See id. at 94. A 1994 poll revealed that 49% of Americans believe Congress is more corrupt now than in 1974. See id. Other studies reveal that 86% of the public believes that special interests control government and that money controls decisions made by public officials. See id. This declining trust in governmental integrity began before FECA and has continued since, indicating that the current system has not accomplished its goals. See id. at 96.
of money in politics. These direct contributions do not enhance the quality or quantity of online political communication, and unlike online advocacy, they could involve enormous sums of money with great corrupting potential. Any attempt to create election law applicable to the Internet should continue the restrictions on direct financial contributions implemented by FECA because they are the greatest threat to the integrity of the political system.

Other provisions of current election law should not apply to the Internet. Restricting only direct financial contributions would eliminate the need to police the contribution/expenditure distinction as it is currently constituted. As the election law system is now applied to the Internet, individuals must show that they have not coordinated their online political activity with a candidate or a campaign. This is difficult to do in a medium where a brief, nearly undetectable message to a supporter can lead to a political message reaching millions of people. The difficulty in enforcing this distinction is one of the reasons current election law should not apply to the Internet, and only by restricting direct financial contributions can campaign finance reform avoid this difficulty. The FEC could thus apply its limited investigatory resources more effectively, rather than having to spread them even more thinly. Saving the FEC from having to enforce the contribution/expenditure distinction would thus serve the goals of campaign finance reform by allowing it to perform its other duties more effectively.

Limiting only direct monetary contributions online also serves the ends of campaign finance reform because money spent on Internet political activities serves to promote more open communication, which has little corrupting potential. Permitting unlimited coordinated expenditures in traditional forms of political communication would substantially contribute to the appearance and presence of corruption because the costs of reaching a large number of people with traditional mediums are considerable. Campaigns devote a large portion of their budgets to these activities, and so the high cost of traditional communication makes coordinated expenditures extremely likely. These coordinated expenditures would be greatly corrupting and also available to only a rich few.

134. See supra notes 99-102 and accompanying text.
135. See supra notes 12, 103-05 and accompanying text.
136. See supra notes 112-17 and accompanying text.
The low cost of Internet communications limits this corrupting potential.\textsuperscript{137} Even if a supporter created and maintained the candidate's website, the cost of doing so would not compare to expensive television campaigns, and so the value of the contribution would be much less. The small financial value of Internet advocacy is similar to the small contributions made by many people, and such support should not be the target of campaign finance reform efforts. In addition, the low cost of online political activity means that almost anyone can participate,\textsuperscript{138} and therefore the political process will not be dominated by only "big money" interests. Thus the capacity of the Internet to reach many people at a small cost limits the corrupting potential of coordinated online expenditures and does not undermine the goals of reforming the campaign finance system.

b. \textit{Unrestricted Communication Will Allow the Internet To Develop as a Tool for Democracy}

If the Internet is allowed to develop, it has the potential to significantly improve the political system. Many observers have noted that it has affected politics already, but that Internet campaigning is still in its nascent stage.\textsuperscript{139} The Internet's decentralized and open nature creates important opportunities for candidates to reach out to voters directly, without the interference of the news media and reporters.\textsuperscript{140} The easy access to information that it permits could change the realm of political ideas and make it possible for individuals in remote areas to participate in the political process as effectively as people in capital cities. Political thought and discourse would not be filtered through powerful, centralized organizations that control access to the national media because, at least theoretically, the Internet "gives all candidates, coalitions, and citizens the same public forum to make their voices heard, to become their own

\textsuperscript{137} See supra notes 12, 17 and accompanying text.

\textsuperscript{138} Participation would, of course, be limited to people with Internet access, which would currently leave many people out. However, these limited restrictions would ensure that as Internet access expands, new users could begin participating in the political process without having to learn a complicated body of campaign finance law.

\textsuperscript{139} See Miller & Schrader, supra note 11, at A1.

\textsuperscript{140} See supra note 18 and accompanying text.
publishers and broadcasters, and to air their personal positions on public issues."  

Seen in this light, the Internet can empower the individual to make her views known to people across media markets and political boundaries. Public discourse could become more a contest of ideas and values than simply a battle of money and manipulation. Without elite organizations controlling access to the local, state, and national political debate, the political system might come closer to realizing its potential as a marketplace of ideas. Jesse Ventura's use of the Internet in Minnesota's gubernatorial election shows that the Internet can contribute to greater, more effective participation by groups not accustomed to following politics. This beginning alone is enough to show the promise that the Internet has for politics.

Nonetheless, the Internet has not yet begun to reach its potential as a campaign tool. Candidates, with a few notable exceptions, are still spending a very small portion of their total budgets on Internet activity, and many analysts are disappointed by the slow rate of development. Currently the Internet serves primarily as a supplement to traditional campaign practices, while candidates and their advisors focus their efforts on television advertising, polling, and get-out-the-vote telephone calls. Indeed, even current attempts to use the Internet in a supplemental capacity have not been uniformly successful, and many attempts to develop new uses end up more as gimmicks than as effective campaign tools.

