

NOTES

LOOPHOLE.COM: HOW THE FEC'S FAILURE TO FULLY REGULATE THE INTERNET UNDERMINES CAMPAIGN FINANCE LAW

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Since the Supreme Court's landmark decision in Buckley v. Valeo, it has been well established in campaign finance law that any expenditure made in coordination with a political candidate is treated (and limited) as though it were a contribution to the candidate. Under the Federal Election Commission's current internet rules, however, any communication disseminated over the internet—other than paid advertising on another's website—is exempt from the coordination rule. This Note explores the history of the coordination standard and the FEC's internet regulations. It describes the coordination loophole in detail and argues that the existing regulations are not consistent with governing campaign finance law. Finally, it proposes a minor change to the regulations that would fix the loophole.

INTRODUCTION

The internet has radically redefined the way people communicate. In the blink of an eye, users can send messages to anyone in the world. Communication is low cost, instantaneous, and versatile.¹ Unsurprisingly, the internet has had a huge impact on the way Americans learn and talk about politics.² The web is an increasingly important political forum, and recent campaigns with an internet focus have seen enormous success.³ Yet even as candidates have focused more attention on internet

1. For a discussion of the factors that contribute to the internet's versatility as a medium for communication, see *infra* Part II.B.2.

2. According to a recent survey, forty percent of Americans got news about the 2008 election from the internet. Aaron Smith & Lee Rainie, Pew Internet & American Life Project, *The Internet and the 2008 Election*, at i (2008), available at http://www.pewinternet.org/~media/Files/Reports/2008/PIP_2008_election.pdf (on file with the *Columbia Law Review*).

3. President Barack Obama's 2008 campaign shattered financial expectations by tapping into small online donors. Obama reportedly raised over \$700 million for his campaign, and his email list is believed to include over thirteen million names. See Jonathon D. Salant, *Obama's Army of E-Mail Backers Gives Him Clout to Sway Congress*, *Bloomberg.com*, Dec. 1, 2008, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=aEVXKOC3s8.k&refer=home> (on file with the *Columbia Law Review*). But see Andrew Malcolm, *Obama's Small-Donor "Myth,"* *L.A. Times*, Nov. 30, 2008, at A14 (explaining that Obama's small donor numbers were inflated by repeat donors); Press Release, Campaign Finance Institute, *CFI Analysis of Presidential Candidates' Donor Reports* (Nov. 24, 2008), at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=216> (on file with the *Columbia Law Review*) (finding high incidence of repeat donors and concluding Obama campaign's reliance on small donors was comparable to that of George Bush's 2004 campaign).

communications, the Federal Election Commission (FEC) has consistently tried to avoid regulating the web.⁴

In *Shays v. FEC*, the D.C. District Court held that the FEC's wholesale exclusion of internet communications from regulation was contrary to the law.⁵ In response, the FEC promulgated a rule that covered only internet communications placed for a fee on another person's website.⁶ This regulatory scheme creates a significant loophole: Communications that cost a substantial amount to produce, but are disseminated for free over the internet, can be directly coordinated with candidates or campaigns without triggering regulation.⁷ Put simply, a candidate can work

The internet has not been a political magic bullet, however. Howard Dean's 2004 presidential campaign relied heavily on the web for fundraising and volunteer coordination. Despite success in both areas, Dean ultimately lost to a more traditional campaign. See Kevin Anderson, Will the Dean-iacs Back Kerry?, BBC News, Mar. 26, 2004, at <http://news.bbc.co.uk/2/hi/americas/3570237.stm> (on file with the *Columbia Law Review*) ("John Kerry was always seen as the solid candidate to Howard Dean's electric but—to his critics—undisciplined candidacy."); Gary Wolf, How the Internet Invented Howard Dean, *Wired*, Jan. 2004, at <http://www.wired.com/wired/archive/12.01/dean.html> (on file with the *Columbia Law Review*) (describing success of Dean's internet fundraising and coordination activities).

4. For a brief history of the FEC's internet regulations, see *infra* notes 86–96 and accompanying text. It is difficult to identify a single reason for the general policy of nonregulation. The FEC has expressed a desire to regulate the internet as minimally as possible. Internet Communications, 71 Fed. Reg. 18,589, 18,589 (Apr. 12, 2006) ("[T]he Commission recognizes [that] the Internet . . . warrants a restrained regulatory approach."). Additionally, at least one former FEC commissioner has been very vocal about his opposition to internet regulation. See Bradley A. Smith, Virus Alert!: McCain-Feingold Is Set to Infect the Internet, *National Review Online*, Mar. 24, 2006, at <http://www.nationalreview.com/comment/smith200603241208.asp> (on file with the *Columbia Law Review*) [hereinafter Smith, Virus Alert] (arguing internet regulations are like "viruses" due to standards "so vague and overbroad they can freeze or shutdown bloggers nationwide"). (Note that Smith is hostile to campaign finance regulation generally. See Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 *Yale L.J.* 1049, 1049–52 (1996) [hereinafter Smith, Faulty Assumptions] (arguing campaign finance regulation conflicts with norms of political equality and can therefore be characterized as undemocratic).) The FEC also faces considerable external pressure to keep the internet unregulated. See Internet Communications, 71 Fed. Reg. at 18,589 ("The Commission received more than 800 comments . . . the vast majority of which urged limited, if any, regulation of Internet activities."). Whatever the reason, the FEC has, over the last several years, shown a consistent desire to not regulate the internet. The arguments in support of the FEC's position are laid out *infra* Part III.C.1.

5. 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). In a 2003 rulemaking, the FEC excluded all internet communications from its definition of "public communication," a label that triggers regulation. The court held that the statutory definition of public communication mandated the inclusion of at least some internet activity. See *infra* Part I.C. (describing internet regulation and *Shays* decision in detail).

6. See Internet Communications, 71 Fed. Reg. at 18,589 ("The revised definition of 'public communication' includes paid Internet advertising placed on another person's website . . ."); *infra* Part I.C. (charting history of FEC internet regulation).

7. Examples of potentially exempted communications include campaign videos, songs, and even supportive websites. For specific examples, see *infra* Part II.B.3.

with a supporter to produce a campaign advocacy piece bankrolled entirely by said supporter and avoid any regulation by posting the product on YouTube. Such communications would be subject to spending limits if disseminated through another medium,⁸ and may be quite valuable to political candidates.⁹

The FEC's refusal to regulate these internet communications is inconsistent with the text and purpose of the Federal Election Campaign Act (FECA), which mandates that any expenditure made in coordination with a candidate be regulated as though it were a contribution to that candidate.¹⁰ The failure to regulate these coordinated communications may also have significant practical implications. Streaming video, combined with free forums such as YouTube and Facebook, can accommodate ads, music videos, and even longer films.¹¹ As internet technology progresses, it will be possible to disseminate increasingly sophisticated (and thus expensive) communications through online forums.¹²

8. They would generally be treated as the functional equivalent of contributions to the campaign and be regulated accordingly. See *Clifton v. FEC*, 114 F.3d 1309, 1320 (1st Cir. 1997) ("Expenditures that are 'coordinated' with a candidate or his/her campaign—which are the functional equivalent of an in-kind contribution to the candidate—are treated as direct contributions to the candidate, rather than as independent expenditures"); *infra* Parts I.B (discussing treatment of expenditures made in coordination with candidates), III.C.1 (discussing FEC's reluctance to regulate internet for fear of chilling speech).

9. Modern political campaigns have benefited from, for example, viral videos distributed through YouTube, MySpace, and similar websites. See Michael Malbin, *The Election After Reform 235* (2006) (describing Dean campaign's plan to use internet tools to create an online community and expand his support base); *infra* Parts II.B.2 (discussing growing prominence of internet and potential for continued growth), II.B.3 (describing how free internet forums can create illusion that expensive communications are "grassroots"); cf. Richard L. Hasen, *Political Equality, the Internet, and Campaign Finance Regulation*, *The Forum*, 2008, Vol. 6, Iss. 1, Art. 7, at 6 [hereinafter Hasen, *Political Equality*] (describing enormous potential of online donors, but qualifying it by noting that small donor fundraising will not "overtake independent spending any time soon").

10. Federal Election Campaign Act, 2 U.S.C. § 441a(a)(7)(B)(i) (2006) (stating any expenditure made in "cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" is a contribution); see also *infra* Parts I.B, II.B.1 (describing coordination rule).

11. To see the potential power of this medium, one has only to look at the popularity of videos like Will.I.Am's "Yes We Can" music video. See David Montgomery, *Pro-Obama Video*, *Wash. Post*, Mar. 1, 2008, at A7 (noting that "Yes We Can" had over eleven million hits on YouTube). Just this term, the Supreme Court granted certiorari in a case regarding the application of campaign finance law to a narrative film. See *Citizens United v. FEC*, No. 08-205, 2009 WL 1841614 (U.S. June 29, 2009).

12. The rise of streaming video, for example, is a relatively recent phenomenon, and the internet's growth and uses have typically been difficult to foresee. See *infra* Parts II.B.2, II.B.3 (discussing increasing popularity of internet videos and danger of exploitation). The FEC itself has acknowledged how quickly internet technology can change. See *Internet Communications*, 71 Fed. Reg. 18,589, 18,596 (Apr. 12, 2006) ("In light of the evolving nature of Internet communications, the Commission is not explicitly excluding . . . any particular software or format used in Internet communications.").

This Note examines how current FEC regulations create a loophole that exempts certain coordinated internet communications, and proposes a regulatory change that would correct the problem. Part I provides a brief history of campaign finance law and explores in depth the FEC's approach to the "coordination" standard and to the internet. Part II describes in detail how the FEC's current regulations function to exempt internet communications from regulation and argues that this exemption (a) is inconsistent with the governing law and (b) allows for potential corruption of the campaign finance system. Part III proposes a minor alteration to the FEC regulations: bringing internet communications with a production cost greater than \$500 within the ambit of regulation. It argues that this change would eliminate the loophole, and concludes that its collateral effects would be minimal.

I. A SLOWLY SINKING SHIP: A BRIEF HISTORY OF CAMPAIGN FINANCE REGULATION

Congress has attempted to combat the corruptive influence of money in politics for over a century.¹³ As the Supreme Court has observed, however, "Money, like water, will always find an outlet."¹⁴ The modern history of campaign finance reform resembles a slowly sinking ship. As new holes appear in the basic structure, Congress and the

13. The first major piece of federal legislation to address money in politics was the 1907 Tillman Act, which banned corporate contributions to federal political candidates. For a detailed account of the early history of campaign finance reform, see Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz & Trevor Potter, *The New Campaign Finance Sourcebook* 7–20 (2005).

The claim that money is a corruptive influence in politics is, however, disputed. For the argument that campaign finance regulation inhibits rather than protects the political process, see Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1046–48 (1985) (arguing laws restricting amount of money in political campaigns significantly burden First Amendment rights and should be reviewed with exacting scrutiny); Smith, *Faulty Assumptions*, supra note 4, at 1051–71 (arguing campaign finance reform is based on faulty assumptions and hinders, rather than aids, democracy).

Proponents of reform laws have offered an array of arguments in response. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369, 1380–82 (1994) (arguing money in politics has coercive effect on both candidates and donors); Fred Wertheimer & Susan Wiess Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1128 (1994) (arguing influence of private finance undermines system of representative democracy); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 Yale L.J. 1001, 1005–06 (1996) (arguing expenditures should not be given same First Amendment protection as pure speech).

Despite the strenuous objections some have made to reform, Congress has continually shown an interest in regulating campaign finance. See Corrado et al., supra, at 7–20 (describing extensive history of Congressional campaign finance reform legislation). But see Allison R. Hayward, *Revisiting the Fable of Reform*, 45 Harv. J. on Legis. 421, 422 (2008) ("At each step, reform was a way to capitalize on public sentiment and restrict political rivals' access to financial resources . . .").

14. *McConnell v. FEC*, 540 U.S. 93, 224 (2003).

Federal Election Commission try to plug them with new laws or regulations. Part I.A describes the campaign finance framework established by the Federal Election Campaign Act and the Supreme Court's seminal decision in *Buckley v. Valeo*. Part I.B discusses the specific history of the "coordination" standard in campaign finance law. Part I.C describes the history of FEC policy with regard to the internet.

A. *The FECA/Buckley Structure*

1. *The Federal Election Campaign Act and Amendments.* — After the 1972 presidential election, congressional investigations of the Watergate scandal unveiled disturbing evidence that money was corrupting the political process.¹⁵ This revelation put pressure on the legislature to enact a comprehensive reform bill.¹⁶ The result was the Federal Election Campaign Act Amendments of 1974.¹⁷ This law had three main components designed to limit the role of money in federal elections: (1) a limit on the amount an individual could contribute to federal candidates,¹⁸ (2) a limit on the amount an individual could spend on behalf of a federal candidate,¹⁹ and (3) a limit on the total amount a candidate could spend on his or her own campaign.²⁰ With the addition of these amendments,

15. Corrado et al., *supra* note 13, at 22 (“[T]he inquiries led to allegations that contributors had ‘bought’ ambassadorial appointments, gained special legislative favors, and enjoyed other special privileges.”).

16. Congress had enacted a weaker reform law in 1972. See Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 11 (1972). This initial attempt introduced extensive disclosure requirements and limited the amount candidates could spend on their own campaigns.

17. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C., and 26 U.S.C.). Technically the 1974 law was an amendment to the existing Federal Election Campaign Act. In actuality, the 1974 amendments created the bulk of the substantive law that governs campaign finance.

18. Individuals were not allowed to give more than \$1,000 to any candidate. *Id.* § 101(a). Individuals were also barred from making more than \$25,000 in total donations per year. *Id.* The law did provide, however, that “political committees” (a special designation for a group specifically dedicated to the election or defeat of candidates) could donate up to \$5,000 to a candidate. *Id.*

19. Individuals were not allowed to spend more than \$1,000 “relative to” any candidate. *Id.* The Supreme Court soon found this limit unconstitutional. See *Buckley v. Valeo*, 424 U.S. 1, 19–20 (1976) (finding limits on personal expenditures uncoordinated with political campaign imposed significant burden on First Amendment rights unjustified by compelling government interest); see also *infra* Part I.A.2 (elaborating on *Buckley* decision).

20. This limit was scaled to the office for which the individual was running. Candidates for President could not spend more than \$50,000 of their own or family money, Senate candidates were limited to \$35,000, and House candidates to \$25,000. *Buckley*, 424 U.S. at 51. Like the limit on independent expenditures, the Supreme Court struck down this portion of FECA as unconstitutional. See *id.* at 54 (holding personal expenditure limits impermissibly burdened candidates’ First Amendment rights).

FECA created a closed universe of donated campaign money and barred candidates from seeking funding outside of it.²¹

2. *Buckley v. Valeo: The Court Alters the Balance.* — Opponents of FECA challenged the law in court almost immediately after its passage.²² They alleged that limits on contributions and expenditures violated the First Amendment rights of candidates and private individuals who wished to participate in the electoral dialogue.²³ In 1976, the Supreme Court handed down a 168 page decision in *Buckley v. Valeo*, addressing a broad spectrum of challenges to FECA.²⁴ The Court found the Act's contribution limits to be constitutional,²⁵ but struck down the provisions limiting the amount an individual could spend of his or her personal money.²⁶

21. Since candidates could only spend a limited portion of their own money, see *supra* note 20, and private individuals were barred from making expenditures "relative" to a federal candidate, see *supra* note 19, candidates were forced to rely entirely on money acquired from contributions. These contributions were limited to an amount that Congress considered non-corrupting. See *supra* note 18. In this way, FECA created a comprehensive system that theoretically prevented candidates from taking funding from sources that might corrupt them.

