A Medium-Specific First Amendment Analysis on Compelled Campaign Finance Disclosure on the Internet

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I. INTRODUCTION

In the wake of growing public concern over Russian attempts to influence the 2016 presidential election, Senators Mark Warner, John McCain, and Amy Klobuchar introduced the Honest Ads Act (the "Act") on October 19, 2017.[1] The Act's primary goal is to "enhance transparency and accountability for online political advertisements by requiring those who purchase and publish such ads to disclose information about the advertisements to the public."[2] The Act would begin by closing cavernous regulatory loopholes regarding political advertising by extending "electioneering communications" and reporting requirements for political advertising to paid political ads on the Internet.[3] Online platforms, such as Facebook, Twitter, Google, and other social media sites would be responsible for making "reasonable efforts" to make sure political ads sold on these platforms were "not purchased by a foreign national."[4] Platforms would also be required to maintain a searchable database of political advertisements that were bought for over $500.[5]

Social media giants and online platforms were predictably slow to come to terms with their ancillary, yet fundamental, role in Russian meddling in the 2016 presidential election. Mark Zuckerberg's initial reaction to public concern over Facebook's role in spreading "fake news" was flippant, publicly stating that it is a "pretty crazy idea" that fake news on Facebook "influenced the election in any way."[6] Social media platforms and First Amendment advocates often raise freedom of speech and privacy concerns if there is

1. Maryland has passed similar legislation, called the Online Electioneering Transparency and Accountability Act, in 2017. The constitutionality of the law is currently being litigated in federal court. *See* Washington Post v. McManus, No. PWG-18-2527 (D. Md. Jan. 3, 2019) (enjoining Maryland election officials from enforcing the law and concluding that plaintiffs are likely to succeed on their First Amendment claim).

2. S. 1989, 155th Cong. (2017).

3. *Id.* at § 6.

4. *Id.* at § 9; *see also* Senator Mark R. Warner, *The Honest Ads Act*, https://www.warner.senate.gov/public/index.cfm?p=the-honest-ads-act [https://perma.cc/6XA4-B4WG].

5. S. 1989 § 8.

6. Will Oremus, *Mark Zuckerberg Says Fake News on Facebook Had "No Impact" on the Election*, SLATE (Nov. 10, 2016, 10:31 PM), http://www.slate.com/blogs/future_tense/2016/11/10/mark_zuckerberg_says_fake_news_on_facebook_had_no_impact_on_election.html [https://perma.cc/8JLZ-N465]. Responding to subsequent public backlash and pressure from Washington, social media companies have recognized their role in Russian efforts to influence U.S. elections and have taken a more active role in preventing the dissemination of false news on their platforms. Taylor Hatmaker, *Twitter endorses Honest Ads Act, a bill promoting the political ad transparency*, TECH CRUNCH (Apr. 10, 2018), https://techcrunch.com/2018/04/10/twitter-honest-ads-act/ [https://perma.cc/A3Q2-LBDQ].

momentum in Washington to impose regulations on the Internet.[7] Specifically, they argue that these platforms are not considered public entities—like television and radio—and therefore have not been given licenses from the government and cannot be compelled to comply with the same public record requirements. Moreover, online platforms are wary of lifting the veil on anonymous speech online and of liability, should they fail to meet the reporting requirements of the Act: "Facebook . . . has long been concerned about assuming any sort of media watchdog role and the company's objection usually takes the form . . . of its well-worn argument that Facebook is a technology company, not a media company."[8]

However, this Note argues that the unique nature of the Internet justifies the government's regulation of online campaign finance disclosure because of its substantial role in public discourse. Furthermore, closing regulatory loopholes to "ensure political ads sold online are covered by the same rules as TV or radio stations" should not automatically trigger constitutional suspicion.[9] A medium-specific First Amendment analysis of the Internet is appropriate because the Supreme Court has historically used such analyses for other mediums of communication and therefore, this is generally consistent with First Amendment jurisprudence.[10] Furthermore, because the Supreme Court has centered its analysis on the physical characteristics and technology of the medium at hand,[11] a medium-specific analysis illuminates the ways in which the Court has resolved and distinguished the constitutional issues that stem from government regulation.

Section II will present background information, including an overview of campaign finance law, Supreme Court decisions upholding the constitutionality of disclosure requirements in campaign finance laws as they relate to the First Amendment, and sponsorship identification requirements imposed by the FCC for political ads on radio, television, and satellite broadcasting. Section III will compare the Supreme Court's treatment of broadcasting with other mediums of communication. Section IV will apply the rationales from previous medium-specific analyses by the Supreme Court and determine if they apply to the Internet. Section IV will also consider additional constitutional issues that are applicable in campaign finance law,

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7. *See* Jack Denton, *Can the Honest Ads Act Fix Facebook?*, PACIFIC STANDARD (Nov. 14, 2017), https://psmag.com/news/can-the-honest-ads-act-fix-facebook [https://perma.cc/WH6A-MRXL]; Tony Romm, *Tech giants support more political ad transparency–but aren't embracing a new bill by the U.S. Senate*, RECODE (Oct. 31, 2017), https://www.recode.net/2017/10/31/16579880/facebook-google-twitter-honest-ads-act-political-ads-russia [https://perma.cc/45BN-VRC7].

8. Charlie Warzel, *How People Inside Facebook Are Reacting To The Company's Election Crisis*, BUZZFEED NEWS (Oct. 20, 2017, 11:03 AM), https://www.buzzfeed.com/charliewarzel/how-people-inside-facebook-are-reacting-to-the-companys?utm_term=.yx7mRj5aj#.dtBJ3AoBA [https://perma.cc/3LQH-5YVM].

9. Press Release, Mark R. Warner, Warner, Klobuchar, McCain Introduce Legislation to Improve National Security and Protect Integrity of U.S. Elections by Bringing Transparency and Accountability to Online Political Ads (Oct. 19, 2017), https://www.warner.senate.gov/public/index.cfm/2017/10/klobuchar-warner-mccain-introduce-legislation-to-improve-national-security-and-protect-integrity-of-u-s-elections-by-bringing-transparency-and-accountability-to-online-political-ads [https://perma.cc/3ZZ2-YFZR].

10. *See* discussion *infra* Section III.

11. *See* discussion *infra* Section III.

such as the government's compelling interests in national security under First Amendment strict scrutiny.

II. BACKGROUND

The federal government regulates campaign finance disclosure in two ways: through the Federal Elections Commission ("FEC") reporting requirements under the Federal Election Campaign Act and through FCC sponsorship identification requirements for paid political ads aired on radio, broadcast television, and cable.

A. The Supreme Court Has Consistently Upheld the Constitutionality of Disclosure Requirements for Paid Political Advertising

The Federal Election Campaign Act ("FECA"), enacted in 1971, was Congress's first attempt at comprehensive campaign finance reform.[12] Almost immediately after the 1974 Amendments (which created the FEC),[13] various candidates running for federal office, as well as political parties and organizations, brought a constitutional challenge to the law in *Buckley v. Valeo*.[14] Plaintiffs challenged the limits on contributions and expenditures following the 1974 FECA amendments on the grounds that they violated the First Amendment, and the Supreme Court agreed.[15] However, the Court focused a substantial amount of its opinion on the constitutionality of the FECA disclosure requirements, which the Court upheld.[16] Under a strict scrutiny analysis, laws burdening speech are only upheld if the law furthers a compelling government interest and is narrowly tailored to achieve that interest.[17] The Court articulated three government interests for mandatory disclosure:

12. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-51).

13. FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (amending FECA, 86 Stat. 3).

14. Buckley v. Valeo, 424 U.S. 1 (1976).

15. *See id*. at 52; *see also* Vitaliy Kats, Note, *Because, the Internet: The Limits of Online Campaign Finance Disclosure*, 67 FLA. L. REV. 1513, 1515 (2016) [hereinafter Kats].

16. *Buckley*, 424 U.S. at 68; Kats, *supra* note 15, at 1515.

17. FEC v. Wis. Right to Life, Inc., 551 U.S. 447, 451 (2007).

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office . . .
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity . . . A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return . . . Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.[18]

The Court declared that FECA's disclosure requirement was not per se unconstitutional because compulsory disclosure was required only if the communications "expressly advocate[d] the election or defeat of a clearly identified candidate."[19] Most notably, the *Buckley* Court articulated that disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption."[20]

However, after *Buckley*, the influence of money continued to be a prominent feature of federal elections, as an increase in "soft money" ads in campaigns and issue advocacy—which was not covered under FECA—skyrocketed.[21] The Bipartisan Campaign Reform Act of 2002 ("BCRA")[22] sought to close these loopholes by banning soft money and expanding disclosure requirements to corporations, individuals, and unions that fund "electioneering communications."[23] BCRA defines electioneering communications as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate" made 60 days before a general election, or 30 days before a primary election and "is targeted to the relevant electorate."[24] This statutory term constitutes a narrower and clearer definition of communications that expressly advocate for the election or defeat of a

18. *Buckley*, 424 U.S. at 66-68 (internal quotations and citations omitted).
19. *Id.* at 80.
20. *Id.* at 68.
21. Kats, *supra* note 15, at 1515. Soft money is defined as "money in federal elections that would otherwise be illegal, such as direct corporate or union contributions or contributions in excess of legal limits" under FECA, often used for funding "party building" activities. Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL'Y REV. 235, 242 (2004). Issue advocacy ads are ads that do not "in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 239 (quoting *Buckley*, 424 U.S. at 44).
22. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 12 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.). Also commonly known as the McCain-Feingold Act.
23. *Id.*
24. 52 U.S.C. § 30104(f)(3)(A)(i)(I–III).

candidate than the *Buckley* Court prescribed.[25] The Supreme Court upheld the constitutionality of the expanded disclosure requirements in a facial challenge against the BCRA in *McConnell v. FEC*, citing the same compelling government interests as it did in *Buckley*.[26]

B. Citizens United and Its Progeny Have Upheld the Constitutionality of the Disclaimer and Disclosure Provisions of the BCRA

Citizens United sparked fierce debate over the role of money in politics, with critics correctly predicting enormous amounts of corporate contributions and spending in future elections.[27] Citizens United, a nonprofit corporation, challenged provisions of the BCRA that prohibited corporations and unions from using treasury funds for speech that qualifies as electioneering communications.[28] The Supreme Court held that the government cannot suppress speech on the basis of the speaker's corporate identity and therefore, the FECA provision barring independent corporate expenditures for electioneering communications violated the First Amendment.[29] Conservative Judge Richard Posner criticized the Court's decision, stating that "[o]ur political system is pervasively corrupt due to our Supreme Court taking away campaign-contribution restrictions on the basis of the First Amendment."[30] Campaign finance reformers have called the decision "an

25. McConnell v. FEC, 540 U.S. 93, 170 (2003).

26. *Id.* at 201–02.

27. Report on *Citizens United v. Federal Election Commission*, Center for Responsive Politics, https://www.opensecrets.org/news/reports/citizens_united.php [https://perma.cc/BE5V-DBDQ]. ("The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission* helped unleash unprecedented amounts of outside spending in the 2010 and 2012 election cycles. The case, along with other legal developments, spawned the creation of super PACs, which can accept unlimited contributions from corporate and union treasuries, as well as from individuals; these groups spent more than $800 million in the 2012 election cycle. It also triggered a boom in political activity by tax-exempt 'dark money' organizations that don't have to disclose their donors.").

28. Citizens United v. FEC, 558 U.S. 310, 318, 321 (2010).

29. *Id.* at 365.

30. James Warren, *Richard Posner Bashes Supreme Court's Citizens United Ruling*, THE DAILY BEAST (July 14, 2012, 5:40 PM), https://www.thedailybeast.com/richard-posner-bashes-supreme-courts-citizens-united-ruling [https://perma.cc/2HL9-ADWU].

unmitigated disaster for the country."[31] Former President Barack Obama has also publicly criticized the decision on multiple occasions.[32]

However, in a small and often overlooked part of the decision, the Supreme Court held that the disclaimer and disclosure provisions of the BCRA did not violate the First Amendment, as applied to the appellant nonprofit corporation's film and three advertisements for the film.[33] While the Court struck down the BCRA's prohibition of corporate independent expenditures as an "outright ban on corporate political speech" and therefore a violation of the First Amendment, [34] Justice Kennedy recognized the importance of campaign finance disclosure, stating that "[d]isclosure is the less restrictive alternative to more comprehensive speech regulations," which have been upheld in *Buckley* and *McConnell*.[35] Furthermore,

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters . . . The First Amendment protects political speech; and 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 and messages.[36]

Chief Justice Roberts expanded on Justice Kennedy's emphasis on the importance of disclosure requirements and transparency in *McCutcheon v. FEC*, stating that "[t]oday, given the Internet, disclosure offers much more robust protections against corruption" and "[b]ecause massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided."[37]

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31. Fred Wertheimer, *Citizens United Has Been A Disaster For The Country*, HUFFINGTON POST (Oct. 20, 2017, 9:45 AM), https://www.huffingtonpost.com/entry/citizens-united-has-been-a-disaster-for-the-country_us_59e9fd50e4b032f98fa30cf7 [https://perma.cc/GP53-2YM9].

32. *See* Ashley Alman, *Barack Obama: 'The* Citizens United *Decision Was Wrong'*, HUFFINGTON POST (Jan. 21, 2015, 2:22 PM), https://www.huffingtonpost.com/2015/01/21/barack-obama-citizens-united_n_6517520.html [https://perma.cc/37RQ-8KKR] ("The *Citizens United* decision was wrong, and it has caused real harm to our democracy."); Lyle Denniston, *Analysis: A New Law to Offset Citizens United?*, SCOTUSBLOG (Jan. 21, 2010, 4:00 PM), http://www.scotusblog.com/2010/01/analysis-a-new-law-to-offset-citizens-united/ [https://perma.cc/5J8D-UQFL] (quoting President Obama's statement that *Citizens United* "has given a green light to a new stampede of special interest money in our politics").

33. *Citizens United*, 558 U.S. at 371.

34. *Id.* at 360.

35. *Id.* at 368.

36. *Id.* at 370–71.

