

**MONEYBOMBS AND DEMOCRATIC PARTICIPATION:
REGULATING FUNDRAISING BY
ONLINE INTERMEDIARIES**

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ABSTRACT

In the last decade, the Internet has up-ended the world of political fundraising, helping campaigns marshal armies of small donors and volunteers. Rather than eliminating the need for fundraising organizations as some predicted, the Internet has created new intermediaries that capitalize on the rapidly changing ecology of online fundraising. These new intermediaries combine fundraising, volunteer mobilization, and activism. They raise new risks of accountability, polarization, and nationalized debate, but they also have the potential to enhance democratic participation. This Article contrasts online and offline fundraising intermediaries and provides a guide for regulating online political fundraising to avoid unintended consequences, to minimize the risks of online fundraising, and to reinforce the Internet's potential for enhanced democratic participation.

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I. INTRODUCTION

You probably have never heard of Trevor Lyman. He is not a political operative. In fact, before the 2008 election, he was not involved in politics at all.¹ On November 5, 2007, however, he “engineered” one of the “largest single-day fundraising haul[s]” of all time—a “moneybomb.”² On October 18, 2007, Lyman launched ThisNovember5th.com, a website that called on supporters of Ron Paul, a long shot Libertarian candidate for the Republican presidential nomination, to donate to his campaign on one specific day.³ When the dust cleared, the Ron Paul campaign had netted over \$4,000,000 in a single day.⁴ Only a month later, Lyman did it again, engineering a \$6,000,000 take for Ron Paul on December 16, the 234th anniversary of the Boston Tea Party.⁵ Small donations and new donors fueled both moneybombs.⁶ According to a campaign spokesman, the drive

1. Kenneth P. Vogel, *Ron Paul Becomes \$6 Million Man*, POLITICO (Dec. 16, 2007, 10:58 PM), <http://politico.com/news/stories/1207/7421.html> [hereinafter Vogel, *\$6 Million Man*].

2. *Id.*

3. Kenneth P. Vogel, *The Man, The Technique Behind Paul’s Haul*, POLITICO (Nov. 6, 2007, 9:06 PM), <http://www.politico.com/news/stories/1107/6746.html> [hereinafter Vogel, *The Technique*]; see REMEMBER THE 5TH OF NOVEMBER, <http://thisnovember5th.com/> (last visited Feb. 27, 2011) (displaying video of Ron Paul and linking visitors to another online fundraising intermediary).

4. Vogel, *The Technique*, *supra* note 3.

5. Vogel, *\$6 Million Man*, *supra* note 1.

6. See Vogel, *The Technique*, *supra* note 3 (suggesting that Lyman’s website aimed to solicit smaller contributions from a large number of people).

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on December 16 raised funds from 24,940 new donors.⁷ Just as remarkable as his success is Lyman's description of the nationwide campaign that made it possible: "It's just a website that said 'hey let's all donate money on this day' [I]t just propagated virally. And that's really it."⁸

To organize his moneybombs without the Internet, Lyman would have needed to buy materials and postage for the millions of direct mail solicitations that would be necessary to generate a comparable number of donations. He would have needed to pay for a mailing list to target his audience (if such a targeted list were even available). He would have needed an army of employees to process the flood of donations. His workers' salaries alone—not to mention all of his other expenses—would have severely diminished his eventual fundraising haul.

The institution most likely to attempt a Lyman-style moneybomb pre-Internet would have been a campaign, political party, or other well-established fundraising organization. These intermediaries absorb the costs of mobilizing large groups of voters, volunteers, and donors, connecting potential contributors with campaigns.⁹ They bundle small donors into easily accessible groups, making the sort of small-donor fundraising that Lyman relied upon economically viable.¹⁰ This intermediating role has made fundraising organizations a powerful political constituency in their own right, with the potential to hold politicians accountable and to become vehicles for special interests.¹¹ Lyman used the Internet to sidestep this established structure, effectively transforming himself into a fundraising intermediary overnight.

Despite Lyman's efforts on behalf of Ron Paul, no campaign typified the transformation of fundraising and organizing in the 2008 election more than Barack Obama's campaign. With one of Facebook's founders as its "online organizing guru," the Obama cam-

7. Vogel, *\$6 Million Man*, *supra* note 1.

8. Vogel, *The Technique*, *supra* note 3.

9. See Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1767 (2001).

10. Cf. James H. Oddie, Comment, *Fighting Speech with Speech: Combating Abuses of Section 527 Political Organizations with More Speech, Not Additional Regulation*, 40 U.S.F. L. REV. 179, 203 & n.156 (2005) (noting that "political parties reported an increase in the number of small donors in 2004").

11. See, e.g., Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1651 (1999) ("Political parties, for example, contribute money to the candidates, make independent and coordinated expenditures on the candidates' behalf, and conduct issue advocacy campaigns designed not only to win a majority in the legislature but also to exert discipline." (footnote omitted)).

paigned set out to maximize the benefits of online fundraising and outreach.¹² The campaign raised hundreds of millions of dollars in small donations from millions of donors via the Internet.¹³ Although campaigns are one of the oldest forms of fundraising intermediary, the Obama campaign transformed itself into anything but a traditional campaign, raising money and engaging volunteers at record breaking levels.¹⁴

The rise of Internet fundraising has done more than empower individual voters. It has also brought online fundraising intermediaries like MoveOn.org, an organization that channeled \$88,000,000 to the Obama campaign during the 2008 election,¹⁵ to the fore. These online intermediaries can be central to the success or failure of national campaigns, and have been even more important for state and local contests, in which candidates do not have the resources or popularity to attract contributors directly.¹⁶

The mere fact that intermediaries in general remain important for online fundraising, however, does not erase the Internet's potential to enhance democratic participation in American politics. At their best, intermediaries help individual voters organize, speak out, and influence candidates. At their worst, they are megaphones for special interests and funnels for soft money. This Article argues that to understand the impact of the Internet on democratic participation, we should begin with the offline fundraising intermediaries that have long been the topic of political and legal debate and ask how these traditional intermediaries differ from the new online intermediaries.

This Article makes two key contributions to the larger debate over fundraising intermediaries.¹⁷ It draws on political science litera-

12. Brian Stelter, *The Facebooker Who Friendened Obama*, N.Y. TIMES, July 7, 2008, at C1 (internal quotation marks omitted).

13. Jose Antonio Vargas, *Obama Raised Half a Billion Online*, WASH. POST (Nov. 20, 2008, 8:00 PM), http://voices.washingtonpost.com/44/2008/11/20/obama_raised_half_a_billion_on.html.

14. *Id.*

15. MOVEON.ORG, PEOPLE-POWERED POLITICS 2008: POST-ELECTION REPORT 4 (2008) [hereinafter MOVEON.ORG 2008 POST-ELECTION REPORT], available at http://s3.moveon.org/pdfs/moveon_postelectionreport_ah14.pdf. See generally MOVEON.ORG, <http://www.moveon.org/> (last visited Feb. 27, 2011).

16. See generally, e.g., MOVEON.ORG 2008 POST-ELECTION REPORT, *supra* note 15, at 9 (describing MoveOn.org's efforts to help elect a Democratic governor in North Carolina).

17. For more discussion of political intermediaries, see generally JOHN H. ALDRICH, WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA (1995); NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2008); SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS (1995); A USER'S GUIDE TO CAMPAIGN FINANCE REFORM (Gerald C. Lubenow ed., 2001)

ture to identify six distinct types of fundraising intermediaries, three offline and three online: political parties, independent fundraising groups (“IFGs”), bundlers, online IFGs, partisan blogs, and fundraising platforms.¹⁸ It also uses this framework to compare the impact of different types of fundraising intermediaries on democratic participation and examines the consequences of a shift toward online fundraising.¹⁹

Although online fundraising intermediaries offer opportunities for enhanced democratic participation, they also pose significant risks.²⁰ Chief among these risks is the question of whether the new media will carry enough accountability to compensate for the increased power that intermediaries will wield through Internet communities.²¹ The 2010 midterm election threw this concern into stark relief; intermediaries made more independent expenditures than in the 2008 election and almost six times the independent expenditures made in 2006.²² Nearly fifty percent of outside spending during the 2010 election was by 501(c) groups that made no disclosures of their funding sources.²³ Two important sources of these funds in the 2010 election were unions and corporations, newly freed from limits on their election spending by the Supreme Court of the United States in *Citizens United v. Federal Election Commission*.²⁴

Since 2008, many commentators have called for regulations that would limit fraudulent online contributions, improve disclosure, and encourage campaigns to rely on small donations.²⁵ Bearing the risks

18. See *infra* Part II.A–C.

19. See *infra* Part III.

20. See *infra* Part III.A–E.

21. See *infra* Part III.E.

22. *Outside Spending*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/index.php> (last visited Feb. 27, 2011) (showing that independent totals dropped from approximately \$211 million in 2010 to approximately \$157 million in 2008 and approximately \$37 million in 2006).

23. *2010 Outside Spending by Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/index.php> (follow “By Groups” hyperlink under “Outside Spending”; then select “Non-party Committees” under “Select Filter”; then select “By Disclosure” under “Spending by Disclosure for Non-Party Committees”) (last visited Feb. 27, 2011) (demonstrating that a large percentage of expenditures were made without disclosures during the 2010 election).

24. 130 S. Ct. 876, 913 (2010) (holding that limiting independent political expenditures of corporations and unions is unconstitutional).

25. See, e.g., ANTHONY J. CORRADO ET AL., CAMPAIGN FIN. INST., AM. ENTER. INST., & BROOKINGS INST., REFORM IN AN AGE OF NETWORKED CAMPAIGNS: HOW TO FOSTER CITIZEN PARTICIPATION THROUGH SMALL DONORS AND VOLUNTEERS 3, 40–43 (2010), available at <http://www.aei.org/docLib/Reform-in-an-Age-of-Networked-Campaigns.pdf> (presenting a comprehensive package of reforms designed to expand the role of small donors in politics); Michael J. Malbin, *Small Donors, Large Donors and the Internet: The Case for Public Financ-*

and opportunities of online fundraising in mind, this Article closes by identifying several areas where online fundraising would benefit from regulation.²⁶ These include: the risk of fraudulent contributions; the need to refine disclosure requirements to address the fact that most online fundraising intermediaries earmark donations by their members rather than donating themselves; and the need to support small donations and the correlated increase in political volunteering.²⁷

Many of the challenges that these regulations pose can be addressed by the careful application of information technology. For example, a software package that allows a trusted third party to remotely monitor campaign disclosure databases would reduce the transaction costs of regulation, improve transparency, and allow the software itself to resolve many of the more complex regulatory challenges.²⁸

The remainder of this Article proceeds in three parts. Part II draws on political science literature to outline the legal development of political intermediaries, to catalogue online and offline fundraising intermediaries, and to outline five ways that intermediaries can enhance democratic participation. Part III uses this framework to compare online and offline intermediaries and identify the many benefits and risks posed by Internet fundraising. It concludes with cautious optimism: Although there are measurable risks, the potential benefits of online fundraising for democratic participation are significant and achievable. Part IV examines potential regulation of online fundraising through the lens of Part III's comparison of online and offline fundraising intermediaries and makes specific recommendations aimed at supporting the benefits and mitigating the risks posed by online fundraising.

II. INTERMEDIARIES, DEMOCRATIC PARTICIPATION, AND ONLINE FUNDRAISING

Scholars predicting the impact of online fundraising on American politics are divided largely into two camps.²⁹ One group foresees rapid transformation—a sharp increase in direct citizen participation,

ing After Obama, (Campaign Fin. Inst., Working Paper, Apr. 2009), available at http://web.posc.jmu.edu/parties/readings/Topic%204%20Campaign%20Finance/PresidentialWorkingPaper_April09.pdf (arguing that the campaign fundraising system should be redesigned in order to promote competition, candidate emergence, and public participation).

26. See *infra* Part IV.

27. See *infra* Part IV.A–B.

28. See, e.g., Part IV.B.2.

29. See, e.g., Nick Anstead & Andrew Chadwick, *Parties, Election Campaigning, and the Internet: Toward a Comparative Institutional Approach*, in *THE ROUTLEDGE HANDBOOK OF INTERNET POLITICS* 56, 58–59 (Andrew Chadwick & Philip N. Howard eds., 2008) (“Since the

the “democratization” of American politics, and the eventual sidelining of traditional political intermediaries.³⁰ The other group expects that existing intermediaries will ultimately absorb the new techniques and media.³¹ This group argues that, despite some initial disruption, the traditional power structure will eventually reassert itself.³² This group has been especially critical of claims about the democratizing nature of online media. For instance, Professor Matthew Hindman, one recent critic of the democratizing potential of the Internet, has argued that the rise of online media has simply moved the goalposts.³³ Rather than making it hard to *publish* political expression, Professor Hindman argues that the increasing online cacophony makes it hard to get political expression *heard*.³⁴

Actual events, thus far, seem to lie somewhere between these two extremes. The Internet has not eliminated fundraising intermediaries. Instead, traditional fundraising intermediaries have incorporated online techniques,³⁵ and new online intermediaries have developed that channel fundraising dollars, public attention, and vol-

net’s early days, analysis of its political impact has been dominated by two distinct schools of thought: the normalizers . . . and the optimists . . .”).