In addition to these direct financial limits, the Act created an optional system of public funding and created the FEC to enforce campaign laws. For a more complete explanation of FECA 1974's provisions, see Corrado et al., *supra* note 13, at 22–27; David L. Boren, *A Recipe for the Reform of Congress*, 21 Okla. City U. L. Rev. 1, 3–4 (1996). For further discussion of public funding, see Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian Public Choice Defense of Campaign Finance Vouchers*, 84 Cal. L. Rev. 1, 45–48 (1996) (describing direct public funding system). But see Bradley A. Smith, *Some Problems with Taxpayer-Funded Political Campaigns*, 148 U. Pa. L. Rev. 591, 624–28 (1999) (questioning value of public funding systems). For further discussion of the FEC as an agency, see Project FEC, *No Bark, No Bite, No Point: The Case for Closing the Federal Election Commission and Establishing a New System for Enforcing the Nation's Campaign Finance Laws 5* (2002) (arguing Commission is "structured by Congress to be slow and ineffective").

22. See *Buckley*, 424 U.S. 1.

23. See *id.* at 11 ("In appellants' view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money.").

24. See *id.* at 1.

25. Although the Court agreed that contribution limits burden political speech, they found the limits justified by the government's compelling interest in restricting "the actuality and appearance of corruption from large individual financial contributions." *Id.* at 26. Unlike independent expenditures, the Court noted, contributions are largely a symbolic gesture of support, and a limit does not significantly decrease the speech's value. *Id.* at 21 ("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."). But see *Randall v. Sorrell*, 548 U.S. 230, 237 (2006) (finding Vermont's contribution limits unconstitutional because they were excessively low).

26. The Court found that such restrictions reduce "the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. The Court further found that, unlike the contribution limits, these limits did not address the government's interest in preventing corruption or the appearance thereof. *Id.* at 46. Importantly, the Court distinguished

The Court also struck down the spending ceiling imposed on campaigns.²⁷

The *Buckley* decision outlines the basic constitutional structure that governs campaign finance law.²⁸ It divides the whole of political spending into two categories: contributions, which may constitutionally be limited, and expenditures, which may not be.²⁹ Over the last three decades, the Supreme Court has repeatedly affirmed *Buckley*'s central holding.³⁰ It was not long, however, before holes started to appear in this structure.

3. *BCRA, McConnell, and the Battle to Close the Loopholes.* — By the end of the twentieth century, two major problems with the FECA/*Buckley* regime were apparent. The most discussed problem was so-called “soft money”—money donated to the national parties to support state and local grassroots organizing or get out the vote efforts.³¹ Because soft money was totally unregulated by FECA, donors could contribute any amount to the national parties, who could in turn spend it on (or distribute it to) their state and local affiliates. Soft money soon became a huge part of national campaign spending. In the 2000 election it accounted for forty-two percent of all major party expenditures.³² Additionally, soft money donations tended to be large contributions from a

between “independent” expenditures and those “coordinated” with a candidate. *Id.* at 46–47. FECA treated the latter as contributions to the candidate, which could constitutionally be limited. *Id.*; see also *infra* Part I.B.1 (discussing coordination rule).

27. The Court found that the ceiling on candidates' personal expenditures restricted the volume and quantity of important political speech and was unsupported by any compelling interest. See *Buckley*, 424 U.S. at 55–57.

28. See *McConnell v. FEC*, 540 U.S. 93, 94–97 (2003) (applying *Buckley* framework to analyze new statutory restrictions on contributions).

29. A major focus in campaign finance is determining into which of these two categories political spending falls. For example, an expenditure made in coordination with a candidate is treated not as an “expenditure,” but instead as a “contribution.” See *Buckley*, 424 U.S. at 46 (explaining coordinated expenditures are treated as contributions); *infra* Part I.B (elaborating on coordination principle).

30. See, e.g., *McConnell*, 540 U.S. at 93–97 (applying *Buckley* framework to Bipartisan Campaign Reform Act of 2002); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 491 (1984) (following *Buckley* holding that “upheld as constitutional the limitations on contributions to candidates and struck down as unconstitutional limitations on independent expenditures” (emphases omitted)). But cf. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 407 (2000) (Kennedy, J., dissenting) (arguing contribution/expenditure distinction makes *Buckley* framework a “misshapen system, one which distorts the meaning of speech”).

31. As long as these activities were not related to a federal election, they were not covered under FECA. Grassroots organizing efforts for state and local elections tend to have a positive collateral effect on a party's federal candidates. *McConnell*, 540 U.S. at 122–24. Additionally, FEC regulations allowed national parties to use soft money to pay for a portion of “mixed” party-building activities (those that benefited the party on both the national and local level). *Id.* at 123 n.7.

32. The major parties raised and spent almost \$500 million in soft funds for that election. *Id.* at 124.

small number of donors, the exact situation FECA was intended to prevent.³³

Campaigns were also able to circumvent FECA through “issue advocacy”—ads attacking candidates for their position on a specific issue rather than advocating their defeat.³⁴ FECA regulated all expenditures made “for the purpose of . . . influencing” a federal election.³⁵ In order to avoid striking down what it found would otherwise be an unconstitutionally vague law, the *Buckley* Court narrowed this provision to cover only “express advocacy,” i.e., a direct request to vote for or against a candidate.³⁶ As a result, unregulated money (such as soft money or corporate funds) could be used to fund ads that supported or opposed federal candidates so long as they avoided specifically advocating the election or defeat of that candidate.³⁷ Unsurprisingly, issue advocacy became a significant portion of campaign spending.³⁸

It was these twin concerns that animated the Bipartisan Campaign Reform Act of 2002 (BCRA),³⁹ a substantial set of amendments to FECA.⁴⁰ BCRA banned national parties from raising or spending unregulated funds (i.e., soft money).⁴¹ It also banned corporations and labor unions from purchasing ads that mentioned a clearly identified federal

33. *Id.* (“Many contributions of soft money were dramatically larger than the contributions of hard money permitted by FECA. For example, in 1996 the top five corporate soft-money donors gave, in total, more than \$9 million in nonfederal funds to the two national party committees.”). Further, because soft money was totally unregulated, FECA’s ban on corporate and labor union contributions was inapplicable.

34. For example, an ad telling the viewer to “call Senator Smith and tell him you oppose his radical position on abortion” is “issue advocacy” and unregulated. By contrast, an ad warning constituents “don’t vote for Senator Smith because he is too radical” would be regulated. See *infra* notes 35–38 and accompanying text.

35. 2 U.S.C. § 431(9)(A)(i) (2006).

36. Under *Buckley*, only ads that “expressly advocate[d] the election or defeat of a clearly identified candidate” could be regulated. *McConnell*, 540 U.S. at 126 (quoting *Buckley v. Valeo*, 424 U.S. 1, 80 (1976)). To constitute “express advocacy,” an ad must include “magic words” like “elect” or “defeat.” All other ads constituted “issue advocacy,” to which no restrictions applied. *Id.* at 126. For an example of an ad that constitutes issue advocacy, see *supra* note 34.

37. The inability to say “elect” or “defeat” may not even have been a hindrance. According to campaign professionals, ads that avoided the “magic words” of express advocacy were usually more effective than those that did not. *McConnell*, 540 U.S. at 127.

38. “By the 2000 election, 130 groups spent over an estimated \$500 million on more than 1,100 different ads.” *Id.* at 127 n.20.

39. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.). This law is commonly referred to as McCain-Feingold, after its sponsors.

40. See *McConnell*, 540 U.S. at 129–30 (stating twin concerns of soft money and issue advocacy animated BCRA). Recent events had brought increased attention to concerns about electoral corruption. There was evidence of substantial campaign finance violations in the 1996 Presidential election. Further, BCRA followed in the wake of the Enron scandal. Before its collapse, Enron had made many large soft money donations to numerous elected officials. Corrado et al., *supra* note 13, at 36–37.

41. 2 U.S.C. § 441i(a)(1) (2006).

candidate within a certain time frame before an election (“electioneering communications”).⁴² Like FECA, BCRA faced a court challenge almost immediately. In *McConnell v. FEC*, the Supreme Court upheld the major provisions of BCRA, including the bans on soft money and electioneering communications.⁴³ BCRA managed to close at least some of the loopholes in campaign finance law, but several remain.⁴⁴ This Note addresses one such loophole that results from the intersection of two different regulatory areas: the “coordination” standard and the internet.

B. *The Coordination Rule*

1. *Working Together: The History of the Coordination Principle.* — When the Supreme Court upheld contribution limits but struck down restrictions on individual expenditures, an obvious conceptual problem resulted. If a donor could no longer contribute to a candidate, she could instead consult with that candidate about what expenditures to make. The Court was able to quickly dismiss this concern, however, because FECA explicitly treats any expenditure made in “coordination” with a candidate as a contribution.⁴⁵ This basic principle has been axiomatic in campaign finance law since *Buckley*: When an individual makes an expenditure in coordination with a political campaign, that expenditure falls on the contribution side of *Buckley*’s dividing line. Since FECA, however, this area of regulation has been plagued by the difficulty of developing a

42. 2 U.S.C. § 434(f)(3)(A)(i). In upholding these restrictions, the Supreme Court stated that the “express advocacy” standard it had invented in *Buckley* was not constitutionally mandated, but rather had been necessary to narrow an otherwise fatally vague law. In this case, the Court found the electioneering communications provision not to be unconstitutionally vague and upheld it. *McConnell*, 540 U.S. at 103.

43. See 540 U.S. 93. In *FEC v. Wisconsin Right to Life*, however, the Court retreated from *McConnell* and held that BCRA’s electioneering communication ban could not be applied to any ad unless it was “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 127 S. Ct. 2652, 2667 (2007). As a result, issue advocacy is once again a potential means to circumvent campaign finance regulation.

44. After *Wisconsin Right to Life*, issue advocacy is once again a problem. *Supra* note 43. Another significant loophole is “bundling”—the lobbying practice of collecting large numbers of small donations and offering them to candidates as a package (implicitly in return for disproportionate influence). See Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 *Stan. L. & Pol’y Rev.* 105, 106–07, 119–29 (2008) (describing bundling and state attempts to restrict it).

45. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (“[S]uch controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.”); see also Federal Election Campaign Act, 2 U.S.C. § 441a(a)(7)(B)(i) (defining expenditures made in “cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate” as contributions). The term “coordination” did not originally appear in FECA, but was coined by the *Buckley* court. *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 83 (D.D.C. 1999).

coordination standard that accurately captures such conduct without chilling unregulated speech.⁴⁶

After *Buckley*, the specific requirements for “coordination” remained unclear for nearly a quarter of a century.⁴⁷ The FEC’s initial regulations in this area were broad,⁴⁸ but the Commission tended to enforce them only in cases where coordinated ads used express advocacy.⁴⁹ In the 1990s, several lower courts found constitutional and practical limits to the coordination standard.⁵⁰ The most significant of these was the D.C. District Court’s 1999 holding in *FEC v. Christian Coalition*.⁵¹ The *Christian Coalition* court was faced with the question of whether the coordination standard could constitutionally be applied to regulate expressive communications (issue advocacy).⁵² Though the court held that coordinated is-

46. See *Shays v. FEC*, 337 F. Supp. 2d 28, 55 (D.D.C. 2004) (“While conceptually cogent, this formulation created practical concerns for courts forced to determine the line that separates an independent expenditure from a coordinated one . . .”), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005); see also *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614 (1996) (addressing question of whether political party is capable of making expenditures related to campaign but not coordinated with its candidate in that campaign); Craig A. Defoe, Note, *Regulating Coordinated Communications: How the FEC Rules Restrict Business Communications and Benefit Incumbents*, 40 *Ind. L. Rev.* 119, 134–35 (2007) (arguing coordination standard is overbroad and may restrict legitimate business communications in cases where business owner is also a candidate).

47. FECA defined coordinated expenditures as those made in “cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate.” 2 U.S.C. § 441a(a)(7)(B)(i). The specific criteria for “cooperation” or “concert” are not clear from the text.

48. Tracking the language in FECA, the FEC considered any expenditure “made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate” to be coordinated. 11 C.F.R. § 109.1(b)(4) (1980) (repealed 2003). The regulation elaborated that coordination included expenditures made “based on information about the candidate’s plans . . . provided to the expending person by the candidate,” and those made “by or through any person who is . . . authorized to raise or expend funds, . . . an officer of an authorized committee, or . . . receiving any form of compensation or reimbursement from the candidate.” *Id.*

49. *Christian Coal.*, 52 F. Supp. 2d at 82–83 (describing Coalition’s argument that “the FEC has only pursued corporate coordinated expenditures for express advocacy”).

50. See *Clifton v. FEC*, 114 F.3d 1309, 1314–16 (1st Cir. 1997) (suggesting coordination standard cannot constitutionally be applied to inquiries made of candidates about their voting records or stances on issues); *FEC v. Pub. Citizen, Inc.*, 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999) (finding coordination standard does not apply to provision by candidate of publicly available information); *Christian Coal.*, 52 F. Supp. 2d at 91 (identifying constitutional limits constraining coordination standard). But see *United States v. Goland*, 959 F.2d 1449, 1451–52 (9th Cir. 1992) (upholding criminal conviction for defendant who coordinated expenditure with candidate he was not supporting in order to aid separate, uninvolved candidate).

51. 52 F. Supp. 2d 45.

52. See *id.* at 91 (“This Court will only address coordination as it applies to expressive coordinated expenditures by corporations.”). The communications at issue were about political candidates but did not directly advocate the candidates’ election or defeat. For a discussion of what constitutes “issue advocacy,” see *supra* notes 34–38 and accompanying text.

sue ads could be regulated, it determined that the First Amendment required a standard that provided “the clearest possible guidance to candidates and constituents.”⁵³ To this end, the court fashioned a coordination test that was intended to gauge the degree of a candidate’s involvement with the communication at issue.⁵⁴ First, the court looked to whether the communication was made at the request or suggestion of the candidate.⁵⁵ If not, the court then examined whether the candidate or campaign had substantial control over—or input into—some aspect of the ad.⁵⁶

Accepting the D.C. District Court’s conclusion that the First Amendment mandated a clear coordination standard, the FEC promulgated a new regulation for “Coordinated General Public Political Communications” that essentially codified the *Christian Coalition* test.⁵⁷ This standard was short lived, however. Only one year later, Congress

53. *Christian Coal.*, 52 F. Supp. 2d at 91.

54. Since, as the court reasoned, coordinated expenditures were treated by FECA as contributions, a coordination inquiry should look for evidence that the candidate viewed the communication as “valuable.” *Id.* at 92. The *Christian Coalition* test therefore limits the coordination standard to only those expenditures “in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign’s needs or wants.” *Id.*

55. *Id.* (“The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate . . .”).

56. Specifically, the court looked at whether a candidate had “control over” or had engaged in “substantial discussion or negotiation” relating to an advertisement’s “(1) contents; (2) timing; (3) location, mode, or intended audience . . . ; or (4) ‘volume.’” *Id.*

57. See General Public Political Communications Coordinated with Candidates and Party Committees, 65 Fed. Reg. 76,138, 76,146 (Dec. 6, 2000) (codified at 11 C.F.R. § 100.23 (2001) (repealed 2002)). Section 100.23 applied to “general public political communications,” which it defined as “those made through a broadcasting station . . . , newspaper, magazine, outdoor advertising facility, mailing or any electronic medium, including the Internet or on a web site, with an intended audience of over one hundred people.” § 100.23(e). Qualifying communications were subjected to a two-part test. The first prong required that the communication be paid for by a person other than the candidate or her campaign. § 100.23(c)(1). The second prong required that the communication be produced either at the “request or suggestion” of the candidate or her campaign, § 100.23(c)(2)(i), after the candidate had exercised control over “the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication,” § 100.23(c)(2)(ii), or after “substantial discussion or negotiation” about these factors between the candidate or campaign and the purchaser. § 100.23(c)(2)(iii).

