Death of the Digital Pamphleteers:

The Possible Threat to Anonymous Political Blogs

“There are only two ways of telling the complete truth - anonymously and posthumously.”

- Thomas Sowell¹

I. INTRODUCTION

“The Internet has revolutionized the computer and communications world like nothing before.”\(^2\) Not since the invention of the movable type printing press by Johannes Gutenberg in 1436\(^3\) has there been such a dramatic shift in the ease and speed with which information can be disseminated. In fact, from the perspective of sheer numbers, Gutenberg was an amateur. He produced only about 180 copies of his famous bible;\(^4\) Internet search engine Google has cataloged over eight billion web pages\(^5\) and it is estimated that over 100 million “blogs”\(^6\)


exist. While a finished Gutenberg bible took three years to produce and cost the equivalent of three years’ wages, today anyone can set up their own blog or web page in minutes, at no (or little) cost, and it may be instantly viewed by one of the nearly one billion worldwide Internet users.

6 A “blog” is short for “web log,” defined as “a web-based publication of periodic articles (posts), usually presented in reverse chronological order. It is an online journal with one or many contributors.” Wikipedia, http://en.wikipedia.org/wiki/Blog#Blog_Defined (last visited Nov. 1, 2005). The people who maintain or contribute to blogs are called “bloggers.” Id.


8 Wikipedia, supra note 4.


These online journals give writers access to millions of potential readers, far beyond the scope of traditional print publications. And given the relative anonymity of the Internet, bloggers can, for the most part, hide behind their computers, insulated from the repercussions of whatever they write.

On a lesser, but no less important scale, the pamphleteers of pre-Revolutionary America were the bloggers of their time. Beginning around 1760, hundreds of ordinary people - lawyers, farmers, ministers, merchants - took up the pen (and the printing press) to express their political ideas. The pamphlets they produced were quick, cheap, provocative, and, for the most part, written anonymously. Who can blame them, given the rumblings of revolution on the horizon? In writing anonymously, “[t]he pamphleteers amounted to the nation’s first underground

30, 2005).

12 See, e.g., Reno v. ACLU, 521 U.S. 844, 897 (1997) (“any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox”).


14 Id.
press, a guerilla counterpart to the established newspapers.”

They had the freedom to write what they believed should be read, with little regard to possible ramifications.

Today’s political bloggers also have that freedom – for now. New regulations currently under consideration threaten bloggers’ anonymous political speech by perhaps ultimately subjecting it to the disclosure rules of the Federal Election Campaign Act (FECA) as amended by the Bipartisan Campaign Reform Act (BCRA, or “McCain-Feingold” after the legislation’s sponsors).

This paper reviews major legislation and court decisions regarding political speech and disclosure, takes a look at political speech on the internet (specifically in the form of blogs), and examines how that legislation and case precedent might be applied to force disclosure of the authors behind anonymous online political speech. Recent regulatory and legislative action aimed at clarifying disclosure rules will

\[15\] Id.
\[16\] Internet Communications, 70 Fed. Reg. 16,967 (proposed Apr. 4, 2005) (proposing a redefinition of “public communication” to include Internet communications).
also be examined. Given, however, the importance placed on political discourse in this country, and our long history of anonymous commentary, the best thing to do with online anonymous political speech is to leave it alone, and let the reader place their own value on it.

II. BACKGROUND

“The lack of money is the root of all evil.”

- Mark Twain\textsuperscript{19}

The Federal Election Campaign Act fundamentally changed then existing Federal campaign finance laws.\textsuperscript{20} One of the major ways the Act revised then-current law was in the area of campaign finance disclosure. Every candidate, political action committee (PAC), and party committee was required to file a quarterly report listing the name, address, occupation, and business of every contributor who gave more than $100 in a

\textsuperscript{19} Mark Twain, \textit{Mark Twain: Collected Tales, Sketches, Speeches, & Essays, 1891-1910} 944 (1992).

Every individual who independently spent more than that amount in a year had to file their own separate statement with the same information. The Act also placed on individuals and groups a limit of $1,000 per calendar year for independent expenditures “relative to a clearly identified candidate.” The Act defined “contribution” as a “gift, subscription, loan, advance, or deposit of money or anything of value” made in an attempt to influence the outcome of a Federal election. “Expenditure” was similarly defined. The new law immediately exposed the shortcomings of the previous disclosure scheme:


24 Pub. L. No. 92-225 § 301(e).

25 Id. § 301(f).
reported contributions increased tenfold by 1972\textsuperscript{26} despite the fact that the Act imposed certain contribution and expenditure limits.\textsuperscript{27}

1. A Challenge to the Act

New York Senator James L. Buckley and former Senator Eugene McCarthy challenged the Act’s compelled disclosure and expenditure limit requirements in *Buckley v. Valeo*\textsuperscript{28} as unconstitutional intrusions on the First Amendment rights of free speech and freedom of association.\textsuperscript{29} While the Court agreed with Sens. Buckley and McCarthy that expenditure limits were not constitutional, they found that the disclosure rules had sufficiently compelling reasons to survive.

A. Expenditure Limits Limit Freedom of Association

The Court, in examining the limits placed by the Act on expenditures, did not find that they “serve[d] any substantial governmental interest in stemming the reality or appearance of

\textsuperscript{26} The Campaign Legal Center, *supra* note 21.

\textsuperscript{27} Pub. L. No. 92-225 §§ 104, 608.

\textsuperscript{28} 424 U.S. 1 (1976).