30. See, e.g., ANDREW CHADWICK, INTERNET POLITICS: STATES, CITIZENS, AND NEW COMMUNICATION TECHNOLOGIES 129 (2006) (“The explosion of blogging has democratized access to the tools and techniques required to make a political difference through content creation.”); Anstead & Chadwick, *supra* note 29, at 58 (explaining that “optimists . . . claim that the internet will reform politics and radically redistribute political power”).

31. See RICHARD DAVIS, THE WEB OF POLITICS: THE INTERNET’S IMPACT ON THE AMERICAN POLITICAL SYSTEM 5 (1999) (“Rather than acting as a revolutionary tool rearranging political power and instigating direct democracy, the Internet is destined to become dominated by the same actors in American politics who currently utilize other mediums.”).

32. See *id.*; MICHAEL MARGOLIS & DAVID RESNICK, POLITICS AS USUAL: THE CYBERSPACE “REVOLUTION” 2 (2000) (“Whatever the future revolutionary implications of cyberspace, we are convinced that it will be molded by the everyday struggle for wealth and power.”).

33. See generally MATTHEW HINDMAN, THE MYTH OF DIGITAL DEMOCRACY (2009).

34. *Id.* at 13 (“[T]he Internet is not eliminating exclusivity in political life; instead, it is shifting the bar of exclusivity from the *production* to the *filtering* of political information.”); see also *id.* at 18 (“While it is true that citizens face few formal barriers to posting their views online, this is openness in the most trivial sense. . . . [W]e care most not about who posts but about who gets read—and there are plenty of formal and informal barriers that hinder ordinary citizens’ ability to reach an audience. Most online content receives no links, attracts no eyeballs, and has minimal political relevance.”).

35. See, e.g., Press Release, EMILY’S LIST, EMILY’S List Announces Launch of Online Rolodex (Aug. 3, 2010), http://www.emilyslist.org/news/releases/launch_online_rolodex/ (detailing an online social networking and fundraising tool recently released by EMILY’S List, a long-established, democratic-leaning political fundraising organization); Nathaniel Gleicher, Survey of Democratic and Republican State Parties (2010) (unpublished study) (on file with the Maryland Law Review) (surveying state Democratic and Republican parties and finding that all had websites, ninety-nine out of 100 had online donation links on their sites, and eighty-four used social networks as a part of their constituent outreach).

unteer resources in ways that no offline fundraising intermediary ever could have.³⁶ These intermediaries have grown quickly, transforming themselves from sideline curiosities in the 2000 election to game changing power players in 2008.³⁷

To understand the impact of online fundraising on democratic participation in America, one must first understand the role of political intermediaries in the electoral process. This Part briefly outlines historical attitudes toward political intermediaries and identifies the roles they have traditionally played in American politics. It lays out U.S. campaign finance law and identifies the types of fundraising intermediaries—offline and online—that exist today. Finally, using the decades-long debate on political parties as its source, it extracts five ways that fundraising intermediaries can enhance democratic participation. These five factors will later be used as a rubric to compare the effect of online and offline fundraising intermediaries on democratic participation.

A. *Fundraising Intermediaries and Campaign Finance Law*

Political intermediaries—first political parties and, more recently, other institutions that raise money, organize voters, and provide resources to campaigns—have been in existence for centuries.³⁸ Candidates, who often have more constituents than they can interact with directly, rely on fundraising intermediaries to group potential supporters together, allowing more efficient contact.³⁹ Constituents, who may not have the time or resources to evaluate all candidates themselves, rely on intermediary labels (Democrat, Republican, and endorsements from special interest groups like the National Rifle Association or the American Civil Liberties Union) to help evaluate possible candidates.⁴⁰ Because of their role as go-betweens and their ability to easily raise money and other resources, fundraising in-

36. See, e.g., *supra* text accompanying notes 3–8.

37. See, e.g., Aaron Smith, *The Internet's Role in Campaign 2008*, PEW INTERNET & AM. LIFE PROJECT (Apr. 15, 2009), <http://pewresearch.org/pubs/1192/internet-politics-campaign-2008> (finding that the percentage of adults who use the Internet for political news and information has increased from four percent to forty-four percent since 1996).

38. See, e.g., 1 F.P. LOCK, EDMUND BURKE: 1730–1784, at 283 (1998) (quoting Edmund Burke as stating that “[p]arty divisions . . . whether on the whole operating for good or evil, are things inseparable from free government”).

39. See Issacharoff & Ortiz, *supra* note 11, at 1629–32, 1638 (explaining that “[p]olitical intermediaries increase the meaningfulness of individual political participation” and reduce costs).

40. See ALDRICH, *supra* note 17, at 49–50 (“Party affiliation provides an initial reputation that reduces decision-making costs and provides a core of likely supporters.”); BERNARD R. BERELSON ET AL., VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN 321

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intermediaries wield enormous power.⁴¹ Volunteer hours, potential voters, publicity, and advocacy infrastructure are all important resources that intermediaries gather from individuals and make available to candidates.

The range of fundraising intermediaries has grown rapidly in recent decades, as the traditional intermediary roles of political parties have been disaggregated into many discrete organizations.⁴² Although there have been many causes for this transition, the most consistent cause has been the impact of regulation.⁴³

Over the past half century, regulatory efforts to limit or channel the use of money in politics have made it impractical or illegal for political parties to perform some of their traditional roles.⁴⁴ As regulations have tightened around parties, the political establishment has responded by creating new, independent organizations that carry on parties' preregulation activities, often with similar effects.⁴⁵

In 1971, Congress passed the Federal Election Campaign Act ("FECA"),⁴⁶ establishing contribution and expenditure limits for candidates and individuals in federal elections. Under FECA, individuals could contribute no more than \$1,000 to a single candidate per election and spend no more than \$1,000 per election to directly support "a clearly identified candidate."⁴⁷ This amount has increased since FECA's original passage: As of 2010, individual donors could contribute up to \$2,400 per candidate per election.⁴⁸ The FECA also delineated the kinds of nonparty fundraising organizations that continued to be permissible under its new regime.⁴⁹ Often called political action

(1954) (suggesting that if a voter "knows the big thing about the parties, he does not need to know all the little things").

41. See Issacharoff & Ortiz, *supra* note 11, at 1631 (describing political intermediaries as powerful "super-agents").

42. See, e.g., Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 157 (2005) (describing the network of new organizations that have taken the place of official party committees in fundraising responsibilities).

43. See, e.g., *id.* at 158 (discussing the reorganization of party operations after the Bipartisan Campaign Reform Act).

44. See *id.* at 156–57 (explaining that the Bipartisan Campaign Reform Act prohibited major parties from raising soft money, a fundraising opportunity that major parties had previously exploited).

45. See *infra* text accompanying notes 64–67.

46. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2, 18, and 47 U.S.C.).

47. 18 U.S.C. § 608(e)(1) (1970 & Supp. VI) (repealed 1976).

48. FED. ELECTION COMMISSION, CONTRIBUTION LIMITS FOR 2009–10 (2009–2010), available at <http://www.fec.gov/info/contriblimits0910.pdf>.

49. See, e.g., James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1065–68 (2002) (outlining the Supreme Court's jurisprudence on political action committees).

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committees (“PACs”), these organizations were intended to gather small donations from many members and then contribute directly to candidates in turn.⁵⁰ Under FECA, PACs with more than 50 members could donate \$5,000 per candidate per election, while PACs with fewer than fifty members were subject to the same donation limits as individuals.⁵¹

In addition to limiting contributions and expenditures, FECA also required that fundraising organizations disclose details about all donations received, including the identity of all donors over a particular threshold,⁵² which is \$250.⁵³ Finally, a 1974 FECA Amendment created the Federal Election Commission (“FEC”) to enforce the law and publish reports of campaign disclosures.⁵⁴ These requirements, later endorsed by the United States Supreme Court, were intended to increase the transparency of candidate funding and reduce political corruption.⁵⁵

In 1976, however, FECA’s campaign finance framework was forever transformed by the Supreme Court’s decision in *Buckley v. Valeo*.⁵⁶ *Buckley* upheld FECA’s contribution limits and disclosure requirements but struck down its expenditure limitations, holding that such limits violate the First Amendment rights of candidates and other political participants.⁵⁷ This ruling breathed new life and power into PACs,⁵⁸ which are well positioned to amass large war chests of funding.⁵⁹ The FECA’s post-*Buckley* framework allowed PACs to spend these resources with little restriction so long as their actions were not “coordinated” with the candidates they supported.⁶⁰ A 1978 advisory

50. See Bradley A. Smith, *The Sirens’ Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL’Y 1, 30 (1997) (asserting that “PACs allow small donors to band together to increase their political clout”); Weinstein, *supra* note 49, at 1065 (defining different kinds of PACs and noting that statutory definitions encourage PACs to include small contributions from many people). R

51. Weinstein, *supra* note 49, at 1065 (citing 2 U.S.C. § 441a(a)(1)(A), (a)(4) (2000)). R

52. Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV’T L. REV. 1, 49 (2008).

53. 2 U.S.C. § 434(c)(1), (c)(2)(C) (2006); 11 C.F.R. § 109.10(b) (2010).

54. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-55).

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

56. 424 U.S. 1.

57. *Id.* at 58-59.

58. See Geoffrey M. Wardle, Comment, *Time to Develop a Post-Buckley Approach to Regulating the Contributions and Expenditures of Political Parties: Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 46 CASE W. RES. L. REV. 603, 610-11 (1996) (“[A]s a result of *Buckley*, large institutional contributors have proliferated.”). R

59. See Issacharoff & Ortiz, *supra* note 11, at 1651-52.

60. Emma Greenman, *Strengthening the Hand of Voters in the Marketplace of Ideas: Roadmap to Campaign Finance Reform in the Post-Wisconsin Right to Life Era*, 24 J.L. & POL. 209, 223

opinion issued by the new FEC complicated matters further, explaining that FECA did not limit contributions for state elections or “party building” projects like voter registration.⁶¹ Money and resources funneled to parties through this loophole came to be known as “soft money.”⁶² Despite efforts to reduce political spending in the years after FECA and *Buckley*, the amount of money spent on political campaigns has increased,⁶³ and PACs spend and contribute to political parties with an increasingly wide degree of freedom—further enhancing their stature as fundraising intermediaries.

The Bipartisan Campaign Reform Act of 2002 (“BCRA”), also known as the McCain-Feingold Act after its principle sponsors, was intended to respond to the loopholes left behind by FECA, *Buckley*, and subsequent decisions.⁶⁴ The BCRA targeted soft money directly, prohibiting its use by party committees.⁶⁵ The political establishment responded to this new constraint by founding private, nonprofit 527 and 501(c) organizations to accept the money that could no longer be sent directly to party committees.⁶⁶ In turn, these intermediaries make “uncoordinated” expenditures that are carefully calibrated to support their favored candidates.⁶⁷ Although both FECA and BCRA were intended to reduce the role of money in politics, both effectively created and empowered entirely new sets of fundraising intermediaries.

In early 2010, the Supreme Court changed the landscape of campaign finance once again with its ruling in *Citizens United v. Federal Election Commission*.⁶⁸ In *Citizens United*, the Court overturned a section of BCRA that prevented corporations from using money from their general treasury funds to direct political advocacy within thirty

n.81 (2008) (noting that PACs “are allowed unlimited expenditures on independent expenditures not coordinated by a candidate or the candidates [sic] committee”). Expenditures that are coordinated or controlled by a candidate or campaign are treated as contributions and remain limited. 2 U.S.C. § 441a(a)(7) (2006); *Buckley*, 424 U.S. at 46 & n.53.

61. 1978 Op. FEC Chairman 10 pt. A (Aug. 29, 1978).

62. Weinstein, *supra* note 49, at 1068–69.

63. See, e.g., *Presidential Fundraising and Spending, 1976–2008*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/totals.php?cycle=2008> (last visited Feb. 27, 2011) (showing that total spending has increased every election year since 1980).

64. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.); Kang, *supra* note 42, at 156–57 (explaining that BCRA prohibits the kind of soft money that was left open by the loopholes).

65. Kang, *supra* note 42, at 157.

66. *Id.* at 157.

67. See *id.*; *supra* text accompanying note 60.

68. 130 S. Ct. 876 (2010).

