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Yes We Can!: The Significance of the Citizens United Decision, the Role of Citizen Journalists and the Social Network in Political Campaign Finance

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Part I: Introduction

The explosion of social networks such as Facebook and Twitter has added a new dimension to the exchange and distribution of information. The dissemination of news, formerly discharged by those with professional and ethical training, is now occurring between citizens with no formal media training. These new “reporters” on the social network,” broadly referred to as “citizen journalists,” are members of the public that play a contributory role in researching, reporting, and publicizing news and information. These new reporters and the social networks comprise a “Fifth Estate:” reporters who lack formal schooling or the ethical and moral component of any established journalism curriculum, and who use social networks that reach more eyes and ears than traditional media ever could.

Social networks are powerful forces that could pose serious social, political, personal and legal problems if left unbridled and in the hands of these citizen journalists. A particularly important and timely issue confronts the “social network” debate as the presidential election race commences. The 5-4 Supreme Court decision in *Citizens United v. Federal Election Commission* lifts regulations on corporations regarding campaign contributions. What role, if any, will corporations participating in the social network play in the political process? Without adequate regulation over social media by the FEC, it is feasible that corporations will flood the social media with partisan ads, reaching masses of people, completely subverting the McCain-Feingold campaign reform law. Unfair use of money in the election process may contaminate democracy and as a result, many are asking whether the “social network” demands regulation. If

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there is a Fifth Estate, it brings dissemination of information “full circle,” that is, back to the individual reporter – the pamphleteer – of the Eighteenth and Nineteenth century, bypassing the news and press organizations that have been carefully crafted over the last 150 years.

This paper will argue that the Citizens United decision undermines many of the most basic campaign finance objectives and leaves the regulatory scheme ill-prepared to monitor undue influence in campaign contributions from new mediums, in particular from social networks. Part II will explore the background of traditional media, the role of politicians in media and the parallel evolution of journalism and campaign finance law. It will also discuss the birth of digital media, the increased participation of citizen journalists and subsequent regulations. Finally, this section will discuss the sweeping decision in *Citizens United v. FEC.* Part III will analyze the use of social media networks by politicians to promote political campaigning and advertising and the implications of regulation in light of the *Citizens United* decision. Part IV will suggest policy recommendations regarding corporate election contributions that are raised through social media networks, and argue that these contributions should be regulated while assuring that the free speech rights of citizen journalists on these social networks not be violated. Part V will conclude this paper by suggesting that regardless of these recommendations, ensuring free speech, equal access, and limiting excessive influence by the wealthy are matters that will continue to plague American democracy.

**Part II: Background- Development of Regulations in Media and Federal Election Finance**

A. Historical Overview Of The Relationship Between The Media And Politicians

The ratification of the First Amendment in 1791 represented the embodiment of the traditional American concept of journalism and freedom of the press. The First Amendment
read, “Congress shall make no law...abridging the freedom of speech, or of the press. . . .”

Many of the founding fathers agreed that “freedom of the press” referred quite literally to the freedom to publish material on a printing press, suggesting that the government does not have the right to try to control or block certain things from being published and disseminated by the press. The framers intended to prevent prior restraint: an attempt by the government to prevent the expression of ideas before they are published. As such, “Freedom of the Press” communicated the freedom of the people “to publish their views, rather than the freedom of journalists to pursue their craft.”

Despite the focus on the right of an individual to express their views, journalism was closely intertwined with politics in the early Eighteenth Century. Rather than a recognized independent profession, journalists were regarded as accessories that supported and preached governmental opinion. In fact, many articles in colonial papers were for the most part propaganda put forth by revolutionists in order to influence public opinion in the United States against reconciling with England and in favor of winning full political independence. Colonial era papers were published weekly by those privileged to own press equipment and only contained short paragraphs of local hearsay, and large portions of political and economic news directly gleaned from the London Press. It was not until the 1760s that other news was included in printed media. As conflict erupted with England, colonial printers chose what sides

3 U.S. CONST. amend. I.
5 Id.
6 Id.
9 Milestones in the History of Media and Politics, PBS.ORG, http://www.pbs.org/now/politics/mediahistory.html (last visited June 2011) [hereinafter Milestones] (stating these pamphlets were four page weeklies).
10 Id. (noting these weeklies rarely contained political news of other colonies or any local political news).
of the conflict they supported and either printed news favoring the English loyalists or the American Revolutionists.\(^\text{11}\) During this period, the press played an important role in creating a new nation, circulating newspapers that represented many political opinions and views.\(^\text{12}\) When the Revolutionary War ended in 1783, the colonies had over forty-three newspapers in print.\(^\text{13}\)

Throughout the eighteenth century, newspapers and other periodicals continued to report on domestic politics, and by the 1830, the United States had over 1,200 newspapers in circulation.\(^\text{14}\) While local political parties continued to fund newspapers, the increased use of advertising decreased the press’ financial reliance on political parties.\(^\text{15}\) Publishers began to express their own views on domestic politics and became more involved in the public debate, often spinning stories with their political biases.\(^\text{16}\) As a result, daily newspapers in every major city represented a “range of ideological perspectives.”\(^\text{17}\) However, even with increased independence from particular political parties, most of the stories rarely exposed the failings of government or large corporations, as only the mercantile and political elites could afford to buy newspapers.

Corporations and political parties saw common ground to be gained in teaming up together. The 1896 election marked the record for expenditures at that time when William McKinley spent nearly seven million dollars on his campaign.\(^\text{18}\) Businessman and chairman of the Republican National Committee, Marcus Hanna managed McKinley’s campaign, using the

\(^\text{11}\) Id.
\(^\text{12}\) See Barber, supra note 8.
\(^\text{13}\) See Milestones, supra note 9.
\(^\text{15}\) Id.
\(^\text{16}\) Id.
\(^\text{17}\) Id.
newspapers to distribute regular press releases, posters and other political advertising.\textsuperscript{19} In turn, Hanna collected enormous financial contributions from leading industrialists and financiers, leading to widespread accusations that Republicans were in league with trusts.\textsuperscript{20}

In response to the perceived corruption and residue of the 1896 election and the 1904 allegations from Democratic presidential nominee Judge Alton B. Parker, that President Theodore Roosevelt had accepted campaign gifts,\textsuperscript{21} President Theodore Roosevelt enacted of the Tillman Act of 1907, the first law to specifically address campaign funding regulation on the federal level.\textsuperscript{22} The Act “prohibit[ed] corporations from making money contributions in connection with political elections.”\textsuperscript{23} However, significant loopholes existed.\textsuperscript{24} For example, a corporation could circumvent this law by giving its officers or directors bonuses for making personal contributions to a candidate, where the bonus would effectively reimburse the officer or director for contributing in the first place.\textsuperscript{25} Ironically, corporations also received tax deductions for “employee benefits” in exploiting this loophole.\textsuperscript{26}

With society’s cynicism about entering other countries’ conflicts that arose in World War I and II,\textsuperscript{27} general news reporting became more thoughtful and journalists’ writing did not follow

\textsuperscript{19} \textit{Id.}
\textsuperscript{20} 
\textsuperscript{22} \textit{The Tillman Act (1907), http://www.polisci.ccsu.edu/trieb/turn.htm} (last visited Aug. 20, 2011).
\textsuperscript{23} \textit{Tillman Act of 1907, 34 STAT. 864 (Jan. 26, 1907).}
\textsuperscript{24} \textit{The Tillman Act (1907), http://www.polisci.ccsu.edu/trieb/turn.htm} (last visited Aug. 20, 2011).
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{See American Propaganda, THINK QUEST EDUCATION FOUNDATION, http://library.thinkquest.org/C0111500/ww2/american/amerprop.htm} (last visited Sept. 30, 2011) (“When it was suggested that World War II was approaching, Americans did not want to go to war... [h]aving sustained losses in World War I and only now coming out of an economic crisis. ...”).
any party line; it was at this time that the press came to be known as the “Fourth Estate.”

To be known as the “Fourth Estate” reflected society’s belief that the press played a significant role as a “watchdog” in the government system of checks and balances. Reporters wrote stories that were “detached, nonpartisan, and presented both sides.”

Objectivity “became the centerpiece of the journalists’ code and became a focal point of journalism education and ethics,” perhaps as a “reaction to skepticism.” Simultaneously, in 1947, with the official enactment of the Taft-Hartley Act, Congress continued its campaign to preserve election integrity and strengthened its view on political campaigning by prohibiting corporations from using general treasury funds to federal candidates.