\textsuperscript{29} Brief of Appellant at ??, *Buckley v. Valeo*, 424 U.S. 1 (1975) (Nos. 75-436 and 75-437).
corruption in the electoral process.” 30 The Court did find a “heav[y] burden[]” on “core First Amendment expression.” 31 That burden, the Court reasoned, required a precision in the expenditure limits that was lacking: “[t]he Court determined that the definition of independent expenditures was unconstitutionally vague because the phrase ‘relative to’ did not clearly indicate permissible and impermissible speech.” 32 Accordingly, the Court struck down the expenditure limits as “constitutionally infirm.” 33

B. Compelled Disclosure is Compelling

Although the Supreme Court warned that the Act’s compelled disclosure could “seriously infringe” on First Amendment freedoms, 34 it nonetheless found the Act’s disclosure provisions constitutional. The Court noted three “sufficiently important” governmental interests that warranted disclosure: (1) “disclosure provides the electorate with information ‘as to where political campaign money comes from and how it is spent by

30 Buckley, 424 U.S. at 47-48.
31 Buckley, 424 U.S. at 48.
32 Ellis, supra note 23.
33 Buckley, 424 U.S. at 143.
34 Buckley, 424 U.S. at 64.
the candidate’ in order to aid the voters in evaluating those
who seek federal office”; (2) “disclosure requirements deter
actual corruption and avoid the appearance of corruption by
exposing large contributions and expenditures to the light of
publicity”; and (3) “recordkeeping, reporting, and disclosure
requirements are an essential means of gathering the data
necessary to detect violations” of the Act.\textsuperscript{35}

The Act was amended by Congress several times, but the core
disclosure rules remained untouched. Later Supreme Court
decisions essentially continued the Buck \textsuperscript{36}
decision as applied
to disclosure requirements.\textsuperscript{36}

However, “[o]ver time, FECA's restrictions on campaign
funding were significantly undermined by aggressive party
fundraising practices and weak or non-existent responses to
these practices by the FEC.”\textsuperscript{37} In particular, the FEC allowed
party committees to raise and spend significant amounts of money
on so-called “party-building activities” and on administrative

\textsuperscript{35} Id. at 66-68 (internal citations omitted).

\textsuperscript{36} Richard L. Hasen, The Surprisingly Easy Case for Disclosure of
Contributions and Expenditures Funding Sham Issue Advocacy, 3

\textsuperscript{37} The Campaign Legal Center, \textit{supra} note 21.
costs.\textsuperscript{38} Eventually, these funds—called “soft money”—came to be used on other activities that directly supported the election of specific federal candidates.\textsuperscript{39} Beginning with the 1996 election, national and state party committees, with negligible objection from the FEC, came up with a new, more effective way to use soft money: issue ads.\textsuperscript{40}

2. Issue advocacy

So-called “issue ads” were first brought to the fore in Buckley. “[T]he Supreme Court drew a distinction between communications \textit{expressly} advocating the election or defeat of a federal candidate and those \textit{referring} to candidates, but not expressly mentioning a candidate’s election or defeat.”\textsuperscript{41} Those communications that merely refer to candidates are more familiarly called “issue ads.” Issue ads have been termed “a communication to the public whose primary purpose is to promote

\begin{itemize}
    \item \textsuperscript{38} Id.
    \item \textsuperscript{39} Id.
    \item \textsuperscript{40} Id.
\end{itemize}
a set of ideas or policies,” and usually are not paid for directly by a particular candidate. Express ads, however, are “a communication to the public whose primary purpose is to advocate the election or defeat of a candidate,” and usually are paid for by a candidate or his agent.

Although the Buckley Court had generally upheld the Federal Election Campaign Act’s disclosure requirements as applied to expenditures for express ads, it found that those requirements applied to expenditures that purchased mere issue ads unconstitutional. In attempting to cure the unconstitutional vagueness of the Act’s definition of “independent expenditure,” the Court interpreted the phrase “relative to a clearly identified candidate” to mean “‘advocating the election or defeat of’ a candidate”. The disclosure requirements of the Act, the Court then said, can only be constitutionally applied to expenditures in cases “that include explicit words of advocacy.”


43 Id.

44 See Buckley, 424 U.S. at 80.

45 See supra Part II.1. FECA placed a limit on “independent expenditures” “relative to a clearly identified candidate”.

46 Buckley, 424 U.S. at 42.
advocacy of election or defeat." The Court gave examples: words or phrases such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." The presence of these "magic words" identified an ad as one that expressly advocated the election or defeat of a candidate, as opposed to an ad containing a simple discussion of the issues. As an example, Buckley would uphold disclosure requirements in the case of expenditures for ads that said "Vote Against Smith," but would strike down disclosure for expenditures on ads that said "Call Smith and tell her what you think of her plan to gut Medicare."

While in theory this seems perfectly sensible, anyone who has watched a round of campaign advertising recently knows that in reality, issue ads do much more than just promote a set of ideas. For example, in the 1996 Congressional election, Montana Democrat Bill Yellowtail had a slim lead over his Republican opponent. A few weeks before the election, an ad with the following voiceover appeared on television stations around the

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47 Id. at 43.

48 Id. at 44 n.52.

49 Hasen, supra note 36 at 252.

state: “Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail’s explanation? He only ‘slapped’ her. But her nose was broken.”

Yellowtail was soundly defeated. Since the ad contained none of the Buckley key language, it was classified as issue advocacy, and the source of the funds that paid for it was not subject to any strict disclosure requirements.

The obvious assumption would be that the ad was paid for by Yellowtail’s opponent; in fact, he denied any knowledge of it.