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days of an election.⁶⁹ The Court concluded that independent corporate expenditures on politically focused advertising constituted protected speech under the First Amendment and that no sufficiently compelling state interest justified their constraint.⁷⁰ Corporations could already support candidates indirectly by funding PACs of their own but were limited in the amount they could transfer to their PACs and when they could make such transfers.⁷¹

Citizens United also helped bring political intermediaries registered under the tax code as 501(c) organizations to the forefront. Rather than contributing to candidates, 501(c)s concentrate on independent expenditures—often advertising campaigns—on behalf of candidates and issues. By registering as 501(c)s, intermediaries escape virtually all the disclosure requirements outlined in FECA and BCRA.⁷² The 2010 election was by far the most expensive election in terms of independent expenditures, due largely to an influx of these groups.⁷³

Corporations have already used the new ruling to raise and spend large sums of money as political advocacy.⁷⁴ At the same time, early advocacy efforts by some companies created significant political backlash. For instance, a group threatened to boycott Target after it donated \$150,000 to an intermediary that supported a candidate who opposed gay, lesbian, and transgender rights.⁷⁵ It is hard to trace the full extent of the massive influx of outside spending in the 2010 elections, because it is unclear how much was spent by 501(c) organizations that did not disclose their sources. Nevertheless, pre-*Citizens United* corporate spending through disclosed channels reveals a pattern that suggests that the *Citizens United* decision will continue to encourage increased corporate political spending.⁷⁶

69. *Id.* at 887–88, 913.

70. *Id.* at 900, 913.

71. *Cf.* David D. Kirkpatrick, *Irked*, *Wall St. Hedges Its Bet on Democrats*, N.Y. TIMES, Feb. 8, 2010, at A1 (describing a series of political donations made by the PACs of Wall Street firms).

72. Kang, *supra* note 42, at 157.

73. *See supra* text accompanying note 23.

74. *See, e.g.*, Katrina vanden Heuvel, Op-Ed., *Citizens United Aftershocks*, WASH. POST, Aug. 25, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/24/AR2010082405642.html?hpid=opinionsbox1> (describing fundraising efforts by a “consortium” of coal mining companies in two southern states).

75. *See* Tom Webb, *Target Apologizes for Controversial Political Donation*, ST. PAUL PIONEER PRESS, Aug. 6, 2010, at A1.

76. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 93–95 (2010) (outlining extensive corporate political spending pre-*Citizens United*).

B. *Types of Offline Fundraising Intermediaries*

Three dominant types of traditional fundraising intermediaries have developed out of political candidates' search for resources and the efforts of regulators to constrain that search: political parties, independent fundraising groups ("IFGs"), and bundlers. Understanding the similarities and differences between these actors is the first step in evaluating their roles in American politics.

Milton Rakove, describing the Chicago Democratic Party machine of the 1970s, wrote that an effective political party provided five things: offices, jobs, money, workers, and votes.⁷⁷ "Offices beget jobs and money; jobs and money beget workers; workers beget votes; and votes beget offices."⁷⁸ Rakove details a powerful, self-reinforcing institution that acts as the ultimate intermediary, drawing in and redistributing resources on all sides.⁷⁹ Political parties are the oldest form of political intermediary, but by the time Rakove was writing, party machines were not the only fundraising intermediaries—or even the only elements of political parties—active in American politics.

Today, the range and independence of party organizations that contribute to fundraising efforts has broadened substantially. Candidates' campaigns, national and state party organizations, and intraparty fundraising organizations like the National Republican Senatorial Committee all fundraise and organize as semi-independent actors, swelling the ranks of political party fundraising intermediaries.⁸⁰ The ever-expanding weave of party organizations has led to a strong argument for reconceptualizing political parties as diverse coalitions of independent actors rather than contractually defined organizations. This vision of party organizations is much more far-flung than the current, generally accepted view.

Another set of fundraising intermediaries with a long history are what I will term independent fundraising groups ("IFGs"), organizations that raise funds for use during political campaigns but are not directly affiliated with either a party or a candidate. Independent fundraising groups might be closely aligned with a particular party—many labor unions, for instance, tend to align themselves with the

77. MILTON L. RAKOVE, DON'T MAKE NO WAVES—DON'T BACK NO LOSERS: AN INSIDER'S ANALYSIS OF THE DALEY MACHINE 164 (1975).

78. *Id.*

79. *Id.* at 164–65.

80. Many of these intraparty organizations, in fact, raise and spend staggering sums of money. The Congressional Black Caucus, for instance, raised at least \$55,000,000 in contributions from 2004 to 2008. Eric Lipton & Erich Lichtblau, *In Black Caucus, a Fund-Raising Powerhouse*, N.Y. TIMES, Feb. 14, 2010, at A1.

Democratic Party—but they are independently operated and may disagree with parties over everything from policy to candidate selection. There are many kinds of IFGs, but they all gather political resources and either deliver these resources to, or mobilize them on behalf of, candidates they support. Independent fundraising groups may be further divided into three types: issue IFGs, influence IFGs, and institutional IFGs.

Issue IFGs are independent organizations that marshal a large membership in pursuit of a specific platform of related policy claims. Special interest groups like the Sierra Club,⁸¹ the National Rifle Association,⁸² and EMILY's List⁸³ are classic issue IFGs. Each seeks to advance its policy goals through direct advocacy and supporting appropriate candidates. Issue IFGs publicly endorse candidates⁸⁴ and encourage members to participate in activism;⁸⁵ consequently they are a key resource for votes, contributions, and volunteers.

Influence IFGs generally have far fewer members than issue IFGs and often engage in little or no public outreach. Rather than advocating for particular policy goals, influence IFGs focus on building political influence through behind-the-scenes fundraising and contributions. Although any IFG could operate as a 501(c), the current relative freedom from disclosure requirements enjoyed by 501(c)s makes such groups particularly well suited as influence IFGs. Their reduced public accountability makes it easier for them to pursue broad influence without worrying about the political ramifications of their sometimes surprising alliances. The prototypical modern ex-

81. *Goals*, SIERRA CLUB, <http://www.sierraclub.org/goals/> (last visited Feb. 27, 2011) (outlining the major policy goals of the Sierra Club, a well-established and influential pro-environmentalist organization).

82. *Who We Are, and What We Do*, NRA-ILA, <http://www.nraila.org/About/> (last visited Feb. 27, 2011) (explaining the goal of the Institute for Legislative Action, the “lobbying” arm of the NRA, which is “preserving the right of all law-abiding individuals to purchase, possess and use firearms for legitimate purposes”).

83. *Our Mission*, EMILY'S LIST, <http://emilyslist.org/who/mission/> (last visited Feb. 27, 2011) (describing the mission as “dedicated to electing pro-choice Democratic women to office”).

84. *See, e.g., Grades & Endorsements*, NRA POLITICAL VICTORY FUND, <http://www.nrapvf.org/grades-endorsements.aspx> (last visited Feb. 27, 2011) (allowing website users to find endorsements based on location); *November 2010 Endorsements*, SIERRA CLUB, <http://www.sierraclub.org/politics/endorsements/> (last visited Feb. 27, 2011) (listing candidates endorsed by the Sierra Club).

85. *See, e.g., Give a Gift of Life*, NAT'L RIGHT TO LIFE, <http://nrlc.org/donations.htm> (last visited Feb. 27, 2011) (soliciting member donations); *Take Action*, TEAMSTERS, http://ibt.convio.net/site/PageServer?pagename=teamsters_home (last visited Feb. 27, 2011) (calling on members of the Teamsters union to sign up for “action alerts” to help them take action on legislative issues).

ample of an influence IFG is the leadership PAC—a fundraising vehicle that incumbent candidates use to gather and spend contributions on behalf of their colleagues.⁸⁶ Leadership PACs provide a sort of influence or currency for incumbent candidates—donations to other candidates may signal campaign support and the size of a leadership PAC’s bank account also serves as a measure of the candidates’ influence.⁸⁷ Because of the nature of their goals, resources, and operations, influence IFGs are the least public IFG; they rarely have an involved membership and often operate, as do leadership PACs, on behalf of one individual or a small group of individuals.

Finally, institutional IFGs support and represent already existing organizations in the political arena. One classic example is the fundraising arm of a labor union. The American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”), for instance, spent about \$1.7 million during the 2008 elections.⁸⁸ The AFL-CIO and its member unions have certain traditional policy goals, such as improving their members’ wages, healthcare, and working conditions.⁸⁹ Institutional IFGs also seek broader influence to promote themselves as power players and deal makers in labor and political circles. Lobbying arms of corporations, such as the AT&T Inc. PAC that spent almost \$5 million dollars during the 2008 elections, are also examples of institutional IFGs.⁹⁰ Institutional IFGs are particularly powerful players in American politics—in fact, the top twenty PAC contributors during the 2008 elections were all institutional IFGs.⁹¹ Many of them distributed their funds nearly evenly between Democrats and Republicans.⁹²

86. Marcus Stern & Jennifer LaFleur, *Leadership PACs: Let the Good Times Roll*, PROPUBLICA (Sept. 26, 2009, 10:32 AM), <http://www.propublica.org/article/leadership-pacs-let-the-good-times-roll-925> (“What separates [leadership PACs] from campaign committees is that lawmakers are supposed to pass along the bulk of the money to other members of their party for their campaigns.”).

87. *Cf. id.* (“[L]awmakers with leadership PACs can earn their beneficiaries’ support when it comes time to divvy up committee chairmanships and other leadership posts.”).

88. PACS: *AFL-CIO*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/lookup2.php?strID=C00003806&cycle=2008> (last visited Feb. 27, 2011) (charting the AFL-CIO PAC’s fundraising and spending from 1990 to 2010).

89. *See, e.g., What We Stand for: Mission and Goals of the AFL-CIO*, AFL-CIO, <http://www.aflcio.org/aboutus/thisistheafcio/mission/> (last visited Feb. 27, 2011) (describing the organizational objectives of the AFL-CIO).

90. PACS: *AT&T Inc.*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/lookup2.php?strID=C00109017&cycle=2008> (last visited Feb. 27, 2011) (outlining the funds raised and expended by AT&T in 2008).

91. *Top PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/toppacs.php?Type=C&cycle=2008> (last visited Feb. 27, 2011).

92. *Id.*

It remains to be seen how institutional IFGs will respond to *Citizens United*. The ruling removed the legal necessity for corporations and unions to maintain separate PACs. The backlash against some corporations for their direct contributions in 2010⁹³ suggests that some institutions might prefer to distance themselves from their political giving. Although institutional IFGs are legally distinct entities, they remain tied to their sponsoring organizations, and their legal separation provides little protection in this context. The top two PACs in terms of dollar contributions during 2010 were affiliated with companies, and almost all of the remaining top twenty were affiliated with unions.⁹⁴ At the same time, however, companies' newfound ability to donate directly to 501(c) groups, which are not required to disclose the source of their donations, will make the influence of institutions like corporations and unions even harder to track. Regardless of whether institutional IFGs will take the form of affiliated PACs or more directly integrated lobbying groups in the future, the *Citizens United* ruling will likely only increase their power in American politics.

Bundlers are the final kind of traditional fundraising intermediaries operating today. Rather than donating themselves, bundlers contact friends, colleagues, and associates, gathering donations and "earmarking" them—effectively delivering stacks of checks signed by their friends and acquaintances directly to campaigns.⁹⁵ Current law only requires the disclosure of bundling by lobbyists; because their names are not on the checks, nonlobbyist bundlers escape most current campaign finance disclosure requirements.⁹⁶ If the bundler is not a registered lobbyist, the recipient need only disclose the source of the donations, not the earmarking intermediary.⁹⁷ Some candidates have chosen to publicly recognize their bundlers, but many can-

93. See, e.g., *supra* text accompanying note 75.

94. *Top 20 PAC Contributors to Candidates, 2009–2010*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/toppacs.php> (last visited Feb. 27, 2011).

95. Brody Mullins, *Donor Bundling Emerges As Major Ill in '08 Race*, WALL ST. J., Oct. 18, 2007, at A1.

96. 2 U.S.C.A. § 434(i)(7) (West Supp. 2009) (defining the "persons" whose bundling contributions must be reported as registered lobbyists or political committees run by registered lobbyists); see Mullins, *supra* note 95 ("Knowledge about these bundlers is limited . . . because candidates aren't required to disclose information about them."); see also Elisabeth Bassett, *Reform Through Exposure*, 57 EMORY L.J. 1049, 1076–78 (2008) (describing lobbyist bundling disclosure requirements imposed by the of the Honest Leadership and Open Government Act of 2007).

