

UCLA

UCLA Public Law & Legal Theory Series

Title

Lessons from the Clash between Campaign Finance Laws and the Blogosphere

Permalink

<https://escholarship.org/uc/item/4nb5t45h>

Journal

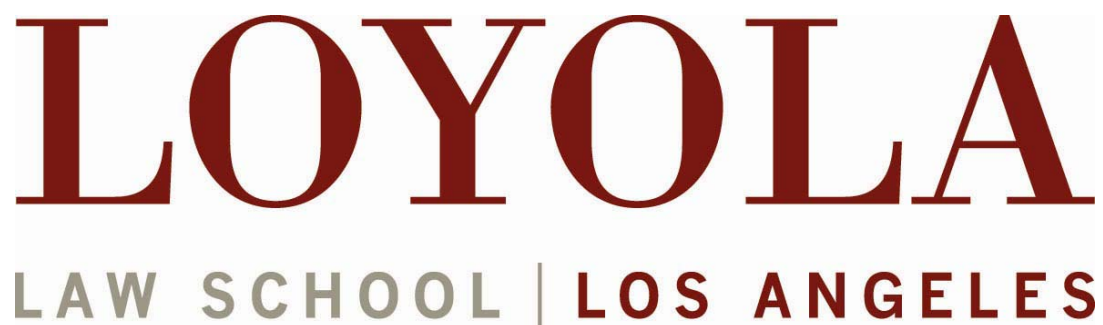
Nexus Law Review, 11(23)

Author

Hasen, Richard L.

Publication Date

2006



Legal Studies Paper No. 2005-24
November 2005

**Lessons from the Clash Between Campaign
Finance Laws and the Blogosphere**

Professor Rick Hasen

This paper can be downloaded without charge from the
Social Science Research Network (SSRN) electronic library at:
<http://ssrn.com/abstract=841386>

Lessons from the Clash Between Campaign Finance Laws and the Blogosphere

Richard L. Hasen*

Introduction

Until recently, Federal Election Commission (FEC) regulations exempted Internet-based election communications from the reach of much campaign finance law. The status quo changed when a federal district court recently held that the FEC must impose some regulations of these communications consistent with Congress's intent in passing the Bipartisan Campaign Reform Act of 2002 ("BCRA," more commonly known as the "McCain-Feingold" law named for its two primary Senate sponsors).¹ The FEC Internet rulemaking sparked a blogstorm of protest,² and as of this writing, the FEC

has not yet promulgated a final rule. Whatever rule the FEC does promulgate is sure to be challenged by some aggrieved party in court, though it is possible that Congress will act first to exempt such communications, or at least attempt to do so, from the ambit of campaign finance laws.

Regardless of the final outcome of this rulemaking, the clash tells us some important things both about the nature of speech in the blogosphere and about the tenability of campaign finance laws in the era of cheap speech and shifting technology. Here are three main lessons that we can draw from observing this

* William H. Hannon Distinguished Professor of Law, Loyola Law School, Los Angeles. Professor Hasen writes the Election Law Blog (electionlawblog.org). As this article went to press, the Federal Election Commission adopted its final rulemaking regarding Internet communications. See <http://www.fec.gov/agenda/2006/mtgdoc06-20.pdf>; A.P., *FEC Won't Regulate Internet Politics*, March 27, 2006 http://www.usatoday.com/news/washington/2006-03-27-fec-internet_x.htm. The FEC's final rules are considerably less regulatory than the draft rules discussed in this article. See Zachary Goldfarb and Thomas B. Edsall, *Proposed FEC Rules Would Exempt Most Political Activity on the Internet*, WASH. POST, Mar. 25, 2006, at A04 < <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/24/AR2006032402012.html> >. It remains to be seen if the rules will be challenged in court or changed by Congress.

NEXUS

clash, and some thoughts on the big picture.

Lesson # 1: The Line Between Blogging and Journalism is Thin Indeed

First, knowledge of some basics about campaign finance law is necessary for understanding many of the issues related to this clash. Roughly speaking, anyone who spends more than a trivial amount of money promoting or opposing candidates for federal office must disclose the spending and the source of the money with the FEC.³ Individuals are limited in how much they can contribute to committees that spend money on federal campaigns, and corporations and unions cannot spend any of their general treasury funds on most election-related speech.⁴ Corporations and unions may set up separate political action committees (or PACs), subject to their own special rules, to pay for such speech.⁵ Media corporations, however, are not subject to these rules to the extent they are producing bona fide news stories and commentaries in a periodical publication or in a broadcast.⁶ Thus, while General Motors and the AFL-CIO cannot use their treasury funds to publish a newspaper or television advertisement urging “Re-elect President Smith,” the “media exemption” allows the *Washington Post* and ABC News to spend their corporate money on news items and editorial content making identical statements about candidate Smith.