Television and radio broadcasters also took steps to avoid partisanship. Many broadcasters allowed “equal time” to various sides of controversial questions. Despite attempts to remain objective, the conclusion of whether a media presentation is partisan, is usually decided by the audience. When airtime is limited and all views have not been heard, the public is usually quick to criticize. Reacting to this criticism, certain stations have

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28 See Fourth Estate, WISE GEEK, http://www.wisegeek.com/what-is-the-fourth-estate.htm (last visited Sept. 30, 2011) (“The fourth estate is the public press, referred to as a collective and encompassing photographers, journalists, television broadcasters, and radio announcers, among others. Several historians credit the coinage of the term to Edmund Burke, who is said to have referenced the fourth estate when discussing the French Revolution, and Thomas Carlyle, a 19th century author, popularized the term.”).
30 See Gant, supra note 14 at 17.
31 Id.
32 See Allen, supra note 29 at 57 (quoting Schudson (citation omitted)).
34 Id.
35 Snyder, supra note 7.
36 Id.
37 Id.
38 Id.
responded by not giving any free time, but selling time to any purchaser. 39 Many who hold minority views argued that this broadcasting system “discriminates against the less affluent.” 40

The emergence of the television in every home brought focus to the physical presentation of politicians, and the visual stimulation of news created a new level of influence over all American citizens. 41 The televised broadcast of the 1960 presidential debates demonstrated the role media played in shifting the focus from a candidate’s ideas to his physical image. 42 Whereas Richard Nixon’s stern and confident voice carried well over radio, his physical appearance did not fare as well on television. 43 John F. Kennedy mastered the “likeability factor,” appearing in dark suit with a wide smile and vivid tan, while Nixon looked pale and aggressive in a gray, ill-fitting suit and “hastily added pancake makeup.” 44 The advent of television in presidential campaigns produced a “spectator sport” event and changed campaign rhetoric from an emphasis on content to a contest of “catchy sound bites.” 45 Candidates manipulated their likability to appeal to the mass market, shifting the focus to how the president looked when speaking rather that what he actually said. 46 However, in spite of the audience’s focus on appearance, the media made a serious attempt to report objectively throughout the Vietnam War and during the Watergate scandal. 47 In the last century, the media transitioned

39 Id.
40 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id.
47 See Gant, supra note 14 at 18-19.
from individualized reporter to objective observer to “quasi-official adversary” of the
government.48

By the 1980s and 1990s, the press had evolved into a competitive commercial business
that focused heavily on creating a media enterprise and turning a profit.49 The content of the
news stories depended primarily on space limitations in newspapers and on television and radio
airtime.50 Printers and broadcasters considered these physical limitations over the messages of
the political party that funded the paper.51 In their effort to raise ratings, sell papers, and lure
advertisers, the media focused on entertaining the masses rather than informing them. ‘Sexy’
issues sold papers and raised ratings; the media quickly zeroed in on ‘hot-button’ issues like
crime, deviance, and political scandal.52 With this focus on “sensationalism,” a candidate had to
adapt his message to meet the desires of the media-driven public – focusing primarily on creating
simple political messages, like “tough on crime,” rather than discuss more complex issues.53

Ronald Reagan was a master of this technique. For example, rather than explaining and
defending his unpopular policies, he focused his 1984 re-election campaign on strengthening the
nation’s confidence by conveying the simple message that the United States had been restored to
“its position as leader of the free world” after many domestic and international crises.54

48 Id.
49 See Mary-Rose Papandrea, Citizen Journalism and the Reporter’s Privilege, 91 Minn. L. Rev. 515, 521-22 (2007)
(“It was not until the late twentieth century that the “press” morphed into a competitive business, engaged in a
commercial media enterprise, competitive and profitable.”).
50 Id.
51 Id.
52 See Mass Media Owners, AGNER FOG, (enter last visited info), www.agner.org/cultsel/chapt9/ (“[T]he
sensationalist focus on button pushing crimes in the news media ha[s] created a public sentiment that many
commentators have characterized as obsession with crime (Session 1995, Adler 1983).”).
53 Id.
54 See Andrew Van Alstyne, Media, Advertising, and the 1984 Presidential Election: Manufacturing Ronald
Reagan’s acting experience enable him to influence the media and ingratiate himself with the public, earning him the nickname, “The Great Communicator.”

Along with the oversimplification of political issues, a candidate’s personality became more important than his message and his media appeal overshadowed his political skills. Politicians who allowed the public a view of their private life garnered popularity for being human and diverted attention from controversial issues. Reagan in many ways embodied the public’s attraction to charismatic leaders and because of the media, people who could play the part of a leader often gained more popularity over those who were educated to do the job.

B. The Federal Election Campaign Act

As the American people began to rely more on the presentation of politicians in the media to make their voting decisions, politicians increased the amount of money they put towards political advertising and campaigning. Aware of the advantage wealthy candidates might have over less wealthy ones, Congress attempted once again to level the playing field. In an effort to prevent financial contributions from having undue influence on American politics, Congress created the Federal Election Commission (“FEC”) and passed the Federal Election

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55 Id.
56 AGNER FOG, supra note 52.
57 Id. (noting the politician takes advantage of this situation and diverts attention away from controversial matters by exposing his private life and make people interested in his wife or his dog); see also So much hype for Obama’s’ New Dog, SEATTLEPI (Apr. 13, 2009), http://blog.seattlepi.com/thebigblog/2009/04/13/so-much-hype-for-obamas-new-dog/ (noting the “rampant media coverage of the first family’s new pooch”); Lynn Sweet, White House dog: It’s Bo, the Portuguese Waterdog for Obama Daughters, CHICAGO SUN TIMES (Apr. 12, 2009), http://blogs.suntimes.com/sweet/2009/04/white_house_dog_and_water_houn.html (Because “the Obama's did not get the dog from a shelter--as they thought they might at one point-- the Obamas will instead made a donation to a Humane Society.”).
58 See AGNER FOG, supra note 52 (“Politicians began to compare their public performance with that of actors as early as the mid nineteenth century. People will rather be moved by a charismatic leader than take a stance for or against his policy, just like they go to a theater to be moved by the actors. . . . The media appeal of a politician may be more important than his/her political skills, and consequently we are seeing more and more media people and actors going into politics.” (citing Way & Masters 1996, Sennett 1974) (internal quotation omitted)).
Campaign Act ("FECA") of 1971.\(^{59}\) Congress enacted this legislature in order to regulate financial influence FEC because "unregulated contributions can lead wealthy interests to buy favor from legislators and can erode democratic government by placing disproportionate power in the hands of a wealthy few."\(^{60}\) This law limited the role of money in federal elections in three ways: (1) limiting the amount an individual could contribute to federal candidates, (2) limiting the amount an individual could spend on behalf of a federal candidate, and (3) limiting the total amount a candidate could spend on his or her own campaign.\(^{61}\)

Initially, the FECA limited political contributions to $1,000 per candidate per election, limited independent expenditures "relative to a clearly identified candidate" to $1,000 per year, and imposed reporting and public disclosure requirements for contributions expenditures.\(^{62}\) An independent expenditure refers to money that corporations may spend on their own to portray a particular candidate as unfit for office, or on an issue; whereas, a direct contribution is a donation to a candidate's campaign, which can be sent however the campaign sees fit.\(^{63}\) Under FECA regulations, corporations may not make direct contributions to federal campaigns from their own treasury; instead, they have to create a separate political action committee, or PAC.\(^{64}\) Rather, a corporation may use corporate funds and resources to solicit pecuniary contributions from

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\(^{60}\) Id.


\(^{64}\) See Baran & Laham, supra note 33 ("Though not regulated by any particular law at the time, PACs were established by corporations and labor unions so that their employees or members could participate in politics without violating either the Tillman or Taft-Hartley Acts. . . . [T]he first corporate PAC[s] [were] Business Industry Political Action Committee (BIPAC) and the American Medical Political Action Committee (AMPAC).")
individuals to its PAC and a PAC is eligible to receive gifts of up to $5000 dollars per calendar year from each individual.\textsuperscript{65}

However, prohibiting corporations from spending their general treasury funds on political campaigns has proved difficult, as evidenced by a curious interpretation of the statute by the Court in \textit{Buckley v. Valeo}.\textsuperscript{66} The \textit{Buckley} court held that, to avoid vagueness and overbreadth problems within the FECA, its provisions should be interpreted to reach only election-related activity containing “express advocacy.”\textsuperscript{67} Subsequently after this ruling, “issue ads,” paid for by corporations, labor unions, and wealthy individuals, began appearing in the 1990s.\textsuperscript{68} These ads appeared to be aimed at influencing federal elections, but they escaped FECA regulation through avoidance of express advocacy for or against a political candidate or political issue.\textsuperscript{69}

In addition, the FECA carves out a “Media Exemption,” which has been an important component of campaign-finance laws.\textsuperscript{70} This media exemption\textsuperscript{71} applies to news stories written by any non-politically controlled press entity\textsuperscript{72} and includes “commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication”\textsuperscript{73} to assure “the unfettered right . . . to cover and comment on political campaigns.”\textsuperscript{74} The FEC applies a two-pronged analysis to determine whether an entity falls

\begin{footnotesize}
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\item \textsuperscript{65} Id.
\item \textsuperscript{66} \textit{Buckley v. Valeo}, 424 U.S. 1 (1976).
\item \textsuperscript{67} See \textit{Buckley}, 424 U.S. at 75-76 (upholding a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures).
\item \textsuperscript{69} Id.
\item \textsuperscript{71} 2 U.S.C. § 431(9)(B)(i).
\item \textsuperscript{72} See Internet Communications, 71 Fed. Reg. 18,589, 18,610 (explaining that the Media Exemption applies to media entities covering news stories or editorials); see also Pandey-Jorrin, \textit{supra}, note 59 (noting that the Court has said legitimate press functions include distributing breaking news, editorials, and political commentary).
\item \textsuperscript{73} See Shepard, \textit{supra} note 70.
\item \textsuperscript{74} H.R. Rep. No. 93-1239, at 4 (1974); see also Pandey-Jorrin, \textit{supra}, note 59 at 415.
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under this exemption. First, the disseminator of the information must qualify as a press entity. Second, that press entity must not be under political control and must perform a “proper press function.” A non-politically controlled press entity is defined as “facilities . . . owned or controlled by any political party, political committee, or candidate.” However, the advent of the internet and the subsequent ability of everyday users to freely disseminate information have complicated this analysis.