97. 2 U.S.C. § 434(i)(7).

didates do not.⁹⁸ Bundlers' anonymity can make it especially difficult to detect the real source of campaign funding.⁹⁹

Despite the regulatory concerns raised by bundling, it has expanded greatly in recent elections.¹⁰⁰ In 2000, George W. Bush publicly labeled bundlers "who could raise at least \$100,000" as "Pioneers," and raised at least \$22,000,000 from bundlers during the 2000 primary election.¹⁰¹ In 2008, bundlers raised at least \$76,500,000 for Barack Obama and at least \$75,750,000 for John McCain.¹⁰² According to a recent study, "Bundled donations account[ed] for more than one-quarter of presidential campaign contributions [in 2008], up from 8% in the 2000 race."¹⁰³

C. Online Fundraising: Intermediaries and the Rise of the Internet

One of the most remarkable changes that the Internet has brought about is a drastic drop in transaction costs for group organization.¹⁰⁴ This is not limited to political contexts—it is frequently cited in social and economic fields.¹⁰⁵ Before the Internet, locating members, communicating with them, soliciting their input, and organizing them to perform tasks were costly, both in time and money. Online organizations radically reduce these costs by using e-mail instead of traditional mail and by relying on the Internet to connect with and organize their members. Activities that were impossible or

98. See Mullins, *supra* note 95 ("While some campaigns honor bundlers by name on their Web sites or disclose the total number of bundlers working for them, others guard their identities.").

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99. See, e.g., Robert P. Beard, Note, *Whacking the Political Money "Mole" Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After Wisconsin Right to Life*, 2008 U. ILL. L. REV. 731, 760 ("[B]ecause candidates need not disclose the bundlers' identities . . . the law effectively drives political money, even hard money, further underground.").

100. Mullins, *supra* note 95 (explaining that bundled funds have increased from the 2004 and 2000 elections).

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101. Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 273 n.166 (2004) (internal quotation marks omitted).

102. *Barack Obama (D): Bundlers*, OPENSECRETS.ORG, <http://www.opensecrets.org/pres08/bundlers.php?id=N00009638> (last visited Feb. 27, 2011).

103. Mullins, *supra* note 95 (describing the results of a study of campaigns and watchdog groups conducted by the *Wall Street Journal*).

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104. See generally CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008) (providing numerous examples of situations where the Internet has reduced transaction costs and encouraged online organizing).

105. See generally, e.g., *id.*

inefficient before—Trevor Lyman’s moneybombs, for instance—are suddenly not only possible, but easy to accomplish.¹⁰⁶

Although the Internet has reduced many organizational costs, it has not eliminated the challenges of organizing. Reduced costs have made new, more complex organizational structures possible, and online fundraising intermediaries have arisen to exploit these new opportunities. Three main types of online fundraising intermediaries have developed to capitalize on the increasing use of the Internet in politics: online IFGs, partisan blogs, and platforms.

Online IFGs are the most familiar type of online fundraising intermediary, because they combine elements of traditional fundraising organizations with new tools and techniques made possible by the Internet. MoveOn.org is a classic example of an IFG that used the Internet to develop into a fundraising powerhouse.¹⁰⁷ Founded in 1998, MoveOn.org spent about \$30,000,000 during the 2004 elections, about \$38,000,000 during the 2008 elections, and more than \$28,000,000 during the 2010 midterm elections.¹⁰⁸ FreedomWorks is a conservative counterpoint to MoveOn.org.¹⁰⁹ Originally an offline IFG, FreedomWorks became an important supporting organization to the online-organized Tea Party movement.¹¹⁰ It now claims over one million members and has integrated Internet strategies into its fundraising and outreach efforts.¹¹¹

Partisan blogs, the second type of online fundraising intermediary, couple fundraising, volunteer mobilization, and advocacy with a suite of more traditionally journalistic roles. Each blog represents a clear political stance and provides political news and analysis based on its particular point of view. Many partisan blogs are in fact group blogs, staffed by dozens of volunteer and/or paid correspondents that act as community leaders. Prominent examples of group blogs include Townhall,¹¹² OpenLeft,¹¹³ Daily Kos,¹¹⁴ and RedState.¹¹⁵ Dur-

106. *Id.* at 47 (“The cost[s] of all kinds of group activity—sharing, cooperation, and collective action—have fallen so far so fast that activities previously [impossible] are now coming to light.”).

107. MOVEON.ORG, *supra* note 15.

108. PACs: MoveOn.org, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/lookup2.php?strID=C00341396> (last visited Feb. 27, 2011).

109. *About FreedomWorks*, FREEDOMWORKS, <http://www.freedomworks.org/about/about-freedomworks> (last visited Feb. 27, 2011).

110. *See, e.g.*, Kathy Kiely, “Tea Party” Label Invites Discord, USA TODAY (Feb. 6, 2010, 2:16 PM), http://www.usatoday.com/news/washington/2010-02-04-tea-party_N.htm.

111. *See* Letter from Matt Kibbe, President & CEO, FreedomWorks, to U.S. Senators (Sept. 23, 2010), *available at* http://www.freedomworks.org/files/9-23-10_Reins_Act_Letter_Senate.pdf (“On behalf of over a million FreedomWorks members nationwide . . .”).

112. TOWNHALL.COM, <http://townhall.com/> (last visited Feb. 27, 2011).

ing elections, these blogs boast daily readerships in the hundreds of thousands, if not millions—large communities of interested potential volunteers and contributors who have already self-filtered for political beliefs and personal motivation.¹¹⁶ In addition to donations and motivated volunteers, partisan blogs also generate the press coverage and online debate that help attract direct donations by raising candidates' profiles.¹¹⁷ Thus, while partisan blogs deliver some fundraising directly through their efforts, they are far more influential in their ability to mobilize partisan activists and the voting public and to spread a candidate's message to communities the candidate might otherwise have difficulty reaching directly.

Platforms are the final type of online intermediaries and are unlike anything politics has seen before. By logging onto the website of an online platform, anyone, from candidates, to organizations, to individuals, can set up a fundraising page where donors can contribute money to a political cause or candidate.¹¹⁸ The platform gathers money and delivers it to the appropriate recipient, ensuring compliance with all necessary laws. Dedicated online platforms, such as ActBlue¹¹⁹ and SlateCard,¹²⁰ have been especially successful, providing both finely tuned resources and a body of users who have self-selected based on a willingness to support political causes.¹²¹ Meetup was a wildly successful, general-purpose intermediary platform used by the Howard Dean campaign during the 2004 elections—volunteers around the country used the platform to organize real-world efforts

113. OPEN LEFT, <http://www.openleft.com> (last visited Feb. 27, 2011).

114. DAILY KOS, <http://www.dailykos.com/> (last visited Feb. 27, 2011).

115. RS: REDSTATE, <http://www.redstate.com> (last visited Feb. 27, 2011).

116. See, e.g., *Daily Kos: Site Summary*, SITEMETER, <http://www.sitemeter.com/?a=stats&s=sm8dailykos> (last visited Feb. 27, 2011) (detailing daily traffic at Daily Kos); *Redstate.com: Site Summary*, SITEMETER, <http://www.sitemeter.com/?a=stats&s=s19redstate> (last visited Feb. 27, 2011) (detailing daily traffic at RedState.com).

117. Jonah Perlin, *Political Blogs and Netroots*, PRINCETON PROGRESSIVE NATION (Oct. 18, 2010), <http://princetonprogressive.com/?p=127>.

118. See David Karpf, *Understanding Blogspace*, 5 J. INFO. TECH. & POL. 369, 379 (2008) (describing ActBlue, which is “an online application that allows anyone, be they candidate, interest group leader, or everyday citizen, to create his or her own fundraising page for registered political candidates”).

119. ACTBLUE, <http://www.actblue.com> (last visited Feb. 27, 2011).

120. SLATECARD, <http://slatecard.com> (last visited Oct. 23, 2010) (on file with the Maryland Law Review); see also *Slatecard.com*, FACEBOOK, <http://www.facebook.com/group.php?gid=5953238017> (last visited Mar. 5, 2011).

121. Cf. *The Quick Five Spot: Online Campaign Contributions*, ARIZ. CAPITAL TIMES, July 25, 2008, available at 2008 WL 13888456 (noting that ActBlue's and Slatecard's successes are due to their “decentralization”—“[t]hey allow people to create their own sites to do their own campaigning and fundraising with family and friends who will listen to their opinion”).

on behalf of their candidate.¹²² More recently, tools leveraging Facebook as a platform for political fundraising have begun to emerge.¹²³ Platforms do not endorse candidates (although they may espouse a more general political view) and do not fundraise themselves.¹²⁴ Instead, they empower supporters to fundraise for and organize around their favorite candidates. The *New York Times* described ActBlue as “part fund-raiser, part social-networker.”¹²⁵ Funds raised via platforms are earmarked and delivered directly to the candidate, like a bundler, but with far more contributors making (generally) much smaller contributions.¹²⁶ More than \$174,408,330 has been raised on ActBlue since it launched in 2004.¹²⁷ Clients of BlueSwarm, a new Facebook-based fundraising application, raised more than \$45,000,000 during the 2010 election cycle.¹²⁸

These three categories are not exclusive, especially for online fundraising intermediaries. Indeed, many intermediaries combine multiple roles. Both the Republican and Democratic parties, for instance, offer their own social networking platforms to help voters organize and fundraise, in addition to accepting donations and mobilizing their members directly.¹²⁹ Similarly, several state parties

122. See, e.g., Gary Wolf, *How the Internet Invented Howard Dean*, WIRED (Jan. 2004), <http://www.wired.com/wired/archive/12.01/dean.html>.

123. See, e.g., Glen Johnson, *Political Fundraising Tool Taps Social Networks*, ABCNEWS (June 13, 2010), <http://abcnews.go.com/Technology/wireStory?id=10903486> (describing early successes in political fundraising over Facebook and other social networks); Ben Smith, *BlueSwarm Launches Fundraising App*, POLITICO (Mar. 29, 2010), http://www.politico.com/blogs/bensmith/0310/BlueSwarm_launches_fundraising_app.html (describing BlueSwarm, a Facebook application that enables social network-based online fundraising).

124. Many are, however, clearly partisan. For instance, ActBlue aims to help Democratic candidates, and SlateCard supports Republicans. *About ActBlue*, ACTBLUE, <http://www.actblue.com/about> (last visited Feb. 27, 2011); *About the Utility*, SLATECARD, <http://www.slatecard.com/about> (last visited Dec. 19, 2010) (on file with the Maryland Law Review).

125. Leslie Wayne, *Act Blue's Record Take*, THE CAUCUS: N.Y. TIMES BLOG (Apr. 3, 2008, 12:43 PM), <http://thecaucus.blogs.nytimes.com/2008/04/03/act-blues-record-take/>.

126. See, e.g., *ActBlue Frequently Asked Questions*, ACTBLUE, <http://www.actblue.com/faq> (last visited Feb. 27, 2011) (“We can directly contribute to and coordinate with candidates, and can transmit earmarked contributions from individuals to candidates.”).

127. ACTBLUE, *supra* note 119.

128. Johnson, *supra* note 123.

129. E.g., GOP, http://our.gop.com/app/render/go.aspx?xsl=tp_community.xsl&UserToken= (last visited Feb. 27, 2011) (calling on visitors to join and use the GOP social network to plan offline events, to share news, videos, and blog posts, and to connect with their communities); PARTYBUILDER, <http://my.democrats.org/page/content/partybuilder/> (last visited Feb. 27, 2011) (encouraging visitors to become members, social network, plan events, and run their own fundraising campaigns on behalf of Democratic candidates).

have rolled out their own fundraising and social networking platforms.¹³⁰ Perhaps the most interesting examples of multirole online intermediaries have grown out of the Tea Party movement, a grass-roots upwelling of conservative activists that spawned numerous organizations.¹³¹ Rather than having a clear hierarchy, the Tea Party movement is an agglomeration of numerous local and national groups, brought into a loose alliance by virtual connections.¹³² While some of these organizations act primarily as community organizing destinations or IFGs, others, such as Tea Party Nation, incorporate elements of IFGs, platforms, and partisan blogs.¹³³

Finally, it is important to note that, although the previous two Sections have drawn a clear distinction between online and offline organizations, the line is much blurrier in practice. I define an online fundraising intermediary as one that has thoroughly integrated online technologies and strategies into its day-to-day operations. Thus, many prominent online fundraising intermediaries are, in fact, offline intermediaries that have embraced new media.¹³⁴ The central question that this Article concentrates on is not whether an intermediary's roots lie in online or offline media but how the intermediary's increasing reliance on online media has changed the way it operates.

TABLE 1

Types of Online and Offline Fundraising Intermediaries

OFFLINE	ONLINE
Independent Fundraising Groups (IFGs) Policy-Focused Institutional Influence-Focused	Online IFGs
Bundlers	Partisan Blogs
Political Parties	Platforms

130. See, e.g., myMSGOP, <http://mymsgop.org/> (last visited Feb. 27, 2011) (online home of the Mississippi Republican Party); TNDP, <http://www.tndp.org/main/authorization/signUp?target=http://www.tndp.org/profiles> (last visited Feb. 27, 2011) (online home of the Tennessee Democratic Party).