It was funded by the Citizens for Reform, a conservative, Virginia-based group that was formed apparently for the sole purpose of sponsoring issue ads during campaigns. In the late 1990s, such groups were easy ways to funnel soft money towards political advertising with “total anonymity and no monetary limits for their donors.”

Proponents of issue ads believe that it is “exactly what the authors of the First Amendment had in mind:” “[e]lection campaigns should be a free marketplace of ideas—messy, robust, never stifled by regulation. Let the public hear it all, and

51 Id.
52 Id.
53 See Beck, supra note 42 at 4.
54 Bunting, supra note 50.
sort it all out.”\textsuperscript{55} Disclosure requirements, they argue, “would have a chilling effect.”\textsuperscript{56} But critics call such ads “stealth attacks” designed to keep the public in the dark.\textsuperscript{57} They also argue that as accountability in political communication declines, “levels of misinformation and deceit tend to rise.”\textsuperscript{58} The Annenberg Public Policy Center classified over 41\% of the issue ads aired on radio and television in the 1996 campaign as “pure attack” ads.\textsuperscript{59}

After years of debate over campaign finance reform, Congress finally acted. Their solution? The Bipartisan Campaign Reform Act,\textsuperscript{60} or, as it is usually called, “McCain-Feingold” after the sponsors of the bill, Senators John McCain and Russell Feingold.

3. Campaign Finance Disclosure: Round 2

McCain-Feingold amended FECA; as part of that amendment, the Act established a “bright-line test to identify a new class

\textsuperscript{55} Beck, supra note 42 at 4.
\textsuperscript{56} Id. at 5.
\textsuperscript{57} Id. at 4.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 10.
\textsuperscript{60} Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155.
of political communications subject to federal regulation, which it called electioneering communications." McCain-Feingold defined “electioneering communication” as “any broadcast, cable, or satellite communication clearly identifying a federal candidate that appears within 30 days before a primary or special election or 60 days before a general election, and which is accessible by at least 50,000 members of the candidate's constituency.”

The Act subjected the newly-defined electioneering communications to disclaimer requirements: if any group or individual makes disbursements totaling $10,000 or more in a calendar year for electioneering communications, a “clear and conspicuous” disclaimer on the communication must state (1) that the communication was paid for by a candidate if the candidate, his election committee, or agent paid for it; (2) that the communication was authorized by the candidate, if it was so authorized (even if the candidate did not pay for it); or

63 11 C.F.R. § 110.11(c)(1).
(3) if the communication was not authorized by a candidate, it had to state that, along with the “the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication.” In particular, this definition of electioneering communication and the more stringent disclosure requirements were designed to help address the growing problem of candidate-specific issue advertising.

McCain-Feingold also made an attempt to reduce the power of soft money. First, it defined “public communication” as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” Second, it provided that “any ‘public communication’ by a party committee that ‘refers to a clearly identified’ federal candidate and promotes, supports, attacks, or opposes a candidate for that office, ‘regardless of whether the communication expressly advocates a vote for or against a [federal] candidate’” is considered to be a “federal election

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64 Id. § 110.11(b)(1)-(3).
65 The Campaign Legal Center, supra note 61.
activity.”67 Federal election activities by party committees have to be paid for with what is called “hard money.”68 “Hard Money is money or anything of value that a political committee receives that satisfies federal contribution limits, source restrictions, and disclosure requirements.”69

McCain-Feingold’s new definitions of public and electioneering communication, and the related disclosure requirements, limited the utility of “sham issue ads” (ads ostensibly about issues, but functionally advocating for or


68 Id. However, “section 527 tax exempt political organizations not registered as federal political committees” may still use soft money for federal election activities. The Campaign Legal Center, Glossary in A Brief History of Money and Politics, http://www.campaignfinanceguide.org/guide-glossary.html#S (last visited Dec. 1, 2005).

against a candidate) somewhat.\textsuperscript{70} However, so-called “527s” (political organizations formed under Internal Revenue Service code section 527) that are not registered with the FEC as “political committees” are not required to disclose money spent for public communications since they do not receive hard money.\textsuperscript{71} 527s are groups formed primarily for the purpose of influencing the selection of candidates to elected or appointed office.\textsuperscript{72} For the most recent Presidential election, the list of most-active 527s included such organizations as the Sierra Club, the “Swift


Under McCain-Feingold, neither the definition of public communication or electioneering communication contained any reference to Internet-based speech. In fact, when the Federal Election Commission (FEC) promulgated regulations based on the McCain-Feingold amendments, they explicitly excluded communications over the Internet.\footnote{11 C.F.R. § 100.26 (“The term public communication shall not include communications over the Internet”).} That, however, may be about to change.

4. **The Shays Decision**

the language and congressional purposes” of McCain-Feingold.\textsuperscript{76} The United States District Court for the District of Columbia agreed.

The court analyzed the language of McCain-Feingold vis-à-vis the FEC regulations using the standard developed in \textit{Chevron, U.S.A., Inc. v. Natural Resources Defense Council}.\textsuperscript{77} The \textit{Chevron} rule is used when an administrative agency regulation or decision that is based on the interpretation of a statute is challenged.\textsuperscript{78} \textit{Chevron} asks a reviewing court to evaluate the statute for ambiguity; if none exists, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”\textsuperscript{79} Should any ambiguity be found, the agency’s interpretation can be held valid as long as it is based on a “permissible construction of the statute.”\textsuperscript{80} In \textit{Shays}, the district court found that the FEC’s decision to exclude Internet-based speech

\textsuperscript{76} \textit{Id.} at 35 (citations omitted).

\textsuperscript{77} 467 U.S. 837 (1984).