C. The Internet Revolution and the Rise of Citizen Journalists

Speech associated with the traditional press functions is clearly exempt from regulation, but the development of the Internet provokes new problems for campaign finance laws and continues to confuse the “entity” and “function” tests established by the FEC. The Internet has caused traditional communication barriers of time and space to erode. Information is available almost instantly at the touch of a button. Traditional media, such as television, radio and newspaper, have taken advantage of this immediate access and expanded to include online operations. In addition, independent, informal online journalism has also flourished.

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75 See Shepard, supra note 70; see also Internet Communications, 71 Fed. Reg. 18,589, 18,607 (Apr. 12, 2006).
76 See Internet Communications, 71 Fed. Reg. 18,589, 18,607 (Apr. 12, 2006) (describing the two part test that is used to determine if an entity qualifies under the Media Exemption).
77 Id.
78 Supra note 71; see also Pandey-Jorrin, supra note 59 at 411 (explaining that an entity does not have to define the expenses that it incurs during its coverage of a federal campaign as a “contribution” or “expenditure.”).
79 Id. (noting “citizen journalists” influence elections, establish interest groups media, and gain media recognition, which confuses the distinction between bloggers from established journalists).
80 See Shepard, supra note 70 at 143 (“The development of the Internet, however, raised wholly new problems for campaign finance laws.”).
81 Id.
82 See Anderson, supra note 4 (noting that [m]ost of the conventional media (newspapers, magazines, television stations and networks, and cable networks) now have online operations, are operated by companies that own several types of media, and that traditional media are beginning to deliver their entire product--news, photos, layout, and ads--online.
Many media conglomerates recognize that digital media is the new platform, and has usurped the traditional publishing business.83 Today, there are far fewer traditional media outlets than existed 10 years ago.84 To fill in the media gap, “citizen journalists” are multiplying by allowing a wide variety of people with a wide variety of perspectives and education to contribute their ideas and opinions to the public discourse via the Internet.85 This plays out most dramatically among so-called “digital natives”—mainly people under thirty years old.86 Citizen journalism encompasses “Average Joes” who research and report information without any expectation of making a profit.87 In this vein, the power of print is now given to every person, as the Founding Fathers intended, without limiting the control of information to only those who had access to a printing press.88 Furthermore, whereas media conglomerates such as Fox News or MSNBC report news to make a profit, citizen journalists can use their power to tell objective news because citizen journalists are “beholden to no one.”89 The Internet may have spawned the makings of “the fifth estate,”90 granting bloggers and nontraditional journalists “watchdog” roles over large media corporations, and bringing the United States back full circle to grassroots efforts like those of the “Revolutionary-era pamphleteers.”91

83 See Anderson, supra note 4 at 438-39 (noting the future of the traditional publishing business lies in electronic media and that some major media companies, “betting their futures on convergence of media forms, are pursuing a multimedia strategy of combining print, television, Internet, radio, cable, and broadband into a single ‘platform.’”)
85 See Papandrea, supra note at 49 (“With the Internet . . . more people are able to contribute their ideas and opinions to the public discourse.”).
86 See Andrew Nachison, Two Thirds of Americans View Traditional Journalism as ‘Out of Touch’, WeMedia (Feb. 27, 2008), http://ifocos.org/2008/02/27/two-thirds-of-americans-view-traditional-journalism-as-%E2%80%98out-of-touch%E2%80%99/.
88 Id.
89 Id.
90 See e.g. supra, note 28.
91 See Gant, supra, note 14 at 186.
While citizen journalism expands the sources that disseminate information, quantity does not guarantee quality.\textsuperscript{92} Moreover, the image of the press as “detached and objective” from politics is clearly fading from the news organizations and in the public.\textsuperscript{93} As a result, many citizen journalists are subconsciously or intentionally inserting their own political agenda while reporting the news.\textsuperscript{94} Arguably, just because an author presents information subjectively does not mean the author is not entitled to the same protections and privileges as if he had more objectively stated the facts.\textsuperscript{95} But as some critics suggest, these facts when relayed subjectively are more susceptible to being distorted, where the motive behind reporting these facts is to confirm citizen journalists’ “own partisan views and link to others with the same ideologies.”\textsuperscript{96} Additionally, the use of anonymity on the Web where the public look to sites like Wikipedia and YouTube, provide the opportunity to hide a reporter’s political agenda. “When advertising and public relations are disguised as news,” political propaganda can be passed off as news and “the line between fact and fiction become blurred.”\textsuperscript{97} Moreover, in light of the explosion on the web bloggers, objectivity in the news has become more defunct to cherry-pick information, which further promotes the reporting of skewed facts and speculation.\textsuperscript{98} This elusiveness ultimately leads readers who follow said bloggers to take those skewed facts are true, which frustrates the

\textsuperscript{92} Id.
\textsuperscript{94} But see Gant, supra note 14 at 168-69 (“[T]he legal privileges and protections should not be based on subjective judgments about the legitimacy or perceived quality of the source of information and ideas . . . . We must also reject the notion that citizen journalism is less worthy of protection . . . because many citizen journalists advocate a point of view rather than dispassionately report only ‘the facts’.”).
\textsuperscript{95} Id.
\textsuperscript{96} See Andrew Keen, THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE 59-60 (2007) (noting this “dangerous form of digital narcissism . . . enable[s] anyone to publish anything, regardless of quality. . .”).
\textsuperscript{97} Id. at 17 (emphasizing that the “undermining of truth is threatening the quality of civil public discourse, encouraging plagiarism” and delivers “dubious content from anonymous sources . . . ”).
\textsuperscript{98} Id. at 16 (highlighting that the consequence of “democratized media” is “less culture, less reliable news and a chaos of useless information . . . [that causes] blurring, obfuscation, and even the disappearance of truth.”)
role of traditional news sources to inform the public about important social and political issues.\textsuperscript{99} Hence, the escalating quandary of determining the reliability of news may call for a thorough reexamination of existing laws to determine whether and how to grant to citizen journalists certain privileges exclusively reserved for professional journalists.\textsuperscript{100}

D. The Effect of the Internet on Campaign Finance Regulation

Internet media create complicating loopholes in campaign finance regulation. The FEC’s neat two prong test to apply the media exemption becomes considerably more difficult: “the development of the Internet, the loss of traditional journalism organizations as gatekeepers, and the rise of issue and political advocacy groups,”\textsuperscript{101} has irrevocably blurred the clear lines of the once simple traditional media test. Though not directed explicitly at Internet media, in 2002, Congress passed the Bipartisan Campaign Reform Act ("BRCA") to attempt to plug legal loopholes that allowed “soft money” donations to political parties; also known a McCain–Feingold Act, it prohibited corporations and unions from spending their general treasury funds to make “electioneering communications” or broadcast advertisements that feature a candidate for federal election and are able to reach 50,000 people within thirty days of a primary election or sixty days of a general election.\textsuperscript{102} In addition to regulating “issue advertising,” which has been used by corporations in the past to bypass the limits on how much the corporation could spend, the BCRA also requires the disclosure to the FEC of contributions funding the advertisement and any other related spending, and a disclaimer when the communication is not authorized by the candidate it intends to support.\textsuperscript{103}

\textsuperscript{99} See \textit{id.} at 19 (noting that the internet promotes “unchecked culture” where “[a] lie can make its way around the world before the truth has a chance to put its boots on.” (quoting former British Prime Minister James Callaghan)).

\textsuperscript{100} See \textit{Gant}, \textit{supra} note 14 at 166.

\textsuperscript{101} See \textit{Shepard}, \textit{supra} note 70 at 151.