The FEC expressly acknowledged that this test was intended to implement the *Christian Coalition* decision. See General Public Political Communications Coordinated with Candidates and Party Committees, 65 Fed. Reg. at 76,138, 76,140. It is also important to note that the “general public political communication” standard included the internet as a regulated medium for coordinated communications. See 11 C.F.R. § 100.23(e). This policy and its subsequent repeal are discussed further *infra* Part I.C.

explicitly repealed the “coordinated general public political communication” test and directed the FEC to fashion a new rule.⁵⁸

2. *BCRA, Shays, and the Current Rules Governing Coordination.* — One of the primary concerns animating BCRA was the use of “issue advocacy” to influence a campaign without being subject to campaign finance regulations.⁵⁹ The sponsors of BCRA believed that such communications were being coordinated with political campaigns in ways that evaded the FEC’s coordination test.⁶⁰ To rectify this situation, Congress explicitly repealed the existing standard⁶¹ and directed the FEC to enact a new rule that addressed non-explicit agreements.⁶² The FEC responded by promulgating two new regulations: § 109.20 and § 109.21.⁶³

Section 109.20 is divided into two subparts. Part (a) defines coordination as “cooperation, consultation or concert with, or [expenditure] at the request or suggestion of, a candidate.”⁶⁴ Part (b) states that any non-communication expenditure satisfying the definition in part (a) is treated as a contribution.⁶⁵ Section 109.21 deals specifically with

58. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214, 116 Stat. 81, 94–95 (repealing FEC coordinated communication regulations and directing FEC to create new regulations).

59. See *supra* notes 35–38 and accompanying text (discussing difference between express advocacy and issue advocacy).

60. *Shays v. FEC*, 337 F. Supp. 2d 28, 64 (D.D.C. 2004) (noting Senators Russ Feingold and John McCain, the two primary sponsors of BCRA in the Senate, felt pre-BCRA standard would “miss many cases of coordination that result from de facto understandings”).

61. § 214(b).

62. Specifically, the law required the FEC to address:

(1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

§ 214(c).

63. 11 C.F.R. §§ 109.20–.21 (2009).

64. 11 C.F.R. § 109.20(a). This regulation implements the definition of coordination in FECA: “[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.” 2 U.S.C. § 441a(a)(7)(B)(i) (2002).

65. 11 C.F.R. § 109.20(b). The regulation specifically excludes coordinated *communications* from its ambit, covering “[a]ny expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is *not made for a coordinated communication* under 11 CFR 109.21.” *Id.* (emphasis added); see also *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (“[P]aragraph (b) of section 109.20 addresses expenditures that are *not made for communications* but that are coordinated with a candidate.” (emphasis added)). Communications are governed instead by § 109.21. *Coordinated and Independent Expenditures*, 68 Fed. Reg. at 425.

Section 109.20(b) makes an additional provision for coordinated expenditures made by political parties. 11 C.F.R. § 109.20(b). Under FECA, political parties are allowed to spend a certain amount on coordinated communications with their candidates in addition to the amount they can donate to those candidates. 11 C.F.R. § 109.37. The argument in

coordinated communications and attempts to implement the standards mandated by BCRA.⁶⁶ This section lays out a three-prong test to determine whether a communication is a “coordinated communication.”⁶⁷ The first criterion is that the communication be paid for by someone other than the candidate or his or her campaign committee.⁶⁸ Second, the communication must meet one of four “content” standards.⁶⁹ Finally, the interaction between the candidate and the purchaser must conform to one of five “conduct” standards.⁷⁰ To be con-

this Note can be applied with equal force to these provisions, but for the sake of clarity they are not discussed at length.

In its rulemaking explanation for § 109, the FEC emphasized that § 109.20(a) is essentially redundant because FECA § 441a(a)(7)(B) defines “contribution” to include expenditures made in coordination with a candidate or campaign. Coordinated and Independent Expenditures, 68 Fed. Reg. at 425. Similarly, the definition of “independent expenditure” excludes expenditures made in coordination with a candidate. 11 C.F.R. § 100.16; Coordinated and Independent Expenditures, 68 Fed. Reg. at 425.

66. See § 214(c); supra note 62 and accompanying text.

67. 11 C.F.R. § 109.21 (describing three distinct parts to coordination analysis).

68. Id. § 109.21(a)(1).

69. Id. § 109.21(a)(2). A communication passes the “content” test if it is (1) an “electioneering communication” (a term used to describe certain kinds of political ads, see id. § 100.29); (2) a “public communication” that republishes campaign materials; (3) a “public communication” containing express advocacy (see supra note 36 and accompanying text); or (4) a “public communication” that refers to a candidate or political party within a certain timeframe of an election in that candidate’s jurisdiction (or, in the case of political parties, a jurisdiction in which that party has a candidate). Id. § 109.21(c). The term “public communication,” defined at § 100.26, is used throughout the FEC regulations. This Note discusses the kinds of communication that are included in (and excluded from) that definition in more detail infra Part II.B.1.

The inclusion of a “content” prong in the coordinated communication test did not receive universal support. See Coordinated and Independent Expenditures, 68 Fed. Reg. at 427 (“Two commenters opposed the inclusion of any content standard, arguing that to do so would inappropriately narrow the scope of the rules when . . . conduct . . . is sufficient, by itself, to eliminate the independence of the communication . . .”). The FEC justified the inclusion of this standard as a way to “limit the new rules to communications whose subject matter is reasonably related to an election.” Id. The content standard, however, sometimes works to exclude communications based on criteria other than their content. See infra Part II.B.1 (discussing exclusion from content standard of communications based on medium through which they are disseminated).

70. 11 C.F.R. § 109.21(a)(3). A communication passes the “conduct” test if it is (1) made at the “request or suggestion” of a candidate (or the candidate assents to the suggestion of the purchaser); (2) made with “material involvement” by the candidate; (3) is the subject of “substantial discussion” between the candidate and the purchaser; (4) the purchaser employs a “commercial vendor” previously employed by the candidate; or (5) the purchaser was a recent former employee of the candidate. Id. § 109.21(d).

The first three standards are essentially the *Christian Coalition* test. See supra notes 55–57 and accompanying text. The fourth and fifth were mandated by Congress in BCRA. See supra note 62 and accompanying text. Section 109.21 also provides several safe harbor provisions that codify exceptions carved out by prior court cases. See supra note 50 (describing court-mandated exceptions for inquiries to campaigns about positions on issues and receipt from campaigns of publicly available information).

sidered coordinated, a communication must satisfy all three parts of this test.⁷¹

Although the FEC's new rules made an effort to implement the requirements laid out in BCRA, that bill's sponsors were not totally satisfied. Soon after § 109.21 was promulgated, Representative Shays and his cosponsors brought suit in the D.C. District Court alleging that the "content" prong unlawfully exempted many communications not made within 120 days of an election—even if they were explicitly coordinated.⁷² The court agreed that the FEC's new test was contrary to the purpose of FECA.⁷³ It found no indication that Congress intended to alter "the basic understanding that established campaign finance law treats coordinated communication expenditures as contributions regardless of their content or when they are broadcast."⁷⁴ As a result, the court held that exempting coordinated communications from regulation based on their timing was unreasonable and invalidated the standard.⁷⁵

The FEC met with more success on appeal to the D.C. Circuit.⁷⁶ Although the court ultimately struck down the coordination standard on an administrative law issue,⁷⁷ it held that the FEC's content restrictions were not facially unreasonable under FECA.⁷⁸ The D.C. Circuit reasoned that the content provisions were designed to determine whether or not a communication fit FECA's definition of "expenditure."⁷⁹ If a communication did not meet this definition, it was outside the ambit of FECA and could not be subject to the coordination test.

71. 11 C.F.R. § 109.21 (requiring that coordinated communications meet all three enumerated tests).

72. *Shays v. FEC*, 337 F. Supp. 2d 28, 57 (D.D.C. 2004). Under § 109.21, if a communication did not meet at least one of the "content" standards, it was not considered coordinated. See *supra* note 69. If a communication that clearly identified a federal candidate was not made within the 120 day pre-election window, it failed standards one or four of the content test. If it also contained no express advocacy and did not republish campaign materials, it failed the other two content standards. Therefore, no matter what level of cooperation was involved, such a communication could not be considered coordinated. *Shays*, 337 F. Supp. 2d at 57. Further, if an ad did not explicitly mention the name of a candidate or political party, it could be run at any time without being considered coordinated. *Id.* at 58.

73. *Shays*, 337 F. Supp. 2d at 64–65.

74. *Id.* at 64.

75. *Id.* at 65.

76. *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

77. The court found that the agency had not provided a sufficient explanation to justify its regulations. *Id.* at 102.

78. *Id.* at 101–02.

79. *Id.* at 99. The definition of "expenditure" requires "the purpose of influencing" a federal election. 2 U.S.C. § 431(9)(A) (2006). The *Shays* court found that the FEC could reasonably use factors like the timing, context, and content of an ad to gauge whether the purchaser had the requisite intent to influence an election. *Shays*, 414 F.3d at 99.

In the wake of the *Shays* litigation, the basic framework of the coordination standard remains unchanged.⁸⁰ Expenditures made in coordination with a candidate are treated as contributions to that candidate and are limited accordingly. A communication must meet all three prongs of the test in § 109.21 to be considered coordinated.

C. A New Frontier: *The FEC Tackles the Internet*

Prior to BCRA, the last significant amendments to FECA were passed in 1980.⁸¹ As a result, campaign finance law was unprepared for the emergence of the internet as a medium for political communication.⁸² In the 1990s, as the internet became an increasingly important means of communication, the FEC addressed web-based campaign finance issues through a series of ad hoc advisory opinions.⁸³ Toward the end of that decade, the FEC drafted, but never promulgated, regulations to deal with several specific internet issues.⁸⁴ The most notable piece of pre-BCRA internet regulation, however, was passed with little fanfare. When the FEC promulgated a new coordination standard in 2000,⁸⁵ it included the

80. After the D.C. Circuit decision, the FEC re-promulgated the rule with several small changes and a more elaborate explanation in 2006. See Coordinated Communications, 71 Fed. Reg. 33,190 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109). The sponsors of BCRA sued again over these rules, and the D.C. Circuit struck down several of them on administrative law grounds. *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The 2006 changes and subsequent litigation are not relevant to the focus of this Note.

81. These amendments refined FECA's disclosure requirements and allowed the use of soft money for certain party-building and organizing activities. See Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980); Corrado et al., *supra* note 13, at 28–30 (discussing FECA Amendments of 1979).

82. Corrado et al., *supra* note 13, at 71 (“The FEC has had to consider the applicability of the FECA—written long before the age of cyberspace—to Internet and e-mail communications.”).

83. *Id.* (noting that prior to BCRA the FEC regulated “in a piecemeal manner in this area”). In some cases, the FEC attempted to treat the internet as analogous to any other medium. See FEC Advisory Op. 1999-37, at 5 (1999) (stating any cost directly tied to making internet communication is an expenditure); FEC Advisory Op. 1998-22, at 3 (1998) (finding costs associated with creating and maintaining website to influence election to be regulated expenditures); FEC Advisory Op. 1995-09, at 2 (1995) (determining communications published on personal website would be regulated as political advertisements).

Toward the end of the 1990s the FEC seemed more willing to carve out exceptions for some types of internet communications. See FEC Advisory Op. 1999-24, at 3–4, 6 (1999) (determining nonpartisan websites with statements and positions of candidates do not constitute expenditures under FECA); FEC Advisory Op. 1999-07, at 1–3 (1999) (providing links to candidates' websites in nonpartisan manner does not count as contribution).

84. Proposed Rules, 66 Fed. Reg. 50,358 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pts. 100, 114, 117). The rules would have (1) extended the volunteer exemption to the internet; (2) exempted hyperlinks on corporate web pages from regulation in some circumstances; and (3) allowed corporate websites to carry candidate endorsements in some cases. *Id.* at 50,362, 50,364–50,365.

85. See *supra* notes 53–57 and accompanying text (describing *Christian Coalition* decision and subsequent FEC adoption of new coordination test).

internet as one of the mediums for “general public political communications.”⁸⁶ Before this regulation could be employed, however, Congress repealed it in BCRA.⁸⁷

When the FEC promulgated a new coordination standard to comply with BCRA, it took a starkly different approach and exempted all communications made over the internet.⁸⁸ The sponsors of BCRA viewed such an exemption as contrary to the law and included this challenge when they filed suit in *Shays v. FEC*.⁸⁹ The *Shays* plaintiffs alleged that BCRA required the FEC to regulate at least some internet communications.⁹⁰ They relied on text in the Act requiring the regulation of “general political advertising” and argued that this included internet advertising.⁹¹ The district court agreed that the wholesale exclusion of internet communications from the definition of “public communication” was unreasonable and in conflict with the Act.⁹² Accordingly, the court remanded the

86. 11 C.F.R. § 100.23(e) (2001) (repealed 2002) (defining “general public political communications” as “those made through a broadcasting station . . . , newspaper, magazine, outdoor advertising facility, mailing or any electronic medium, including the Internet or on a web site, with an intended audience of over one hundred people”) (emphasis added); see also General Public Political Communications Coordinated with Candidates and Party Committees, 65 Fed. Reg. 76,138, 76,146 (Dec. 6, 2000) (codified at 11 C.F.R. pts. 100, 109–110).

In its rulemaking explanation, the FEC barely mentioned the inclusion of the internet in this standard. *Id.* at 76,144 (“[I]ncluding communications made over the Internet reflects the expanding role of that medium in federal campaigns.”). Regulation of the internet in this manner had been foreshadowed by several of the FEC’s advisory opinions in the 1990s. See *supra* note 83 (describing FEC advisory opinions regarding internet).

87. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(b), 116 Stat. 81, 94–95. See generally *supra* notes 61–63 and accompanying text.

88. The Commission once again commented only minimally on its decision with regard to the internet. It mentioned simply that “[a]lthough the term ‘public communication’ covers a broad range of communications, it does not cover some forms of communications, such as those transmitted using the Internet and electronic mail.” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 430 (Jan. 3, 2003). For an explanation of how, specifically, these regulations exempt internet communications from the coordination standard, see *infra* Part II.A.

89. 337 F. Supp. 2d 28, 65 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005). This lawsuit was an attack on multiple FEC regulations. See *supra* note 72 (discussing *Shays*’s holding regarding coordinated communication test).

90. *Shays*, 337 F. Supp. 2d at 65 (“Plaintiffs claim that the new regulation’s exclusion of all Internet communications from treatment as ‘coordinated communications’ runs contrary to Congress’s intent.”).

91. “General political advertising” is a catchall term in the statutory definition of “public communication.” Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431(22) (2006); *Shays*, 337 F. Supp. 2d at 66. In response, the FEC argued that the lack of any reference to the internet in the “public communication” definition despite its inclusion elsewhere in the Act evinced a Congressional intent to exclude that medium from coordination regulation. *Shays*, 337 F. Supp. 2d at 66. The classification of a communication as a “public communication” is necessary in order to subject it to coordination regulation. See *infra* Part II.A (describing coordinated communication test).

92. *Shays*, 337 F. Supp. 2d at 70. The court specifically found the exclusion of internet communications unreasonable with regard to coordination. *Id.* (“To permit an entire class

case to the FEC to promulgate a new standard that included the internet.⁹³

In response to the *Shays* decision, the FEC adopted a rule regulating only those internet communications placed for a fee on the website of another.⁹⁴ In its rulemaking explanation, the FEC expressed a desire to leave the internet largely unregulated.⁹⁵ To this end, it created additional regulations designed to protect internet communications other than paid advertisements.⁹⁶ These rules, promulgated in 2006, have not been the subject of a court challenge. The internet therefore remains largely a regulation-free zone. Part II will describe the FEC's current internet regulations in more detail and explain how these regulations allow expensive coordinated communications to be paid for with unregulated money.

II. LOOPHOLES IN CYBERSPACE: DEFECTS IN THE FEC'S INTERNET COORDINATION RULES

In its haste to protect the internet from campaign finance regulation, the FEC has left a significant loophole in the regulatory landscape.

of political communications to be completely unregulated irrespective of the level of coordination between the communication's publisher and a political party or federal candidate, would permit an evasion of campaign finance laws.”).

93. The court mandated that the FEC regulate whatever constituted “general political advertising” on the internet. *Id.* at 129–30.