Consider now a blogger who is incorporated, perhaps for its advantages in limiting liability. Suppose this blogger

wishes to blog about politics and concentrate her writing about which candidates she prefers (or opposes) for Congress. Under prior law, the Internet was treated as a safe harbor, even if theoretically some of the campaign finance laws could have reached Internet communications had anyone tried.⁷ Without that safe harbor, it appears that not only would the blogger have to file periodic disclosures with the FEC (assuming spending on blog-related activities reaches a certain threshold), but the incorporated blogger’s election-related activities would be illegal corporate spending on federal elections absent some new exemption.⁸

During the FEC rulemaking, bloggers argued for an exemption akin to the media exemption or an exemption for volunteer work.⁹ Indeed, some argued that they already fit into the media exemption on grounds that posts to their blogs constitute “periodical publications.” This claim raises an issue of statutory construction: perhaps a daily website like *Slate* is a periodical publication, but what about a blogger who updates her site irregularly and whose site does not “look” like a periodical the way that *Slate* does?

Putting aside the statutory construction question and thinking only of the question on policy grounds, the bloggers have a point. In a 1990 case, the Supreme Court upheld the constitutionality of a state law providing special exemptions for media corporations from the general limits on corporate election activity because of the media’s “unique societal role” in “informing and educating the public, offering criticism, and providing a forum for discussion and debate.”¹⁰ It is

Richard L. Hasen

hard to seriously contest that political blogs serve these same social purposes today that journalists have served for many years. Why should the *New York Times* get to spend unlimited corporate sums supporting a federal candidate, but a prominent blogger like an Andrew Sullivan or a Hugh Hewitt who is incorporated may not?

Any kind of test to separate political bloggers from newspapers and television news shows seems doomed to failure. Some may contend that journalists are more apt to be “objective” than bloggers (and many disagree with that assessment), but aside from the merits of the objection (which seems patently inapt when discussing newspaper editorials), I see no way to put that kind of objective test into action. Nor does the regularity of publication or the technological means of transmission (print, broadcast, or internet) seem relevant to the question of who should be entitled to the media exemption. If we are to have the exemption, it should be a functional one, and the social function of the press identified by the Supreme Court applies to many blogs as easily as to many newspapers.

Lesson # 2: Many Bloggers View Their Activities as More Worthy of Protection Than Traditional Political Communications, But They Shouldn't

One of the disclosure rules that generally applies outside of the Internet is that public communications related to elections such as campaign mailings or television advertisements must reveal *on*

the face of each communication who paid for it and if it was authorized by any political committee.¹¹ In considering the question of what rules should apply to bloggers, I have proposed that anyone paid by a campaign or committee to blog for or against federal candidates for office should have to disclose that fact on the blog, just like the law requires of communications made through these other media.¹² The recommendation stemmed from reports that two bloggers in South Dakota were paid \$35,000 to support Senate candidate John Thune against incumbent Tom Daschle in the 2004 federal election in South Dakota.¹³

The reaction in the blogosphere to my proposal was swift and negative. Well known liberal blogger Atrios (Duncan Black), for example, wrote that “campaign finance and election laws don’t exist to satisfy Rick Hasen’s desire for people to be able to ‘more easily judge the credibility of a blogger and blog post knowing the person is getting paid to write on the topic.’ That isn’t their purpose.”¹⁴ The more conservative blogger Mickey Kaus was similarly negative: “The burden is way too great, even if there are a few slippery characters around.”¹⁵

Yet far from internet exceptionalism, my call is to treat bloggers the same as everyone else. Further, why is it not the purpose of election laws to allow people to more easily judge the credibility of speakers who advocate the election or defeat of a candidate? That does not satisfy my personal desire, but the desire of the people as expressed through Congress’s decision to pass laws requiring disclosure.¹⁶

NEXUS

Some bloggers call for a right to anonymous campaign speech on the Internet, but the value of such speech is overrated, as anonymous campaign speech is no more honorable than an anonymous phone call or letter.¹⁷ As the Supreme Court has recognized, anonymity should be available in the election context when someone faces threats of harassment or reprisals for supporting unpopular political views.¹⁸ Otherwise, disclosure serves important public purposes and is justified.¹⁹ Nevertheless, my proposal would require disclosure on the face of blog posts only by those few bloggers who are actually on the payrolls of candidates or political committees.²⁰

Just as it is not clear why bloggers should be treated worse than journalists, it is not clear why they should be treated better than everyone else who is paid to create campaign materials. Perhaps the best way to understand the strong negative reaction to my truly modest proposal is that bloggers see any regulation as a camel's nose in the tent, and therefore oppose even modest and helpful disclosure rules.