37. McCutcheon v. FEC, 572 U.S. 185, 224 (2014).

C. Federal Courts Have Been Wary of the FCC's Sponsorship Identification Requirements for Radio, Broadcast Television, and Cable, Particularly the "Reasonable Diligence" Duty

1. Early Developments of FCC Sponsorship Identification Requirements

Broadcasters have been subject to sponsorship-identification requirements since the Radio Act of 1927:[38]

> "All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation."[39]

The Communications Act of 1934 adopted essentially the same sponsorship identification requirements in Section 17 for both radio and television, and the FCC adopted similar rules for cable programming in 1969. [40] The FCC's own promulgation of sponsorship identification regulations impose three general duties: (1) broadcasters must make a general announcement for content aired in exchange of money or other consideration of who paid for the content; (2) broadcasters must "exercise reasonable diligence to obtain from [their] employees" information necessary for the sponsorship announcement, and broadcasters cannot simply take information blindly without further investigation; and (3) broadcasters must "fully and fairly disclose the true identity of the person or persons . . . or any other entity by whom or on whose behalf [payment or consideration for the advertisement] is made."[41]

The FCC has traditionally paid particular attention to sponsorship identification ads and has extended these three general duties on broadcasters for paid political advertisements:[42]

38. Radio Act of 1927, Pub. L. No. 69-632, § 19; Lili Levi, *Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. U. L. REV. 97, 130 (2011) [hereinafter Levi, *Plan B*].

39. Radio Act of 1927 § 19.

40. The Communications Act of 1934, 47 U.S.C. § 317 (2012); 47 C.F.R. § 76.1615.

41. 47 C.F.R. § 73.1212 (2012).

42. *See* Levi, *Plan B*, *supra* note 38 (describing various examples of how the FCC is particularly aware of the need to regulate and enforce its sponsorship identification requirements).

> In the case of any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance for which any film, record, transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast on which such material or service is used that such film, record, transcription, talent, script, or other material or service has been furnished to such station in connection with the transmission of such broadcast matter.[43]

Furthermore, when the FCC imposed the "true identity" requirement on broadcasters when amending the sponsorship identification rules in 1975, it made its intent clear:

> [W]here a political broadcast is presented, promoting one candidate directly or through criticism of his opponent, by a committee which is really a campaign instrumentality for a candidate or a political organization, the public should be made plainly aware of the latter fact. The public's basic right to know by whom it is being informed, particularly as to a political matter or controversial public issue, is too basic to need lengthy discussion here.[44]

Loveday v. FCC, decided eight years after the 1975 amendments, was a significant case that involved the scope of the true identify requirement imposed from these regulations.[45] In response to a public complaint, the FCC investigated whether broadcast stations should have identified the tobacco industry as the true sponsor and the source of funds behind political advertisements by Californians Against Regulatory Excess ("CARE"), a political action committee ("PAC") that opposed a state ballot measure to limit public cigarette smoking.[46] The FCC determined that the broadcasters had acted with reasonable diligence to identify the sponsor of the ads and were not required to investigate more diligently the petitioner's claims that members of the tobacco industry were the true sponsors of the ad.[47]

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43. 47 C.F.R. § 73.1212(d) (2012).

44. Amendment of the Commission's Sponsorship Identification Rules, 52 F.C.C.2d 701, 703 (1975); Sushma Raju, Note, *The FCC's Abandonment of Sponsorship Identification Regulation & Anonymous Special Interest Group Political Advertising*, 93 WASH. U. L. REV. 1103, 1112 (2016) (explaining the history and scope of § 317 of the Communications Act with regard to paid political advertising).

45. Loveday v. FCC, 707 F.2d 1443 (D.C. Cir. 1983).

46. *See id.* at 1445.

47. *Id.* ("[T]he licensees were not required to inquire further into the actual sponsorship of the political advertisements. Indeed, we have substantial doubt that the [FCC] could require licensees to do more.").

The D.C. Circuit affirmed that the broadcast stations did not violate the sponsorship identification provisions of the Communications Act.[48] The court reasoned that "[a] duty to undertake an arduous investigation ought not casually be assigned to broadcasters" and would create administrative[49] and constitutional complications.[50] The court expressed concerns that the invasive nature of this kind of diligent investigative duty on broadcasters would create First Amendment concerns because it would delay political speech by placing an excessive burden on broadcasters to investigate the true sponsors of political ads.[51] Furthermore, the court held this investigative duty would chill political speech because PACs such as CARE may choose not to air ads to avoid regulatory requirements to discover the true identity of sponsors.[52] The court also took notice of Supreme Court precedents that indicated broadcasting receives limited First Amendment protection compared to print media because "[t]he rationale that applies most forcefully in the present context would seem to be the scarcity of available frequencies on the broadcast spectrum," suggesting a flair of a medium-specific rationale that this Note will delve further into.[53]

2. Additional Disclosure Requirements, Yet a Lack of Enforcement

In 1991, the FCC required additional public-file requirements for broadcasters because of its sensitivity to the importance of disclosing political advertisements.[54] Stations must maintain a public file of information about aired political ads that is accessible to individuals and interested parties.[55] Stations, in addition to making the announcement of who paid for the political ad, must make public "a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity."[56]

Since *Loveday*, the FCC has retreated on its enforcement of the sponsorship identification regulations.[57] In 2014, several media watchdog

48. *Id.* at 1460. The court noted that 98% of the funding for CARE came from tobacco industries. *Id.* at 1445-46, n.1.

49. The court wrote that this kind of duty would create an "administrative quagmire" because the amount of resources and personnel vary greatly among broadcasters to conduct a more searching investigation into the true sponsors of political advertisements. *Id.* at 1457.

50. *Id.* at 1449.

51. *Id.* at 1457.

52. *See id.* at 1459 ("Nonetheless, even in broadcasting where the law's attempt to discover the true utterers of political messages becomes so intrusive and burdensome that it threatens to silence or make ineffective the speech in question, the law presses into areas which the guarantee of free speech makes at least problematic.").

53. *Id.* at 1458 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.") (quoting FCC v. Pacifica Foundation, 438 U.S. 883, 748 (1978)).

54. Codification of the Commission's Political Programming Policies, *Report and Order*, 7 FCC Rcd No. 2, paras. 39-41, 45 (1991).

55. 47 C.F.R. § 73.1212(e) (2012).

56. *Id.*

57. *See* Raju, *supra* note 44, at 1122.

groups filed complaints against two television stations which broadcasted ads funded by super PACS[58] but failed to disclose the true identity of individuals who funded the super PACS.[59] The FCC did not initiate enforcement and concluded that the evidence presented by the watchdog groups was not "sufficient [enough to show] that the station had credible evidence casting into doubt that the identified sponsors of the advertisements were the true sponsors"[60] and cited the "sensitive First Amendment interests present."[61]

III. EXAMPLES OF MEDIUM-SPECIFIC ANALYSES

A. The First Amendment Effects of the Scarcity of Spectrum, the Role of Gatekeepers, and Editorial Discretion

1. Broadcast: *Red Lion*, *Pacifica*, and the Scarcity Rational

The rationale historically relied upon by the FCC and the Supreme Court to distinguish radio and broadcasting from other mediums of communications under the First Amendment is the scarcity rationale. Under this rationale, courts have reasoned that government restrictions on speech are justified because the electromagnetic spectrum is limited.[62] In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court upheld the constitutionality of

58. A super PAC "may raise unlimited sums of money from corporations, unions, associations and individuals, then spend unlimited sums to overtly advocate for or against political candidates. Unlike traditional PACs, super PACs are prohibited from donating money directly to political candidates, and their spending must not be coordinated with that of the candidates they benefit." Center for Responsive Politics, *Super PACS*, https://www.opensecrets.org/pacs/superpacs.php [https://perma.cc/CKF5-CV7F].