\textsuperscript{78} See \textit{Shays}, 337 F. Supp. 2d at 51.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} at 52.
from the definition of public communication failed both prongs of the Chevron test. 81

McCain-Feingold’s definition of public communication included, in addition to specific forms of communication, the phrase “any other form of general public political advertising.” 82 The district court did not find that ambiguous, 83 and concluded that “[w]hile all Internet communications do not fall within the [definition of ‘any other form of general public political advertising’], some clearly do.” 84 However, the court did not define what specific forms of Internet speech would fall under the umbrella of “general public political advertising”; it left that task to the FEC. 85

Moreover, even presupposing some measure of ambiguity in McCain-Feingold, the court found that the FEC’s exclusion of all Internet communications from the definition of public communication was inconsistent with McCain-Feingold’s general aims 86 and violated Chevron prong two. Should all Internet speech

81 Id. at 70.
82 Id. at 69.
83 Id.
84 Id. at 67.
85 Id. at 70.
86 Id.
be exempted, the court said, it “would permit an evasion of campaign finance laws, thus ‘unduly compromis[ing] the Act's purposes,’ and ‘creat[ing] the potential for gross abuse.’”

5. **The FEC’s new rules**

In response to the *Shays* court’s ruling, the FEC circulated a set of proposed regulations aimed at implementing the required changes. The new regulations would only require individuals to post disclosures on “announcements placed for a fee on another person’s or entity’s Web site.” In the proposal’s explanatory text, the FEC indicates the new regulation would be aimed at “paid Internet advertisements . . . if the advertisements either solicit contributions or expressly advocate the election or defeat of a clearly identified candidate for Federal office.” It seems that the new regulation, then, would only be brought to bear on express ads; issue ads would remain unaffected.

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87 Id. (quoting Orloski v. FEC, 795 F.2d 156, 164, 165 (D.C. Cir. 1986)) (alteration in original).

88 Internet Communications, 70 Fed. Reg. 16,967 (proposed Apr. 4, 2005).

89 Id. at 16,977.

90 Id. at 16,969 (emphasis added).
6. **Are the new rules enough to satisfy Shays?**

Although the current proposed FEC regulations would regulate paid express advertisements placed on Web sites,\(^{91}\) it is difficult to see how this will be sufficient to satisfy the court’s holding in Shays. The Shays court found the FEC’s regulatory definition of public communication erroneously omitted all Internet-based communication, given McCain-Feingold’s inclusion of “any other form of general public political advertising” in its definition of public communication.\(^{92}\) It did so not only because the language of the statute appeared to mandate its inclusion, but also because a blanket exclusion of Internet speech would thwart the general purpose behind the statute.\(^{93}\) How, then, can regulating only paid internet advertisements that expressly advocate the election or defeat of a candidate be sufficient?

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\(^{91}\) *Id.* at 16,970.

\(^{92}\) *Shays*, 337 F. Supp. 2d at 67.

\(^{93}\) *Id.* at 70. See also 148 *Cong. Rec.* S2096, 2110-11 (indicating that one of the main purposes of McCain-Feingold was to “curb[] issue ads, those special interest ads that clearly target particular candidates in an attempt to influence the outcome of an election”) (statement of Sen. Daschle).
And how should the situation be handled if a political campaign has in some way funded a supposedly independent blogger? During the 2004 election, the Howard Dean campaign, as part of its “Internet outreach,” reached out and paid two prominent bloggers to serve as “consultants.” In reality, it was most likely done to get the bloggers to give Dean “good blog.” Dean’s “good blog” is an advertisement in the truest sense, and one that is, at least on some level, controlled by a candidate. Such an arrangement appears permissible under the new FEC rules; there is no strict “announcement placed for a fee.” The blogger provides services apart from the advocacy - at least, that is the theory. But no doubt the intent of the candidate is to generate positive commentary and increase his standing among potential voters in much the same way an express ad would. Not requiring some measure of disclosure in those


95 Id.

96 “Advertising” can be defined as “[t]o make public announcement of, especially to proclaim the qualities or advantages of (a product or business) so as to increase sales.” The American Heritage Dictionary of the English Language (Houghton Mifflin Co. 4th ed. 2000)).
cases would certainly be seen as circumventing McCain-Feingold’s purpose.

The Shays court did not address whether or not Internet speech might also fall somewhere under McCain-Feingold’s definition of electioneering communication; in the plain language of the statute, Internet speech is not mentioned, and no express FEC regulation exempted (or included) it. But the court may have opened the door to examination of Internet speech as issue advocacy. Since McCain-Feingold regulates issue advocacy that qualifies as an electioneering communication, if courts were to stretch that definition to include Internet speech, McCain-Feingold’s disclaimer requirements would apply. As one writer put it, “[i]f you think of those political blogs as political ads, then they're worth money-making them subject to regulation.” If a political blog posting “clearly identif[ies] a federal candidate . . . appears within 30 days before a primary or special election or 60 days before a general


98 Learning to Live with the 'Blogosphere', Ventura County Star (Cal.), Nov. 12, 2005, at 15.
election,” and the value of the message meets or exceeds the $10,000 limit, the blog might be forced to carry a disclaimer identifying the name and address of the person who paid for the blog, even if the posting does not expressly advocate the election or defeat of a specific candidate. This could potentially apply to many political blogs. In fact, the Commissioner of the FEC said that “any decision by an individual to put a link (to a political candidate) on their home page, set up a blog, send out mass e-mails, any kind of activity that can be done on the Internet” could ultimately be subject to disclosure requirements. The anonymous “Wonkettes” of the world would then have to “clear[ly] and conspicuous[ly]” display their name, address, and phone number for all to see. This is troubling, especially given how important anonymous political speech has been in our country’s history, and how much


102 11 C.F.R. § 110.11(c)(1).
importance the Supreme Court has placed on anonymous political speech.