\textsuperscript{102} \textit{Id.}

Initially, the FEC excluded Internet communications from the jurisdiction of the FECA and the BCRA. In 2002, the FEC promulgated new rules that would allow bloggers and other Internet activists, which could include nonprofit organizations, the expansive freedom from regulation so long as they were not paid for their journalism; however, any online political advertising for which the blogger receives compensation is subject to FEC regulations.

However, members of Congress argued that to comply with the BCRA, all Internet material should be regulated if used for political purposes, such as campaigning or fundraising. As a result, the current FEC rules, as amended in 2006, require that political committees disclose their Internet communications and advertisements, but do not obstruct individual Internet users to speak freely regarding candidates and elections. In enacting the amended rules, the FEC emphasized that “the vast majority of Internet communications are, and will remain, free from campaign finance regulation . . . . Internet activities by individuals and groups of individuals face almost no regulatory burdens under the Federal Election Campaign Act. The need to safeguard constitutionally protected political speech allows no other approach.”

E. The Release from Certain Regulations after *Citizens United v. FEC*

The melding of independent political commentary and traditional political campaign organizations highlights the issues caused by politically driven bloggers. The potential outlets

\[104\] See Shepard, *supra* note 70 (citing 2 U.S.C. § 434 (f)(3)(A)(i)(I)-(II)(aa)(bb) defining electioneering communication as any broadcast, cable, or satellite communication which “(I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate.”).

\[105\] See *Shays v. Federal Election Comm’n*, 337 F. Supp. 2d 28, 65 (D. D.C. 2004), aff’d. 414 F.3d 76 (D.C. Cir. 2005) (ruling that new rules that allowed bloggers and other Internet activists the expansive freedom from regulation so long as they were not paid for their journalism was “inconsistent with the aims of the FECA statute.”).


\[107\] *Id.* (explaining the rules were amended in response to *Shays v. Federal Election Commission* (citation omitted).

\[108\] *Id.*

\[109\] *Id.* (as quoted in the Federal Register, p. 18590).

\[110\] See Shepard, *supra* note 70 at 144.
for political campaigning have multiplied and various organizations are motivated to spend more of their money to disseminate their political messages.\textsuperscript{111} In \textit{Citizens United v. FEC}, the Supreme Court held that the BCRA violated the First Amendment by prohibiting corporations the right to spend money to influence political elections.\textsuperscript{112}

Citizens United, an incorporated non-profit organization,\textsuperscript{113} produced and attempted to distribute a “documentary” style video about Hillary Clinton when she was a candidate for the Democratic Party presidential nomination.\textsuperscript{114} Citizens United independently produced the film, “Hillary: The Movie,” a ninety minute documentary, without the support of a candidate or political party.\textsuperscript{115} Citizens United planned to use 1.2 million dollars of its general treasury funds to broadcast the film through cable “video-on-demand” services within thirty days of the Democratic Party’s primary election.\textsuperscript{116} Anticipating negative action by the FEC, Citizens United preemptively sought declaratory judgment and injunctive relief, arguing the BCRA’s ban on corporate funded independent expenditures was unconstitutional as applied to this type of documentary film and advertisements for the film.\textsuperscript{117}

Indeed, the majority in the \textit{Citizens United} opinion acknowledged the pejorative characterization of Senator Clinton that was central to the film and noted it was plainly calculated to persuade the public to vote against her.\textsuperscript{118} However, the Court did not use the “as applied” test to determine whether the BCRA was unconstitutional.\textsuperscript{119} Rather, the Court wrote a sweeping opinion broadly characterizing corporations’ rights to free speech as including political

\begin{flushleft}
\textsuperscript{111}Id. at 144-45. \\
\textsuperscript{112}See \textit{Citizens United}, 130 S. Ct. at 882. \\
\textsuperscript{113}See generally \textbf{CITIZENS UNITED}, www.citizensunited.org (last visited Aug. 20, 2011). \\
\textsuperscript{114}See \textit{Citizens United}, 130 S. Ct. at 887. \\
\textsuperscript{115}Id. \\
\textsuperscript{116}Hasen, supra note 68 at 589 (2010). \\
\textsuperscript{117}\textit{Citizens United}, 130 S. Ct. at 888. \\
\textsuperscript{118}Id. at 890 (“[T]here is no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton”). \\
\textsuperscript{119}See Hasen, supra note 68.
\end{flushleft}
speech, focusing on the First Amendment interests at hand. Specifically, the court found that the “prohibition on corporate independent expenditures . . . [constituted] a ban on speech,” and explained, “[w]ere the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process.” The Court recognized political speech as central to the First Amendment, and thus applied strict scrutiny to the BCRA to determine its constitutionality as applied to corporations.

The Court found that the means selected to further the government’s interest were not narrowly tailored; the stringent limitation the BCRA places on a corporation’s political speech rights are not necessary to prevent the appearance of corruption in political campaigning. In fact, the Court entirely foreclosed the assertion of any possible significant state interest that would satisfy First Amendment scrutiny. “Favoritism and influence” are inherent in representative politics. “The fact that [corporations] may have influence over or access to elected officials does not mean [they] are corrupt.” The world of campaign finance is a legitimate system of give and take: a supporter votes for or contributes to a particular candidate with the hope that the candidate will then “produce[e] those political outcomes the supporter favors.”

A corporation’s independent spending that is not coordinated through a candidate’s campaign only seeks to persuade the voters “who have the ultimate influence over elected

120 See id. at 882 (“As a restriction on the amount of money a person or group can spend on political communication during a campaign, that statute ‘necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.’”) (citation omitted).
121 Id. at 888.
122 Citizens United, 130 S. Ct. at 882.
123 Id. at 882; see also Hasen supra note 68 at 113 (acknowledging that while the Court must consider “attempts by Congress . . . to dispel either the appearance or the reality of these influences,” the solution “must comply with the First Amendment,” and an “outright ban on corporate political speech during the critical pre-election period is not a permissible remedy.”)
124 See Citizens United, 130 S. Ct. at 913 (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).
125 See Hasen supra note 68 at 107.
126 Citizens United, 130 S. Ct. at 884.
127 See Hasen, supra note 68 at 107.
officials,”” and does not cause the appearance of corruption. 128 “The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.” 129

In stating that the U.S. government has no “compelling” interest in leveling the playing field 130 among political candidates, the majority in Citizens United overruled Austin v. Michigan Chamber of Commerce, 131 where the Court previously upheld such limits on corporate electioneering expenditures. 132 In Austin, the Court found that the Michigan prohibiting corporations from using treasury finds to endorse candidate in state elections was justified to prevent “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” 133

The majority could not reconcile core values of the First Amendment with the “antidistortion rationale” 134 cited in Austin, stating that if this rationale were accepted, “it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.” 135

While the Court recognized the constitutional requirement to allow corporations free political speech expressed by spending money, the Court upheld the sections of the BCRA

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128 See Hasen, supra note 68 at 108 (citing Citizens United, 130 S. Ct. at 910).
129 Citizens United, 130 S. Ct. at 910.
130 See id. at 904 (quoting Davis v. Federal Election Comm'n, 128 S. Ct. 2759, 2774 (2008) (“Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election.”).
132 Citizens United, 130 S. Ct. at 882.
133 See Austin, 494 U.S. at 652 (“A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press' unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations.”).
134 See Rights And Liabilities In Media Content, 2d ed. Smolia, Rodney A at 11-47 (As the Court in Citizens United explained, “the antidistortion rationale described in Austin sought to defend the antidistortion rationale as a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace.”)
135 Citizens United, 130 S. Ct. at 904.
requiring disclosure of spending and a disclaimer of authorship. However, Justice Kennedy’s majority opinion overturned the provision banning “electioneering communications” paid for by corporations from their general funds, arguing that there was no principled way to distinguish between media corporations and other corporations. Further, Justice Kennedy criticized the dissent’s theory by claiming it would “allow Congress to suppress political speech in newspapers, on television news programs, in books and on blogs.”