131. See Jonathan Rauch, *How Tea Party Organizes Without Leaders*, NAT'L J., Sept. 11, 2010, at 29, 29 (detailing the rise of the Tea Party movement).

132. *Id.*

133. See TPN: TEA PARTY NATION, <http://www.teapartynation.com/> (last visited Feb. 27, 2011) (incorporating blogs, social networking, and member mobilization).

134. See, e.g., EMILY'S LIST, <http://emilyslist.org/> (last visited Feb. 27, 2011); FREEDOMWORKS, <http://www.freedomworks.org/> (last visited Feb. 27, 2011).

D. Why Intermediaries Are Valuable in a Democratic Society

Although fundraising intermediaries have been shaped by political influence-peddling and enabled by loopholes in federal regulation, they also enhance democratic participation by providing voters with avenues to donate their money and their time. If it is true that “[w]hat makes a culture democratic . . . is not democratic *governance* but democratic *participation*,”¹³⁵ then the potential for access that fundraising intermediaries offer is central to American democracy. Different kinds of interaction, of course, can have different consequences for democratic participation. Volunteering, whether door knocking, phone banking, or organizing at a local headquarters, is a “directly collaborative activity” that strengthens “[a] community’s stock of social capital.”¹³⁶ It draws more citizens into the process and provides for increased opportunities for debate and political engagement. This suggests that contributions of time, and contributions of money that lead to contributions of time, are particularly valuable for democratic participation.¹³⁷

As political parties are the oldest, most entrenched, and most studied fundraising intermediaries, there is a rich literature that discusses the benefits and risks they pose.¹³⁸ From this debate, it is possible to identify five ways that fundraising intermediaries increase democratic participation within American politics: Fundraising intermediaries can (1) increase the political engagement of their members, (2) aggregate their members’ opinions into a single voice loud enough to reach candidates’ ears, (3) shape public debate, (4) hold politicians accountable by influencing elections, and (5) be held accountable by their members and the public. An intermediary that accomplishes all five of these roles would be a boon to democracy and might be preferable even to direct engagement between candidates and constituents. Examining each of these functions in turn will provide a rubric for evaluating the impact of any particular fundraising

135. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004).

136. Michael J. Malbin et al., *The CFI Small Donor Project: An Overview of the Project and Preliminary Report on State Legislative Candidates’ Perspectives on Donors and Volunteers* 4, (Campaign Fin. Inst., Paper prepared for the Annual Meeting of the Am. Pol. Sci. Ass’n, Aug. 29, 2007), available at http://www.cfinst.org/pdf/books-reports/cfi_small-donor_APSPaper_2007.pdf.

137. See *id.* at 19 (noting that “at least some small donor contributions [may be] social activities” and commenting “that . . . contributions for a nontrivial number of small donors [may be] a gateway form of participation”).

138. See generally, e.g., ALDRICH, *supra* note 17.

intermediary on democratic participation. I use this rubric in Part III to compare online and offline intermediaries.

First, intermediaries enhance their members' political engagement by allowing them to express and debate their political beliefs and to associate with a group that shares those beliefs.¹³⁹ A democratic culture is built on the ability of its citizens to debate. It relies on the fact that "everyone—not just political, economic, or cultural elites—has a fair chance to participate."¹⁴⁰ Intermediaries provide this opportunity to their members by offering fora for discussion and opportunities for citizens to engage directly through debate, advocacy, and donation. In addition, intermediaries allow individuals to identify themselves with causes that are meaningful to them. As the Supreme Court noted in *NAACP v. Alabama*,¹⁴¹ "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."¹⁴² The Court reaffirmed this right in *Buckley v. Valeo*, noting that the First Amendment protects "[t]he right to associate with the political party of one's choice."¹⁴³ Thus, effective intermediaries allow individuals to align themselves with particular causes by becoming members and provide them with opportunities to debate, discuss, and take action—to engage in the political process.

Second, intermediaries aggregate the desires of their members. Political parties, according to their great defender Edmund Burke, are bodies "of men united, for promoting by their joint endeavours the national interest."¹⁴⁴ This joint promotion is what enables groups of citizens to compete with the wealthy and powerful. Most voters could not individually muster the resources to even cover a candidate's time spent calling constituents or traveling to a fundraiser. Intermediaries help small donors aggregate their resources and

139. For example, many of the partisan blogs described above allow users and members to comment on articles and interact with each other on discussion boards. Specifically, Daily Kos provides its members with the ability to maintain personal diaries, which are rated and commented on by other users. *Diaries*, DAILYKOS, <http://www.dailykos.com/diaries> (last visited Feb. 27, 2011).

140. Balkin, *supra* note 135, at 4.

141. 357 U.S. 449 (1958).

142. *Id.* at 460; *see also id.* at 466 (finding that compelling the NAACP to reveal its membership rolls violated its members' First Amendment right to free association).

143. 424 U.S. 1, 15 (1976) (alteration in original) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)) (internal quotation marks omitted).

144. EDMUND BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL, AND OTHER PRE-REVOLUTIONARY WRITINGS 271 (David Womersley ed., 1998).

command the attention of candidates whose limited time and high expenses otherwise pressure them to concentrate on wealthy donors.

One of the guiding principles in democratic theory is that each citizen should not only have a voice in politics, but that his voice should be “clear, loud, and equal: . . . equal so that the democratic ideal of equal responsiveness to the preferences and interests of all is not violated.”¹⁴⁵ Ensuring equality is perhaps most challenging in the realm of political giving because each citizen does not have a single, equally valued vote to spend. If this equality is not ensured, it can lead to a participatory distortion when the group that is most politically active does not represent the larger community.¹⁴⁶ The demographics and political views of more affluent citizens do not match those of the general population—for instance, they tend to have more conservative views on economic issues than the general population.¹⁴⁷ If their voices are louder than their proportional representation, the democratic representativeness of the system as a whole suffers.¹⁴⁸ Short of further restraints on contributions and funding that would likely violate the First Amendment, the aggregative power of fundraising intermediaries is a prime counterpoint to the power of wealthy donors.¹⁴⁹

Third, intermediaries shape public debate by bringing important issues to the fore, by providing informational cues to political participants, and by engaging in negotiation with other intermediaries to simplify their members’ choices.¹⁵⁰ Many citizens may not have the time or the resources to fully evaluate the policy questions and the candidates on which they are asked to vote. For these citizens, intermediaries provide heuristic cues—labels that serve as shortcuts to

145. VERBA ET AL., *supra* note 17, at 509.

146. *Id.* at 178–85.

147. *Id.* at 480 (“[I]n both parties the more affluent have more conservative economic views.”).

148. See Clyde Wilcox, *Contributing as Political Participation*, in A USER’S GUIDE TO CAMPAIGN FINANCE REFORM, *supra* note 17, at 109, 116 (“Giving may be an additional source of political inequality, expanding the political voice of the advantaged and channeling a distorted image of public opinion into government institutions.”).

149. Intermediaries’ aggregative role has become even more important in the wake of *Citizens United*, which empowered corporations to directly enter the political fray. See *supra* text accompanying notes 68–71.

150. See, e.g., ALDRICH, *supra* note 17, at 49 (“[T]he collective action problem for voters of becoming sufficiently informed to make a (possibly preliminary) determination of whom they favor is greatly attenuated, given party affiliation and perhaps other reputational cues.”); Philip E. Agre, *Real-Time Politics: The Internet and the Political Process*, 18 INFO. SOC. 311, 312 (2002) (“Political parties and legislatures, for example, do not simply transmit information; they actively process it, especially by synthesizing political opinions and interests into ideologically coherent platforms.”).

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help them identify which causes and candidates they should support.¹⁵¹ A voter might not be able to investigate a particular candidate's stance on environmental policy, but if the voter often agrees with an environmental intermediary, for example, he could use that intermediary's endorsement as a key factor in his decision.¹⁵²

More generally, intermediaries "are integral to democratic deliberation, and deliberation elucidates their significance."¹⁵³ Intermediaries set the public agenda and ensure progress on that agenda in three key ways. Most simply, intermediaries present individual points of contact for the "discovery process of negotiation," narrowing the field of interested parties from hundreds of millions of voters to thousands of intermediaries.¹⁵⁴ This helps make national negotiation in a country as large as the United States possible. More than just acting as representative negotiators or points of contact, intermediaries also ensure that issues of importance to the populace become central to political debate. An unconnected mass of environmentally conscious voters, for instance, is poorly suited to focusing political attention on environmental issues. Environmental intermediaries, however, have the resources, political knowledge, and public influence necessary to insert themselves meaningfully into public debate.¹⁵⁵ Part of this power comes from the aggregated voices of their members, but part also comes from the skills and experience of the intermediaries themselves. Further, fundraising intermediaries shape political debate by influencing the attitudes of their members. For instance, it is unlikely that every member of the American Farm Bureau ("AFB") agrees on how to prioritize agricultural policy goals or what tactics should be used in pursuit of these goals.¹⁵⁶ By recom-

151. See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1149–51 (2003) (providing a brief introduction to heuristic cues).

152. See, e.g., Arthur Lupia, *Dumber than Chimps? An Assessment of Direct Democracy Voters,* in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 66, 67 (Larry J. Sabato et al. eds., 2001) (using as an example a voter's selection of Bill Clinton for President based on his endorsement by the Sierra Club).

153. ROSENBLUM, *supra* note 17, at 307.

154. Agre, *supra* note 150, at 312.

155. See, e.g., GREENPEACE INT'L, ANNUAL REPORT '09, at 29–31 (2009), available at http://www.greenpeace.org/international/Global/international/publications/greenpeace/2010/Annual_Report_2009/AR2009.pdf (describing the amount of money raised and spent by Greenpeace in 2009).

156. See *We Are Farm Bureau*, THE VOICE OF AGRIC.: AM. FARM BUREAU, <http://www.fb.org/index.php?fuseaction=about.home> (last visited Feb. 27, 2011) ("[American Farm Bureau] is the unified national voice of agriculture, working through our grassroots organization to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities.").

mending policy goals to its members, the AFB uses its expertise to rally them to specific goals.

Fourth, intermediaries hold politicians responsible for their actions and help ensure that their members' voices influence their representatives.¹⁵⁷ For individuals to play a meaningful part in the political process, their participation must have "more than a negligible probability of influencing the outcomes toward which that participation is directed."¹⁵⁸ The ability of intermediaries to aggregate and represent their members and to shape public debate will have little impact if the intermediaries cannot influence political actors to advance those interests. While individual constituents may have difficulty directly influencing their representatives, a powerful intermediary's threat to withhold supporters, voters, and contributors can exert meaningful pressure.¹⁵⁹ This influence can be a two-edged sword, however. Although influence is necessary for intermediaries to empower individual citizens, unchecked influence transforms intermediaries from loudspeakers for the concerns of citizens to another megaphone that drowns them out.

This concern raises the final role of fundraising intermediaries—the role that must provide a check to all the influence described in the previous four roles. Intermediaries should themselves be held accountable for their actions and endorsements by their members and the public sphere. This will ensure that intermediaries wield their influence in service of, rather than in competition with, the citizens they represent. Membership accountability is the most talked about form of pressure that intermediaries might face. Professors Persily and Cain discuss two relevant concepts—voice and exit.¹⁶⁰ Voice provides members with a means to "work within the organization . . . to influence its positions, decisions and leadership."¹⁶¹ Exit provides them with a realistic opportunity to leave the intermediary should they be unable to sway the intermediary's direction.¹⁶² If "voice" is the carrot,

157. Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, DAEDALUS, Summer 1980, at 25, 26 ("[O]nly if those elected know they will be held accountable for the results of their decisions (or nondecisions, as the case may be), do they have a personal incentive to govern in our interest.").

158. MICHAEL MARGOLIS & GERSON MORENO-RIÑO, *THE PROSPECT OF INTERNET DEMOCRACY* 6 (2009).

159. Issacharoff & Ortiz, *supra* note 11, at 1650–51.

160. Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 797–98 (2000) (borrowing the terms "voice" and "exit" from Albert O. Hirschman (citing ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 4–5 (1970))).

161. *Id.* at 797.

162. *Id.* at 797–98.

then “exit” is the stick—members’ threat to depart lends credibility to their efforts to influence the intermediary. A robust exit right relies not only on the qualities of the intermediary but also on the space in which the intermediary operates: How easy is it for dissatisfied members to depart for a competing organization?; How many alternative groups are there?. These factors can compel intermediaries to respect the wishes and arguments of their members and to ensure that their acts are shaped by their entire membership, not merely by a small undemocratic steering committee.¹⁶³

In addition to being responsive to their members, intermediaries should also be responsive to the public sphere. As Professors Issacharof and Pildes have noted, “[A]ppropriate democratic politics [is] akin in important respects to a robustly competitive market Only through an appropriately competitive partisan environment can . . . the policy outcomes of the political process be responsive to the interests and views of citizens.”¹⁶⁴ Thus, intermediaries must be open to challenge and criticism by other intermediaries, by journalists, and by individual candidates and activists. To be publicly criticized, of course, an intermediary must act within the public sphere. Thus, the public (or nonpublic) nature of intermediaries will have a significant impact on whether they are meaningfully accountable. It should be of little surprise that the ability of 501(c)s to keep their funding sources largely secret raises serious concerns about the likelihood that they will fulfill this final goal of fundraising intermediaries.