7. Anonymous Political Speech and McIntyre

In 1988, Ohio fined Margaret McIntyre $100 for violating a state statute. Her offense? Distributing homemade leaflets urging voters to defeat a school tax levy. She signed the leaflets “Concerned Parents and Taxpayers”—not with her name. Ohio prohibited such anonymous political speech in order to, according to the state, “prevent[] fraudulent and libelous statements” and “provid[e] the electorate with relevant information.” The Supreme Court, however, took a dim view of this restriction. In McIntyre v. Ohio Elections Commission, the Court described political speech as “occup[ying] the core of the protection afforded by the First Amendment.” They held that Ohio’s anti-anonymity provision failed “exacting scrutiny,” because it was not “narrowly tailored to serve an overriding

106 Id. at 346.
state interest.”107 “Under our Constitution,” Justice Stevens wrote, “anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”108 And in his concurrence, Justice Thomas pointed out that “the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion.”109

But there are limits. The “exacting scrutiny” test would be satisfied if an overriding governmental interest is at stake. In McIntyre, the Court acknowledged that Ohio’s stated interest in preventing fraudulent and libelous statements was nearer that mark. The Court nonetheless found this interest insufficient, as Ohio had other provisions in its elections code prohibiting false statements during political campaigns that it found less restrictive on core speech.110

107 Id. at 347. “The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.” Id. at 348.
108 Id. at 357.
109 Id. at 371 (Thomas, J., concurring in the judgment).
110 Id. at 349.
The Buckley Court said that “deter[ing] actual corruption and avoid[ing] the appearance of corruption” were sufficiently strong interests to uphold restrictions on political speech. Either of these interests then, applied to anonymous political speech in the right circumstances, would likely support regulation of that speech.

111 Buckley, supra note 24. The Buckley Court did provide one additional consideration for those who wished their contributions to political speech to remain anonymous: if there was a “reasonable probability” that disclosure would subject the contributor to “threats, harassment, or reprisals from Government officials or private parties,” he or she was entitled to an exemption from the disclosure laws. Richard L. Hasen, The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy, 48 UCLA L. Rev. 265, 270 (2000).
III. ANONYMOUS SPEECH AND THE INTERNET

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” In addition to the Colonial pamphleteers mentioned earlier, who wrote anonymously under threat of reprisal from the British and their sympathizers, numerous others have used anonymous speech as a tool for communication. Cato’s Letters, a series of essays that some call the most influential eighteenth century work on freedom of speech and political liberty, were written by two

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112 Peter Steiner, cartoon in The New Yorker, July 5, 1993, at ?

113 Talley v. California, 362 U.S. 60, 64 (1960).
British men under the pseudonym “Cato.”\textsuperscript{114} The authors of the Federalist Papers (and their opponents, the authors of the Anti-Federalist Papers), written after the Revolutionary War in support of the adoption of the Constitution, chose to keep their names secret. After the American Civil War, many writers on either side of the issue of slavery chose to keep their identities hidden, for obvious reasons.\textsuperscript{115} “It is plain that anonymity has sometimes been assumed for the most constructive purposes.”\textsuperscript{116}

That is not to say that anonymity in itself is inherently positive. “One who can lie anonymously is more likely to lie than one who will be identified,”\textsuperscript{117} and the more readily and completely one’s identity can be concealed, the greater the risk


\textsuperscript{115} \textit{Id.}

\textsuperscript{116} Talley, 362 U.S. at 64.

that the anonymous speech is suspect, or an outright falsehood.\textsuperscript{118}

The Internet is certainly an easy place to be anonymous. Aliases can be used; email addresses can be crafted to hide real names (and even hidden behind special “anonymizers” called remailers\textsuperscript{119}); a special server called an “anonymous proxy” can serve as a “go-between” to retrieve web pages for a client disguising the location of the client and the client’s Internet address.\textsuperscript{120} In such cases, only the most technically-inclined sleuth might ferret out someone’s true identity.


1. Can you really blog anonymously?

When it comes to blogging, however, it is much more difficult to remain completely anonymous. Most blogging tools require at least a contact email address. Even if that email address uses some sort of technology to mask the real user behind it, a blogger must still connect to the blog server with his computer in order to post messages. In establishing this connection, it is likely the blog server would record the Internet address of the connecting computer in its logs, providing a way to trace back to the connecting computer. Anonymous proxies can mitigate that somewhat (as well as using public computer systems like those found in a public library), but connection records from those proxies (or the records of anonymous remailers) might be accessible, for example, by subpoena. To combat these legal and technological methods of


\[ \text{See Robb S. Harvey and Richard G. Sanders, “Outing” the Anonymous Internet Poster, 17 Intellectual Prop. Litig. 1, 17 (2005). Some jurisdictions, most notably California, provide special laws called “Anti-SLAPP” statutes that limit lawsuits aimed at interfering with First Amendment rights. Id.} \]
detection, savvy Internet programmers are currently in the process of developing truly anonymous methods of posting.\textsuperscript{123}

In the meantime, of course, most bloggers who wish to remain anonymous will simply post messages under a pseudonym. To the general Internet user, this would probably be sufficient to hide the poster’s true identity.