Justice Stevens’ dissent protested the majority’s broad statutory grounds and the narrow interpretation of the impact of corporate political contributions. Justice Stevens suggested a much more inclusive understanding of “undue influence” that justifies regulations on campaign finance, and rejected the majority’s faith that independent spending does not cause corruption. Moreover, Justice Stevens argued that the legislature cannot regulate political speech based on the identity of the speaker – this is antithetical to the First Amendment jurisprudence of the past. Baffled at the majority’s innovation of a blanket corporate right to political speech, Justice Stevens emphasized that from the inception of this country, there has been a limitation on

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136 See Citizens United, 130 S. Ct. at 914. See also Hasen, supra note 116 (“[T]he Court rejected Citizens United’s challenges to the BCRA’s § 311, requiring that televised electioneering communications include a disclaimer stating who was responsible for the content of the advertisement, and to § 201, requiring disclosure by anyone spending more than $10,000 on electioneering communications in a calendar year. . . . The Court stated that these rules impose ‘no ceiling on campaign-related activities’ and could be justified by the government’s ‘sufficiently important’ interest in providing the electorate with information about the sources of election-related spending.”).
137 See 2 U.S.C. §§ 441 b(a) and 441 b(b)(2). An "electioneering communication" is any broadcast, cable or satellite communication targeted to the relevant electorate that refers to a clearly identified Federal candidate either 60 days before a general election or 30 days before a primary election. 2 U.S.C. 434(f)(3).
138 See Citizens United, 130 S. Ct. at 961 (”[T]he difference between selling a vote and selling access is a matter of degree, not kind.”).
140 See also Citizens United, 130 S. Ct. at 945 (Stevens, J., concurring in part, dissenting in part) (observing that the holding of Bellotti was “far narrower than the Court implies”).
141 See Hasen, supra note 68.
142 See id. at 947 (“[T]he assumption that the identity of a speaker has no relevance to the Government’s ability to regulate political speech would lead to some remarkable conclusions.”).
corporate spending for political campaigning\textsuperscript{143} and the Court should not assume this limitation is no longer necessary.\textsuperscript{144}

\textit{[C]orporations are different from human beings . . . .} A regulation such as BCRA § 203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice. . . . The opinions of real people may be marginalized . . . drowning out [] noncorporate voices . . . generat[ing] the impression that corporations dominate our democracy. . . . giv[ing] corporations special advantages in the market for legislation. . . . \textit{[C]orporate domination of the airwaves prior to an election may decrease the average listener’s exposure to relevant viewpoints, and it may diminish citizens’ willingness and capacity to participate in the democratic process.”}\textsuperscript{145}

Justice Stevens’ dissent is particularly relevant when discussing the increased use of online journalism. Whereas the majority overruled the antidistortion perception in \textit{Austin}, Stevens advocates strongly for application of the antidistortion rationale working in conjunction with the anticorruption rationale.\textsuperscript{146} Ultimately, the Court held that spending limits for corporations violate the First Amendment.\textsuperscript{147}

\textbf{F. The FEC Advisory Opinion Declaring Citizens United As \textquoteleft\textquoteleft The Press\textquoteright\textquoteright\textsuperscript{148}}

In 2010, Citizens United requested the FEC to be reevaluated as a press entity.\textsuperscript{148} The FEC ruled 4-1 that Citizens United's films were a press function that qualified the organization for

\textsuperscript{143} See id. at 960 (Stevens, J., concurring in part and dissenting in part) (“In sum, over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to ‘[p]reserve[e] the integrity of the electoral process, preven[t] corruption, ... sustai[n] the active, alert responsibility of the individual citizen,’ ‘protect the expressive interests of shareholders,’ and ‘[p]reserve [e] ... the individual citizen’s confidence in government.’ (citations omitted). These understandings provided the combined impetus behind the Tillman Act in 1907 ... the Taft-Hartley Act in 1947 ... [the] FECA in 1971, and [the] BCRA in 2002.”).

\textsuperscript{144} See id. at 942 (Stevens, J., concurring in part and dissenting in part) (“At bottom, the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”).

\textsuperscript{145} \textit{Citizens United}, 130 S. Ct. at 971-76. See also Hasen, \textit{supra} note 68.

\textsuperscript{146} \textit{Id.} at 970 (“The majority fails to appreciate that Austin’s antidistortion rationale is itself an anticorruption rationale. . . .”).

\textsuperscript{147} \textit{Citizens United}, 130 S. Ct. at 916.

the press exemption, concluding that “Citizens United’s costs of producing and distributing its films, in addition to related marketing activities, are covered by the press exemption from the Act’s definitions of ‘expenditure’ and ‘electioneering communication.’”\textsuperscript{149} Noting that, in recent years, the FEC has “read the press exemption more broadly, consistent with the Act’s legislative history,” the Commission argued that the press exemption applies not only to traditional news outlets, but to “news stories, commentaries, and editorials no matter in what medium they are published.”\textsuperscript{150} Even though the Commission had previously found in 2004 that Citizens United would not qualify for the press exemption, the Commission cited the increased video production and distribution and also noted that the organization used a “substantial portion” of its annual budget.\textsuperscript{151} The Commission emphasized “an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial.”\textsuperscript{152} The Commission further blankly stated that Citizens United was not owned or controlled by a political party, political committee, or political candidate.\textsuperscript{153} Finally, the Commission concluded that Citizens United engaged in its “legitimate press function” because the entity’s materials are available to the general public, and that those materials are comparable in form to those ordinarily issued by the entity.\textsuperscript{154}


\textsuperscript{150} Id. at 6 (quoting Advisory Opinion 2008 (Melothe, Inc.) at 3 (citing the Commission’s 2006 rulemaking, Explanation and Justification for Final Rules on Internet Communications, 71 FR 18589,18608 (Apr. 12, 2006), extending the press exemption to websites and “any Internet or electronic publication”).

\textsuperscript{151} Id.

\textsuperscript{152} Id.

\textsuperscript{153} Id.

\textsuperscript{154} See the test used in \textit{FEC v. Mass. Citizens for Life}, 479 U.S. 238, 250 (1986) (noting the Court did not have to reach the plaintiff’s argument that it had the right to claim the press exemption under 2 U.S.C. 431(9)(B)(i) reserved for “any news story, commentary, or editorial distributed through the facilities of any . . . newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate” because the publication in question was “not published through the facilities of the regular
Based on this determination, Citizens United would no longer have to disclose its income and spending related to the film projects, which questions the effects the FEC’s determination will have on future bloggers and social network users. Coupled together, the *Citizens United* decision and the FEC’s advisory opinion increase the apprehension that corporate financial contributions to campaigns will likely unduly influence the masses, especially with the growth of online social media networks in which millions of American citizens participate.\(^{155}\)

G. Enter Facebook and Twitter . . .

The risk of undue influence through political advisements is further complicated by the increased popularity of citizen journalists and their activity on social networks, such as Facebook and Twitter. Facebook is the largest of the interactive social networks and contains more than 500 million active users as of July 2010.\(^{156}\) Facebook has become a favorite online destination for people, businesses, and organizations to “connect and share information.”\(^{157}\) As the most multimedia-friendly network, members can post text, pictures, notes, audio, and video on their “Facebook page.”\(^{158}\) A Facebook page can be designated as an individual, a celebrity, a business, a government, or a variety of other titles.\(^{159}\) Twitter, the second most utilized social media network, is “based on 140-character micro-blog posts.”\(^{160}\) Users enter short updates that can be seen by any user on the internet, even if they are not logged into the site.\(^{161}\) Posts may

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\(^{157}\) Id.

\(^{158}\) Id.

\(^{159}\) Id. (reflecting the expansion from the exclusive requirement that users have a Harvard University email address to any college email address, to finally opening Facebook to anyone in the general public with an email address).

\(^{160}\) Id.

\(^{161}\) Id.
include text and links to other internet website or any multimedia content. The people who follow the “tweeter” will see his updates, or “tweets” in their timeline when they log in. Unlike with Facebook, anyone can follow Twitter updates without having reciprocal access to a follower’s Twitter posts. Both of these sites provide extremely popular and powerful approaches to forming and influencing opinions, as well as associating oneself with a political cause.

Part III: Analysis

The onset and deluge of Internet media output satisfies individuals’ and corporations’ need to be heard. The Internet has become an increasingly powerful tool of political campaigning; the dominant use of social networks such as Facebook and Twitter only exacerbates the potential for abuse and violation of the BCRA and permits “corrosive influences, including anonymity, a lack of transparency, and the absence of media gatekeepers.” However, it is impossible to sort out what is objective news, what is a corporation’s political message and what is mere opinion. American democracy seems to demand protection of free speech, as well as public assurance that news reporting will be truthful and objective. Scholars and policy makers have yet to find the right balance, erring on the side of little to no regulation.

While Citizens United preserves the BCRA’s regulation for disclaimer and overall contributions a corporation can make in a year, Facebook and Twitter provide a medium to circumvent these regulations. First, Facebook and Twitter blur the distinction between what is political advertising and what is merely free political speech, which in turn provides corporations a less transparent way of influencing the political process. Second, in addition to the confusion caused by social networks, the FEC’s advisory opinion, explicitly deeming a nonprofit organization like Citizens United “media-exempt,” further obfuscates and undermines the

162 Id.
163 Id.
164 See Shepard, supra note 70.
distinction of what society defines as press and the basic objectives of traditional campaign-
finance regulations. Finally, Facebook and Twitter are “free” but extremely powerful means of communication and tools to mobilize the masses, which will make it difficult for Congress or state legislatures to place effective limitations on corporate contributions in political campaigns.

A. Social Networks Distorts the Line Between Political Speech and Political Advertising.

Social networks bypass a century of jurisprudence that recognizes the distinction between political speech and political advertising. Corporate political advertising is regulated financially, whereas corporate political speech is protected and unlimited. When corporations utilize Facebook and Twitter mediums to advertise their political message, these corporations escape the purview of regulation by exercising their blanket political speech rights.