In these five ways, intermediaries operate as more than just necessary evils of representative politics. They enhance democratic participation and reinforce the democratic process. Although some intermediaries may be little more than foils for special interests, others empower the public’s voice in elections and enhance the efficiency of the political and legislative process. Identifying the effectiveness of particular fundraising intermediaries operating in these five roles will help reveal whether they are a positive, democratic influence on the political process, or whether they are merely avenues for funneling money to candidates.

163. *See id.* at 798 (“For example, the prospect of the Christian Coalition or Right-to-Life Party running its own candidates in a general election ensures that the Republican candidates, such as George W. Bush, will think twice before alienating them from the Republican Party by compromising their position on abortion.”).

164. Samuel Issacharof & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998).

III. CONTRASTING ONLINE AND OFFLINE FUNDRAISING INTERMEDIARIES

The role of fundraising intermediaries in American politics provides a backdrop against which the rise of online fundraising can be examined. This Part compares the effectiveness of online and offline fundraising intermediaries in each of the five roles identified in the previous Part. This comparison reveals that, while the Internet has not eliminated the need for political intermediaries, as some had hoped, it has changed how intermediaries operate. Online intermediaries certainly pose risks, especially in the area of accountability, but they also have the potential to enhance democratic participation in American politics.

A. *Member Engagement*

The reduced transaction costs of organization on the Internet enable online intermediaries to interact with a larger membership more frequently and foster more opportunities for engagement among their members than their offline counterparts.¹⁶⁵ The pressures of online fundraising, whereby intermediaries aggregate small donations and volunteer commitments from a large, disparate group of donors, make efforts by online intermediaries to engage with their members not only possible, but necessary. The resulting increase in online intermediaries' member engagement increases democratic participation in three main ways: it makes citizen participation easier; it exposes contributors to other, more active forms of engagement such as volunteering; and it creates more continuous relationships between members and intermediaries, fostering continued interaction and engagement. Besides increasing their members' expression and engagement, online intermediaries also raise concerns about the demographics of online fundraising, the Internet's ability to nationalize public debate, and donors' ability to make anonymous contributions.

The lower transaction costs of online contributing and volunteering makes it much easier for citizens to engage with the democratic process; simplified citizen participation makes it possible for online intermediaries to quickly amass large memberships.¹⁶⁶ Offline in-

165. See generally Brian S. Krueger, *A Comparison of Conventional and Internet Political Mobilization*, 34 AM. POL. RES. 759, 760 (2006) ("[T]he Internet offers a communication channel that radically reduces the costs of political mobilization efforts.").

166. Cf. *id.* at 670–71 (suggesting that transaction costs are transferred from the institution to the individual).

intermediaries can also command large memberships, but it is remarkable how quickly online intermediaries have come to rival even the largest of their offline counterparts. For example, the Sierra Club, with 1.4 million members, was founded in 1892.¹⁶⁷ The AFL-CIO, one of the largest unions in the United States, was founded in 1955 by the merger of two older unions and currently boasts 12.2 million members.¹⁶⁸ In comparison, MoveOn.org already has 5 million members—almost five times as many as the Sierra Club and close to half as many as the AFL-CIO—despite being barely a decade old and having no external institutional support.¹⁶⁹ The large memberships of online intermediaries mean that they can easily engage more citizens in the democratic process than traditional, offline intermediaries.

A related question concerns the quality and depth of the interactions that take place within these large groups. Scholars break social connections into weak ties (shallow relationships) and strong ties (strong, meaningful relationships).¹⁷⁰ The disconnected nature of online communications tends to support weak ties more easily than strong ones.¹⁷¹ Weak ties are better at connecting communities than at eliciting action—although many people support causes on Facebook, few take action beyond that initial click of their mouse.¹⁷² One risk of online engagement is that it will weaken meaningful social interaction by replacing strong-tie, offline networks with weak-tie, online networks.

While it is certainly true that many online connections are weaker than their offline analogs, this criticism misses three critical points. First, this criticism is only a concern if online engagement replaces real-world engagement. The low-level commitment required by online political activity may instead attract people who would not other-

167. *Welcome to the Sierra Club!*, SIERRA CLUB, <http://www.sierraclub.org/welcome/> (last visited Feb. 27, 2011).

168. *About Us*, AFL-CIO, <http://www.aflcio.org/aboutus/> (last visited Feb. 27, 2011).

169. *About the MoveOn Family of Organizations*, MOVEON.ORG, <http://www.moveon.org/about.html> (last visited Feb. 27, 2011).

170. See generally Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973) (dividing social connections into strong and weak ties and outlining the differences between the two).

171. Malcolm Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*, NEW YORKER, Oct. 4, 2010, at 42; see also Granovetter, *supra* note 170, at 1366 (“Intuitively speaking, this means that whatever is to be diffused can reach a larger number of people, and traverse greater social distance . . . when passed through weak ties rather than strong.” (footnote omitted)).

172. See, e.g., Kim Hart & Megan Greenwell, *To Nonprofits Seeking Cash, Facebook App Isn't So Green*, WASH. POST, Apr. 22, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/21/AR2009042103786.html> (finding that only a small percentage of Facebook members join causes and noting that even fewer donate to those causes).

wise take part—even weak engagement is better than no engagement at all. Second, online engagement does not take place in a vacuum. Online intermediaries expose contributors to multiple forms of political engagement, from fundraising and phone banking to volunteering for local campaigns. By acting as one-stop shops, online fundraising intermediaries can actually draw weakly committed online activists into more significant forms of political engagement.¹⁷³ As a result of this crossover, online contributors are more likely to participate in other kinds of political activity than are their offline counterparts.¹⁷⁴ Third, in contrast to offline fundraising, many of the activities in which online intermediaries' members engage are fundamentally communal, from letter writing to canvassing local neighborhoods, and thus embody stronger social ties than pure monetary donations.¹⁷⁵ These forms of engagement compel participants to connect with other citizens and to engage in the debates and discussions that underpin the democratic process.

The increase in online intermediaries' member engagement also exposes contributors to other, more active forms of engagement. Online intermediaries must do more than just process donations. They must coordinate and support their members' volunteer efforts. As a result, many online intermediaries' websites feature social communities¹⁷⁶ and facilitate real-world meetings between members,¹⁷⁷ two strategies that enhance member engagement and increase volunteerism. Combining advocacy and fundraising greatly increases member-

173. See, e.g., MOVEON.ORG 2008 POST-ELECTION REPORT, *supra* note 15, at 3–4 (touting the 2.14 million calls made by members and the “over 933,800 volunteers” turned out for the Obama campaign). R

174. See, e.g., INST. FOR POLITICS, DEMOCRACY & THE INTERNET, GEORGE WASHINGTON UNIV., SMALL DONORS AND ONLINE GIVING: A STUDY OF DONORS TO THE 2004 PRESIDENTIAL CAMPAIGNS 22–24 (2007), available at http://www.cfinst.org/pdf/federal/president/IPDI_SmallDonors.pdf (finding that twenty-three percent of online donors who gave \$100 or less in 2004 planned to volunteer in 2008, compared to only six percent of offline donors of like amounts; similarly, twenty-one percent of online donors who gave \$500 or more in 2004 planned to volunteer in 2008, compared to only twelve percent of offline donors).

175. Cf., e.g., *id.* at 29–30 (“Online donors were far more likely to forward e-mail.”).

176. See, e.g., Sarah Lai Stirland, *Finally, a Facebook for Republican Campaign Donors*, WIRED (Oct. 8, 2007), <http://www.wired.com/politics/law/news/2007/10/slatecard> (explaining, in the words of Slatecard's co-founder, that “people can not only support candidates with a donation, but they can also support that person within their social network” and noting that undecided voters can use Slatecard to see who friends or public figures are endorsing (internal quotation marks omitted)).

177. See, e.g., TPN: TEA PARTY NATION, *supra* note 133 (including an interactive list of upcoming events that allows members to post and organize their own events); Wolf, *supra* note 122 (noting that supporters of Howard Dean used MeetUp.com to arrange volunteer meetings and events during the 2004 presidential campaign). R
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member and member-intermediary interaction. Increased interaction increases the social rewards that members reap from political engagement, thus encouraging greater participation.

In addition, reduced transaction costs and the pressures of small donor fundraising mean that online fundraising intermediaries have more continuous relationships and frequent interactions with their members than offline intermediaries. Instead of distributing monthly or annual newsletters, online intermediaries can communicate with their members on a daily—or even an hourly—basis, allowing them to respond quickly to new developments and shifts in member sentiment. Online intermediaries can even conduct polls of their members and use the results to inform their actions.¹⁷⁸ By creating a tighter feedback loop between members and intermediaries, these communications help reassure members that intermediaries are listening and responding to their desires and encourage greater engagement. Indeed, because online intermediaries raise money largely from individual donors making repeated, small donations,¹⁷⁹ they must keep their members engaged if they are to meet their fundraising goals.

Although online intermediaries increase their members' expression and engagement, they also raise several concerns. First, initial studies seem to indicate that the demographics of Internet users, and politically active Internet users in particular, are quite similar to those of citizens who are politically active offline.¹⁸⁰ Both groups tend to be

178. See, e.g., Jane Hamsher, *2010 Fire Dogs: Kucinich, Grayson and Weiner Win*, FDL (Feb. 10, 2010, 12:31 PM), <http://fdlaction.firedoglake.com/2010/02/10/2010-fire-dogs-kucinich-grayson-and-weiner-win/> (describing a contest to identify three candidates that best embodied the goals of Firedoglake.com in which 110,000 ballots were cast and the website committed to fundraise and phone bank for the winners).

179. Michael Luo, *Small Online Contributions Add Up to Huge Fund-Raising Edge for Obama*, N.Y. TIMES, Feb. 20, 2008, at A18 (noting that President Obama raised \$28 million online in January 2008, with ninety percent of that total from donors giving \$100 or less and with forty percent giving \$25 or less). But see INST. FOR POLITICS, DEMOCRACY & THE INTERNET, *supra* note 174, at 17 (explaining that “[t]here was no difference in the rate of online giving between small donors (\$100 or less) and large donors (\$500 or more)—contrary to a widely held assumption that large donors did not give online” in 2004).

180. See, e.g., Krueger, *supra* note 165, at 759 (arguing that reduced transaction costs make organizing large communities online easy, but that online organization still focuses on citizens who are likely to be politically active offline). But see INST. FOR POLITICS, DEMOCRACY & THE INTERNET, *supra* note 174, at 17 (claiming that “[o]nline donors tended to be younger than other donors”).

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wealthier and more educated than citizens who are not politically active and do not use the Internet.¹⁸¹

While ninety-five percent of households with over \$75,000 in annual income use the Internet, only sixty-three percent of those with incomes below \$30,000 use the Internet.¹⁸² While ninety-six percent of those with a college degree or higher use the Internet, only fifty-two percent of those without a high school diploma use the Internet.¹⁸³ A recent PEW study reached similar conclusions when comparing the demographics of online and offline political activity.¹⁸⁴ The community of Internet users is still in flux, but if these trends remain constant, online civic engagement will be least likely to reach those citizens who stand to benefit the most from new opportunities for political engagement.

Although this divide is real, the barriers to online fundraising—namely, access to the Internet and ownership of a credit card—are less significant and less socially stratifying than those for offline political engagement. Offline donors often must have time to attend fundraisers, contacts in the proper social and political circles for invitations to those fundraisers, and the ability to meet minimum expected donations of hundreds or thousands of dollars. Reducing the Internet access gap between the rich and poor in the United States would further strengthen the promise of online civic engagement. Even if Internet access in the United States remains skewed toward the wealthy, however, the Internet's lower barriers to entry mean that more outliers may be able to defy the odds and get involved.¹⁸⁵

A related concern about the demographics of online fundraising is Professor Cass Sunstein's argument that the Internet is a polarizing medium.¹⁸⁶ According to Professor Sunstein, the ability of Internet users to select from a wide array of partisan news sources means that people will gravitate to information and opinions online with which

181. AARON SMITH ET AL., PEW INTERNET, THE INTERNET AND CIVIC ENGAGEMENT 3, 34–42 (2009) available at <http://www.pewinternet.org/~media/Files/Reports/2009/The%20Internet%20and%20Civic%20Engagement.pdf>.