59. Compl. of Campaign Legal Ctr. et al., Against ACC Licensee, LLC, MB 12-203 (July 17, 2014); Compl. of Campaign Legal Ctr. et al., Against Sander Media, LLC, MB 13-203 (July 17, 2014).

60. Compl. Against ACC Licensee, LLC & Sander Media, LLC, Letter, DA 14-1267, 29 FCC Rcd 10427, 10427-28 (Media Bur. 2014).

61. Letter from Robert L. Baker, Assistant Chief, Policy Division of Media Bureau, FCC, to Andrew Jay Schwartzman, Attorney, Inst. for Pub. Representation (Sept. 2, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1267A1.pdf; Raju, *supra* note 44, at 1124.

62. *See* FCC v. Pacifica Foundation, 438 U.S. 726, 731, n. 2 (1978) ("[T]here is a scarcity of spectrum space, the use of which the government must therefore license in the public interest."); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) ("Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants"); Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1943) ("Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.").

the fairness requirement of the Communications Act, which requires radio and TV broadcasters to present fair and balanced coverage of public issues.[63]

Justice White concluded that broadcast frequencies were a "scarce resource," a characteristic of the medium that is constitutionally significant enough to "justify differences in the First Amendment standards."[64] Justice White compared the use of broadcast equipment to the "ability of new technology to produce sounds more raucous than that of the human voice," which justifies government restrictions on this "sound-amplifying equipment" to limit the use of the technology to drown other forms of private, free speech.[65] Thus, the FCC's extensive regulations on broadcasters (among others, who are granted licenses to operate by the FCC) are constitutional because these regulations are in the public interest to give equal opportunity for the discussion of both sides of issues of public importance.[66] Content-based regulations of broadcasting fall under less rigorous scrutiny than that of other modes of communications, in which a regulation is constitutionally permissible if it is reasonably related to some legitimate public interest.[67]

In *FCC v. Pacifica*, the Supreme Court also applied a less rigorous form of scrutiny to broadcast media and upheld the FCC's determination that the language of a broadcast monologue was indecent and not "censorship" within the meaning of the Communications Act of 1934.[68] Justice Stevens emphasized that the Court has "long recognized that each medium of expression presents special First Amendment problems" and articulated that out of all forms of media, broadcasting is afforded the most limited First Amendment protection.[69] Justice Stevens offered two novel distinctions of broadcasting from all other forms of communications that were relevant to the case, in addition to the scarcity rationale.[70] First, broadcast media is a "uniquely pervasive presence in the lives of all Americans."[71] Second, it is "uniquely accessible to children,"[72] and the Court had previously recognized the "government's interest in the 'well-being of its youth.'"[73] Prior to *Pacifica*, the Supreme Court had never held that either of these characteristics were constitutionally unique enough to generally render a medium subject to less First Amendment protection than other modes of communication.[74]

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63. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 387-90 (1969). The fairness doctrine was repealed by the FCC in 1987, despite the Supreme Court upholding its constitutionality in *Red Lion*. *See generally*, KATHLEEN ANN RUANE, CONG. RES. SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES (2011).

64. *Id.* at 376, 386.

65. *Id.* at 387.

66. *Id.* at 381.

67. *See id.* at 390.

68. FCC v. Pacifica Foundation, 438 U.S. 750 (1978).

69. *Id.* at 748.

70. *Id.* at 748-49.

71. *Id.* at 748 (citing Rowan v. United States Post Office Dep't., 397 U.S. 728 (1970)).

72. *Id.* at 749.

73. *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 640 (1968)).

74. *See* David A. Levy, Comment, *FCC v. Pacifica Foundation*, 7 HOFSTRA L. REV. 781, 797 (1979).

2. Cable and Print: Editorial Discretion as a Factor in a Medium-Specific Analysis

The Supreme Court made distinctions between cable providers and broadcast television in *Turner Broadcasting Systems, Inc. v. FCC*.[75] The Court was unable to reach a consensus on the constitutionality of must-carry rules for cable providers, which required carriage of local broadcast stations on cable systems.[76] However, eight Justices rejected the government's argument that the same First Amendment scrutiny the Court formulated in *Red Lion* should apply similarly to cable.[77] The Court recognized that unlike broadcast television, cable does not inherently have a limited number of speakers who can use the medium and declined to apply the "more relaxed standard of scrutiny adopted in *Red Lion* and other broadcast cases" based solely on the different physical characteristics of cable.[78] While the Court recognized criticisms of the scarcity rationale, it still rejected the government's argument that broadcast and cable providers both possess economic characteristics that make them subject to "market dysfunction" and determined that the must-carry obligations imposed on cable providers are more of an "industry-specific antitrust legislation."[79]

Moreover, the Supreme Court articulated that cable operators are gatekeepers "over most (if not all) of the television programming that is channeled into the subscriber's home" and therefore, have the ability to "silence the voice of competing speakers . . . with a mere flick of the switch."[80] Thus, the must-carry provisions of the Cable Act of 1992 were subject to *O'Brien* intermediate scrutiny, in which content-neutral government regulation that imposes an incidental burden on speech is upheld if "it furthers an important or substantial governmental interest," rather than a compelling state interest that strict scrutiny requires.[81] However, the Court's application of intermediate scrutiny for cable providers suggests that like broadcast, cable operators also have limited First Amendment protection because of the limited amount of operators who are able to regulate televised images to their subscribers.[82]

As *Turner Broadcasting* suggests, *Red Lion* is an anomaly that deviates from traditional forms of First Amendment scrutiny applied to other mediums

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75. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

76. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 U.S.C.).

77. *See Turner Broad. Sys., Inc.*, 512 U.S. at 638–39; *see also* Laurence H. Winer, *The Red Lion of Cable, and beyond–Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT. L.J. 1, 21 (1997).

78. *Turner Broad. Sys., Inc.*, 512 U.S. at 639 (citation omitted).

79. *Id.* at 639, 640.

80. *Id.* at 656.

81. *Turner Broad. Sys., Inc.*, 512 U.S. at 662 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)) (internal quotation marks omitted).