Political speech is enabled by social networking in a way that no other media has allowed previously. The power of the Internet is obvious: American society has diverged from traditional sources of news, such as newspapers and TV, and looks directly to the Internet for first source information. Once discounted as unreliable, online sources have gained increased respectability as trustworthy sources. Due to this growing trust and dependency on online resources, online writers are becoming journalists, even when they ignore a journalist’s fundamental duty to exercise caution in reporting information as fact or statistic without confirmation.165 It is in this realization that the realm of political speech and advertising are now indistinguishable.

Political advertising “informs voters about the candidates’ positions” and “allows voters to develop differentiated images of the candidates, images that play an important role in shaping

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165 See Stein, supra note 87; see also Gant, supra note 14 (discussing growing importance of objectivity in journalism).
voting choices.”\textsuperscript{166} In contrast, political speech decisions can be made at the click of a Facebook post button or “tweet”\textsuperscript{167} at the direction of an independent director and without detailed disclosure to the FEC. While a corporation is now allowed to spend as much money as it wishes, it still must disclose advertising expenditures to the FEC.\textsuperscript{168} The fundamental difference between political advertising and political speech is that in the past, one had to pay for this advertising. While a corporation can still buy an advertisement through Facebook or Twitter’s websites, it is no longer necessary to pay to spread its advertising, and unfortunately for those crafting regulations, political advertising on social networks functions in almost the exact same way as political speech does.

Like bloggers, Facebook and Twitter users have agendas to extend the message of political campaigns and causes.\textsuperscript{169} A corporation could use Facebook or Twitter to “exercise their political speech rights” by “linking to campaign websites, accepting money for political advertisements, or reprinting candidates’ press releases.”\textsuperscript{170} Additionally, the web links posted to a corporation’s Facebook or Twitter could function as an extension of the candidate's official webpage or could just be political speech supporting the candidate. One may also consider how balanced or reasonable a corporation’s news coverage on Facebook or Twitter may be.

In addition, Politicians are already actively using Facebook and Twitter to spread their political messages, which exemplifies how corporations can do the same to support or oppose

\textsuperscript{167} See \textit{e.g.} Twitter, http://www.twitter.com/tweet.
\textsuperscript{168} See supra note 136 (upholding disclosure and disclaimer requirements).
\textsuperscript{169} See Pandey-Jorrin, \textit{supra} note 59 (citing Comment from Duncan Black, Markos Moulitsas Züniga & Matt Stoller to Brad C. Deutsch, Associate General Counsel, FEC (June 3, 2005), http://www.fec.gov/pdf/nprm/internet_comm/comm_09.pdf) (discussing the consequences that may lead to bloggers using their anonymity to avoid compliance with campaign regulations, frustrating attempts to “rectify campaign abuses”).
\textsuperscript{170} Pandey-Jorrin, \textit{supra} note 59 at 422-23 (citation omitted).
those politicians. For example, Republican State Representative Justin Amash is among the first legislators to post all of his votes on his “Facebook Fan Page” with an explanation as to why he supported or opposed a political stance.\footnote{171} Amash has received significant media attention for his open social policies and asserts that because he posted his votes for certain bills, he believed the public was entitled to explanations.\footnote{172} Many of his Facebook fans have voiced that they appreciate what his explanations. As Amash asserted in an email interview, “[i]t became clear to me that posting my votes in real-time on Facebook could revolutionize the process of legislating.”\footnote{173} In November of 2010, Amash was elected to represent Michigan’s Third District in the 112th United States Congress, commended for his leadership role of “incorporating Facebook and other social media into his work as a public official.” In Amash’s case, he has gained some public confidence by using Facebook and Twitter to make himself appear transparent and accountable. One can be a fan of his Facebook page, “like” his status messages and posts\footnote{174} and follow his tweets. However, corporations are not mandated to use Facebook and Twitter in the same way that Amash uses his social media sites, and Corporations could potentially abuse the significant message spreading abilities of these sites.

In addition to being a free means of campaigning, social networks are highly efficient and significantly decrease the time it takes to spread a political message. Even if \textit{Citizens United} had not eliminated the thirty and sixty day time limits, Facebook and Twitter would have significantly weakened the regulation’s efficacy by reducing the time it takes to spread a message and allowing it to continue to grow long after its original posting. More importantly,
Facebook and Twitter allow individuals to spread the political message in a way that it no longer seems political.

Foreign nations have already voiced an existing concern that the use of major social media networks will unduly influence the people and politics. For instance, the French government in May of 2011 felt so strongly that it banned the use of the word Facebook and Twitter on French airwaves. 175 Invoking a 1992 decree that targets the prevention of subliminal advertising, the Superior Audiovisual Council of France claimed that using the words Facebook and Twitter was a form of “clandestine advertising,” and that unless Facebook and Twitter are the particular topic of a news story, French television and radio broadcasters must abstain from referring to Facebook or Twitter by name when urging their viewers to view their products. 176 France’s ban is demonstrative of the apprehension from a government that sees these two major social sites as unduly influencing its people.

Given the haziness that social media networks create to define corporate political speech and corporate political advertising, this resemblance amplifies the threat of corruption in our political system and a corporation can now shape its political messages through a medium that encourages free speech rights, but using it as clandestine advertising. Senator Charles Schumer, New York Democratic Senator objected to the Citizens United decision, stating “[w]ith a stroke of a pen, the court decided to overrule the 100-year-old ban on corporate expenditures and override the will of millions of Americans who want their voices heard in our democracy.” 177 Ultimately, letting corporations call political advertising “political speech” on Facebook and

176 Id.
Twitter gives way for undue influence and disregards the founding principles of campaign finance regulations.

B. Non-profit corporations and bloggers are now “journalists.”

Campaign finance law is convoluted and self-contradicting, and its current regulatory format is ill-equipped to meet the wave of further complications from the surge of citizen journalism and politics in social networking. While the comingling of political campaigns and social media networks has increased participation and encouraged transparency and accountability in politics, the FEC has now created precedent for allowing nonprofit corporations like Citizens United to qualify for the press exemption, so that any organization considered press is excluded from disclosure and disclaimer requirements completely. If a speaker is not press-exempt, the speaker must disclose information related to the communication and must report that information to the FEC. However, applying the FEC’s advisory opinion, the average user of Facebook or Twitter likely could qualify as a press entity. Analyzing the FEC’s factors that it considered to determine Citizens United was press-exempt, Facebook and Twitter users who 1) produce documentaries on a regular basis; 2) are not owned or controlled by a political party, political committee, or political candidate; and 3) distribute these films with a “legitimate press function” should be considered press. Since users of Facebook and Twitter likely could meet all three factors by utilizing the applications on these sites, any social media network user, whether an individual or a corporation, would be media exempt.

Similar non-profit organizations are now encouraged to attempt similar tactics that Citizen United used, such as increasing their video production, and could use Facebook and

178 See supra note 154.
179 Id.
Twitter links to provide a medium to distribute their own documentaries to the public\textsuperscript{180} to qualify for the media exemption of the FECA. Indeed, Facebook users have access to post their own videos and can make their page available to the public without having to “friend” everyone. A Twitter user can tweet a link to another website to advertise its “media” content.

Secondly, the FEC did not voice why exactly Citizens United was not under political control in its advisory opinion. In two paragraphs,\textsuperscript{181} the FEC declared Citizens United “free from political control” but did not give any reason as to how it made this determination. This finding facilitates the likelihood that any Facebook user can now qualify under this factor of the media exemption test by just saying that it is free from political control. However, it is impractical to think that all Facebook and Twitter users will be free from political control because users are able to create pseudo names and identities and are cannot be monitored for integrity or accuracy. Whereas Journalists know that their names and reputations attach to their work, Facebook and Twitter users could operate under a pseudonym to show that they are not under political control. Like bloggers, Facebook and Twitter users are able to spread a message on these sites without having to acknowledge their real identity.

Under the third prong of the FEC’s test, Facebook and Twitter users may be able to prove that they are exercising a legitimate press function. This broad definition includes that the entity’s materials are available to the general public, and that those materials are comparable in form to those ordinarily issued by the entity.\textsuperscript{182} Additionally, the FEC no longer requires objectivity in reporting for an entity to perform a legitimate press function.\textsuperscript{183}

\textsuperscript{180} See FEC 2010 Advisory Opinion, supra note 149, (noting that the FEC determined that it does not matter what nontraditional mediums these documentaries are distributed from).
\textsuperscript{181} Id.
\textsuperscript{182} See supra note 154.
\textsuperscript{183} See supra note 149.
As discussed above, the exposure that is garnered by using Facebook and Twitter could be enormous if corporations are now free to use as much money as it wants to advertise. It could use Facebook and Twitter to publish these advertising materials. So long as these materials are consistent with other materials that are published, the FEC may be able to declare that these corporations are performing proper press functions. However, this declaration also confronts two important social issues; first, if those users are only copying information without having first-hand knowledge or investigating the facts,\(^{184}\) can the product of the dissemination still be understood by society as “news”? Second, and more importantly, how does the definition of “journalist” change if Facebook and Twitter users, who only voice opinion, are considered press?