94. 11 C.F.R. § 100.26 (2009) (stating “public communication” definition “shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site”). In reaching this conclusion, the FEC determined that such communications were the internet analog of traditional media advertisements. Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006) (arguing traditional media advertising is characterized by “distribution of content through an entity ordinarily owned or controlled by another person”). The merits of this approach, as well as another potential analogy to traditional forms of advertising, are addressed *infra* Part III.A.

95. Internet Communications, 71 Fed. Reg. at 18,589 (explaining internet is “distinct from other media in a manner that warrants a restrained regulatory approach”). Three of the FEC’s six commissioners wanted to appeal the *Shays* decision to the D.C. Circuit in the hopes of avoiding any regulation of the internet. A fourth vote would have allowed them to do so. See Declan McCullagh, *Newsmaker: The Coming Crackdown on Blogging*, CNET News, Mar. 3, 2005, at http://news.cnet.com/The-coming-crackdown-on-blogging/2008-1028_3-5597079.html (on file with the *Columbia Law Review*) (“[Commissioner] Smith and the other two Republican commissioners wanted to appeal the internet-related sections.”).

The FEC’s desire to avoid regulating the internet may be at least partially the result of external pressure. See *supra* note 4 (noting that FEC received over 800 comments urging it not to regulate internet). Additionally, there are a number of strong arguments for regulating the internet only minimally. The case for lax regulation is examined *infra* Part III.C.

96. The FEC liberally extended the “media exemption” (which protects legitimate news organizations from campaign finance regulation) to internet users, 11 C.F.R. §§ 100.73, 100.132, and exempted “uncompensated Internet activity” from all regulation, 11 C.F.R. §§ 100.94, 100.155. These regulations are discussed in greater detail *infra* Parts II.A.2, II.A.3.

Any internet communication disseminated for free⁹⁷ automatically fails the content standard of the coordinated communication test and can therefore be explicitly coordinated with a candidate without triggering any restrictions.⁹⁸ Additionally, communications may fall under one of two other FEC rules that exempt them from regulation under FECA, and by extension from the coordination standard. The result is that potentially expensive internet communications can be directly coordinated with political candidates without being subject to FEC regulation. Part II.A describes in detail how coordinated internet communications are exempted from FEC regulations. Part II.B explains how this result contravenes the text and purpose of FECA and examines its practical pitfalls.

A. *The Triple Protection of Internet Communications*

1. *The Coordinated Communication Exemption.* — The FEC implemented FECA's rule that coordinated expenditures be treated as contributions through 11 C.F.R. §§ 109.20 and 109.21.⁹⁹ Importantly, the FEC does not consider these two regulations to be coextensive: An expenditure is either a communication, covered under § 109.21, or it is not a communication and § 109.20 applies.¹⁰⁰ To determine if a communica-

97. As used in this Note, "free" dissemination refers to distribution that does not require the payment of a fee to the exhibitor. On the internet, "free" distribution might include placing a video on YouTube or Facebook. Alternatively, the creator of the communication could create a website or group of websites through which it could be distributed. The FEC uses the distribution cost of an advertisement to trigger regulation rather than its production cost. "Free" communications cost nothing to distribute, but may still have been expensive to produce. See *infra* Part III.A.2 (discussing FEC's focus on distribution cost rather than production cost).

98. Free internet communications are by definition excluded from the content standard of the coordinated communication test. See *supra* note 69; *infra* Part II.A.1. Normally, a communication made in coordination with a candidate would be treated as (and limited like) a contribution to that candidate. See *supra* note 45 and accompanying text.

99. See 2 U.S.C. § 441a(a)(7)(B) (2006) (requiring coordinated expenditures be treated as contributions); *infra* Part I.B.2 (describing §§ 109.20 and 109.21 in detail).

100. See Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (explaining that "the regulations in 11 CFR 109.21 . . . specifically address the meaning of the phrase 'made in cooperation, consultation, or concert, with, or at the request or suggestion of' *in the context of communications*" while "section 109.20 addresses expenditures *that are not made for communications* but that are coordinated" (emphases added)). In practice, the FEC appears to fold § 109.20 into the coordinated communication test in § 109.21. See FEC Advisory Op. 2004-33, at 5 (2004) (stating FEC applies both §§ 109.20 and 109.21 through three-prong test in § 109.21); FEC Advisory Op. 2004-29, at 3-4 (2004) (explaining that FECA's coordinated expenditure provision is implemented through the test in § 109.21). In either case, a communication must meet the three-prong test in § 109.21 in order to be considered "coordinated."

Neither FECA nor FEC regulations precisely define "communication." At first glance, it might appear that the FEC intended the term "communication" to cover only those expenditures that passed the content prong of § 109.21. This reading is supported by the text of § 109.20(b), which applies § 109.20 to "[a]ny expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is not made for a coordinated

tion is coordinated, § 109.21 employs a three-part test.¹⁰¹ If a communication fails any part of this test, it is treated as uncoordinated.¹⁰²

The second prong of the coordinated communication test (the content prong) requires that a communication conform to one of four separate standards.¹⁰³ Each of these four standards requires either a “public communication”¹⁰⁴ or an “electioneering communication.”¹⁰⁵ Internet communications are excluded from the definition of “electioneering communication,”¹⁰⁶ and the FEC excludes free internet communication from the definition of “public communication.”¹⁰⁷ Therefore, an expen-

communication *under 11 CFR 109.21.*” 11 C.F.R. § 109.20(b) (emphasis added). FEC rulemaking explanations make clear, however, that there exists a class of communications that are not “coordinated communication.” Internet Communications, 71 Fed. Reg. at 18,594 (noting most forms of “Internet *communication*” are excluded from coordinated communication standard (emphasis added)); Coordinated and Independent Expenditures, 68 Fed. Reg. at 427 (describing intent of content prong to “limit the new rules to communications whose subject matter is reasonably related to an election”). It is therefore clear that the FEC considers some types of communications (including most internet communications) to be outside the reach of both §§ 109.20 and 109.21.

101. The test requires that the communication be paid for by someone other than the candidate, that it conforms to at least one content requirement, and that the interaction between the candidate and the purchaser meets one of the conduct requirements. See 11 C.F.R. § 109.21 (2009); *supra* notes 67–70.

102. 11 C.F.R. § 109.21(a).

103. 11 C.F.R. §§ 109.21(a)(2), 109.21(c). A communication must be (1) an electioneering communication; (2) a public communication that republishes campaign materials; (3) a public communication containing express advocacy (see *supra* note 36 and accompanying text); or (4) a public communication that refers to a candidate or political party within a certain timeframe of an election in that candidate’s jurisdiction. 11 C.F.R. § 109.21(c).

104. 11 C.F.R. § 109.21(c)(2)–(4). The term “public communication” is defined as: [A] communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. *The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.*

11 C.F.R. § 100.26 (emphasis added).

105. 11 C.F.R. § 109.21(c)(1). The term “electioneering communication” contains a number of specific criteria, but applies only to “broadcast, cable, or satellite communication.” 11 C.F.R. § 100.29(a). Therefore internet communications are by definition excluded.

106. 11 C.F.R. § 100.29(b)(1).

107. Since the term “public communication” is used as a trigger for a variety of FEC regulations, the exemption of internet communications from its definition has other implications as well. For example, entities that normally must spend regulated money from a separate segregated fund on influencing elections may use unregulated money for communications that are not “public communications.” See 11 C.F.R. § 106.6(b); Internet Communications, 71 Fed. Reg. 18,589, 18,602 (Apr. 12, 2006).

Most significantly, disclaimer requirements generally apply only to “public communications” and “electioneering communications.” 11 C.F.R. § 110.11(a). Therefore, internet communications disseminated for free do not require a disclaimer. In 2006, the FEC added a specific disclaimer requirement for two other forms of internet

diture for a communication that is disseminated for free over the internet can never satisfy the content prong of the coordination test.¹⁰⁸ Since any communication that does not meet all three prongs is considered uncoordinated,¹⁰⁹ internet communications disseminated for free are automatically uncoordinated. As a result, such communications may be made with the candidate's direct involvement, can be funded with corporate or union money, and may exceed the contribution ceiling.¹¹⁰

The automatic exclusion of free internet communications from the coordination standard leaves some of these communications in a regulatory no-man's land. Under the *Buckley* paradigm, if a communication expressly advocating the election or defeat of a candidate is not coordinated, it is an independent expenditure.¹¹¹ FECA defines an independent expenditure, however, as an expenditure "not made in concert or cooperation with or at the request or suggestion of" a candidate or campaign.¹¹² The result is that an internet communication made in concert with a candidate but disseminated for free is technically neither an

communications: the sending of 500 or more "substantially similar" emails, and the websites of political committees. *Id.*; see also Internet Communications, 71 Fed. Reg. at 18,600-01. Other internet communications have no disclaimer requirement. See *infra* Part III.B.2 (discussing disclaimer requirements for public communications).

108. The definition of public communication includes only internet communications "placed for a fee on another person's Web site." 11 C.F.R. § 100.26. In shaping this regulation, the Commission considered the practice of buying advertisement space on another's website to be the only internet communication that constitutes "advertising." Internet Communications, 71 Fed. Reg. at 18,595 (noting that concept that "there are forms of advertising on the Internet other than paid advertising" is "contrary to the Commission's view"). The Commission has clarified that the form of the communication is not important as long as it is placed for a fee on another's website. *Id.* at 18,594 (noting advertisement could be "a banner, video, or pop-up advertisement").

Therefore, the determinant of whether an internet communication can be coordinated is the ultimate means of its dissemination. If an entity creates a communication and places it solely on its own website, it cannot be coordinated. *Id.* ("[A] communication through one's own website is analogous to a communication made from a soapbox in a public square."). This is the case even if the website was created solely for the purpose of distributing a communication. Additionally, any communication distributed through a website that allows the posting of, for example, videos or songs for free (such as YouTube or Facebook) is exempt from the coordination standard.

109. 11 C.F.R. § 109.21(a).

110. Coordinated expenditures are treated as contributions. Individuals are limited in the amount they can contribute to a candidate, and corporations and labor unions are banned from contributing. See *supra* notes 18, 33. Independent expenditures are not subject to the same limits, but are regulated in other limited ways. See Corrado et al., *supra* note 13, at 54-56 (discussing historical development of distinction between independent and coordinated expenditures and regulation of independent expenditures generally). FECA employs a separate provision to deal with uncoordinated communications that are not express advocacy. See *id.* at 56 (describing FECA "electioneering communications" provision).

111. See *supra* Part I.A.2 (discussing *Buckley* framework). A coordinated expenditure is ordinarily treated as a contribution. See *supra* Part I.B (discussing coordination rule).

112. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431(17)(B) (2006). The FEC has expressly adopted this definition in its regulations. 11 C.F.R. § 100.16.

independent expenditure nor a contribution.¹¹³ Although this is not currently a large problem,¹¹⁴ it underscores the strangeness of categorically excluding certain kinds of communication from the coordination standard even when they are explicitly coordinated.

2. *The Uncompensated Internet Activity Exemption.* — Internet communications are also protected from regulation by another FEC rule wholly independent of the coordination standard: the exemption for “uncompensated Internet activity.”¹¹⁵ In its 2006 internet rulemaking, the FEC was forced by the *Shays* decision to regulate coordinated activity on the internet in some capacity.¹¹⁶ The Commission was extremely wary of subjecting bloggers and individual internet users to potentially speech-chilling regulation.¹¹⁷ To reaffirm the protection of grassroots internet speech, the FEC promulgated two rules exempting “uncompensated Internet activity” from the definitions of contribution and disclosure.¹¹⁸ These provisions were intended to extend to the internet existing regula-

113. It is still an “expenditure” under 2 U.S.C. § 431(9), but this label alone does not trigger much regulation. See *supra* notes 35–36 and accompanying text. If an individual or group makes enough expenditures, however, it may become a regulated political committee. See 11 C.F.R. § 100.5(a).

It is possible (though not certain) that the FEC does not even consider these communications to be expenditures. Under FECA, an expenditure must be made “for the purpose of influencing any election for federal office.” 2 U.S.C. § 431(9)(A). In *Shays v. FEC*, 414 F.3d 76, 99 (D.C. Cir. 2005), the D.C. Circuit held that the FEC’s content test was a permissible way of excluding communications that were not made to influence an election and therefore not expenditures under FECA. See also *supra* notes 78–79 and accompanying text (describing *Shays* decision). If the D.C. Circuit’s holding means that the only way the FEC can legally exclude communications based on their content is to find that they were not intended to influence a federal election, then it may be the FEC’s position that nothing excluded from the content test in § 109.21 is an expenditure under FECA. Since, however, a payment for an internet communication that expressly advocates the election of a candidate could still fail the content prong, this result seems untenable. For an argument that, based on the Court’s logic, the FEC’s exclusion of communications from the content prong based on their form is, in fact, contrary to BCRA, see *infra* Part II.B.1.

114. The major impact of this categorization is that individuals making independent expenditures in excess of \$250 are required to disclose those expenditures. 11 C.F.R. § 109.10(b). This is currently not a serious problem, however, because an individual who makes more than \$1,000 in expenditures becomes a regulated political committee. 11 C.F.R. § 100.5(a).

115. 11 C.F.R. §§ 100.94, 100.155.

116. See *supra* Part I.C (describing *Shays* litigation and FEC response).

117. See Internet Communications, 71 Fed. Reg. 18,589, 18,590 (Apr. 12, 2006) (“To the greatest extent permitted by Congress and the *Shays District* decision, the Commission is clarifying and affirming that Internet activities by individuals face almost no regulatory burdens . . .”).

118. 11 C.F.R. §§ 100.94 (stating uncompensated internet activity not considered a contribution), 100.155 (stating uncompensated internet activity not considered an expenditure).

tions exempting volunteer services.¹¹⁹ Instead of just revising the existing rules to include internet activity, however, the FEC created two entirely new provisions. Sections 100.94 and 100.155 provide qualifying internet activity with total immunity from regulation.¹²⁰ Further, the scope of “uncompensated Internet activity” is not clear and potentially quite broad: “Internet activity” encompasses “any . . . form of communication distributed over the Internet.”¹²¹

The original exemptions for volunteer services have a number of provisions qualifying the extent of exempted activities.¹²² Many of these specify which ancillary costs incurred while volunteering are exempted from regulation.¹²³ The internet activity exemption, by contrast, has no qualifying provisions to help explain its applicability. If the exemption extends to any “communication distributed over the Internet” that costs something to produce (such as a video or sound recording), it is unclear

119. See 11 C.F.R. §§ 100.74–.76 (stating uncompensated volunteer activities do not count as contributions); §§ 100.135–.136 (stating uncompensated volunteer activities do not count as expenditures).

120. If something is not legally considered an “expenditure” or “contribution,” FECA does not regulate it in any way. If a communication is covered by these regulations, it will be exempted from regulation before even being subjected to the coordination test. In fact, the regulations themselves specify that they cover activities done “in coordination with any candidate, authorized committee, or political party.” 11 C.F.R. §§ 100.94(a), 100.155(a).

121. 11 C.F.R. § 100.94(b) (stating internet activity includes “but is not limited to: Sending or forwarding electronic messages; . . . blogging; creating, maintaining or hosting a Web site; . . . and *any other form of communication distributed over the Internet*” (emphasis added)). The regulations, however, do not exempt payments made for a public communication. See *supra* Part II.A.1.

The regulations further note that the exemption applies to individuals using “equipment or services” for the activity. 11 C.F.R. § 100.94(a)(2). This term seems intended to apply to technology that is used to access the internet, but is not specifically limited to that. See 11 C.F.R. § 100.94(c) (“[T]he term ‘equipment and services’ includes, *but is not limited to*: Computers, software, Internet domain names, Internet Service Providers . . . and any other technology that is used to provide access to or use of the Internet.” (emphasis added)).

122. See 11 C.F.R. §§ 100.75–.79 (explaining extent of exemptions for volunteered property and service); 11 C.F.R. §§ 100.135–.139 (explaining extent of exemptions for expenditures).