82. *See id.* at 637; *see also* Ronald W. Adelman, Essay, *Turner Broadcasting and the Bottleneck Analogy: Are Cable Television Operators Gatekeepers of Speech?*, 49 S.M.U. L. REV. 1549, 1552 (1996) [hereinafter Adelman].

of communication.[83] Indeed, the Court has repeatedly stressed that its holding in *Red Lion* is only applicable to regulations on broadcast.[84] In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a Florida statute that gave political candidates the right to reply to criticism from the press, holding that the statute was an impermissible government regulation under the First Amendment because it intruded on an essential function of the press to be "surrogates for the public":[85]

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[86]

Curiously, the Supreme Court did not cite *Red Lion* in its decision in *Tornillo*, although both cases involved a statutory right to reply.[87] However, the Court in *Tornillo* appeared to rest its decision on the fact that freedom of the press enjoys a more historic tradition than regulations on broadcast television, a relatively new medium of communication.[88] The Court noted that it has exempted the press from antitrust laws because "by virtue of the First Amendment"[89] because there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open" [90] despite the monopolistic control of the press. Furthermore, government intervention in editorial decisions is incompatible with the First Amendment, whereas in broadcast, the government acts as a gatekeeper and gives licenses for broadcasters on select channels.[91]

The Supreme Court has applied a more relaxed level of scrutiny to government regulations on broadcast, while the Court has applied traditional strict scrutiny to regulations on print media because of the historical tradition of freedom of the press and the physicality of those mediums of

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83. *See* Miami Herald Publ'n Co. v. Tornillo, 418 U.S. 241 (1974); Henry Geller, *Turner Broadcasting, the First Amendment, and the New Electronic Delivery Systems*, 1 MICH. TELECOMM. & TECH. L. REV. 1, 1 (1995) [hereinafter Geller].

84. *See, e.g.*, Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983) ("Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.").

85. *Tornillo*, 418 U.S. at 251.

86. *Id.* at 258.

87. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 370-71 (1969); *id.* at 247.

88. *See Tornillo*, 418 U.S. at 248-49.

89. *Id.* at 252 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

90. *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

91. *See* Geller, *supra* note 83, at 5.

communications. Thus, medium-specific analysis is not wholly novel to First Amendment jurisprudence.

IV. CONSTITUTIONAL CONSIDERATIONS FOR A MEDIUM-SPECIFIC ANALYSIS ON CAMPAIGN FINANCE DISCLOSURE FOR ONLINE POLITICAL ADS

The Internet is perhaps the most participatory form of mass speech ever developed. It has enabled better forms of communication through social networking, instant messaging, emailing, and online forums.[92] It allows consumers to communicate with potentially billions of users, unlike any other medium of communication,[93] and its communicative impacts have sparked social and cultural movements.[94] Nearly 68% of all U.S. adults use Facebook, and more than half of online U.S. adults use more than one of the five major social media platforms (Facebook, Twitter, Instagram, Pinterest, and LinkedIn).[95] Skepticism of government regulation on the ever-evolving communicative capabilities of the Internet ignores the realities of laws impacting other mediums of speech and the societal implications of a readily accessible, largely egalitarian mode of communication. Moreover, critics of government regulation on the Internet underestimate its influence on

92. *See* Seth Masket, *Don't fear the network: the internet is changing the way we communicate for the better*, PACIFIC STANDARD (June 2, 2014), https://psmag.com/environment/networks-changed-social-media-internet-communication-82554 [https://perma.cc/2BDJ-SK2V].

93. *See generally The Rise of the Internet*, IBM 100, http://www-03.ibm.com/ibm/history/ibm100/us/en/icons/internetrise/impacts/ [https://perma.cc/QZW7-5DAQ] (last visited Mar. 6, 2018).

94. *See*, *e.g.*, David Cary, *For #MeToo movement, a mixed reception in nations outside of US*, AP NEWS (Mar. 6. 2018), https://apnews.com/e16f5ff6c97e438b92b4ef4a80a24197/MeToo's-global-impact:-Big-in-some-places,-scanty-in-others?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosam&stream=top-stories [https://perma.cc/NKX2-HM9L] ("Thanks to the vast reach of social media and the prevalence of sexual misconduct in virtually every society, the #MeToo movement has proven itself a genuinely global phenomenon," although "no nation has experienced anything close to the developments in the United States, the movement's birthplace."); Samantha Schuyler, *Students Aren't Waiting for March or April. They're Protesting Now*, THE NATION (Mar. 5, 2018), https://www.thenation.com/article/students-arent-waiting-for-march-or-april-theyre-protesting-now/ [https://perma.cc/597M-N2AQ?type=image] (describing the use of social media in organizing national protests in support of gun reform legislation).

95. Shannon Greenwood et. al., *Social Media Update 2016*, PEW RES. CTR. ON INTERNET & TECH. (Nov. 11, 2016), http://www.pewinternet.org/2016/11/11/social-media-update-2016/ [https://perma.cc/2L5Z-D8J4].

politics.[96] Like broadcast, radio, and cable, the distinctive features of the World Wide Web do not render regulations automatically constitutionally suspect.[97]

A medium-specific analysis is necessary to formulate any First Amendment jurisprudence for speech on the Internet because courts have not historically applied a consistent level of scrutiny for government regulation across other mediums of communication.[98] Thus, the constitutionality of regulations on speech communicated via the Internet calls for a "close analysis that constrains . . . Congress, without wholly incapacitating it in all matters" within the contours of a traditional strict scrutiny standard.[99] As Justice Souter noted,

> [I]n charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. Because . . . we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.[100]

Justice Souter rightly suggests that the Court often engages in a medium-specific analysis when determining whether a government regulation touches, and perhaps undermines, the First Amendment values and ideals of the of free and public discourse that a medium can promote.[101] Subsequently, a discussion of the context for requiring regulation on the Internet is appropriate when formulating a constitutional analysis for disclosure requirements for online political ads. The Supreme Court has consistently

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96. *See* Joe Concha, *Facebook drops newsfeed experiment after it promoted fake news*, THE HILL (Mar. 1, 2018), http://thehill.com/homenews/media/376301-facebook-drops-newsfeed-experiment-after-it-promoted-fake-news [https://perma.cc/UWS9-MMYB] (explaining how Facebook recently informed Congress that fake political advertisements from a Russian troll farm on its website potentially reached 126 million US users during the 2016 presidential election); s*ee also* Lee Rainie, et. al., *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RES. CTR. ON INTERNET & TECH. (Mar. 26, 2017), http://www.pewinternet.org/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/ [https://perma.cc/E6NB-TNXH] (describing the concerns by the public at large and Internet analysts that "social media's increasingly influential impacts" on public discourse is being driven by bad online actors).

97. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 660 (1994) ("It would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others."); *see also* Andrew Chin, *Making the World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*, 19 HASTINGS COMM. & ENT. L.J. 309, 310 (1996) [hereinafter Chin].

98. *See Turner Broad. Sys., Inc.*, 512 U.S. at 660.

99. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 778 (1996) (Souter, J., concurring).

100. *Id.* at 777 (Souter, J., concurring). Justice Souter also noted that "[i]t is not surprising that so contextually complex a category was not expressly assigned a standard level of scrutiny for reviewing the Government's limitation at issue" in *Pacifica Foundation*. *Id.* at 775.

101. *See* Ryan S. Bezerra, *What Dalzell Saw: Medium-Specific Analysis under the First Amendment*, 17 GLENDALE L. REV. 1, 5 (1999).

upheld such regulations on other mediums of communication,[102] but a closer analysis of the capabilities of the Internet warrants a new First Amendment analysis in the context of campaign finance laws.