141. SELNOW, supra note 12, at 108.
142. Cf. supra notes 1-2 and accompanying text.
143. By July 1999, for example, Steve Forbes had devoted a substantial amount of his budget to Internet campaigning in the 2000 Presidential election, but his opponents for the Republican nomination had yet to follow suit. See Dana Milbank, Virtual Politics, NEW REPUBLIC, July 5, 1999, at 22, 22.
144. See Miller & Schrader, supra note 11, at A1.
145. See id.
146. In the 1998 California Senate race, for example, Republican challenger Matt Fong appeared in a virtual town hall meeting, which is the kind of interactive communication medium that many see as the future for online politics. See William Booth, Politicians Set Their Sites on the Web; More Are Going Online to Woo Voters, Donors, Volunteers, WASH. POST, Oct. 17, 1998, at A1. Only 250 people logged in, however, a miniscule portion of California's voting population. Some of the Internet's potentially unique political tools are, however, beginning to develop. In Iowa, Senator John McCain's campaign sent 50,000 e-mails to supporters, providing them with a script to use for telephone calls that would enable them to respond to attacks mounted by George W. Bush. See John F. Dickerson, Point, Click, Win!, TIME, Jan. 31, 2000, at 42.
Internet, in short, is a new political medium that has only begun to fulfill its potential.\textsuperscript{147}

At this stage, any attempt to broadly regulate the Internet could have negative consequences. The best policy is to let this new political tool develop and only regulate if particularly egregious abuses arise. The FEC's inability to make consistent, straightforward applications of current election law to the Internet,\textsuperscript{148} and its probable inability to adequately investigate suspicious campaign practices online,\textsuperscript{149} make any severe limitations of the Internet inadvisable. Heavy-handed and clumsy regulation could limit some potentially valuable uses and generally slow its development. Rather than make mistakes by regulating too broadly too early, election law should leave the Internet largely unrestricted so that candidates, citizens, and committees can make their own best use of this new tool.

Requiring disclosure of the sources of Internet campaign funding should be sufficient to prevent any extreme abuses in the developmental stages. Among the potential problems with online politics is the ease with which individuals can present distortions of their opponents' position and record, or simply tell lies about other candidates without getting caught.\textsuperscript{150} By requiring disclosure of the funding sources for Internet activities, election law would provide an incentive for those financial backers to present the truth, since their role would be easily identifiable and injured parties could easily seek relief. This would lead to private policing of online discourse as injured parties bring libel claims to prevent their opponents from defaming them.\textsuperscript{151} Official, centralized enforcement could not be as thorough as candidates themselves looking out for their own best interests, and under this system the FEC would not even be needed for cataloging financial disclosures. The FEC's involvement in managing the disclosure information would not be a problem because organizing such public information has been

\textsuperscript{147} A Time/CNN poll showed that, as of January 2000, only 17% of adults use the Internet to connect with politics. See Dickerson, \textit{supra} note 146, at 42.

\textsuperscript{148} See \textit{supra} notes 64-68 and accompanying text.

\textsuperscript{149} See \textit{supra} notes 112-17 and accompanying text.

\textsuperscript{150} This danger is due primarily to the decentralized and egalitarian nature of the Internet as a communications medium. See \textit{supra} note 12 and accompanying text.

\textsuperscript{151} Online defamation is an increasingly litigated subject, and the courts are beginning to determine how First Amendment protections apply to the Internet. See, e.g., \textit{supra} notes 73-78 and accompanying text.
one of the few bright spots in its history. As long as the Internet has a reasonably effective means for requiring truth in political communications, as such a disclosure requirement would become, election law should leave it to develop its potential as a powerful new political tool.

CONCLUSION

Campaigning on the Internet has become an increasingly important part of the political process in the United States. It has done so, however, against the backdrop of campaign finance laws that Congress enacted long before the Internet had developed as a political tool. Election law, accordingly, does not address many of the important issues that this new technology raises, and this results in an ambiguous legal situation in which political players are left uncertain about their ability to utilize this new tool fully. In order to permit this technology to develop into an effective tool for campaigns and democracy generally, election law should be rewritten to ensure that the Internet can develop to its full potential without being stunted by clumsy applications of the current regulatory framework. Specifically, only the limits on direct financial contributions should apply to online political activity, and Internet communications should be allowed unfettered development, restricted only by a requirement of funding source disclosure. This approach would permit the online political community to develop to its full potential and possibly improve the entire democratic community.

152. See JACKSON, supra note 62, at 70. Jackson notes that the "FEC is generally praised for its handling of... public information." Id.