If the FEC answered these questions in the affirmative, these determinations would confuse the important role\(^ {185}\) that media and journalists have played in the past as the Fourth Estate and would threaten to destroy the professional institution\(^ {186}\) and traditional definition\(^ {187}\) of journalists. Moreover, while, the FEC currently holds the view that news does not have to be objective to be considered news, Americans have generally recognized an ethical obligation in

\(^{184}\) *See* Keen, *supra* note 96 (observing that as advertising dollars migrate from newspapers, magazines and television news to the Web, organizations with the expertise and resources to finance investigative and foreign reporting face more and more business challenges).

\(^{185}\) *Id.; see also* Ethics and Standards, JOURNALISTS FOR INTERNATIONAL PEACE (2007) available at http://www.j4ip.org/J4IP/pg002.html (“The professionalism, reliability and public accountability of a news organization are three of [a journalist’s] most valuable assets.”).

\(^{186}\) *See* Keen, *supra* note 96 at 15 (“[D]emocratization [of the Internet] . . . is undermining truth, souring civil discourse, and belittling experience, expertise and talent . . . . it is threatening the very future of our cultural institutions.”).

\(^{187}\) While various existing Journalism ethic codes have some differences, most share common elements including the principles of — truthfulness, accuracy, objectivity, impartiality, fairness and public accountability — as these apply to the acquisition of newsworthy information and its subsequent dissemination to the public; *see also* http://www.rcfp.org/newsitems/docs/20090918_122243_91709_amendment.pdf (displaying S. 448 amendment); http://www.niemanlab.org/2009/09/shield-law-definition-of-journalist-gets-professionalized/ (explaining the Senate Judiciary Committee approved the amendment which defines a journalist as Senate Judiciary Committee, a journalist is defined as someone who “obtains the information sought while working as a salaried employee of, or independent contractor for, an entity—(I) that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means; and (II) that—(aa) publishes a newspaper, book, magazine, or other periodical;(bb) operates a radio or television broadcast station, network, cable system, or satellite carrier, or a channel or programming service for any such station, network, system, or carrier;(cc) operates a programming service; or (dd) operates a news agency or wire service.”).
the professionalism of journalism to report accurate news. Heavily opinionated news creates the risk that the author taints a story’s precision, accuracy, and truthfulness, which ultimately reverts news to the revolutionary “pamphleteers” era before professional journalism standards existed.

Corporations already overtly editorialize through traditional media, “influencing elections by choosing what to cover and how to cover it.” Should sites like Facebook and Twitter that are easily influenced by opinion be overcrowded with the corporation’s partial news that would further bias an election? By declaring Citizens United as media exempt, the FEC has only muddled an already impenetrable predicament the FEC faces in granting other nonprofit organizations exempt from campaign-finance law in the future. Under these standards, considering an individual who uses Twitter or Facebook a journalist or part of the media would further undercut the ability of the FEC to limit the amount an individual contributes to candidates and the amount an individual spends on behalf of a candidate, two fundamental reasons for the enactment of the FECA. Nevertheless, the use of anonymity on Facebook and Twitter already poses the problem of corporations who are now enabled to sidestep the existing disclosure and disclaimer requirements of the BCRA. The American people are not going to the streets anymore to voice their opinions; the political election wars are now being fought on Facebook and Twitter and the loudest voice may be likely to win as evidenced by President Obama’s success on social media networks in 2008.

188 The Editors, How Corporate Money Will Reshape Politics, NEW YORK TIMES OPINION PAGES (Jan. 21, 2010), http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/; but see Citizens United, 130 S. Ct. at 890 (noting that media corporations have enjoyed protection that other corporations have been denied and leveling the playing field means protecting all corporations, no matter who the speaker is).

189 See infra note 196.
C. While Social Networks are No-Cost, Powerful Tools of Mobilization that Undermine the Power of Corporations to Control a Political Message, Social Networks Can Also Effectively Evade Campaign Finance Restrictions.

Social networks will do exactly what Congress feared corporations would do: unduly influence the political message. Arguably, this proposition ameliorates any concern that Congress had in the past with corporate dominance in traditional media, such as newspapers and television advertisements, which cost money to run. Using digital media, users of social networks can offset and oppose the political message that corporations may try to control. Social networks enable the average citizen with a vehicle to disseminate the same amount of information and endless power to spread a political message to other social network users.

The emergent, worrisome concern is that corporations and nonprofit organizations may put their money behind an army of citizen journalists who take to the social network “streets” to spread a political message on the corporation or organization’s behalf, which ultimately corrodes the protections from undue political influence that prior laws have tried to prevent. Although money allows for undue influence in political dominance, money is no longer the only factor that should be disclosed to measure regulation. In light of the rise of citizen journalism and social networking, the power to distort transparency and disguise influence within massive digital media dissemination is also an important factor to consider.

The Court in Citizens United reasoned that there should be no concern for undue influence from corporations in political elections because “. . . disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers

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190 See Gant, supra note 14 (highlighting that digital media empowers average individuals to undertake corporations and nonprofit organizations with remarkable effectiveness).
However, the disclosure and disclaimer requirements of the BCRA that were left intact by the Court are likely to be easily maneuvered around by corporations with the click of a Facebook or Twitter post. This is because the lack of regulation of a corporation’s expenditures on the internet may encourage Politicians to take advantage of the support that can be obtained by turning to Facebook and Twitter’s army of citizen journalists. Several bills have already attempted to address the Internet dilemma of disclosing the corporate sponsoring of and spending on political advertisements. Some of these bills attempted to unequivocally exempt bloggers from the FEC regulations that limit campaign contributions. For example, in 2005, the Online Freedom of Speech Act permitted unlimited internet spending and did not require any reporting to the FEC. Those promoting the bill believed the internet should remain “free from FEC regulation,” while those against the bill believed it would “reopen the floodgates of corrupting money,” and largely unravel the BCRA. Congress did not pass this bill, and has not reopened the issue. Significantly, this attempt to provide blanket protection for online contributions occurred before the full explosion of society’s use of Facebook and Twitter. Arguably, the concerns voiced by the opponents of this bill become even more compelling.

These concerns are not unfounded. Politicians have begun to raise individual contributions using Facebook. Most notably, in 2008, President Obama’s campaigning team recognized the opportunity to raise money on the internet. The team created a method that would be easier for people to make donations online and donate affordable sums of money.

191 Citizens United, 130 S. Ct. at 916.
192 Shepard, supra note 70 at n.43.
193 Id.
194 Id. at n. 43-44.
195 Id.
196 See 3 Mindblowing Online Tactics that Took Obama to the White House, SOCIAL PEEL (Jan. 21, 2009), http://www.socialpeel.com/2009/01/21/3-mindblowing-online-tactics-that-took-obama-to-the-white-house/.
197 Id.
As a result, 94% of the funds donated were for sums of $200 or less.\textsuperscript{198} By reaching out to “the common man” via the Internet, the campaign team raised approximately $600 million, bestowed by roughly 3 million donors.\textsuperscript{199} Essentially, the way that John F. Kennedy proactively used his image on the television paved the way for President Obama to make his presence felt and convey an image not only on television but on the Internet.\textsuperscript{200}

While Obama’s campaign did not commit a violation of the FECA, the increased use of corporate spending that aims to support or oppose a political candidate on Facebook and Twitter is of concern because the disclosure requirements are not uniform and “vary in application depending on the content, timing, and medium of the ad, and the identity of its sponsor.”\textsuperscript{201} Facebook and Twitter allow corporations to run political advertisements through their websites and do not have to disclose the identity of any donors, unless a donor gave money\textsuperscript{specifically} for the purpose of funding independent expenditures or electioneering communications. Even where disclosure of contributors is required, like the problem noted with bloggers, it may be difficult to discern the identity of corporations on Facebook and Twitter if a donor’s money has passed through one or more channels and intermediaries. Facebook and Twitter are just other intermediaries that will make it difficult to follow the money.

Just like bloggers, Facebook and Twitter users are capable of evading BCRA disclaimer restrictions that were left intact by\textit{ Citizens United}. Under current law, corporate ads will bear a disclaimer like “Paid for by Acme Inc., and not authorized by any candidate or candidate’s committee.”\textsuperscript{202} But as skeptics note, this type of disclaimer only works if the name of the organization or corporation is familiar to the public (i.e. Sierra Club, Bank of America etc). This

\begin{thebibliography}{9}
\bibitem{198} Id.
\bibitem{199} Id.
\bibitem{200} Id.
\bibitem{201} See Alex DeMots, \textit{How to Address Political Corporate Spending}, CENTER FOR AMERICAN PROGRESS (Feb. 3, 2010), http://www.americanprogress.org/issues/2010/02/citizens_united.html.
\bibitem{202} Id.
\end{thebibliography}
allows for advertisements to run on traditional media or online to be paid for a corporation that is ambiguously named and the public does not gain any useful information to satisfy what the disclosure requirement was intended to do: inform the public.