A. Underlying Rationales in Medium-Specific Analyses as Applied to the Internet

1. Editorial Discretion and the Internet as a Conduit of Speech

A cursory glance at First Amendment analyses of more traditional mediums of communications are unhelpful for applying a similar analysis to the Internet. Courts have already noted that distinctions in *Pacifica* and other First Amendment cases applied to specific mediums of communications, noting that the scarcity rationale does not apply to the Internet because it "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." [103] Moreover, in the many decades since the development of the scarcity rationale, the number of radio, broadcast, and cable providers have increased substantially, which the *Loveday* court took notice of:

> Today when the number of broadcast stations not only far exceeds the number when the Communications Act was adopted and the number when the [*NBC*] case was decided but rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried, it seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand.[104]

However, a closer look to the underlying rationale of differential treatment of mediums of communication is more revealing. While commentators have questioned whether *Red Lion* and *Turner Broadcasting* are good law,[105] the Court's reasoning in both cases is still relevant for analyzing a medium-specific analysis for the Internet. *Turner Broadcasting* emphasized that cable operators act as "a conduit for the speech of others, transmitting it on a continuing and unedited basis," a characteristic of cable that the Court relied on in upholding the must-carry provisions of the Cable Act of 1992 that required cable operators to include broadcast stations.[106]

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102. *See* discussion *supra* Section II.

103. Reno v. ACLU, 521 U.S. 844, 853 (1997); *see also* Shea v. Reno, 930 F. Supp. 916, 928 (S.D.N.Y. 1996) (distinguishing *Pacifica* and *Turner* because "Internet communication is an abundant and growing resource."); Chin, *supra* note 98, at 314.

104. Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983).

105. *See* Adelman, *supra* note 82, at 1554-59; L.A. Jr. Power, *Red Lion and Pacifica: Are They Relics?*, 36 PEPP. L. REV. 445 (2009).

106. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 629 (1994) (citing Daniel Brenner, *Cable Television and the Freedom of Expression*, 1998 DUKE L.J. 329, 339 (1988)).

Because cable providers have historically served as conduits of programming, cable viewers are not likely to assume that the messages carried on a cable system "convey ideas or messages endorsed by the cable operator."[107] Thus, the must-carry provisions did not compel cable operators to "speak" in violation of their First Amendment rights.[108]

The Court's reasoning suggests that the structures of various forms of mass media create a dimension of public discourse where speakers can convey and receive ideas. Additionally, it implies that the impact of government regulation on these mediums should guide the Court's assessment of the constitutionality of those impacts.[109] This reasoning explains why the Court declined to apply broadcast rules to cable television because of the "fundamental technological differences between broadcast and cable transmission."[110] Cable operators, unlike print media for example, arguably exercise little editorial discretion when conveying messages to their audience. Nevertheless, the Court concluded that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment" because cable is recognized as a medium where messages are sent and received and in turn promote public discourse.[111]

Similarly, the Internet promotes public discourse and is not owned by any one entity that exercises absolute editorial discretion on the messages conveyed through the medium.[112] Thus, the practical effects of imposing campaign finance disclosure and disclaimer requirements on those who wish to spend money to convey political speeches has little effect on the actual message the speaker intends to convey because disclosure requirements "do not prevent anyone from speaking."[113] Campaign finance disclosure for online political ads, particularly on social media platforms, only closes a regulatory gap in campaign finance laws that already impose requirements on broadcasters and cable providers.[114] Moreover, social media companies are the conduits of the political speech—they are merely providing the forum for

107. *Turner Broad. Sys., Inc.*, 512 U.S. at 655.

108. *Id.* at 636 (citation omitted).

109. *See* Reno v. ACLU, 521 U.S. 844, 929–30 (1997) ("The ease of entry of many speakers sets interactive computer systems apart from any other more traditional communications medium that Congress has attempted to regulate in the past."); Bezerra, *supra* note 101, at 22.

110. *Turner Broad. Sys., Inc.*, 512 U.S. at 639.

111. *Id.* at 636 (citation omitted).

112. Internet service providers, which are companies that provide subscribers with access to the Internet, are, of course, distinguishable from the Internet itself, which is accessible to anyone with a Wi-Fi connection. Tim Fisher, *Internet Service Provider (ISP)*, LIFEWIRE (Dec. 1, 2017), https://www.lifewire.com/internet-service-provider-isp-2625924 [https://perma.cc/NNU3-CEDY].

113. Citizens United v. FEC, 558 U.S. 310, 318, 366 (2010) (quoting McConnell v. FEC, 540 U.S. 93, 201 (2003)).

114. Curiously, FCC sponsorship identification requirements do not apply to print media. *See* 47 C.F.R. § 73.1212 (2012).

the "paid speech of others."[115] Thus, disclosure requirements also do not interfere with a medium's editorial discretion and judgement, at least as to the content of the speech.

2. The Potential Anticompetitive Effects of the Internet

Although the Internet has overall low-barriers to access, Silicon Valley giants such as Google, Amazon, Facebook, and Apple are de facto gatekeepers of the Internet; they dominate many facets of our online and virtual lives and they often have monopolistic tendencies.[116] The Court's rationale in *Turner Broadcasting* that cable operators act as gatekeepers was premised on the Court's ready acceptance of congressional findings concerning the "bottleneck" characteristics of cable that could threaten the "viability of broadcast television."[117] Because cable operators have the ability to choose which broadcast signals to transmit, they have an "incentive to harm broadcast competitors" and thus, the government is the proper entity to prevent monopolistic behaviors.[118] Social media companies have similar market power through targeted advertising based on almost any of the

115. Brief for Campaign Legal Center and Common Cause as Amici Curiae Supporting Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, Washington Post v. McManus, No. 1:18-cv-02527, available at https://www.commoncause.org/wp-content/uploads/2018/11/Proposed-Memo-of-Amici-in-Support-of-Defs-Opposition-to-Pls-Motion-for-Preliminary-Injunction.pdf.

116. Elizabeth Kolbert, *Who Owns the Internet?*, THE NEW YORKER (Aug. 28, 2017), https://www.newyorker.com/magazine/2017/08/28/who-owns-the-internet [https://perma.cc/LR8R-9YCV]; *see also* Sean Illing, *Why "fake news" is an antitrust problem,* VOX (Sept. 23, 2017, 10:07AM), https://www.vox.com/technology/2017/9/22/16330008/facebook-google-amazon-monopoly-antitrust-regulation [https://perma.cc/LQF5-H3MS] ("Companies like Facebook and Google have had an outsize effect on political discourse because of the ways their algorithms help to promote and spread fake news and propaganda."). Internet Service Providers can also be characterized as gatekeepers of the Internet. However, this Note primarily discusses proposed campaign finance disclosure requirements imposed on social media conglomerates, and not ISPs. *See* Stuart N. Brotman, *Internet gatekeeping policies and the test of time,* BROOKINGS INSTITUTE (June 10, 2015), https://www.brookings.edu/blog/techtank/2015/06/10/internet-gatekeeping-policies-and-the-test-of-time/ [https://perma.cc/5AUN-2CD9].

117. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994).