Lesson # 3: The Convergence of Journalism and Blogging and Internet and Television Will Put Pressure on the Rules Limiting Corporate and Union Participation in the Election Process

The first lesson (it is hard to distinguish journalists and bloggers) suggests that we will soon move to an era when bloggers, or at least some bloggers, get the same exemption as journalists from

spending on election-related speech. But that move threatens to undermine the entire structure of campaign finance law in this country.

When everyone owns the equivalent of a printing press, and everyone is a journalist, what happens to the media exemption? Does it apply to the GM blog, or the AFL-CIO blog, or are we going to draw a line at small or ideological corporations, leaving large corporations and unions (except traditional media corporations) subject to the old rules?

Furthermore, what will happen a few years from now when we receive both our Internet computer access and television signals through the same cable or signal? Is a political program broadcasted or beamed from your favorite (incorporated) environmental group or evangelical organization going to receive the benefit of the media exemption? If GM or the AFL-CIO runs an advertisement touting President Smith's record just before her reelection campaign, and these ads appear on "Internet television" and political blogs, are those to be treated as exempt Internet communications or prohibited broadcast communications?

These hypotheticals demonstrate that the blurring of the blogging-journalism line and the television-internet line can lead to the end of effective corporate and union limits on election-related communication. Congress or the FEC can create laws for today, but as social roles change and technology evolves, it is possible that old laws will become ineffective or have unintended consequences in promoting or preventing certain kinds of election-related speech.

Richard L. Hasen

The Big Picture

In considering how, if at all, Congress or the FEC should regulate political blogging, it is easy to lose sight of the forest for the trees. One could debate, for example, the extent to which blogs and other websites should be treated as “periodical publications” for purposes of the current media exemption. In having such a debate, it would be worth beginning with the recognition that we do not have a working definition of a “blog” that would distinguish it from other kinds of websites run by individuals, groups, or corporations.

A more fruitful approach, however, is to concentrate on the goals of campaign finance regulation and to consider whether certain laws that regulate blogging activities help or hinder those goals (or whether the goals themselves should be rethought).

One of the main goals of campaign finance law is to prevent corruption and the appearance of corruption, which stems from the large contributions given to political candidates or spent on behalf of those candidates.²¹ These dangers of corruption appear relatively small when considering how the blogosphere functions. In the blogosphere, speech is exceptionally cheap, and the danger (or the appearance of the danger) that political votes or other legislative action will be sold to the highest bidder is slim. Rather than presenting a danger of corruption, bloggers can play an important social role in elections by providing information, making persuasive arguments, and organizing voters and contributors for effective

political action.²² These are activities that should be encouraged, not stifled in the name of anticorruption goals.

If this analysis is correct, we should not treat incorporated bloggers who provide news and commentary on election-related activities in the same way that we would treat big business or big labor because the value of what the bloggers provide is high and the danger of corruption is low. Further, we should not adopt the policy the FEC has considered enacting. The FEC has considered limiting a corporate employee’s ability to use corporate-owned computers to blog on a personal (not corporate owned or directed) website to only “occasional, isolated, and incidental” use, while only providing the corporate employee a safe harbor of a measly four hours per month for personal blogging activity.²³ This same analysis does, however, suggest that big business and big labor websites, “blogs” or not, should be subject to the same restrictions placed on their activities in other media. The anticorruption interest remains the same whether or not the Internet is involved.

Though the Supreme Court has sometimes denied it, another goal of campaign finance regulation is to assure some kind of political equality.²⁴ Blogging tends to create political equality rather than hinder it. Because blogospheric speech is so cheap and the quality of the speech is more valuable than the money invested in the speech production, blogging can create an environment in which ideas are more valuable in campaigns than money. For this reason, those people concerned with political equality and the major role that money

NEXUS

has played in political campaigns should support the cheap speech of blogging and not take steps to limit it.

If corruption and equality goals suggest that the government should keep its hands off the blogosphere, the matter should be different when it comes to campaign finance disclosure. By allowing people to follow the money from donors to elected officials' policy decisions, campaign finance disclosure serves an anticorruption rationale.²⁵ As already noted, blogging (at least not by big business and big labor) presents no special danger of corruption or of creating political inequality.²⁶ Further, disclosure serves an important information interest, especially for those busy voters who do not have a lot of time to invest in deciding the candidate deserved of their vote.

Disclosure provides cheap voting cues for voters.²⁷ If an individual is told nothing about two candidates except that one has received contributions from the National Rifle Association's PAC and the other has received contributions from the Sierra Club's PAC, the individual would have a significant amount of information upon which he or she can make a decision. We evaluate candidates and campaign information depending upon who pays for it. It is this information rationale that supports the disclosure of money paid to bloggers through a contemporaneous and clear form of disclosure that allows the reader to know that the information he or she reads on a blog or other website might be colored by money from a candidate.