2. The Blogosphere\textsuperscript{124} and the Rise of Political Blogs

It is unknown exactly how and when blogs began. One of the earliest acknowledged bloggers was a college student at Swarthmore, who began compiling an online diary in 1994.\textsuperscript{125} The first public blogging service, “Open Diary,” started up in

\textsuperscript{123} See, for example, http://www.invisiblog.com (“You don't ever have to reveal your identity - not even to us. You don't have to trust us, because we'll never know who you are”). The service is still under development.

\textsuperscript{124} “Blogosphere . . . is the collective term encompassing all weblogs or blogs as a community or social network.” Wikipedia: Blogosphere, http://en.wikipedia.org/wiki/Blogosphere (last visited Nov. 16, 2005).

Blog growth was steady, but relatively modest, with only 23 blogs known to be in existence at the beginning of 1999. Although publishing a blog was a relatively straightforward task, it required a working knowledge of the structural language of Web pages (HTML, or Hypertext Markup Language). Then in the summer of 1999, free blog tools Pitas, Blogger, and Groksoup launched. These services provided an easy-to-use Web-based interface for blog publishing, and the modest growth “turned into an explosion,” with the user base for some services expanding by 30 percent monthly. It was only a matter of time before blogs devoted to politics would arise.

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128 Id.

The first established political blogs launched in 2001 and 2002. Initially rather quiet and unobtrusive, these political blogs first flexed their online muscle during the Trent Lott/Strom Thurmond scandal of 2002. At Senator Thurmond’s 100th birthday celebration, Senator Lott made a remark that Thurmond, who had run on a segregationist platform for President in 1948, would have made a good President.

No one seemed to think much of it at the time; most articles on the celebration even omitted the quote. The remark might have faded away as a minor blunder if not for the attention of liberal bloggers. By keeping the scandal at the forefront of the online political debate, the bloggers eventually drew the

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130 Wikipedia, supra note 126. These first important political blogs were andrewsullivan.com, politics1.com, mydd.com, and dailykos.com. Id.

131 “I want to say this about my state: When Strom Thurmond ran for president, we voted for him. We're proud of it. And if the rest of the country had followed our lead, we wouldn't have had all these problems over all these years, either.” Glen Elsasser & Jill Zuckman, S.C. Senator Personified Changing South, Chicago Tribune, June 27, 2003, at 1.

attention of mainstream media. The spotlight ultimately resulted in the resignation of Senator Lott as U.S. Senate Majority Leader.\footnote{\textsuperscript{133}}

Recently, conservative political bloggers scored a success of their own in the “Rathergate” scandal of 2004. After Dan Rather presented documents on a segment of the “60 Minutes II” CBS television show purporting to cast a negative light on President Bush’s service in the Texas Air National Guard, bloggers were online within hours questioning the documents’ authenticity.\footnote{\textsuperscript{134}} The mainstream media quickly picked up the story, and eventually, a CBS investigation led to the conclusion that the documents were most likely fakes.\footnote{\textsuperscript{135}} Several CBS producers lost their jobs, and CBS’s reputation was damaged.\footnote{\textsuperscript{136}}

Since then, blogs and the Internet have grown even more pervasive as a source for political news. Eighty-four million Americans used the Internet to get political news on and

\footnote{\textsuperscript{133} Id.}
\footnote{\textsuperscript{135} Id.}
\footnote{\textsuperscript{136} Id.}

While the people behind a number of the most influential political blogs are known, there exist several blogs whose primary contributors remain anonymous.\footnote{See, for example, http://www.lowculture.com; http://thenexthurrah.typepad.com; http://www.billmon.org.} Even on established blogs whose operators are known, sometimes significant numbers of individual contributors remain anonymous.\footnote{See, for example, http://www.wonkette.com; http://www.dailykos.com.} Given the tenuous state of anonymous online political speech, their postings, if they choose not to reveal their names, may be stopped.
IV. PROTECTING ANONYMOUS ONLINE POLITICAL SPEECH FROM DISCLOSURE

“We've heard that a million monkeys at a million keyboards could produce the complete works of Shakespeare; now, thanks to the Internet, we know that is not true.”

- Robert Wilensky\(^{141}\)

Given the Supreme Court’s rule that disclosure is permissible, but their stance that anonymous political speech is to be honored, what is to be done with anonymous political bloggers?

1. **Shays and Anonymous Political Blogs**

   The Supreme Court has already articulated a “substantial government interest” in compelled disclosure for express advocates: the prevention of corruption.\(^{142}\) That interest extends to identified as well as anonymous speakers. The McIntyre Court all but said its holding striking down Ohio’s law prohibiting anonymous campaigning was restricted to “referenda or other issue-based ballot measures.”\(^{143}\) The Shays court has ruled that Internet-based political speech is subject to McCain-Feingold’s

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\(^{141}\) Robert Wilensky, speech at a 1996 conference (need specifics)

\(^{142}\) *Buckley*, 424 U.S. at 83.

\(^{143}\) *McIntyre*, 514 U.S. at 356.
definition of public communication, and the court may have also effectively extended application of the definition of electioneering communication to that speech.\textsuperscript{144} Where does this leave anonymous blogs? Barring any future legislative action to the contrary, they are likely subject to the disclaimer requirements of FECA and McCain-Feingold.

2. **Application of the Press Exemption**

The Federal Election Campaign Act exempts most press coverage from regulation. It “excludes from the definitions of contribution, expenditure, and electioneering communication any communication appearing in a news story, commentary, or editorial.”\textsuperscript{145} The FEC grants press entities the exemption if they are “acting in their usual press capacity” when they publish.\textsuperscript{146} The key question is, then, “can bloggers be considered journalists?”

\textsuperscript{144} See supra Part II.6.