182. *Trend Data: Demographics of Internet Users*, PEW INTERNET, <http://www.pewinternet.org/Static-Pages/Trend-Data/Whos-Online.aspx> (last visited Feb. 27, 2011).

183. *Id.*

184. See SMITH ET AL., *supra* note 181, at 36–37 (“Those with higher levels of income are much more likely than those at lower levels of income both to use the internet and to have high-speed internet access at home.”).

185. *Cf. id.* at 14 (indicating that digital tools may facilitate political participation because activity can take place at any time of the day or night, from different locations, and at reduced costs).

186. See generally CASS R. SUNSTEIN, REPUBLIC.COM 2.0, at 46–97 (2007).

they are likely to agree.¹⁸⁷ This self-imposed intellectual segregation tends to generate more extremist views and to reduce the opportunity for meaningful debate on the Internet.¹⁸⁸ Perhaps most troubling, online faux-debates within, instead of across, political and ideological boundaries can actually replace debate in more bipartisan fora, as political activists choose to engage through partisan online communities rather than attend in-person events or write letters to the editor.¹⁸⁹

This trend could deal a heavy blow to online fundraising intermediaries whose goal is to enhance democratic engagement. There are several factors that mitigate the risks of online polarization, however. First, one recent study that analyzed the use of links to connect political blogs found that significant references were made across partisan lines.¹⁹⁰ According to the study, liberal and conservative bloggers posted more than 100 links to their counterparts across party lines in a three month period.¹⁹¹ While far more links were posted to blogs that agreed with the poster,¹⁹² these cross-partisan postings are nevertheless evidence of exactly the sort of debate that demonstrates democratic participation. Second, as discussed earlier, it is not clear that online discussion is replacing, rather than supplementing, offline debate. Indeed, because online donations act as a gateway to other, more participatory political activities, the rise of online fundraising could well push more people into the sort of face-to-face discussions that are often seen as underpinning democratic deliberation.¹⁹³

In addition to demographics, another factor in the online fundraising debate is the Internet's ability to nationalize public debate. Online intermediaries that are available throughout the country may find it difficult to focus on local campaigns, and candidates may become increasingly unable to ignore the resources promised them by national intermediaries. A candidate who raises money through a national intermediary relies not only on his own constituents but also on a much broader range of national (and potentially international) contributors. This is particularly true for high profile races. Scott Brown,

187. *Id.* at 49–50.

188. *See, e.g., id.* at 58–64 (discussing hate groups and group polarization, in which “people are likely to move toward a more extreme point in the direction to which the group’s members were originally inclined”).

189. *See, e.g., id.* at 69–72 (recognizing the insulation that may occur when debate is limited to online interactions).

190. *See generally* Eszter Hargittai et al., *Cross-ideological Discussions Among Conservative and Liberal Bloggers*, 134 PUBLIC CHOICE 67, 76–80 (2008).

191. *Id.* at 80 tbl.7 (indicating that there were forty-two conservative to liberal links and sixty-three liberal to conservative links).

192. *Id.* at 76–80 & 80 tbl.7.

193. *See supra* text accompanying notes 136–37.

the winner of the 2010 Massachusetts Special Election, for instance, raised large sums of money online from donors outside of Massachusetts.¹⁹⁴

On the one hand, nationalizing public debate brings more people into the discussion and ties the voting population closer together. A local congressional race that might formerly have interested only local constituents could now be a topic of discussion and concern across the country. On the other hand, a candidate seeking to raise money through national contributions must consider his positions on national issues, not only local ones. Accordingly, a candidate's political calculations may focus on factors that matter little to his direct constituents. Indeed, a candidate may feel compelled to conduct two campaigns—one targeted at his local constituents and another at prospective Internet supporters. Not only does this arrangement burden candidates, but it also risks transforming candidates from representatives of their constituents on all matters into representatives on only a few key national issues.

Another concern brought to the forefront by online fundraising is the ability of donors to make anonymous contributions—as well as the risk of fraud that anonymity creates. After the 2008 election, donor lists from the Obama campaign were released that included donors with names like “Derty Pooiuy,” “Mong Kong,” and “Fornari USA,” as well as numerous addresses that were obviously fake.¹⁹⁵ Critics claimed that some Obama campaign donors avoided FECA's disclosure requirements and exceeded its donation limits by making multiple small donations with untraceable “gift cards” and under obviously false names.¹⁹⁶ Critics argued that some of the anonymous donations were, in fact, coming from overseas donors—in violation of U.S. campaign finance law.¹⁹⁷ The Republican National Committee

194. See Brian C. Mooney, *Outside Donations Buoyed Brown*, BOS. GLOBE, Feb. 24, 2010, at 1.

195. Dan Morain & Doug Smith, *Obama's Fundraising Prowess Exposes Flaws in Law*, L.A. TIMES, Oct. 9, 2008, at A19; Ken Timmerman, *Secret, Foreign Money Floods into Obama Campaign*, NEWSMAX.COM (Sept. 29, 2008, 9:23 PM), <http://newsmax.com/Politics/Obama-fundraising-illegal/2008/09/29/id/325630>.

196. See, e.g., Dan Morain & Doug Smith, *Obama Fundraising Comes Under Scrutiny*, NEWS-DAY, Oct. 12, 2008, at A34 (discussing the Republican National Committee's filing of a complaint alleging that Obama donors exceeded donation limits); Timmerman, *supra* note 195.

197. Timmerman, *supra* note 195. See generally Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162 (2009) (outlining several examples of international fundraising from the 2008 elections, describing the tools of extraterritorial fundraising, and discussing the implications of extraterritorial fundraising for American politics).

even filed a federal complaint.¹⁹⁸ Although campaigns are legally bound to return donations from donors that aggregate to more than FECA limits, the campaign is not even required to disclose the identity of the donor for donations under \$250.¹⁹⁹ With no oversight, campaigns have little incentive to be rigorous about rejecting or returning contributions.

The majority of fraud allegations during the 2008 elections came from conservative organizations, and the polarized nature of American elections makes it hard to evaluate the extent of actual fraud underlying these claims.²⁰⁰ Further, because the Obama campaign was not required to disclose detailed data on small donors, a complete picture of individual donations is still unavailable.²⁰¹ Even with unlimited access to campaign records, it is unlikely that an accurate picture of how many fraudulent donations actually took place could be compiled.

Each form of online fundraising intermediary has distinct impacts on member engagement. Online IFGs often provide extensive resources and support for member activism, both online and offline, which provide members with opportunities to express their own political opinions and debate their opinions with others. Partisan blogs similarly provide a space for public debate—a platform for discussion by members who choose to take part and information for those who merely listen. Even platforms offer opportunities for member engagement. Social networking, which allows users to easily launch fundraising campaigns, encourages members to get directly involved, allowing them to form their own intermediaries and to drive funding to particular candidates and issues. Overall, online fundraising enables a wider range of citizens to engage in the political process than offline fundraising and changes the way that those citizens take part, making it easier and more likely that they will discuss politics online, participate in phone banks, or even canvass. Despite some risks, online fun-

198. Morain & Smith, *supra* note 195. The complaint alleged that “some of Obama’s small donations are illegal because they come from foreign nationals or exceed the limit.” *Id.*

199. See *supra* text accompanying notes 52–53.

200. See, e.g., David Freddoso, *Fake Donors, Phony Pledge*, NAT’L REV. ONLINE (Oct. 22, 2008, 8:00 AM), <http://article.nationalreview.com/376039/fake-donors-phony-pledge/david-freddoso> (strongly criticizing the Obama campaign’s handling of its online fundraising and demanding disclosure of small donations); Pamela Geller, *Obama’s Campaign Contribution Records Scrubbed Clean*, BIGGOVERNMENT (Oct. 14, 2010, 7:13 AM), <http://biggovernment.com/pgeller/2010/10/14/obamas-campaign-contribution-records-scrubbed-clean/> (same).

201. See Freddoso, *supra* note 200 (“A pair of human eyes has to check each one, even if amounts smaller than \$200 are not required by law to be disclosed in any report.”).

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draising intermediaries overall do a better job of engaging citizens than their offline counterparts.

B. *Aggregating Opinions*

The Internet also helps online intermediaries excel at aggregating their members' opinions into a single voice. In particular, there are three ways that the Internet helps intermediaries aggregate their members' opinions. First, as discussed above, reduced transaction costs allow online intermediaries to represent the interests of more citizens, thus giving more citizens a voice in American politics.²⁰² Increasing the weight behind the intermediary itself strengthens that voice.

Second, online intermediaries can gather members that might be beyond their reach or resources if they were operating offline, and reduced transaction costs change the composition of intermediary memberships. The Internet makes it economical for intermediaries to actively pursue small donations²⁰³ and very easy for individuals to contribute—they simply enter an amount, enter a credit card number, and press a button. Online fundraising also eliminates many social and geographic boundaries, helping those who do not live in a targeted region or are not part of a politically involved social group take part in political campaigns. In addition, many online donors are also first time donors.²⁰⁴

Third, online intermediaries can aggregate their members' opinions more accurately and be more responsive to their members' attitudes because of their frequent, interactive engagement. The Internet not only allows intermediaries to aggregate *more* and *different* opinions, it also enhances the quality of their aggregation. An offline intermediary might interact with its members largely through donations—in some cases, donations are automatically debited from member paychecks.²⁰⁵ With donations serving as the primary barometer

202. See *supra* text accompanying notes 165–69.

203. ActBlue, for instance, has a minimum donation of one dollar. *ActBlue Frequently Asked Questions*, *supra* note 126 (explaining that a minimum donation is necessary to “ensure[] that a campaign doesn’t spend more money processing a donation than the donation is actually worth”).

204. See, e.g., INST. FOR POLITICS, DEMOCRACY & THE INTERNET, *supra* note 174, at 40 tbl.35 (finding that sixty percent of donors who gave less than \$100 online in 2004 were first time donors, and seventy-four percent of donors who gave more than \$500 online in 2004 were first time donors).

205. The United Parcel Service, for example, requires employees to contribute to Democrat, Republican, Independent Voter Education (“DRIVE”) under their employment agreement. See National Master United Parcel Service Agreement 8 (Dec. 19, 2007–July 31, 2013), available at <http://www.tdu.org/files/ups-2008-master.pdf> (“The Employer agrees

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of member interests, it may be difficult for an intermediary to even know what its members' opinions are, much less aggregate them. Offline intermediaries that *do* have more detailed interactions with their members, however, face higher transaction costs that limit the frequency and depth of these interactions. In contrast to these limited interactions, online intermediaries can develop an especially nuanced understanding of what their members actually want through more frequent, low-cost interactions. In 2000, for instance, presidential candidate Al Gore's website allowed visitors to select issues of interest from a list of twenty-two issue areas and voter groups; once submitted, the site generated a customized webpage for that visitor and encouraged him to forward a link to the page to others.²⁰⁶ Thus, intermediaries that use the Internet not only aggregate more members' opinions but also are more able to accurately represent their members' opinions.

Even though online intermediaries effectively aggregate their members' opinions, the question of which citizens are able to become members remains open. The aggregative nature of online intermediaries offers the greatest potential to lower-income voters, who can take part online more cheaply than offline²⁰⁷ and can most benefit from banding together to balance the fiscal influence of wealthier communities. Unfortunately, citizens who use the Internet tend to be wealthier than those who do not.²⁰⁸ The extent to which online intermediaries fail to reach poorer citizens, who have the least influence without intermediary aggregation, calls into question their aggregative potential. Nevertheless, the same factors that dampened the risks of the digital divide mentioned above²⁰⁹ apply here, as well. Online demographics are changing rapidly, but even if they remain as they are, the barriers to online engagement are significantly lower than the

to deduct from the paycheck of all employees covered by this Agreement voluntary contributions to DRIVE.”). DRIVE is the Teamsters’s PAC. *Learn More About DRIVE*, TEAMSTERS, <http://www.teamster.org/content/drive> (last visited Feb. 27, 2011).

206. CHADWICK, *supra* note 30, at 155 (citing Steven M. Schneider & Kristen A. Foot, *Online Structure for Political Action: Exploring Presidential Campaign Websites from the 2000 American Election*, 9 JAVNOST/THE PUBLIC 43, 50 (2002)).

207. *Compare* MARGOLIS & RESNICK, *supra* note 32, at 54 (predicting that the Internet will not transform American politics, but rather “reinforce the status quo”), and MARGOLIS & MORENO-RIÑO, *supra* note 158, at 150 (stating that although “the Internet has facilitated changes in . . . politics,” Internet politics “is largely a replication—a mirror image—of politics in the real world,” and thus “the Internet often becomes a conduit for channeling the passions and practices of the actors of politics”), with INST. FOR POLITICS, DEMOCRACY & THE INTERNET, *supra* note 174, at 18 (stating that the Internet facilitates participation in a campaign because it makes it easier to give unsolicited donations, whereas offline unsolicited donation is a longer process that usually must be done by mail).