123. For example, § 100.76 allows the use of a church or community room for volunteer activities, and specifies that a “nominal fee” can be paid for the use of such a room without being considered a contribution. 11 C.F.R. § 100.76. Section 100.77 states that the cost of food and beverages for a function at a residence or community room are not considered contributions as long as they amount to less than \$1,000 in a given election. 11 C.F.R. § 100.77. Sections 100.136 and 100.137 exempt the same activities from being considered expenditures. 11 C.F.R. §§ 100.136–.137.

All of these provisions are rooted in the text of FECA, which specifically exempts these volunteer activities from the definitions of “contribution” and “expenditure.” See Federal Election Campaign Act, 2 U.S.C. § 431(8)(B) (2006) (specifying volunteer activities that are not contributions); *id.* § 431(9)(B) (specifying volunteer activities that are not expenditures). For further discussion of FECA’s volunteer exemptions, see *infra* notes 159–166 and accompanying text.

where or if a line would be drawn.¹²⁴ The FEC has only addressed this issue in one advisory opinion.¹²⁵ The opinion concerned a website named “VoterVoter.com” that allowed users to post political video advertisements they created.¹²⁶ One of the questions asked by VoterVoter was whether the costs incurred by users in creating such videos were exempted from regulation under §§ 100.94 and 100.55. The FEC replied that the costs of making the videos were exempt so long as the communications were never placed for a fee on another person’s website.¹²⁷ The VoterVoter opinion suggests that the FEC intends to apply this exemption broadly to internet communications that incur ancillary costs. The exemption from coordination afforded by the uncompensated internet activity regulations is largely redundant.¹²⁸ These provisions do, however, remove qualifying communications from other aspects of regulation, such as disclosure.¹²⁹

3. *The Media Exemption.* — Overall, the FEC’s regulation of the internet has not garnered substantial scholarly attention. The one issue that has received significant treatment is the application of the media exemption—a FECA provision designed to protect media speech¹³⁰—to

124. If, for example, a political video was made at home with the filmmaker’s own equipment and distributed over the internet, it seems clear that this would constitute a “personal service” related to a qualifying “Internet activity” (distribution of a communication over the internet). Now imagine the filmmaker pays a \$500 fee to use a soundstage to produce his video. His production of a video is still a personal service, but it now involves an ancillary cost. Sections 100.94 and 100.155 fail to specify if and at what point such costs prevent the activity from being considered a “personal service” and make it an expenditure or contribution. See 11 C.F.R. §§ 100.94, 100.155.

125. FEC Advisory Op. 2008-10, at 1 (2008).

126. *Id.* at 4.

127. If they were placed for a fee on the website of another person, they would become public communications under § 100.26 and be subject to regulation. *Id.* at 7–8. The uncompensated internet activity exemption does not cover payments for public communications. 11 C.F.R. §§ 100.94(e), 100.155(e) (“This section does not exempt . . . [a]ny payment for a public communication . . .”).

128. The uncompensated internet activity provision does not cover the production of public communications, see *supra* note 127, and if an internet communication is not a public communication, it is already exempt from the coordination test, see *supra* Part II.A.1. It follows that if free internet communications were included in the definition of public communication, they would no longer be exempted from regulation under this provision *or* the coordination standard. See *infra* Part III.A (proposing inclusion of internet communications within definition of public communication).

129. Disclosure rules apply only to contributions, independent expenditures, or political committees. If payments made by an individual are not expenditures, they cannot be contributions or independent expenditures, and that individual cannot qualify as a political committee. See 11 C.F.R. § 100.5(a) (describing when entity must register as political committee).

130. When Congress enacted FECA, it added this exception to avoid burdening journalists, who are necessarily involved with contacting and publicizing political campaigns, with speech-chilling fears of financial regulation. See Corrado et al., *supra* note 13, at 57–59 (describing origin of media exemption).

bloggers and other online entities.¹³¹ Like the volunteer exemption, the media exemption works by totally excluding media content from the definitions of contribution and expenditure.¹³² The FEC applies this exemption through a three-part test.¹³³ First, the speaker must be a press entity.¹³⁴ Second, it must not be “owned or controlled” by a political party, political committee, or candidate.¹³⁵ Finally, it must be engaged in a proper press function.¹³⁶ If all of those factors are met, the communication on issue is totally exempt from FECA regulation.

The FEC’s 2006 rulemaking codified the extension of the media exemption to the internet, but the Commission had been applying it to online content as early as 2000.¹³⁷ In 2005, the FEC issued an advisory

131. See 11 C.F.R. § 100.73 (exempting news stories distributed over internet from regulation as contributions); Internet Communications, 71 Fed. Reg. 18,589, 18,610 (Apr. 12, 2006) (“The Commission concludes that bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities.”). This issue has been addressed at length in the scholarly literature and is outside the focus of this Note. A brief explanation of its application, however, is useful to understanding the overall regulatory structure that governs the internet. Additionally, the media exemption is later considered by this Note as one component of a potential solution to the coordinated communications loophole. See *infra* Part III.C.2.

Much of the scholarship on this subject has been critical of the extent to which the FEC has expanded this exemption. See, e.g., Neil Pandey-Jorin, Comment, *Is Everyone Now a Journalist?: How the FEC’s Application of the Media Exemption to Bloggers Weakens FEC Regulation*, 60 Admin. L. Rev. 409, 424–26 (2008) (arguing media exemption should not be categorically extended to blogs and should instead be replaced by fact-based inquiry); Niki Vlachos, Comment, *The Federal Election Commission & Political Blogging: A Perfect Balance or Just Not Enough?*, 24 J. Marshall J. Computer & Info. L. 611 (2006) (arguing application of media exemption to internet is overbroad and must be clarified). But cf. David Stevenson, Note, *A Presumption Against Regulation: Why Political Blogs Should Be (Mostly) Left Alone*, 13 B.U. J. Sci. & Tech. L. 74, 86–95 (2007) (finding application of media exemption to blogs generally appropriate but suggesting alterations to the regulations).

132. 11 C.F.R. § 100.73 (stating news stories not contributions); *id.* § 100.132 (stating news stories not expenditures). Like the volunteer exemptions, these provisions are rooted in the text of FECA. See 2 U.S.C. § 431(9)(B)(i) (2006) (stating news stories not expenditures).

133. Corrado et al., *supra* note 13, at 58 (describing three factors looked at by FEC to determine application of media exemption).

134. 11 C.F.R. § 100.73 (requiring news story be carried by a “broadcasting station . . . , Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication”).

135. *Id.* (excluding facilities “owned or controlled by any political party, political committee, or candidate”).

136. *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981) (holding FEC could investigate whether entity was involved in legitimate press function to determine if it qualified for press exemption).

137. See Internet Communications, 71 Fed. Reg. 18,589, 18,607–10 (Apr. 12, 2006) (clarifying that internet communications are covered under media exemption); FEC Advisory Op. 2000-13, at 3 (2000) (applying media exemption to internet video news site); see also FEC Advisory Op. 2005-16, at 4 (2005) (applying media exemption to partisan blog); FEC Advisory Op. 2004-07, at 4 (2004) (finding online publishing of MTV electoral survey results qualified for media exemption).

opinion to Fired Up!, LLC, a corporation that intended to create a network of partisan websites to disseminate information on current political events.¹³⁸ The Commission found that Fired Up! would qualify for the press exemption despite its partisan nature.¹³⁹ In keeping with this opinion, the FEC has been very liberal in applying the media exemption to blogs and other internet news sources, even when they are coordinated with political campaigns.¹⁴⁰ The problems with the internet media exemption have been well documented¹⁴¹ and will not be taken up here. Despite its shortcomings, however, the media exemption does not create a loophole in the same way as the coordination standard or the uncompensated internet activity exemption.¹⁴² It is rooted in the text of FECA¹⁴³ and requires a case-by-case inquiry to determine qualifying communications rather than categorically excluding them based on their form.¹⁴⁴

B. *The Flaw in the Plan*

The FEC's extreme cautiousness toward regulating the internet is understandable, but has led to a problematic result: The current regulatory structure allows for unregulated coordinated expenditures in a manner that contravenes the text and purpose of FECA.¹⁴⁵ By focusing only on the cost of disseminating a communication, and not on the cost of

138. FEC Advisory Op. 2005-16, at 1 (2005); see also Benjamin Norris, Note, *Fired Up! in the Blogosphere: Internet Communications Regulation Under Federal Campaign Finance Law*, 84 Wash. U. L. Rev. 993, 997-98 (2006) (describing Fired Up! decision).

139. FEC. Advisory Op. 2005-16, at 4 (2005); Norris, *supra* note 138, at 998.

140. See *Internet Communications*, 71 Fed. Reg. at 18,609 ("Commissioners have also concluded that the presence or absence of alleged coordination between a press entity and a candidate or political party is irrelevant to determining whether the Act's press exemption applies."); see also Vlachos, *supra* note 131, at 611-15 (describing occurrence of political blog being paid by campaign).

141. See *supra* note 131.

142. For detailed explanations of how those regulations create loopholes for free internet communications, see *supra* Parts II.A.1, II.A.2. Unlike the other exemptions discussed in this Part, the media exemption is more legitimate (at least in theory) because it is based on content rather than form. Further, if applied correctly the media exemption should not cover any of the communications this Note considers dangerous. See *infra* Part III.C.2. A reasonable policy toward the media exemption would not create a loophole in the same way as the other regulations analyzed here, because it would not protect high-cost advertisements made in coordination with candidates. Such communications would not be in keeping with a legitimate press function. See *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981) (requiring legitimate press function for application of media exemption); *supra* note 136 and accompanying text.

143. See 2 U.S.C. § 431(9)(B)(i) (2006) (excluding news stories from definition of expenditure).

144. See *supra* notes 133-136 and accompanying text (describing fact-specific inquiry for determining if a communication qualifies for media exemption).

145. See 2 U.S.C. § 441a(a)(7)(B)(i) (noting expenditures made in "cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate" are treated as contributions); *supra* Parts II.A.1, II.A.2 (describing situations in which coordinated expenditures are not subject to regulation as contributions).

producing it, the FEC has exempted a class of potentially expensive ads from meaningful regulation.¹⁴⁶ This system violates the fundamental principle that expenditures made in coordination with campaigns are treated as contributions.¹⁴⁷ Additionally, regulating in this way is inadvisable given the growth of technology that makes it easier to disseminate high-cost advertisements online.

1. *The FEC's Regulations Contravene FECA.* — Since *Buckley*, it has been axiomatic in campaign finance law that expenditures coordinated with a political campaign—unless they fall into one of a limited number of statutory exceptions, such as media or volunteer activity—are considered contributions to that campaign.¹⁴⁸ FECA clearly states that expenditures made in “cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate” are contributions.¹⁴⁹ Despite this clear statement, the FEC’s regulations allow expenditures for internet communications that are ultimately disseminated for free to be made in cooperation, consultation, or concert with a candidate without being treated as contributions.¹⁵⁰ In order for this lack of regulation to be justified, these communications must either not be “expenditures” under FECA, or they must be specifically excluded from the definition of contribution by some other provision in the statute. Neither is the case here.

FECA defines “expenditure” as “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.”¹⁵¹ Section 109.21’s coordination test unarguably excludes at least some communications that involve purchases or payments.¹⁵² The only re-

146. See *supra* note 108 (describing how cost of dissemination is sole determinant of whether a communication can be considered coordinated).

147. See *supra* Part I.B.1 (describing history of coordination rule).

148. See *McConnell v. FEC*, 540 U.S. 93, 219 (2003) (“Ever since our decision in *Buckley*, it has been settled that expenditures by a noncandidate that are ‘controlled by or coordinated with the candidate and his campaign’ may be treated as indirect contributions subject to FECA’s source and amount limitations.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 46 (1976))); *supra* Part I.B.1 (describing coordination principle). Without this rule, the contribution limits would be so easy to circumvent as to be effectively useless.

The few exceptions to the coordination rule are all provided for in the plain text of FECA. See 2 U.S.C. § 431(8)(B), (9)(B); *infra* notes 159–163 (summarizing statutory exceptions in FECA). Those exceptions also specify a monetary amount that can be spent in conjunction with the exempted activity. FECA does not exempt money spent to produce a communication. Therefore, unlike the volunteer and media exemptions, the coordinated communication loophole does not have a textual basis in FECA and is wholly created by FEC regulations.

149. 2 U.S.C. § 441a(a)(7)(B)(i).

150. See *supra* Parts II.A.1, II.A.2 (describing situations in which communication coordinated with a candidate does not fall under FEC’s coordination standard).

151. 2 U.S.C. § 431(9)(A)(i).

152. The coordination test exempts any communication that is distributed only over the internet and not placed for a fee on another’s website. See *supra* Part II.A.1 (explaining regulatory scheme for internet communications). This can include, for example, videos produced offline. See FEC Advisory Op. 2008-10, at 8 (2008) (finding

maining issue, therefore, is whether payment is made “for the purpose of influencing any election for Federal office.”¹⁵³ When the FEC first implemented a “content” standard for coordinated communications, it justified its decision as a way to “limit the new rules to communications whose subject matter is reasonably related to an election.”¹⁵⁴ Similarly, the D.C. Circuit held in *Shays v. FEC* that the content standard was permissible as a means of excluding communications that lacked sufficient purpose to influence an election and were therefore not “expenditures” under FECA.¹⁵⁵ Yet current FEC regulations exclude an entire class of internet communications regardless of their content. Even a communication that expressly advocates the election or defeat of a candidate is excluded, though such a communication is unambiguously “for the purpose of influencing [an] election for Federal office.”¹⁵⁶ Thus, § 109.21 has the effect of removing coordination regulation from at least some communications that constitute “expenditures” under FECA.¹⁵⁷

user-created videos posted on website are not public communications unless distributed for a fee). The FEC treats the cost of producing a communication as included in the cost of that communication. Internet Communications, 71 Fed. Reg. 18,589, 18,597 (Apr. 12, 2006) (“[T]he Commission generally treats the costs of producing campaign-related materials as subject to the same funding limits and source prohibitions as the costs of distributing the materials.”). Therefore, free dissemination of a video that involved substantial costs to produce offline entails purchase or payment. Such a video is automatically considered uncoordinated under § 109.21. See *supra* notes 101–110 and accompanying text (describing coordinated communication test).

153. 2 U.S.C. § 431(9)(A)(i).

154. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 427 (Jan. 3, 2003).

155. 414 F.3d 76, 99 (D.C. Cir. 2005) (agreeing with FEC that “time, place, and content may be critical indicia of communicative purpose”).

156. 2 U.S.C. § 431(9)(A)(i). When faced with the ambiguous phrase “for the purpose of influencing any Federal election,” the Supreme Court found the narrowest permissible interpretation to reach only “communications that expressly advocate the election or defeat of a clearly identified candidate.” *Buckley v. Valeo*, 424 U.S. 1, 77–81 (1976). Communications that expressly advocate the election or defeat of a candidate are almost always made for the purpose of influencing an election. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) (noting coordinated communications will often be “as useful to the candidate as cash” (citing *Buckley*, 424 U.S. at 47)); *Shays v. FEC*, 528 F.3d 914, 926 (D.C. Cir. 2008) (“[T]here is no question that coordinated ads omitting magic words are often intended to influence federal elections.”).

157. The FEC has argued that its exclusion of internet communications not placed for a fee on another person’s website from the definition of public communication is based on its belief that such communications do not constitute “general public political advertising” and thus do not fit the statutory definition of “public communication.” Internet Communications, 71 Fed. Reg. at 18,595 (stating that Commission views “advertising” as requiring a paid communication).