As Mickey Kaus has intimated, this information is valuable to all voters and

is not too burdensome to provide, as is also evident in the archive of left-leaning blog Daily Kos from the 2004 election season.²⁸ In the top left corner in clear type the blog states: "Disclosure: I do some technical work for Howard Dean."²⁹ Further, on my own website, electionlawblog.org, I have a section on the main page of my blog disclosing my role in some election litigation.³⁰ I also endeavor to repeat that disclosure every time I blog on an issue about which I have a stake in the litigation. This information serves a valuable purpose in helping readers evaluate any possible bias in the blog posts.

If we structured our campaign finance system to prevent corruption, promote equality, and provide valuable information to voters, we would do little to limit the political activities of bloggers, but we would impose some sensible disclosure rules. In implementing regulations to meet these goals, we should be aware that the new sensible exemptions for blogging today may have unintended and far-reaching consequences tomorrow.

Notes

1 Shays v. FEC, 337 F.Supp.2d 28, 65-70 (D.C. 2004).

2 See Richard Hasen, *Should the FEC Regulate Political Blogging?*, PERSONAL DEMOCRACY FORUM, March 7, 2005, <http://www.personaldemocracy.com/node/416>.

3 See generally DANIEL H. LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW—CASES AND MATERIALS (3d ed. 2004) (providing a more formal introduction to these issues). Campaign finance law is quite complicated, and this quick sketch leaves out a great deal of nuance.

4 *Id.* at 761-96.

5 *Id.*

6 See generally *id.*

Richard L. Hasen

7 See GROSSMAN, MATT ET AL., *Square Pegs & Rounds Holes: Applying Campaign Finance Law to the Internet—Risks to Free Expression & Democratic Values*, CENTER FOR DEMOCRACY & TECHNOLOGY, October 1999, <http://www.cdt.org/speech/political/financereport.shtml>.

8 See *supra* n.3. In addition, some incorporated bloggers might argue that they are entitled to an exemption from expenditure limits available to certain non-profit ideological corporations (the so-called MCFL exemption). Bloggers who take paid advertising, however, may not be able to take advantage of this exemption.

9 See, e.g., Brian Faler, *FEC Hears Bloggers' Bid to Share Media Exemption*, THE WASHINGTON POST, July 12, 2005, at A19.

10 Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 667-668 (1990).

11 See generally *supra* n.3.

12 Hasen, *supra* note 2.

13 Jan Frel, *Daschle, Thune, and the Blog-Storming of South Dakota*, PERSONAL DEMOCRACY FORUM, February 22, 2005, <http://www.personaldemocracy.com/node/378>.

14 Duncan Black, *Why Bloggers*, ESCHATON, April 6, 2005, http://atrios.blogspot.com/2005_04_03_atrios_archive.html#111280968926729057.

15 Mickey Kaus, *Kausfiles – A Mostly Political Weblog*, SLATE, April 8, 2005, <http://slate.com/id/2116317/#hasen>.

16 See generally *supra* n.3.

17 McIntyre v. Ohio Election Commission, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting).

18 Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 94 n. 9 (1982).

19 See Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Express Advocacy*, 3 ELECT. L.J. 251 (2004) (explaining that the law regarding when the First Amendment creates a right to anonymous campaign speech remains muddled).

20 Additional questions arise if bloggers are not on the regular "payroll," as contractors or employees of political committees, but instead receive significant advertising revenue from these committees or simply a "Paypal" donation for work done that benefits the committee.

21 Buckley v. Valeo, 424 U.S. 1, 25-26 (1976); see also Karen Griffin Kaldahl, *A Short History of the Bipartisan Campaign Reform Act of 2001*, 71 MISS. L.J. 275, 285 (2001).

22 Seth Grossman, *Creating Competitive and Informative Campaigns: A Comprehensive Approach to "Free Air Time" for Political Candidates*, 22 YALE L. & POL'Y REV. 351, 385-387 (Spring 2004).

23 See Alison R. Hayward, *It's Getting Hot (Heated) in Here: The FEC's Internet Summer*, PERSONAL DEMOCRACY FORUM, June 16, 2005, <http://www.personaldemocracy.com/node/645> (providing a critical look at this provision and others proposed in the FEC's rulemaking).

24 Daniel Ortiz, *Law and the Political Process: The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 900 (1998); see also Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, at 23 (Oct. 17, 1996) (book review).

25 Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 202 (1999).

26 Grossman, *supra* note 22.

27 See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 UCLA L. REV. 1141 (2003).

28 Archive of Daily Kos, http://www.dailykos.net/archives/cat_elections.html (last visited March 11, 2006).

29 Daily Kos, <http://www.dailykos.net> (last visited March 11, 2006).

30 Richard Hasen, www.electionlawblog.org.