\textsuperscript{146} Id.
Most of the laws in this country that protect journalists are much newer than the First Amendment. They were passed in recent decades “to protect and foster a specific activity called reporting.” It seems, then, that any blogger, anonymous or not, who is engaged in reporting should be covered by the FEC’s press exemption. After all, it can be argued that the reporting performed by a blogger is no less valuable than reporting performed by a person for, say, the New York Times. Both are in the pursuit of information that is essential to an informed public, an important goal especially in the political process.

One might also think that a reporter employed by the Times, working under their code of ethics, and trained in journalism would naturally produce more trustworthy, reliable reporting than an anonymous blogger. The Jayson Blair scandal effectively

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147 Daly, supra note 13.

148 Id. Daly defines “reporting” as “the pursuit . . . of verifiable facts and verbatim quotations.”

149 See, e.g., Buckley, 424 U.S. at 14-15 (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.”)

disproves that notion.\textsuperscript{151} The fact that a blogger might publish the fruits of his reporting anonymously does not necessarily make the information less reliable. A reader can weigh the fact that the identity of the reporter is unknown when deciding how much significance to give the information.\textsuperscript{152}

What about bloggers that function not necessarily as reporters, but as commentators? The FEC does not draw a distinction between reporting and presenting analysis or commentary when granting the exemption.\textsuperscript{153} If bloggers would be entitled to an exemption for reporting, it would not make sense

\begin{itemize}
\item[\textsuperscript{152}] See \textit{infra} Part IV.5.
\item[\textsuperscript{153}] See The Campaign Legal Center, \textit{supra} note 142.
\end{itemize}
to exclude them from the exemption in cases when the blogger is offering commentary. And the FEC apparently agrees.

In a unanimous vote on November 17, 2005, the FEC “issued a[n] advisory opinion extending the . . . press exemption to people who disseminate news and commentary on the Internet.”154 The opinion was specifically directed at websites created by Fired Up, a Missouri-based company that runs pro Democratic Web sites in Maryland, Missouri and Washington.155 The FEC declared that the websites in question, although clearly politically biased, “fall within the legitimate press function.”156

Some supporters of McCain-Feingold, though, have concerns. Particularly, they “fear that party organizations will be able to take advantage of the exemption for bloggers by launching Web sites that appear to be independently controlled.”157 In doing so, political parties could circumvent the controls of McCain-Feingold via the Internet. That is certainly a possibility, although a party would risk a potential public relations


155 FEC Unanimously Approves Media Exemption For Some Blogs, CongressDaily, Nov. 18, 2005.

156 Id.

157 Nelson, supra note 154.
disaster should the scheme be found out. But those fears are largely unfounded. The public tends to trust only those news sources that have been in existence for an extended period of time.\(^{158}\) While the meaning of “extended period of time” is much shorter in terms of the Internet than as applied to traditional media outlets (the Internet as most people have come to know it has only been in existence since 1991\(^{159}\)) it still follows that those websites and blogs with a significant history will be deemed more reliable than ones the pop up immediately before an election.\(^{160}\)


\(^{160}\) One further point: in the last Presidential election, Howard Dean put two well-known liberal bloggers on his payroll. See supra Part II.6. Since these bloggers, ostensibly independent journalists, were in the employ of a candidate for President,
3. **Application of the Volunteer Exemption**

"[C]ampaign finance laws [also] allow for a ‘volunteer exemption’: The amount of money an individual spends on his or her own volunteer activity is not counted as a contribution to a campaign."¹⁶¹ The exemption specifically provides that the use of personal property at an individual’s place of residence does not fall under the definition of “contribution” as long as the amount expended is less than $1,000 per election (and less than $2,000 in a calendar year).¹⁶² Clearly this exemption would not apply to the big blogs, but home-based bloggers probably can


¹⁶² See 2 U.S.C. § 431(8)(B)(ii) (“The term ‘contribution’ does not include . . . the use of real or personal property . . . in rendering voluntary personal services on the individual's residential premises . . . to the extent that the value does not exceed $1,000 with respect to any single election and . . . $2,000 in any calendar year”).
breathe easy. The cost to set up and maintain a basic blog is so low,\textsuperscript{163} they would likely be covered. The calculation can become sticky, however, and this bright-line test may not be so bright. How should the costs of personal computer equipment be allocated? How about a personal Internet connection? If an enterprising blogger maintains his own server, does that expense count towards the limit? If the blog itself is not primarily political, do you have to apportion the costs by making some sort of calculation based on the “politicalness” of the blog? If the equipment used in creating the blog is not exclusive to the blog or website, does the value calculation take into consideration what percentage of “non-blog” use the computer gets? Even though the exemption exists, if someone is near that bright line, the sheer complexity of figuring out if the exemption applies might be enough to scare them off.

One of the main problems in applying the exemptions is that, although Congress has granted the FEC lawmaking powers to interpret the Federal Election Campaign Act,\textsuperscript{164} those decisions are vulnerable to court rulings, just as the FEC’s definition of

\textsuperscript{163} See \textit{supra} note 10.

“public communication” was overruled by the Shays court. Congress can, of course, cure these problems by simply crafting legislation that draws a better bright-line. However, though several proposals have been advanced, so far none has garnered enough support to become law.