Even if this is the case, it only excuses the FEC from regulating such communications as “public communications.” The plain language of FECA requires that even a non-“public communication” expenditure that is coordinated with a candidate be treated as a contribution. See 2 U.S.C. § 441a(a)(7)(B)(i) (defining contribution as an expenditure made in cooperation or consultation with a candidate). Yet the FEC applies § 109.21 as the sole means of determining whether a communication is coordinated. See *supra* notes

The only other legally justifiable way that the FEC could exclude these communications from the coordination rule is if they fall under some other provision that specifically excludes them from constituting expenditures or contributions.¹⁵⁸ FECA lists ten circumstances in which a payment does not count as an “expenditure” and fourteen circumstances in which it does not count as a “contribution.”¹⁵⁹ The only provisions potentially applicable to the creation of communications are the volunteer provisions in 2 U.S.C. § 431(8)(B).¹⁶⁰ FECA exempts “uncompensated personal service” from the definition of contribution.¹⁶¹ It further specifies that volunteers may use their real or personal property in furtherance of their activities and even incur ancillary costs for refreshments.¹⁶² It seems clear from the specificity of these provisions that they are intended to cover small political gatherings hosted by volunteers.¹⁶³ They do not, however, seem applicable in the case of producing a mass communication. The FEC has a policy of including the cost of producing a communication as part of the total cost of that communication.¹⁶⁴ This policy would be inexplicable if the FEC viewed the creation of a communication and the costs associated therewith as “uncompensated personal service.”¹⁶⁵ Indeed, if the volunteer exemption were read to include all

100–102 (describing coordinated communication test). Therefore, a communication that does not meet the FEC’s definition of “public communication” will not be regulated for coordination under § 109.21 or any other provision. See supra notes 111–114 and accompanying text (describing how communications made in cooperation with a candidate but failing coordinated communication test fall into a regulatory no-man’s land).

158. The media exemption, for example, is one such provision. See supra Part II.A.3.

159. Activities exempted from the definition of “expenditure” include: (i) news stories; (ii) nonpartisan get-out-the-vote activities; (iii) communication from membership organization to members; (iv) costs to local parties of printing sample ballots; (v) corporate activities not considered expenditures; (vi) costs incurred by candidate’s authorized committee while soliciting donations; (vii) costs of some legal and accounting services; (viii) costs of campaign materials for local parties; (ix) local party get-out-the-vote activities; and (x) payments received as a condition for ballot access. 2 U.S.C. § 431(9)(B).

The FECA definition of “contribution” excludes all of the above activities and additionally exempts: (i) value of uncompensated volunteer services; (ii) use of personal property and refreshments below a certain value while providing uncompensated volunteer services; and (iii) moderate discounts in cost of food from vendors below a certain threshold. 2 U.S.C. § 431(8)(B).

160. 2 U.S.C. § 431(8)(B)(i)–(iii). The “uncompensated Internet activity” exemption is presumably rooted in this statutory provision. See 11 C.F.R. §§ 100.94, 100.155 (2009); supra Part II.A.2.

161. 2 U.S.C. § 431(8)(B)(i).

162. *Id.* § 431(8)(B)(ii).

163. The only costs referenced are for food, drink, and obtaining a meeting place. See 2 U.S.C. § 431(8)(B)(ii)–(iii).

164. Internet Communications, 71 Fed. Reg. 18,589, 18,597 (Apr. 12, 2006); see supra note 152 (describing how FEC includes cost of production in calculation of total cost).

165. If this were the Commission’s view, it would have to treat the cost of a communication as solely the amount paid to distribute it, since any expense incurred creating it would be “uncompensated personal service.” Yet the Commission does include

payments made for communications as “personal service,” the provision would swallow the rest of the Act’s expenditure and contribution rules and destroy the regulatory scheme.¹⁶⁶ It is therefore reasonable to conclude that payments made for creating a communication are not specifically exempted from the definition of contribution or expenditure, and thus any such payment made in cooperation or consultation with a candidate must be regulated as a contribution.¹⁶⁷

Regarding coordinated expenditures, the text of FECA is unmistakably clear: Expenditures made in concert with a political campaign are contributions to that campaign. BCRA made no attempt to change this fundamental understanding.¹⁶⁸ Under current FEC regulations, coordinated expenditures for communications that are distributed over the internet (but not placed for a fee on another person’s website) are not treated as contributions.¹⁶⁹ This rule contravenes the plain language and intent of FECA.¹⁷⁰ Additionally, the FEC’s refusal to regulate these communications in accordance with the law creates a potential threat to the

cost of production when determining the total amount of an expenditure. See *supra* note 164.

166. Unlike food or drink, for which FECA provides specific monetary limits, there is no line drawn in these provisions to establish when personal expenditures for communications exceed mere volunteerism. See 2 U.S.C. § 431(8)(B)(iii). The logical conclusion is that the Act intends no such expenditures to be covered by the provision.

167. For purposes of coordination, the uncompensated internet activity provisions are not inconsistent with this conclusion. Those regulations note that payments for public communications are not exempted. 11 C.F.R. §§ 100.94(e)(1), 100.155(e)(1) (2009). The VoterVoter opinion, FEC Advisory Op. 2008-10, at 1, 8 (2008) (exempting costs of video creation), results from the unjustified exclusion of such videos from the definition of public communication, not from their inclusion in the volunteer exemption. See *supra* Part II.A.2 (describing VoterVoter opinion).

168. BCRA specifically adopted the FECA definition of contribution that included coordinated expenditures. See 2 U.S.C. § 441a(a)(7)(B)(i). With regard to communications, BCRA repealed the FEC’s existing coordination standard and directed that the FEC re-promulgate it to address specific concerns. Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002); see also *Shays v. FEC*, 337 F. Supp. 2d 28, 63 (D.D.C. 2004) (finding BCRA’s silence on content was due to “basic understanding that established campaign finance law treats coordinated communications expenditures as contributions regardless of their content or when they are broadcast”), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005). The main thrust of Congress’s instruction was to require the FEC to include additional conduct in its test. See § 214(c), 116 Stat. at 95 (“The regulations shall not require agreement or formal collaboration to establish coordination.”). Section 214 does not indicate that Congress authorized the FEC to establish a standard that filtered out communications based on content. See *Shays*, 337 F. Supp. 2d at 63 (observing legislative history shows focus on “defining what constitutes coordination, not on content restrictions”).

169. These communications also do not fall into any of the statutory exceptions listed in FECA. See *supra* notes 159–163 and accompanying text.

170. See *Shays*, 337 F. Supp. 2d at 28, 65 (observing that exclusion of coordinated communications falling outside of specific timeframe subverts FECA’s purpose by allowing unregulated funds to pay for coordinated expenditures).

overall regulatory structure.¹⁷¹ This danger is heightened by the unique and powerful nature of the internet as a tool for fundraising and communication.

2. *The Internet and the Promise of a Rebooted Politics.* — In addition to contravening the text of FECA, the FEC's exemption of free internet communications from the coordination standard is unwise considering the internet's increasing centrality and potential for growth. In its short lifetime, the internet has radically changed the way Americans communicate.¹⁷² It is also an increasingly prominent source of political information.¹⁷³ The value of the internet as a tool for political communication should not be taken lightly when crafting regulations.¹⁷⁴ The web has a number of benefits that set it apart from other mediums as a tool for political engagement. Unlike most other communication tools, the marginal cost of communicating over the internet is essentially nothing.¹⁷⁵ Further, the internet is a particularly good medium for interpersonal communication. Messages are both immediate and durable, and can reach a targeted or broad audience.¹⁷⁶ It is thus easy to conceive of the

171. *Id.* (“To exclude certain types of communications regardless of whether or not they are coordinated would create an immense loophole that would facilitate the circumvention of the Act’s contribution limits, thereby creating ‘the potential for gross abuse.’” (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (1986))).

172. In a 2006 survey, seventy-three percent of respondents self-identified as internet users. Further, forty-two percent reported that they had broadband connections at home. Mary Madden, Pew Internet & American Life Project, *Internet Penetration and Impact 3* (2006), available at http://www.pewinternet.org/~//media/Files/Reports/2006/PIP_Internet_Impact.pdf.pdf (on file with the *Columbia Law Review*); see also *Internet Communications*, 71 Fed. Reg. 18,589, 18,589 (Apr. 12, 2006) (“The Internet’s accessibility, low cost, and interactive features make it a popular choice for sending and receiving information.”). But see Cass R. Sunstein, *Republic.com* 54–56 (2001) (arguing blogs “balkanize” people by allowing them to “filter” information based on “what they like and dislike”).

173. In the 2008 election, forty percent of Americans got news or information about the election from online sources. Almost twenty percent said they went online at least once a week to do something related to a campaign, and six percent responded that they did so daily. Smith & Rainie, *supra* note 2, at i. Many view the internet as a forum where political speech can be truly democratic and as such are staunchly opposed to its regulation. See *Internet Communications*, 71 Fed. Reg. at 18,591 (describing how FECA received hundreds of comments on internet rulemaking, half of which warned that any regulation would end up chilling political speech on the internet).

174. The FEC obviously takes this concern very seriously, and appears to prefer over-protecting internet speech. See *Internet Communications*, 71 Fed. Reg. at 18,589 (describing how *Shays* decision forced FEC to regulate internet but asserting intent to restrain regulation as much as legally allowable).

175. For example, an individual with internet access (available for free at most public libraries) can comment for free on most blogs or create a free blog on sites like www.blogger.com. See *id.* at 18,590. Additionally, many internet service providers provide free or low-cost web hosting so that individuals can create their own websites. Sites like YouTube and Facebook allow users to post videos for free and make those videos accessible to large audiences.

176. An email or blog post is communicated the instant it is sent or posted, but will last until the sender or receiver terminates it. The result is a highly flexible medium. See,

internet as an egalitarian free speech zone in which virtually anyone can communicate effectively for little or no cost. These benefits should not be understated.¹⁷⁷

In the political realm, the internet has also shown great promise as a mechanism for small donor fundraising.¹⁷⁸ An obvious way in which the internet facilitates fundraising is by removing the costs of solicitation and publicity.¹⁷⁹ Some scholars have argued that the success of internet fundraising may be due to the creation of online “communities” that give small donors a sense of participation and solidarity that they previously lacked.¹⁸⁰ Such communities do seem to have formed, both directly related to campaigns and independently.¹⁸¹ This same characteristic has a downside: It increases the value to candidates of videos and other such community-building communications disseminated for free over the internet—the very same communications exempt from current FEC regulations.

3. *Exploiting Internet Community Building and Grassroots Advocacy.* — The internet, by its nature, has a vast capacity to evolve and change as

e.g., *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (noting that internet provides “relatively unlimited, low-cost capacity for communications of all kinds”); Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 *Santa Clara Computer & High Tech. L.J.* 289, 316–17 (2005) (noting potential for internet communications to have a “long shelf life”).

177. See, e.g., Ryan P. Winkler, Note, *Preserving the Potential for Politics Online: The Internet’s Challenge to Federal Election Law*, 84 *Minn. L. Rev.* 1867, 1896 (2000) (“If the Internet is allowed to develop, it has the potential to significantly improve the political system.”).

178. This potential was clearly illustrated by Barack Obama’s campaign for President. In early 2007, then-Senator Obama raised \$7.5 million in internet donations in just thirty-six hours. See Clyde Wilcox, *Internet Fundraising in 2008: A New Model?*, *The Forum*, 2008, Vol. 6, Iss. 1, Art. 6, at 1. But see *supra* note 3 (considering argument that Obama’s small donor statistics were overstated).

179. The low cost of internet communication helps less prominent candidates increase their visibility and reach larger audiences. See Hasen, *Political Equality*, *supra* note 9, at 5 (“The changes in modes of political communication may be allowing candidates written off by the mainstream media to continue to garner significant amounts of attention . . .”).

180. Clyde Wilcox, for example, notes that many of the solicitations he received were intended to include the recipient in a network of citizens and make that individual feel included in the campaign. Before the internet, such inclusion of small donors was prohibitively expensive. Wilcox, *supra* note 178, at 9; see also Malbin, *supra* note 9, at 235 (describing intent of Howard Dean campaign to use internet to “stimulate interwoven activities that would expand the support base and organize volunteers, as well as raise money”).

181. Perhaps the best example of an online political community is the now-famed blog DailyKos, which receives an average of four million views each week and works actively to recruit money and volunteers for political causes in which it believes. See Michael M. Grynbaum, *Bloggers Battle Old-School Media for Political Clout*, *Boston Globe*, July 6, 2006, at A3.

technology improves.¹⁸² Up to this point, the internet's growth has been marked by an increase in the complexity—and thus potential cost—of communications that can be sent and received.

Videos are now a significant mode of internet communication.¹⁸³ The increase in their importance has occurred at a startling pace: When the FEC published its Notice of Proposed Rulemaking in April of 2005, the video sharing site YouTube was largely unknown.¹⁸⁴ A year later, over one hundred million videos were being viewed on YouTube per day.¹⁸⁵ Videos have also become an important means of political communication.¹⁸⁶ “Viral videos” made by enthusiastic supporters received a great deal of attention in the 2008 election. One of the most popular featured the “Obama Girl”—a woman who sang suggestively about Barack Obama's candidacy.¹⁸⁷ The first “Obama Girl” video received millions of views.¹⁸⁸ At first blush, this sort of communication seems like exactly the kind of internet speech that should be protected: an enthusiastic supporter making a low-cost video. In reality, however, the “Obama Girl” was a paid actress and the video cost several thousand dollars to produce.¹⁸⁹

The “Obama Girl” scenario is not unique. The low-cost, free communication perception most users have of the internet is ripe for exploitation. Perhaps the most famous example of such exploitation is the case of Marié Digby, an unknown singer who purportedly built a career

182. See, e.g., Internet Communications, 71 Fed. Reg. 18,589, 18,595–96 (Apr. 12, 2006) (noting specific references to blogs were inappropriate given propensity of internet technology and communication to change).

183. In a recent Pew survey, fifty-seven percent of adults who use the internet said they had watched a video online. Almost twenty percent do so daily. Mary Madden, Pew Internet & American Life Project, Online Video, at i (2007), available at http://www.pewinternet.org/~media/Files/Reports/2007/PIP_Online_Video_2007.pdf.pdf (on file with the *Columbia Law Review*).

184. YouTube was created in late 2005 and became popular in early 2006. See Reuters, YouTube Serves Up 100 Million Videos a Day Online, USA Today, July 16, 2006, at http://www.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm (on file with the *Columbia Law Review*). The FEC issued its NPRM on April 4, 2005 and promulgated its final rules on April 12, 2006. Internet Communications, 71 Fed. Reg. at 18,589.

185. Reuters, *supra* note 184.

186. See Wilcox, *supra* note 178, at 9 (noting all email solicitations he received from political candidates had “short attached videos”). Aware of this trend, President Obama posted a video of one of his first radio addresses on his website, and it was picked up by YouTube. Kenneth T. Walsh, For Obama, Governing in the Age of YouTube, U.S. News & World Rep., Nov. 25, 2008, at <http://www.usnews.com/articles/news/campaign-2008/2008/11/25/for-obama-governing-in-the-age-of-youtube.html> (on file with the *Columbia Law Review*).

187. See Jake Tapper, Music Video Has a ‘Crush on Obama,’ ABC News, June 13, 2007, at <http://abcnews.go.com/Politics/Story?id=3275802> (on file with the *Columbia Law Review*).

188. *Id.*

189. *Id.* (quoting video's creator as stating video “probably cost a couple thousand dollars”).

by posting videos of her songs on YouTube and MySpace.¹⁹⁰ After she became relatively famous, the Wall Street Journal uncovered that she had, in fact, signed with Hollywood Records prior to posting any videos on YouTube, and the company had helped her plan a strategy for building an online “grassroots” reputation.¹⁹¹

The cases of Marié Digby and the “Obama Girl” illustrate the real potential for expensively produced videos disseminated online to masquerade as grassroots communications.¹⁹² In the case of the “Obama Girl,” there is no indication of coordination with the Obama campaign.¹⁹³ Even if there had been, however, no regulation would have attached. Indeed, a campaign could work directly with an individual or corporation to produce a faux grassroots video costing any amount without triggering contribution limits or disclaimer requirements.¹⁹⁴ Given the apparent success of campaign strategies designed to create an online community and draw in donors,¹⁹⁵ such videos are clearly valuable to candidates.¹⁹⁶ Further, the internet continues to evolve. It is entirely possible that a more popular, more pervasive, and higher cost form of communication will replace video in the coming years. In light of these considerations, the FEC’s exemption of internet communications disseminated for free creates a loophole that is potentially (and increasingly) serious.