118. *Id.* at 633.

personal characteristics, tendencies, and preferences of their users.[119] Moreover, these companies have significant influence on political discussion on their platforms because of the way their algorithms target and distribute news, including "fake news," to their consumers.[120] Because these social media giants have a substantial competitive edge due to their ability to aggregate data on their users, they have the ability to exert considerable influence on, or even harm to, their primary competitors, such as traditional news publishers.[121]

The *Red Lion* Court's justifications for limited First Amendment protection for broadcasters rest on the scarcity rationale.[122] However, a more scrutinizing look at the Court's reasoning recognizes the government's role as the sole entity that would properly regulate the communicative ability of broadcast television.[123] Although the Internet is not a scarce resource, the government is the only entity with regulatory and enforcement capabilities to regulate it as a medium of communication—particularly the tech giants that possess significant market power—like it regulates other mediums of communication.[124]

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119. *See* Alexandra Bruell, *U.S. Digital Ad Market to Grow 16% This Year, Led by Facebook and Google*, WALL ST. J. (Mar. 14, 2017); https://www.wsj.com/articles/u-s-digital-ad-market-to-grow-16-this-year-led-by-facebook-and-google-1489489202 [https://perma.cc/8SWT-CAY6] (describing the dominance of major tech companies' market power in various markets, such as Facebook's market share of display advertising at 39%, Google's search ad market share at 78%, and its mobile ad market share at "one-third of it"); Caitlin Dewey, *98 personal data points that Facebook uses to target ads to* you, WASH. POST (Aug. 19, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/?utm_term=.0308b15aae60 [https://perma.cc/W2W7-DZDS] (explaining how "no company on earth" extensively tracks consumers online activity like Facebook does, making the social media company an "advertising giant" that made $6.4 billion in advertising revenues); *Getting to know you*, THE ECONOMIST: SPECIAL REPORT (Sept. 11, 2014), https://www.economist.com/news/special-report/21615871-everything-people-do-online-avidly-followed-advertisers-and-third-party [https://perma.cc/YHN6-Q3TM] ("Facebook and Twitter accumulate heaps of information, including ages, friends, and interests, about people who sign up for accounts and spend time on their sites"); *see also*, *e.g.*, Julia Angwin et. al, *Facebook Enables Advertisers to Reach 'Jew Haters,'* PROPUBLICA: MACHINE BIAS (Sept. 17, 2017, 4:00 PM), https://www.propublica.org/article/facebook-enabled-advertisers-to-reach-jew-haters [https://perma.cc/87HU-2W6T] (explaining how the authors of the article bought Facebook ads promoting a ProPublica article in a targeted ad category which Facebook described as "Jew hater" and "Antysemytism," the Polish word for antisemitism).

120. Sally Hubbard, *Why fake news is an antitrust problem*, FORBES (Jan. 10, 2017, 12:00 AM), https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/#620046ed30f1 [https://perma.cc/NWH6-RYW5] ("66% of Facebook's 1.71 billion US users receive news from the platform.").

121. *Id.* In June 2017, the European Union fined Google $2.7 billion because it harmed rivals and consumers by prioritizing its own shopping search results over others. Mark Scott, *Google Fined Record $2.7 Billion in E.U. antitrust ruling*, N.Y. TIMES (June 27, 2017), https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html [https://perma.cc/5LXU-VQ8G].

122. *Supra* Section III.A.1.

123. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

124. *See id.* ("It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market[.]").

Moreover, it is the people who "as a whole retain their interest . . . to have the medium function consistently with the ends and purposes of the First Amendment."[125] As the Court duly noted, "it is the right of the listeners" not the right of the conduits of speech, like social media companies, "which is paramount."[126] Thus, *Red Lion*'s analysis in upholding the regulations on broadcasters hinted at an affirmative obligation by the government to ensure that the marketplace of ideas is not harmed by anticompetitive concentrations of power.[127] Because social media companies are in particularly well-positioned to exert influence on political debates,[128] this special role of social media companies justifies government regulation on those entities, as it has done for other mediums of communication.

B. Disclosure Requirements for Online Political Ads Would Survive Strict Scrutiny Under a Medium-Specific Analysis

In the hierarchy of types of speech that the First Amendment protects, political speech has remained at the top since the country's founding. Political speech is "more than self-expression; it is the essence of self-government":[129]

125. *See id*.
126. *Id.*
127. David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 2 YALE L. & POL'Y REV. 236, 277 (1991).
128. *See* Ali Breland, *Facebook Let These Misleading Advertisers Promote the Border Wall Fundraiser*, MOTHER JONES, (Dec. 21, 2018 7:10 PM), https://www.motherjones.com/politics/2018/12/facebook-approved-misleading-border-wall-ads/ [https://perma.cc/5RAG-V2LV].
129. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Although First Amendment protections are not confined to the exposition of ideas, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. In a republic where the people are sovereign, *the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation* . . . [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.[130]

Political speech is afforded the most robust First Amendment protection.[131] The notion that any communication that contributes to the public discourse should be protected, except speech that causes imminent harm or involves criminal consequences, is fundamental to American political theory and First Amendment jurisprudence.[132] Government imposed, content-based regulations that place any burden on political speech triggers the highest level of scrutiny because the "First Amendment stands against attempts to disfavor certain subjects or viewpoints . . . [and] restrictions distinguishing among different speakers."[133] When any regulation or law that burdens political speech is challenged under the First Amendment, strict scrutiny is applied, and the law will only be upheld if it is narrowly tailored to serve a compelling or "overriding state interest."[134] Intermediate scrutiny, in contrast, applies when content-neutral government regulations impose an incidental burden on speech, and these regulations are only upheld if they furthers an important governmental interest.[135]

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130. Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (citations and internal quotation marks omitted) (emphasis added).

131. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (describing the history of strong First Amendment protection of political speech because it is "premised on mistrust of governmental power").

132. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring) (The Framers believed "that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . and that public discussion is a political duty" that is "a fundamental principle of American government.").

133. *Citizens United*, 588 U.S. at 340 (citations omitted).

134. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

135. United States v. O'Brien, 391 U.S. 367, 377 (1968).

1. Preserving Electoral Integrity as a Compelling Government Interest

Indeed, difficulties arise in applying a medium-specific analysis where the Supreme Court has historically applied varying levels of scrutiny, in contrast with political speech, where the Court has consistently applied a strict scrutiny analysis.[136] The Court itself has noted that "it is the rare case" that a law survives such searching scrutiny.[137] Nevertheless, the Court has recognized the compelling government interests in "protecting voters from confusion and undue influence" and "preserving the integrity of the election process" and has upheld government regulations that further these interests.[138] Moreover, a medium-specific analysis would be an operationally effective form of judicial review by allowing courts to respond to the difficulties in constitutional interpretation, particularly when conflicts between First Amendment values and the validity of the government's response to contemporary issues arise.[139]

A required consideration in previous medium-specific analyses is a discussion of the interests the government seeks to further in adopting regulations on speech. In *Turner Broadcasting*, the Court readily relied on Congress's finding of the "bottleneck" characteristics of cable and accepted the government's interest in the continued availability of local broadcast signals in imposing must-carry provisions by cable operators because of their function as gatekeepers of televised speech.[140] The main underlying reason for the Court initially upholding disclosure requirements in *Buckley* was that such requirements "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of the public," which is a compelling government interest that survived the Court's strict scrutiny analysis of the FECA amendments.[141] Disclosure requirements have been consistently upheld for paid political speech, and the government's interest in deterring corruption is even more compelling when there is a

136. *See supra* Section III.

137. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2236 (2015) (Kagan J., concurring) (quoting Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666 (2015)) (internal quotation marks omitted).

138. Burson v. Freeman, 504 U.S. 191, 199 (1992) (internal quotation marks and citations omitted) (holding that a state's prohibition of solicitation of votes and display of campaign materials within 100 feet of the entrance to a polling place on election day was narrowly tailored to serve the state's compelling interest in preventing voter intimidation and election fraud, and therefore did not violate the First Amendment).

139. For example, Fourth Amendment protection against unreasonable searches and seizures originally constituted searches of physical occupations of private property, but now the scope of a person's Fourth Amendment protection is determined by his or her "reasonable expectation of privacy." *See* Katz v. United States, 398 U.S. 347, 360 (1967) (Harlan, J., concurring). Furthermore, the Supreme Court has now observed that "it would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advancement of technology." Kyllo v. United States, 533 U.S. 27, 33-34 (2001).

140. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656 (1994).

141. Buckley v. Valeo, 424 U.S. 1, 67 (1976).

significant amount of evidence of Russian attempts to influence the integrity of the election process.[142]

2. Deference to National Security

Generally, courts give more deference to the government during national security crises and in times of war.[143] The most infamous example of this phenomenon is *Korematsu v. United States*, in which the Supreme Court upheld the mass internment of persons of Japanese descent living in the western region of the United States during World War II.

Russia's election interference first drew national headlines a month before the November 2016 presidential election when the Department of Homeland Security and the National Intelligence director under the Obama Administration released a "stunning" statement accusing the Russian government of hacking into candidate Hillary Clinton's and the Democratic National Committee's emails.[144] While the extent of the Russian election meddling is still undergoing investigation by Congress, recent reports from the U.S. Senate Select Committee on Intelligence revealed that Russia's Internet Research agency created false Facebook pages targeted towards African-Americans that attracted 1.2 million followers.[145] The most popular fake Instagram account, @blackstagram, had over 300,000 followers.[146] Other studies reveal that one fourth of voting-age adults visited a false news website in the weeks leading up to the 2016 election and that false news sites generated more engagement than legitimate news outlets, such as the *New York Times* and the *Washington Post*.[147] The Department of Justice has indicted several Russian intelligence officers for hacking the email servers of the Democratic National Committee and Clinton.[148]

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142. Bill Chappel, *U.S. Hits Russian Oligarchs and Officials With Sanctions Over Election Interference*, NPR (Apr. 6, 2018, 8:37 AM), https://www.npr.org/sections/thetwo-way/2018/04/06/600083466/u-s-hits-russian-oligarchs-and-officials-with-sanctions-over-election-interferen [https://perma.cc/2WS3-2FG5].

143. Korematsu v. United States, 323 U.S. 214 (1944); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) ("[W]hen a nation is a war[,] many things that might be said in times of peace or such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."); Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 386-87 (2017) [hereinafter Chen, *Free Speech*].

144. Jane Meyer, *How Russia Helped Swing the Election for Trump*, THE NEW YORKER, (Oct. 1, 2018), https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump [https://perma.cc/55XG-XCV8].

145. John Naughton, *Social Media is an Existential Threat to Our Idea of Democracy*, The Guardian, (Dec. 23, 2018), https://www.theguardian.com/commentisfree/2018/dec/23/social-media-existential-threat-idea-democracy [https://perma.cc/EEL8-KB4L].

146. *Id.*

147. Danielle Kurtzleben, *Did Fake News On Facebook Help Elect Trump? Here's What We Know*, NPR (Apr. 11, 2018, 7:00 AM), https://www.npr.org/2018/04/11/601323233/6-facts-we-know-about-fake-news-in-the-2016-election [https://perma.cc/87HX-BUSH].

148. Jane Meyer, *How Russia Helped Swing the Election for Trump*, THE NEW YORKER, (Oct. 1, 2018), https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump [https://perma.cc/55XG-XCV8].

A court could conceivably view foreign interference into U.S. elections as a national security crisis, especially hacking into a presidential candidate's email account which may contain sensitive information. Furthermore, foreign interference in elections undermines one of the most fundamental aspects of democracy. Thus, preventing foreign influence in U.S. elections is a substantial compelling interest that should survive strict scrutiny under a medium-specific analysis of the Internet. The *Buckley* Court emphasized that disclosure requirements deter "actual corruption" and "may discourage those who would use money for improper purposes either before or after the election."[149] Facebook has already revealed that 470 pages and profiles linked to the Kremlin placed 3,000 ads costing $100,00 and another $50,000 worth in ads that it believes has a Russian source, which is the type of corruption the Buckley Court referenced in its opinion.[150] The Court recognized that disclosure requirements are the least restrictive means of "curbing the evils of . . . corruption" that the government has a clear interesting in pursuing.[151]

While courts have been criticized to overestimate threats to national security,[152] the role of the Internet and its distinct features from traditional forms of media, such as its ability to communicate messages broadly and rapidly, are noteworthy for a medium-specific analysis. Judicial analysis that is attune to the idiosyncrasies of the Internet and the ability of online speech to infiltrate national institutions, like the electoral process, is necessary when analyzing the constitutionality of regulations on the Internet.

V. CONCLUSION

The First Amendment was enacted to secure a free "market place of ideas,"[153] and the Internet inherently fosters this marketplace by providing a forum where the public can engage and discuss. However, discourse is lacking on appropriate regulation on this amorphous communicative platform in the context of campaign finance laws.[154] The Supreme Court has used medium-specific analyses effectively, to some degree, when confronted with issues and ideas stemming from constitutional challenges to government regulation of new technology. More importantly, medium-specific analyses push the Court to be more sensitive toward how a given case impacts the philosophies of the First Amendment.

A medium-specific First Amendment analysis recognizes the substantial institutional role in the marketplace of ideas of tech companies, particularly in comparison with other traditional mediums of communication. While there are legitimate reasons to be cautious of allowing the government

149. Buckley v. Valeo, 424 U.S. 1, 67 (1976).

150. *Id.*; Nicholas Fandos & Scott Shane, *Senator Berates Twitter Over 'Inadequate' Inquiry Into Russian Meddling*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/us/politics/twitter-russia-interference-2016-election-investigation.html [https://perma.cc/4Q7Z-D8WL].

151. *Buckley*, 424 U.S. at 68.

152. *See* Chen, *Free Speech*, *supra* note 144, at 390 (detailing legal scholars' criticism of courts during national crises).

153. United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas, J., concurring).

154. *See* Adam Blaier, *Fair Use and the First Amendment: Without Fair Use, What Would You Freely Speak About?*, 8 PACE. INTELL. PROP. SPORTS & ENT. L.F. 97, 119 (2017).

to ensure the free marketplace of ideas, the First Amendment should not be understood as an automatic wall against government action—as shown by the varying levels of scrutiny the Supreme Court has applied to print, broadcast, and cable. Rather, the Court has recognized the unique characteristics of each medium and the government's compelling interests in regulating those mediums under the purposes and ends of the First Amendment. Through this type of constitutional lens, the proliferation of political speech on the Internet and subsequent governmental intervention will allow for clearer First Amendment jurisprudence.