Part IV: Recommendations For Enforcing Disclosure and Disclaimer Requirements on Social Networks and Avoiding Confusion when Granting Press Exemptions.

The Citizens United decision, combined with the FEC’s lax determinations on who may be press exempt, effectively avoids the existing BCRA requirements of disclosure and disclaimer. First, while the Court has unleashed nonprofit organizations and corporations from using their money however they desire, new amendments to the BCRA to resourcefully monitor and enforce disclaimer and disclosure requirements on online social networks will help to ameliorate many concerns that corporations and nonprofit organization threaten to drown out the individual voices with an influx of corporate political speech. Second, although the FEC in recent years has been lenient to grant press exemptions to many non-traditional forms of media, the FEC should look to other findings that courts have implemented to determine who is a journalist is and what is news. Third, the architects and designers of Facebook and Twitter should be looked to as a resource to help Congress find ways to reasonably monitor and enforce disclosure and disclaimer requirements on popular social networks.

A. The BCRA Should Find Creative Ways to Strengthen the BCRA’s Disclaimer and Disclosure Requirements.

The disclosure and disclaimer requirements of the BCRA are in jeopardy with the enormous influence and use of social media networks on the Internet. The social networks have produced a medium where it becomes easy for corporations and nonprofit organizations to manipulate, corrode and make less transparent the public dialogue. Thus, the BCRA should be amended to implement creative ways that campaign political messages and the origins of the speaker can be tracked for the public.
Several states are finding ways to strengthen disclaimers in political advertisements by requiring political advertisements include the top few donors to the organization running said advertisement.\textsuperscript{203} Under this requirement, the disclaimer would resemble a phrase such as, “Paid for by Americans for Good Things, with support from Mining Inc., Drilling Inc., and Power Inc.” Alex DeMots, legal counsel at American Progress, argued that “[t]his kind of disclaimer provides the public with a context in which to evaluate the advertisement [and]... might also deter some corporations from funding political ads in the first place, either because the disclaimer undermines the ad’s effectiveness, or because it tarnishes the corporation’s brand.”\textsuperscript{204}

However, after the \textit{Citizens United} decision gave corporations the freedom to do whatever it wants with its money, it is important that Congress weighs the benefits of new disclaimer requirements with the rising popularity of social media networks, rather than the deterrent effects on corporate political advertising.

\textbf{B. The FEC Should Revert to Stricter Definitions on What Organization Can Be Press.}

Moving forward, the FEC should raise the standards of what organizations can qualify for the FECA media exemption and should be apprehensive to grant anyone press immunity from regulations. The effect of the 2010 FEC advisory opinion establishes that almost any nonprofit organization that interacts with the public using non-traditional media formats, such as documentaries, without direct coordination or control of a political party or candidate and exercises a legitimate press function would qualify as a press entity. Two organizations, Democracy 21 and the Campaign Legal Center, have voiced opposition to the FEC’s determination of Citizens United’s press exempt status. They wrote, “[i]f the Commission

\textsuperscript{203} See Felsenthal, supra note 106; see also Scott Felsenthal, 10-state analysis of campaign-ad disclosure laws FIRST AMENDMENT CENTER (Apr. 23, 2007) http://www.firstamendmentcenter.org/10-state-analysis-of-campaign-ad-disclosure-laws (noting Alabama, Connecticut, Ohio, Texas, and Virginia have internet improved disclaimer and disclosure requirements).

\textsuperscript{204} DeMots, supra, note 201.
determines that a classic advocacy organization like Citizens United acquires the protections of
the press exemption merely by producing a handful of films in furtherance of its advocacy
mission, the unbounded nature of that determination will open the door for any and all advocacy
groups to obtain an exemption from the campaign finance laws.”

Some commentators have suggested that using guidelines like those used to determine
who is eligible to invoke the reporters’ privilege and shield law statutes may help the FEC with
granting the exemption to certain corporations and individuals. Another way that the FEC
could determine press is by using the Society of Professional Journalists ethics code. While
not all journalists need to report objective news to qualify as journalists, the FEC could invoke
the standards set forth in journalism ethics code to decide who is and is not media, just as it
decides who can invoke the journalist’s shield law privileges, and not frustrate the First
Amendment.

C. Facebook and Twitter Should Also Cooperate With the FEC and Help to Develop
Ways to Implement Stronger Disclaimer and Disclosure Requirements.

Facebook and Twitter should look at their policies and perhaps try to make disclosure and
disclaimers more readily apparent. More than ever before, voters expect to be given an
opportunity to express themselves and interact with information by sharing with friends, posting
to Facebook, tweeting and commenting on posts. Unfortunately, social communication offers
candidates and campaigns the opportunity to engage with voters and empower them to put their
own twist on content as they share it with friends. Thus, it is important that Facebook and
Twitter take interest in authenticating the identities of corporations on Facebook and Twitter.
Additionally, labels to help identify these companies, and usage of phrases such as “advertising

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205 See Comment on Agenda Document No. 10-34 by Democracy 21 and the Campaign Legal Center (06/09/2010),
206 See Shepard, supra note 70.
material only” could help to distinguish the realm of objective news and a political agenda. Regardless of whatever route that the FEC or social media networks take, regulations should be implemented that strengthen disclosure and disclaimers requirements and have an overhaul to be able to control corporations from manipulating what has become U.S. citizens’ popular method for communication, ideas and community to influence political elections.

While one needs to think about regulation on these networks for corporations who look to take advantage of these mediums to spread its political message, this might also in effect frustrate First Amendment rights of free speech and association when these social networks at its onset were meant to promote. There are some208 who would argue Facebook and Twitter do the exact opposite of what this paper proposes and who believe that the overall impact of the Citizens United decision may be less harmful than anticipated and that allowing corporations to spend their money freely could improve electoral competition.209 Under this theory, by allowing all corporations to spend their treasury funds to support candidates, more challengers may enter the competition against politicians who already have a fund-raising advantage.210 By lifting campaign finance regulations, there is less discrimination of those who want to participate in the political process and arguably, these political contributors who have the finances can support less wealthy candidates, placing them on more equal footing with larger competitors. Moreover, with the access to online media, blog sites, and social media networks like Facebook and Twitter, everyone now has a voice. Some feel that with this realization, it would be nearly impossible for corporations to take over these sites, when everyone has equal rights of entry to the Internet and

208 Supra note 188.
209 Id.
210 Id.
social media networks. Furthermore, Facebook and Twitter are essential mediums for creation, self-expression and connection.\textsuperscript{211}

Nevertheless, the broad interpretation of corporate rights to political speech that the \textit{Citizens United} Court held will make it very difficult for Congress or state legislatures to put effective controls on money in campaigns, or even adopt effective public financing laws. If the BCRA is to have any effect regulating undue and unfair political influence, then the same government interests in regulating soft money in television advertising should apply to the Internet medium. The strength of disclosure and disclaimer requirements should be enhanced.

\textbf{Part V: Conclusion}

As the 2012 election approaches, the use of social media has become an important medium that every campaign will attempt to utilize in their political message strategy. “Campaigns hoping to lead in 2012 need to look to proven social methods to reach, engage, and motivate supporters with messaging that is true to their brand and ignites conversation within key influencers’ social graphs.”\textsuperscript{212} However, by solely exploiting basic First Amendment cases to support corporations’ rights to political speech and not deciding the case on narrower grounds, \textit{Citizen United} only complicates the fundamental problem of corporations’ increased use of social media to maneuver around disclaimer and disclosure requirements that were left intact by the Court. Moreover, corporations, who wish to be exempted from campaign finance regulation, might not even have to use disclaimers or disclosures by merely calling themselves “media” under the FEC’s lenient 2010 advisory opinion. Social media is another way for corporations to maneuver around disclaimer and disclosure requirements. In order for regulations to begin to

\textsuperscript{211}See \textsc{Facebook}, http://www.facebook.com/facebook (last visited Sept. 30, 2011), \textit{see also} \textsc{Twitter}, http://www.twitter.com/aboutus (Jan. XX, 2011).

counteract the potential for undue influence in political campaigns and preserve the central
government interests that remain in disclosure and disclaimer requirements, two potential
solutions include expanding the BCRA to apply to the internet (to promote transparency in
political campaigns) and to raise the standards of who can invoke the press exemption. The role
of citizen journalists, the social network, and the future of social network regulation concerning
political campaigns remains uncertain until the government interests in making more distinctions
among online disseminators becomes more obvious.