190. Ethan Smith & Peter Lattman, *Download This: YouTube Phenom Has a Big Secret*, Wall St. J., Sept. 6, 2007, at A1.

191. *Id.*

192. In the case of videos intended to influence an election, current FEC regulations would not even require a disclaimer stating that a campaign was involved. See 11 C.F.R. § 110.11 (2009) (requiring disclaimers only for public communications); *id.* § 100.26 (excluding internet communications other than those placed for a fee on another person’s website from definition of public communications).

193. Tapper, *supra* note 187 (noting Obama campaign official’s statement that “its teams had nothing to do with the video”).

194. So long as it was only distributed for free over the internet, such as through YouTube. See *supra* Part II.A.1 (noting FEC regulations allow free internet communications to be explicitly coordinated with candidates). In the case of videos meant to imitate grassroots support, however, free distribution serves to heighten their credibility and effect. A video about a candidate that appears on YouTube seems more legitimately homemade than one placed on a major commercial website.

195. See *supra* notes 180–181 and accompanying text (describing how political campaigns use internet to build broader support base and raise more funds).

196. Their value to candidates implicates the corruption danger that FECA’s contribution limits were designed to address. See *Buckley v. Valeo*, 424 U.S. 1, 36 (1976) (finding Congress has valid interest in guarding against “corrupting potential of large financial contributions to candidates”); see also *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) (observing coordinated communications may be “as useful to the candidate as cash”); *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999) (looking to whether communications were “valuable” to candidates in determining whether they should be regulated as contributions).

III. FIXING THE LOOPHOLE

The loophole left by the FEC's regulations is not the result of any fundamental inability to reconcile the value of the internet with the dangers of coordination. Instead, it can be solved relatively easily, with little burden on the internet speech of individuals. Part III.A proposes that communications costing more than \$500 to produce be included in the definition of "public communication" and describes how this inclusion is consistent with the text and purpose of FECA. Part III.B examines how this inclusion would change existing regulations and concludes that it would remedy the problem described in this Note and would not have a detrimental effect on other regulations. Part III.C examines the collateral effect this solution would have on internet speech and concludes that the danger of chilled speech is minimal.

A. "Free" Advertising and the Internet

The FEC has excluded from "public communication" all communications over the internet that are not placed for a fee on another's website on the basis that such communications do not constitute "advertising."¹⁹⁷ In doing so, the Commission has contravened the text and purpose of FECA.¹⁹⁸ Additionally, it has misconstrued what constitutes "advertising" on the internet. The Commission focuses on the cost of *communicating* the advertisement, which, on the internet, is often zero.¹⁹⁹ Instead, the regulations should focus on the cost of *producing* the communication. This approach would capture expensive coordinated communications that have corruptive potential while leaving the majority of internet communications unaffected.

1. *The Solution.* — Often, the simplest solution is best. The loophole described in this Note is a direct result of the FEC's exclusion of certain internet communications from the definition of "public communication."²⁰⁰ The obvious answer is to include internet communications

197. Internet Communications, 71 Fed. Reg. 18,589, 18,595 (Apr. 12, 2006) (explaining that view that there are "forms of advertising on the Internet other than paid advertising" is "contrary to the Commission's view"). The statutory definition of "public communication" lists several specific communications and concludes with the language "or any other form of general public political advertising." Federal Election Campaign Act, 2 U.S.C. § 431(22) (2006); see *supra* notes 94–96 (describing FEC regulation of public communications). Under the reasoning given by the FEC, the exclusion of these communications would not be justified if they were "advertising."

198. See *supra* note 157 and accompanying text (explaining current FEC regulations).

199. See *supra* note 175 (discussing how internet facilitates low-cost communication).

200. See 11 C.F.R. § 100.26 (2009); see also *supra* Parts II.A.1, II.A.2 (describing how exclusion of free internet communications from definition of "public communication" removes them from FEC regulation under both the coordinated communication standard and the uncompensated internet activity exemption). The media exemption, which could potentially exempt high cost internet communications from regulation, is not a loophole. If applied correctly, the media exemption should only protect legitimate news stories and

within that definition.²⁰¹ Simply including all internet communications, however, may create the speech-chilling situation feared by opponents of regulation.²⁰² Further, the communications that pose a circumvention threat are not textual messages on blogs, but media that involve a substantial cost to produce, such as videos or songs.²⁰³ The Commission should therefore amend its definition in § 100.26 to include the following language: “*The term ‘general public political advertising’ shall include communications over the Internet that cost more than \$500 to produce.*”²⁰⁴ The vast

editorials, which do not raise the same corruption danger as private ads. See *supra* note 142 (noting that reasonably applied media exemption does not pose corruption danger).

201. Any internet communications included in the definition of “public communication” would be eligible for the coordinated communication test in § 109.21 and would be regulated as a contribution if coordinated. See 11 C.F.R. § 109.21; *supra* Part II.A.1 (describing coordinated communication test). Additionally, the costs of producing a public communication are not included in the uncompensated internet activity exemption. See 11 C.F.R. §§ 100.94, 100.155; *supra* note 128 (explaining that uncompensated internet activity exemption does not cover production of public communication). Therefore, adding free internet communications to the definition of “public communication” would eliminate both of these loopholes. The media exemption may still protect the communication from regulation, but that provision is not a loophole in the same way as the other two. See *supra* notes 142–144 and accompanying text (distinguishing media exemption from regulatory loopholes).

202. See Smith, *Virus Alert*, *supra* note 4 (“[I]f you run a group blog anywhere in the country, and the Internet is included in the definition of ‘public communication,’ how long would you pause over a piece before posting it?”).

203. See *supra* Part II.B.3 (providing examples of types of videos that pose corruption threat).

204. Currently, the definition of “public communication” states:

[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. The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.

11 C.F.R. § 100.26. This Note’s proposed solution would remove the final sentence of the existing regulation and replace it with: “The term *general public political advertising* shall include communications over the Internet placed for a fee on another person’s Web site and communications over the Internet that cost more than \$500 to produce.” This new regulation would expand on, rather than replace, the FEC’s existing internet rule.

The \$500 figure is an estimated amount that could be refined further in an FEC rulemaking proceeding. The purpose of the monetary figure is to clearly differentiate expensive and potentially corruptive communications from ordinary textual communications. A \$500 threshold is well above the cost of placing a comment on a blog or even starting a small political website. Communications that reach this price are likely to be sophisticated and professional.

The cost “to produce” a communication will not always be easy to determine. For example, if an individual owns a high definition video camera and a soundstage, she might not need to spend any money to make the equivalent of an expensive production. Under current law, however, “in kind” contributions (i.e., discounts in services normally provided) are treated just as any other contribution. See 2 U.S.C. § 431(8)(A) (2006) (defining contribution as “anything of value”); *Citizens for Responsibility and Ethics in Wash. v. FEC*, 475 F.3d 337, 338–39 (2007) (discussing whether list of like-minded activists was in kind contribution to political campaign). Additionally, the difficulty of determining

majority of internet speech involves textual messages posted to websites or blogs, which are essentially free to create. That entire mode of communication would remain free from regulation.²⁰⁵ At the same time, this rule would capture communications like songs or videos that entail a substantial cost to produce.²⁰⁶ In this way, it would eliminate the danger of internet communications that are expensive, coordinated, and unregulated.

2. *This Solution Is Consistent with the Law.* — The proposed addition to § 100.26 improves the overall regulatory scheme by closing a loophole. It is also more consistent with FECA than the FEC's current approach. Unlike the current FEC rules, this solution adheres to FECA's treatment of coordinated expenditures as contributions.²⁰⁷ As FECA mandates, expenditures for internet communications made in cooperation or consultation with a candidate would be regulated as contributions.²⁰⁸ The pro-

cost is not unique to the proposed regulation. Current FEC policy already requires a determination of the production cost of non-internet communications. Internet Communications, 71 Fed. Reg. 18,589, 18,597 (Apr. 12, 2006) (“[T]he Commission generally treats the cost of producing campaign-related materials as subject to the same funding limits and source prohibitions as the costs of distributing the materials.”). It should therefore not be difficult for the FEC to employ the same procedures it uses to calculate production cost of non-internet communications in cases covered by the proposed regulation.

205. It is hard to conceive of a textual message, photograph, or other similar communication that would cost over \$500. See *supra* Part II.B.2 (discussing low cost of communicating over internet).

206. The regulation does not mention specific kinds of communications so as to accommodate the rapidly changing nature of the internet. See *supra* Part II.B.3 (discussing continually evolving nature of web communication). The FEC used this same rationale when deciding not to specifically exempt “blogs” from regulation. Internet Communications, 71 Fed. Reg. at 18,595 (noting nature of the internet cautions against “crafting a regulation tied to specific forms of Internet communication”). The FEC's specific concern was that blogging would be replaced by a new form of egalitarian communication that might accidentally be regulated. *Id.* at 18,595–96. This Note's proposed solution addresses this concern as well. The proposed change to § 100.26 is meant to divide all internet communication into two categories: communications with a significant production cost, and cheap everyday communications. Any new technology that requires a \$500 expenditure for each individual message is unlikely to become a popular medium for internet political discussion. (In fact, internet technology trends toward making communication cheaper rather than more expensive.) Any new “blogging” technology would therefore almost certainly not be regulated. On the other hand, if a new form of communication does involve a substantial production cost, it is likely to raise circumvention concerns and should be regulated. For a further explanation of how the proposed regulation will still protect internet speech, see *infra* Part III.C.

207. Under this proposal, the class of coordinated expenditures currently exempted from the definition of contribution would be captured by the coordination test in 11 C.F.R. § 109.21. For a discussion of how the FEC's current regulation fails to comport with FECA, see *supra* Part II.B.1.

208. It is true, however, that the proposed regulations will still allow for coordinated expenditures of *less than* \$500 to be exempted from regulation as contributions. A literal reading of FECA does require such expenditures to be regulated as contributions. See 2 U.S.C. § 441a(a)(7)(B)(i) (2006) (defining any expenditure made in coordination with a

posed revision would satisfy this fundamental tenet of campaign finance law.²⁰⁹

The proposed regulation is also consistent with FECA's definition of "public communication" because the communications it includes fall within the ambit of that definition's "general public political advertising" language.²¹⁰ The FEC's view that the internet equivalent of "advertising" includes only those communications placed for a fee on another person's website is untenable.²¹¹ In arriving at this conclusion, the FEC observes that "the word 'advertising' connotes a communication for which a payment is required."²¹² From this interpretation, the Commission extrapolates that said payment must be given "for access to an established audience using a forum controlled by another person."²¹³

The FEC's conclusion that advertising requires a payment is not entirely unreasonable. The flaw in the Commission's logic lies in its insistence that payment be made to *disseminate* the communication rather than just to *produce* it. In regulating traditional media, the FEC's policy is

political campaign as a contribution). The proposed regulation, however, is far more consistent with the spirit of FECA than the current scheme. Additionally, the cost threshold is likely necessary to avoid an undue burden on the First Amendment rights of internet users. See *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 83–84 (D.D.C. 1999) (limiting scope of campaign finance law in light of First Amendment concerns).

The exemption of communications that cost under \$500 to produce may also be justified by FECA's volunteer provisions. Section 431(8)(B) indicates that ancillary costs incurred during volunteer activities are not considered contributions. See *supra* notes 159–166 and accompanying text (discussing volunteer exemptions). Though exempting up to \$500 stretches the text somewhat, see *supra* Part II.B.1, these expenses are at least too small to implicate the corruption concern underlying the Act.

209. See *supra* Part II.B.1 (describing history and importance of coordination rule).

210. 2 U.S.C. § 431(22) (stating "public communication" refers to "any other form of general public political advertising"). Adding these communications to the regulatory definition of public communication is justified by the text of FECA.

211. See *Internet Communications*, 71 Fed. Reg. at 18,595 (stating FEC's view that communications placed for a fee on website of another person are sole communications that constitute advertising on internet); *supra* note 197 (describing FEC position that only paid internet communications are advertisements).

212. *Internet Communications*, 71 Fed. Reg. at 18,594. For support for this interpretation, the Commission cites a number of dictionary definitions: The American Heritage Dictionary of the English Language (4th ed. 2000) ("The activity of attracting public attention to a product or business, as by *paid announcements* in the print, broadcast, or electronic media." (emphasis added)); The Random House Webster's Unabridged Dictionary (2d ed. 2005) ("1. The act or practice of calling public attention to one's product, service, need, etc., esp. by *paid announcements* in newspapers and magazines, over radio or television, on billboards, etc.; . . . 2. *paid announcements* . . ." (emphases added)).

213. *Internet Communications*, 71 Fed. Reg. at 18,594. The FEC arrives at this conclusion by analogizing to traditional communications. Non-internet mediums generally require the advertiser to pay a third party for use of that party's forum (i.e., print journalism, television). Therefore, the FEC argues, advertising on the internet consists of only those communications that are placed on the forum of another for a fee. *Id.* at 18,594–95.

to include the cost of producing a communication in its total cost.²¹⁴ Therefore, under current FEC regulations, if an individual pays for a coordinated communication, the cost of producing that communication will be considered a contribution if he pays to place it on someone's website, but that same cost will go totally unregulated if he posts the video on YouTube.²¹⁵ The FEC uses cost of distribution as an on/off switch for regulation and ignores cost of production when there is no dissemination expense.

A regulatory policy that focuses only on cost of distribution simply does not make sense for the internet. The FEC itself has noted that communication over the web is significantly less expensive than traditional media.²¹⁶ Indeed, the internet's primary benefit is its low cost of access.²¹⁷ Moreover, it is possible to advertise on the internet without paying a third party for access to its forum.²¹⁸ It strains logic to suggest that it would not constitute "advertising" for a company to produce a video encouraging the viewer to buy its product and post it on that company's website.²¹⁹ Yet this is precisely the position taken by the FEC: The Commission determines what qualifies as an "advertisement" on the internet not by its content or cost, but by how much is paid to distribute it. Such a view makes little sense given the low-cost distribution potential of the internet. The solution proposed by this Note focuses instead on the cost of *producing* a communication and regulates expensive advertisements even if they ultimately have no distribution cost.²²⁰ It therefore

214. *Id.* at 18,597 ("[T]he Commission generally treats the costs of producing campaign-related materials as subject to the same funding limits and source prohibitions as the costs of distributing the materials.").

215. Or distributes it through any other free forum. See *supra* note 175 (describing various means of free internet communication).

216. Internet Communications, 71 Fed. Reg. at 18,590 ("[T]he Internet provides a means to communicate with a large and geographically widespread audience, often at very little cost.").

217. See *id.*; *supra* Part II.B.2 (describing low barriers to internet access).

218. Individuals can create their own websites, often for little or no cost, from which they can distribute advertisements of their own making. The internet also contains a number of forums, such as YouTube, MySpace, and Facebook, through which songs or videos can be distributed for free to a large audience. Once such a communication has been initially posted on a website or forum, it can spread organically as others link to it or embed it on their own websites. In traditional media, by contrast, most advertisers will need to purchase access to an advertising forum. For all practical purposes, there are no television channels that will run commercials for free and no newspapers that will allow individuals to take out an ad without charge.

219. A prominent example of this is free distribution of movie trailers through internet sites. Many films post trailers on their own websites, and trailers posted in such a way would not be considered "advertisements" by the FEC. Yet the purpose of these trailers is clearly to advertise for the films, and any reasonable person would consider them advertisements.