4. Legislative Action

On Nov. 2, 2005, the “House of Representatives . . . narrowly turned back an effort to exempt all Internet communication from campaign-finance regulations.”\textsuperscript{165} Texas Representative Jeb Hensarling’s Online Freedom of Speech Act\textsuperscript{166} would have “exclude[d] blogs, e-mails and some other Internet communications from federal regulation.”\textsuperscript{167} The bill “would have . . . allow[ed] corporations, labor unions, and individuals to spend unlimited amounts on Internet ads supporting


\textsuperscript{166} Online Freedom of Speech Act, H.R. 1606, 109th Cong. (1st Sess. 2005). The bill would have codified the FEC’s exclusion of Internet-based speech from McCain-Feingold’s definition of “public communication.” \textit{Id.} at § 2.

candidates."\textsuperscript{168} Government watchdog groups and some legislators opposed the measure, alleging that the bill would “bring[] corrupt, soft money back into federal campaigns."\textsuperscript{169} In response, Representatives Martin Meehan and Christopher Shays (of \textit{Shays v. FEC} fame) filed an “alternative bill that would protect bloggers from government regulation, but maintain the current system where Internet advertising is subject to the same limits placed on advertising in other media.”\textsuperscript{170} The House of Representatives did not consider that bill, because the sponsors of the Online Freedom of Speech Act used a special “fast-track” maneuver to bring the Act to a vote, which precluded any amendments from

\textsuperscript{168} Klein, supra note 165.

\textsuperscript{169} Id.

\textsuperscript{170} Id.
being offered and severely limited debate.\footnote{Id. The “fast-track” maneuver, known as a “Suspension of the Rules,” requires a bill receive a two-thirds majority to pass. The Online Freedom of Speech Act only received a simple majority (225 for, 186 against). Id. Although the Act failed, the majority vote indicates that Congress (or at least the House of Representatives) may be ready to consider the matter, and to pass laws protecting Internet-based speech.} That haphazard introduction no doubt doomed Hensarling’s Act.\footnote{Rep. Barney Frank, referring to the lack of available debate, said, “It's self-parody. Let's all defend free speech without having any.” Klein, supra note 165.}

Undaunted, however, Representative Brad Miller of North Carolina introduced a more targeted bill, to amend the Federal Election Campaign Act to “exempt news stories, commentaries, and editorials distributed through the Internet from treatment as expenditures or electioneering communications.”\footnote{H.R. 4389, 109th Cong. (1st Sess. 2005).} As of this writing, the bill is under consideration by the House Committee on House Administration. Considering, however, the narrow defeat of the Online Free Speech Act, the current bill, which protects online speech without introducing loopholes for online ads (and, therefore, minus the attendant worries of corruption) would seem
to have a good chance to pass, and those who wish to post anonymously will be able do so without fear.

5. What should be done?

Three options exist to protect anonymous online political speech: 1) maintain the status quo, and hope the new FEC advisory opinion is sufficient in light of Shays; 174 2) find some way to apply the FEC’s press or volunteer exemptions; 175 or 3) wait for Congress to do something. 176 None of these are particularly enticing.

On first reflection it seems as though enforcing disclosure rules on anonymous online political speech is antithetical to the founding fathers’ purpose in enacting the First Amendment. After all, shouldn’t “no law” mean “no law”? 177 However, as has been discovered in the 214 years since ratification of the First Amendment, “no law” really means “limited laws.” And those limited laws generally make a lot of sense. But here, when confronted with the same type of speech that was so important to

174 See supra Part II.5.
175 See supra Parts IV.2-IV.3.
176 See supra Part IV.4.
177 “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. Const. amend. I.
the very founding of this country,\textsuperscript{178} some courts and members of Congress seem ready to throw a regulatory blanket over its use. Given the tremendous amounts of money spent on political campaigns, some regulation, under the Buckley guise of preventing corruption, is probably warranted.

But not here. Anonymous political speech has a built-in limiting function: it’s anonymous. Any person reading a posting written by someone who refuses to give their real name can simply consider the source, and determine the trustworthiness of the message appropriately. In the “marketplace of ideas,” consumers of those ideas can pick and choose among those they deem reliable.\textsuperscript{179} It follows that the marketplace serves its function best if consumers have a wide selection to choose from.

Considering the importance of the speech in question, and Buckley’s corruption concerns, the most viable option currently available is Representative Brad Miller’s current bill before the House of Representatives.\textsuperscript{180} It exempts key anonymous online political speech from disclosure, while keeping in place current

\textsuperscript{178} See supra Part I.


\textsuperscript{180} See supra note 173.
controls over online political advertising.\textsuperscript{181} The House of Representatives should act soon to bring this bill out of committee, and to the floor for debate and vote. Until then, anonymous online political speech is in danger.

V. CONCLUSION

“[E]rror of opinion may be tolerated where reason is left free to combat it.”

- Thomas Jefferson\textsuperscript{182}

In the end, the Supreme Court’s assertion in \textit{Buckley} that disclosure requirements serve the purpose of preventing corruption may be a bit overblown. Perhaps we are fortunate there was no \textit{Buckley} rule in the 1760s: the American Revolution might never have happened. Now, in light of \textit{Buckley}, McCain-Feingold, and especially \textit{Shays}, online commentators might think twice about posting a controversial piece, since it may very well have to be accompanied by their name and address. Admittedly, preventing corruption is an honorable goal. But the public as a whole gets far too little credit for being able to spot a fake. We entrust a panel of ordinary men and women with the power to declare a criminal defendant guilty or innocent, or

\textsuperscript{181} See supra Part IV.4.

\textsuperscript{182} Thomas Jefferson, Inaugural Address (Mar. 4, 1801).
even send him to his death, but not to sift out questionable political commentary:

Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is “responsible”, what is valuable, and what is truth.  

For those still unconvinced, perhaps Douglas Adams said it best: “Don't believe anything you read on the net. Except this. Well, including this, I suppose.”

If the Federal Government wants to require a disclaimer on anonymous political blogs, that sounds about right.

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