220. This Note's solution essentially reverses the FEC's analytical approach. Instead of using cost of distribution as an on/off switch to trigger regulation, the proposed regulation would be triggered if the communication entailed a cost of production *or* a cost of distribution. The FEC's current policy regulating communications placed for a fee on

comports with FECA's coordination rule²²¹ and its definition of "public communication."²²²

B. *Effects of the Proposed Solution*

1. *Applying the Proposed Regulation to Coordinated Communications.* — This Note identified the categorical exclusion of "free" internet communications from regulation as coordinated communications as the major problem with the FEC's existing regulatory scheme.²²³ Amending the definition of "public communication" in the way proposed by this Note would allow the coordinated communication test to potentially cover a new group of communications: those produced for a significant cost but disseminated for free through an internet forum.²²⁴ This does not mean, however, that all such communications would automatically be regulated. Instead, these communications would be subjected to the FEC's existing coordinated communication test.²²⁵ The content standard would still ap-

another person's website is retained by this proposal. See *supra* note 204 (describing proposed change to regulation).

221. See 2 U.S.C. § 441a(a)(7)(B)(i) (2006); *supra* Part II.B.1 (describing how FECA requires coordinated communications to be treated as contributions).

222. See 2 U.S.C. § 431(22) (including "general public political advertising" in definition of "public communication").

223. This categorical exclusion was a product of the automatic exemption of such communications from the coordinated communication test, see *supra* Part II.B.1, and the extensive protection provided by the uncompensated internet activity exemption, see *supra* Part II.B.2. The media exemption, identified by this Note as another means through which these communications could be excluded from regulation, is not a categorical exclusion, and if applied correctly does not raise any circumvention danger. See *supra* note 142 (explaining media exemption).

224. These communications were previously excluded because they did not fall under either the definition of "public communication," 11 C.F.R. § 100.26 (2009), or "electioneering communication," *id.* § 100.29. They were also excluded from the test by the uncompensated internet activity exemption. 11 C.F.R. §§ 100.94, 100.155. Public communications are not covered by this exemption, and these internet communications would therefore be removed from its protection.

225. 11 C.F.R. § 109.21. The communications would then have to meet the payment standard, one of the four content standards, and one of the five conduct standards. See *supra* Part I.B.2 (outlining required elements for coordinated communications). Internet communications would still be excluded from the definition of "electioneering communication," 11 C.F.R. § 100.29, and thus could not qualify for the first content standard. *Id.* § 109.21(c)(1). An internet communication could still pass the content test if it: republishes campaign materials, *id.* § 109.21(c)(2); uses express advocacy, *id.* § 109.21(c)(3), or refers to a candidate in that candidate's jurisdiction within a certain timeframe before the election, *id.* § 109.21(c)(4).

The republication of campaign materials on the internet might initially appear problematic, since posters, photos, videos, and other communications can be easily replicated and disseminated. The proposed definition, however, includes only those communications that cost more than \$500 to produce. *Supra* Part III.A.1. It does not cost the copier a substantial amount to produce a republished communication online, and so such an action would be excluded from the proposed definition in § 100.26.

The internet would obviate the jurisdictional requirement in § 109.21(c)(4) because a website is viewable in any jurisdiction. This bolsters the fear voiced by Bradley Smith and

ply, but it would be used for the legitimate purpose of determining whether the communication was “intended to influence” a federal election and thus not an expenditure under FECA.²²⁶ The net result of the proposed amendment to § 100.26 would be to bring a class of potentially expensive political communications that are currently unregulated under the governance of the FEC’s existing coordination test. Whether they would ultimately pass this test would be determined on a case-by-case basis.

2. *Collateral Effects of the Proposed Regulation.* — The term “public communication” is not just used in the context of coordinated communications.²²⁷ Most importantly, public communications are subject to dis-

others that bloggers who mention a candidate will suddenly fall within the FEC’s regulatory ambit. See Smith, *Virus Alert*, supra note 4 (“[I]f you run a group blog anywhere in the country, and the Internet is included in the definition of ‘public communication,’ how long would you pause over a piece before posting it?”). The exclusion of textual postings on websites, however, should ameliorate this concern. The act of paying over \$500 to produce a communication to influence an election is not one undertaken as lightly as posting one’s political views on a blog. See infra Part III.C.1 (arguing that spending more than \$500 on campaign communication is indicative of substantial planning).

226. *Shays v. FEC*, 414 F.3d 76, 99 (D.C. Cir. 2005) (holding FEC’s coordinated communication test can permissibly use contextual criteria to exclude communications not intended to influence a federal campaign). The content standard itself is facing other assaults. In 2008, the D.C. Circuit struck down the FEC’s content scheme as a violation of FECA. *Shays v. FEC*, 528 F.3d 914, 925 (D.C. Cir. 2008). The exact provisions of § 109.21 are therefore uncertain going forward. The changes mandated by the D.C. Circuit, however, do not bear on the specific issue discussed by this Note.

227. One significant use of the term “public communication” not addressed here is the case of party coordinated communications. Under current FEC regulations, parties are able to spend up to a certain amount on “coordinated party expenditures.” 11 C.F.R. § 109.32. The party coordinated expenditure amount is relatively large: For presidential elections, parties may spend an amount “equal to two cents multiplied by the voting age population of the United States.” 11 C.F.R. § 109.32(a)(2). This amount includes “party coordinated communications,” covered under § 109.37. Section 109.37 is functionally identical to § 109.21, but applies to parties rather than individuals. *Id.* § 109.37.

Though parties have an allotment for coordinated spending, the Supreme Court has held that parties are also capable of making unlimited *uncoordinated* independent expenditures on behalf of candidates. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996). Therefore, the coordinated communication issue addressed in this Note affects internet communications funded by political parties similarly to those funded by individuals. A party coordinated communication under § 109.37 employs the same requirement of a “public communication” contained in the § 109.21 coordinated communication test. Therefore, parties can fund unpaid internet communications with non-coordinated funds even if they coordinate with their candidate to produce them. The solution proposed by this Note would correct this problem.

The term “public communication” is also employed in two other minor regulations. Under 11 C.F.R. § 106.6, certain political committees (separate segregated funds and nonconnected political committees) are restricted in the way they can allocate funds to pay for public communications. Additionally, the definition of “agent” of a candidate for state and local office includes an authorization to spend funds on public communications. 11 C.F.R. § 300.2(b)(4). The change proposed by this Note will not have a significant impact on the functioning of those regulations.

claimer requirements.²²⁸ Current disclaimer rules apply only to public communications or electioneering communications, thus exempting internet communications other than those placed for a fee on the website of another.²²⁹ This Note's proposed regulation expands the definition of public communication to include expensive internet communications disseminated for free. As a result, these communications would potentially require a disclaimer.²³⁰

The proposed regulations would also clarify a murky area of the law by removing expensive internet communications from the ambit of the "uncompensated Internet activity" exemption in §§ 100.94 and 100.155.²³¹ As discussed above, whether these communications are currently covered by that exemption is somewhat ambiguous.²³² The proposed change would therefore clarify the law in this area and affirm that internet communications produced for a cost do not fall under §§ 100.94 and 100.155.²³³ By contrast, the proposed change does not affect the media exemption.²³⁴ The media exemption makes distinctions based on whether a communication is produced by a proper press entity performing a proper press function.²³⁵ If a communication qualifies, it is not

228. Public communications require a disclaimer when they (1) are produced by a political committee, (2) expressly advocate for or against a clearly identified federal candidate, or (3) solicit contributions. 11 C.F.R. § 110.11.

229. Section 110.11 also contains specific requirements for two non-"public communication" forms of internet communication: Disclaimers are necessary on websites of political committees and on sets of 500 or more substantially similar emails. *Id.*

230. These public communications would not automatically need a disclaimer. As with the coordination standard, the proposed regulation would only subject them to the test in § 110.11. Such communications would still need to be produced by a political committee, expressly advocate a candidate's election or defeat, or solicit contributions in order to require a disclaimer. See *id.*

231. See *id.* §§ 100.94, 100.155 (stating exemption does not apply to production of a public communication); *supra* Part II.A.2 (describing uncompensated internet activity exemption in detail).

232. See *supra* Part II.A.2 (discussing extent of uncompensated internet activity exemptions).

233. Not falling under these exemptions merely allows the communications to be treated as expenditures or contributions under existing FEC regulations. See *supra* Part II.A.2. If these communications would have been previously exempted, the change proposed by this Note may require producers of such communications to register as political committees, depending on the cost of their communications. See 11 C.F.R. § 100.5(a) (stating an individual or group making expenditures greater than \$1,000 must register as a political committee and thus submit to disclosure requirements and contribution limits). It may also require these communications to provide disclaimers. See *id.* § 110.11 (describing disclaimer requirement).

234. 11 C.F.R. §§ 100.73, 100.132; see *supra* Part II.A.3 (describing media exemption).

235. 11 C.F.R. §§ 100.73, 100.132; see also *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981) (requiring legitimate press activity for media exemption); *supra* notes 134–136 and accompanying text (detailing media exemption test).

treated as a contribution or expenditure.²³⁶ It would therefore never be regulated under the coordination standard or any other FEC regulation. The media exemption is not altered by the proposed regulation and operates independently to protect news stories from regulation.²³⁷ Any blogs that qualified for the media exemption would be similarly beyond regulation.

C. *The Speech Issue*

1. *Is the Net Cast Too Widely?* — The FEC's reluctance to regulate the internet results from its fear of chilling speech in a medium that holds great promise as a forum for political dialogue.²³⁸ The argument against regulating internet speech has been laid out comprehensively by former FEC Commissioner Bradley Smith.²³⁹ Smith argues that subjecting internet speech to the coordination standard will chill grassroots political speech because it will force bloggers and others to consider whether they have had any contact with candidates or campaigns and whether their speech falls within the regulatory domain of the FEC.²⁴⁰ Smith notes that an FEC investigation is as bad a consequence for bloggers, who will be subjected to invasive inquiries and legal fees, as the actual punishment for a violation.²⁴¹ Therefore, he argues that anyone making internet communications will censor him or herself so as to not attract the attention of the FEC and warrant a possible investigation.²⁴²

Smith's argument is overstated. He provides no evidence to suggest that a significant number of individuals posting comments on internet websites have had contact with federal campaigns.²⁴³ Even if Smith is correct, however, the regulation proposed in this Note exempts internet

236. 11 C.F.R. §§ 100.73, 100.132.

237. Because the media exemption, if correctly applied, does not pose a corruption danger and is rooted in FECA's text, it is not a loophole in the same sense as the other coordination exemptions. Its continued operation therefore does not impair this Note's solution. See *supra* note 142 (describing how media exemption is not a loophole).

238. See Internet Communications, 71 Fed. Reg. 18,589, 18,589 (Apr. 12, 2006) ("Through this rulemaking, the Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach."); *supra* Part II.B.2 (discussing promise of internet as tool for political dialogue).

239. See Smith, Virus Alert, *supra* note 4.

240. *Id.* ("You know your site has a nationwide reach, so you ask yourself: Have you or your fellow bloggers traded e-mail with that candidate's campaign? What would the e-mail show? Have you spoken to that candidate? Received calls from his staff?"). Smith makes the same argument with regard to state and local parties. See *id.* The party claim is even stronger than the one regarding individuals because local parties frequently communicate with or interact with federal candidates and campaigns.

241. *Id.* ("How much would it take to convince the FEC you didn't coordinate? Could you afford the legal fees?").

242. *Id.*

243. Even if they have had such contact, other protections exist. See *infra* Part III.C.2 (noting blogs and websites qualify for media exemption).

communications that cost less than \$500 to produce.²⁴⁴ Smith's argument applies with considerably less force to communications that involve an expenditure of any significance. Such communications do not fit the mold of casual political dialogue. If a communication's production involves an expenditure of over \$500, it is likely that the communication involved considerable planning. Further, once substantial cost is involved, other FEC regulations may be triggered—whether or not the communication fits the definition of public communication.²⁴⁵ This indicates that the FEC is comfortable attaching restrictions to speech that involves significant cost, and the proposed regulation restricts only expensive communications. The danger of chilling everyday political speech on the internet is therefore minimal.

2. *The Media Exemption as a Protection for Online Speech.* — The proposed regulation attempts to precisely target internet communications that are problematic due to their cost and avoid the rest of internet speech. It is impossible, however, to craft a perfect regulation, and the one proposed by this Note errs on the side of overbreadth.²⁴⁶ The FEC possesses a tool to help mitigate the unintended effects of this expanded regulation: The proposed regulation does not affect the functioning of the media exemption.²⁴⁷ The FEC has stated that blogs and other websites can qualify for the media exemption.²⁴⁸ The media exemption protects communications from regulation even if they are coordinated with a candidate.²⁴⁹ As a result, a significant portion of expensive but politically valuable internet political speech will still be exempted from regulation even under the proposed rule.²⁵⁰ This is especially valuable reassurance for blogs operating as media entities.

244. See *supra* Part III.A (describing proposed alteration to regulation).

245. Specifically, an individual who makes more than \$1,000 in expenditures in a given year must register as a political committee and subject herself to reporting requirements, disclaimer requirements, and solicitation limits. See 11 C.F.R. § 100.5(a) (2009).

246. Any internet communication involving more than \$500 to produce will be covered, see *supra* Part III.A, even though some such communications likely do not pose a danger of significant corruption. (It is conceivable that a homemade video could cost more than \$500.) Still, such communications would only face the *potential* of regulation. They would only face limits or disclosure requirements if they met other specific requirements. See, e.g., *supra* notes 225, 230 (describing how qualification as public communications would not automatically subject communications to regulation).

247. See 11 C.F.R. §§ 100.73, 100.132; *supra* Part II.A.3.

248. See *Internet Communications*, 71 Fed. Reg. 18,589, 18,607–09 (Apr. 12, 2003) (“The Commission finds as a matter of law that the media exemption applies to the same extent to entities with only an online presence as to those with an offline component as well.”). The FEC has been very liberal in applying the media exemption to websites, including partisan bloggers. See *supra* Part II.A.3.

249. *Internet Communications*, 71 Fed. Reg. at 18,609 (“[T]he presence or absence of alleged coordination between a press entity and a candidate or political party is irrelevant to determining whether the Act’s press exemption applies.”).

250. Many scholars have been critical of the extent to which the media exemption has been applied to internet speech. See *supra* note 131. The scope of the media exemption,

CONCLUSION

The FEC's current regulatory scheme for the internet is not consistent with FECA. It exempts an entire class of communications from its coordinated communication standard solely on the basis of their form, and therefore allows expenditures to be made in cooperation with candidates without triggering contribution restrictions. This approach is also practically unwise. As candidates look to build online communities that encourage a broad base of small donors, "grassroots" communications like videos and songs are increasingly valuable. Additionally, internet technology is progressing at a rapid rate and it is becoming easier to disseminate higher cost communications through fora like YouTube and MySpace. Because the FEC's regulations focus only on the cost of disseminating these communications—which, on the internet is often low or nonexistent—they ignore the potentially substantial cost involved in producing such communications and the value those communications can have to political candidates.

This Note has proposed an alteration to the regulations that would make them consistent with the governing law and treat all coordinated non-nominal expenditures for internet communications as contributions (which face FECA limits). Despite fears to the contrary, this alteration would have a minimal effect on valuable, low-cost internet political speech. It would close a significant regulatory loophole and prevent circumvention of the law. The internet holds significant promise as a democratic forum for political discourse. There are unique dangers, however, posed by such an anonymous forum if high-cost, unregulated communications can be produced at the behest of candidates. Videos or other campaign tools masquerading as grassroots or viral projects may be quite valuable to candidates and provide a hospitable outlet for funds that otherwise cannot be donated to candidates. The regulation proposed by this Note would close a significant loophole in campaign finance regulation and bring the FEC's regulatory scheme into compliance with the Federal Election Campaign Act without severely affecting internet grassroots political speech.

however, is another issue altogether. What speech it should be applied to is a determination not made here. It suffices to say that, whatever kind of speech the media exemption *should* protect, it is important to preserve that genre of speech on the internet as well. The speech considered by this Note to raise a corruption danger is not legitimate press speech and would not be covered by a correctly applied media exemption.