208. See *supra* text accompanying note 182.

209. See *supra* text accompanying notes 180–89.

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barriers to offline engagement—making online intermediaries at least an improvement, if not a complete solution.

All of the forms of online intermediaries discussed in this Article are well suited to aggregating member opinions, though each engages with the public in different ways. Online IFGs have the most traditional intermediary-member relationship, distributing frequent e-mail newsletters and soliciting donations.²¹⁰ Partisan blogs have readers, rather than members, who have a much more casual relationship with their intermediary.²¹¹ Nevertheless, both endorse candidates, poll their membership, and interact with the public. Platforms are similarly well suited to aggregating their members' interests; support is easily measured by examining the page views or donations made through the fundraising page for a candidate or organization.²¹² Thus, all three forms of online intermediaries excel at effectively aggregating their members' voices.

Offline intermediaries, by contrast, are more uneven in their ability to aggregate the voices of large memberships. While issue IFGs, institutional IFGs, and political parties obviously pursue this goal, influence IFGs and bundlers do not. The latter two only aggregate the voices of small groups of members. Leadership PACs, for instance, often represent only a single member—the candidate whom their efforts support.²¹³ Since these intermediaries act privately and often with no particular ideological or policy goal, it is not clear what member opinion they might express. Even the offline intermediaries that do focus on large, engaged memberships struggle in comparison to online intermediaries.²¹⁴ They interact with members less frequently, and the challenges of group governance prevent them from seeking out member input on most intermediary decisions.

C. Structuring and Shaping Political Debate

In the same way that the Internet makes it possible for online intermediaries to empower their members to express their views and engage in public debate, it also affords intermediaries a greater role in shaping and structuring political debate. First, online in-

210. See generally *supra* text accompanying notes 107–11.

211. See generally *supra* text accompanying notes 112–17.

212. See generally *supra* text accompanying notes 118–28.

213. See *supra* text accompanying notes 86–87; see also *Leadership PACs and Sponsors*, FED. ELECTION COMMISSION, <http://www.fec.gov/data/Leadership.do?format=html> (last visited Feb. 27, 2011) (listing registered leadership PACs).

214. See *supra* notes 166–69 and accompanying text (comparing the growth in membership of offline and online IFGs).

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intermediaries' constant stream of communication with their members and the public increases their opportunities to influence opinions. Rather than only declaring themselves in infrequent newsletters, or at occasional press conferences with once-in-a-cycle endorsements, on-line intermediaries can respond to new developments in near real time, wielding constant influence.²¹⁵ The Obama campaign, for instance, generated \$10,000,000 in donations in the twenty-four hours following Sarah Palin's acceptance of the vice presidential nomination at the 2008 Republican Convention by appealing directly to democratic supporters.²¹⁶

Second, in addition to acting as centers for fundraising, voter identification, and volunteer mobilization, many online intermediaries also serve as forums for discussion. Partisan blogs are the perfect example, and here the Internet's ability to empower low-cost, high-exposure communications is particularly transformative.²¹⁷ RedState's Editor in Chief described his blog as "a central hub for communication in the conservative movement."²¹⁸ One of the ways that he sees RedState fulfilling this role is through its "Morning Briefing," a daily e-mail sent out to all of its subscribers that highlights issues that either are not covered in the national media or are covered with elements missing that RedState considers pertinent.²¹⁹ What is said in a daily communiqué like this has enormous power in shaping what is talked about and how it is discussed, both online and offline.²²⁰

Other types of online intermediaries can also fulfill this role. Because these portals become central destinations for debate, the topics

215. Indeed, web-based businesses have been developed to provide campaigns with precisely this capability—constantly communicating with supporters and the general public. See, e.g., CAMPAIGN 2.0, http://www.complet_campaigns.com/campaign20.asp (last visited Feb. 27, 2011) (providing clients with the ability to incorporate the Internet into their campaign strategy by using a variety of web-based communication).

216. See *Obama Raises \$10 Million After Palin Speech*, CHARLESTOWN GAZETTE & DAILY MAIL (W. Va.), Sept. 5, 2008, at 3A ("[T]he Obama camp promptly used the speech as a fundraising hook, sending an overnight e-mail to supporters to contribute.").

217. See *supra* text accompanying notes 116–17.

218. *Erick Erickson on the Conservative Message*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/video/2009/12/30/VI2009123001548.html?sid=ST2010020101258> (last visited Feb. 27, 2011).

219. *Id.*; see also *Morning Briefing: What Conservatives Read First*, RS: REDSTATE, <http://www.redstatemb.com> (last visited Feb. 27, 2011).

220. See, e.g., Jerry Markon, *New Media Help Conservatives Get Their Anti-Obama Message Out*, WASH. POST, Feb. 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/31/AR2010013102860.html> (describing how one of RedState's "Morning Briefings" went viral on conservative online publications, later fueled discussion at the weekly meetings of prominent Washington, D.C., conservatives, and was endorsed by Rush Limbaugh).

raised and positions advocated by the portals themselves have wide exposure and compelling weight behind them.²²¹ Even online intermediaries that do not engage in direct advocacy, such as ActBlue, can shape public debate because they empower and amplify the voices of a wide range of individuals. Even the way online forums are designed—Do they allow anonymous comments? Do they privilege certain speakers over others? Can they shape the debate that takes place there, lending the intermediaries themselves significant architectural power to shape discussions?—can influence the shape of political debate.

Third, because of online intermediaries' large memberships, they can directly influence the attitudes of far more individuals through internal debate than offline intermediaries. FreedomWorks's ability to easily convey a direct endorsement of a candidate or position on a particular issue to its online members provides a powerful and immediate influence on public debate.²²² While it is unlikely that every member will accept the intermediary's assertion without question, they will likely lend it significant weight and may defend it in public debate with nonmembers.

Fourth, the Internet has made it possible for online intermediaries to convey a surprisingly powerful environment of intimacy to their members.²²³ E-mails from campaigns often come from the candidate. Candidates release videos to their online members before making them public, speaking to them directly, often as if the candidate and the member were in the same room.²²⁴ High profile speakers use casual, informal tones on services like Twitter to make their relationship with members seem friend-to-friend rather than

221. See generally, e.g., SUNSTEIN, *supra* note 186, at 138 (asserting that it seems that political blogs "hav[e] a real influence on people's beliefs and judgments").

222. See FREEDOMWORKS, *supra* note 134 (listing 1,122,973 total members and 701,800 online members).

223. Cf. *Marketing Presidential Candidates on the Web Goes Mainstream: But Does It Get Votes?*, UNIVERSIAKNOWLEDGE@WHARTON (Jan. 23, 2010), <http://www.wharton.universia.net/index.cfm?fa=viewArticle&id=1459&language=english> (quoting Jonah Berger, a marketing professor at Wharton, as stating that "Web 2.0 allows candidates to organize and raise money, but it also allows people to feel more connected to a candidate. People are more involved" (internal quotation marks omitted)).

224. Cf., e.g., *Candidate Videos*, ACTBLUE, http://blog.actblue.com/blog/candidate_videos/ (last visited Feb. 27, 2011) (displaying videos of Democratic candidates discussing their campaigns and the importance of ActBlue's role in their campaigns); see also Clyde Wilcox, *Internet Fundraising in 2008: A New Model?*, 6 FORUM 1, 9 (2008) (describing videos that the author received via e-mail from the Clinton and Obama campaigns and characterizing the videos as the candidates' efforts to foster a sense of online community).

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candidate-to-supporter.²²⁵ While it is unlikely that all of these personal interactions actually come from the high profile speakers themselves, many members perceive that they do, making them more sympathetic to the intermediary's message.

While this intimacy certainly enhances the ability of intermediaries to shape political debate, its two-faced nature raises the first significant concern about online intermediaries' enhanced ability to shape political debate. How asymmetrical is the seemingly "open" nature of online fundraising intermediaries? Can an intermediary easily use online media to cloak itself in openness and transparency without actually embracing these values? At its root, this is a question about accountability. Does the added accountability of online scrutiny serve to balance out the enhanced influence accorded by online intermediaries' new media-based strategies?²²⁶

Professor Cass Sunstein's warning about online polarization is also problematic for the debate-shaping capacity of online intermediaries. According to Professor Sunstein, the Internet's polarized environment means that intermediaries themselves tend to be more polarized than their offline counterparts and will become more polarized over time.²²⁷ If the intermediaries that are shaping democratic debate become too polarized, they may paralyze political discussion, rather than move it forward.²²⁸ On this point, it is important to recall the study discussed earlier that found that online intermediaries were not as polarized as Professor Sunstein feared.²²⁹ That study also came to another conclusion: Over the ten month span the study considered, there was no evidence that the examined intermediaries actually became more polarized.²³⁰ Instead, cross-party debate continued steadily throughout the period of review.²³¹ Thus, while the Internet may have polarizing effects on intermediaries themselves, the extent

225. See, e.g., Sarah Wheaton, *Palin, Shakespeare and the Ground Zero Mosque*, THE CAUCUS: BLOG N.Y. TIMES (July 18, 2010, 8:34 PM), <http://thecaucus.blogs.nytimes.com/2010/07/18/palin-shakespeare-and-the-ground-zero-mosque/> (detailing several examples of informally worded tweets posted by Sarah Palin).

226. For a discussion of this question, see *infra* Part IV.A.

227. See SUNSTEIN, *supra* note 186, at 57 ("[I]t will be difficult for people armed with such opposing perspectives to reach anything like common ground or to make progress on the underlying questions.")

228. See *id.* at 56 ("If diverse groups are seeing and hearing quite different points of view, or focusing on quite different topics, mutual understanding might be difficult, and it might be increasingly hard for people to solve problems that society faces together.")

229. See, e.g., Hargittai et al., *supra* note 190, at 76-80 (finding that a significant number of links on political blogs are made across party lines).

230. See *id.* at 85, 78-80, 80 tbl.6 (finding "no evidence that conservative or liberal bloggers are addressing each other less at the end of [the] time period than at the beginning").

231. *Id.* at 85.

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of these effects is not yet clear. If nothing else, the risk of polarization does not seem to be worsening—the relative polarization of online intermediaries may even decrease as more mainstream fundraising organizations adopt new media strategies.

Finally, some online fundraising intermediaries—particularly blogs and online IFGs—serve as outlets for both news and advocacy.²³² As Professor Sunstein notes, online consumers increasingly obtain their political information from online advocacy and activist organizations.²³³ This dual role—reporting and advocating—lends enormous shaping power to these intermediaries in particular. For instance, if a citizen receives the majority of his political information from the diaries and blogs at Firedoglake.com,²³⁴ he will probably be more likely to respond to a fundraising drive for candidates that the intermediary endorses. For one, he likely sympathizes with the organization as a result of visiting the site and likely trusts its endorsement. Even if he might not agree with some of the endorsed candidate's positions, the coverage at Firedoglake.com most likely focused on the positive aspects of the candidate—reasons for the endorsement with which he likely agrees. If he does not go elsewhere for his news, he might not encounter other important facts about the candidate that he might find troubling. There is no ethic of neutrality for fundraising intermediaries—indeed, such a commitment would seem strange coming from partisan entities.

Online intermediaries are clearly more effective at shaping public debate than their offline counterparts. Their enhanced influence over public debate and their own members, in fact, raises concerns over whether their mediation will enable progress or create more division. Although the polarization of online fundraising intermediaries may not be as severe as Professor Sunstein warns, it could still raise concerns. Without proper accountability, the influence of online intermediaries could lend enormous manipulative power to a relatively small group of individuals and institutions.

D. Influencing the Outcomes of Elections

If the efficacy of online intermediaries at shaping public debate raises concerns, then their strong ability to influence the outcomes of elections is just as troubling. Influencing elections is the fundamental

232. In fact, many bloggers have been hired by major news magazines as a result of the news reporting on their blogs. Karpf, *supra* note 118, at 370.

233. See SUNSTEIN, *supra* note 186, at 9–10 (discussing the decline of general interest intermediaries, such as newspapers and radio stations).

234. FDL: FIREDOGLAKE, <http://firedoglake.com/> (last visited Feb. 27, 2011).

purpose of fundraising intermediaries, and it is central to American democracy. At the same time, intermediaries with too much power may become kingmakers, holding their promised resources over candidates as a kind of illicit influence. Thus, the influence of Internet fundraising must be examined carefully to determine whether it provides too much power to the new intermediaries that it has created.

The Internet enhances the ability of fundraising intermediaries to influence elections in several ways. First, just as online intermediaries' use of multiple kinds of political activism increases their members' engagement, it also increases their members' political influence. A candidate might court an online intermediary not only because of its fundraising potential but also to secure access to its membership directly or to seek positive coverage in the intermediary's ubiquitous blog postings. An endorsement e-mail to MoveOn.org members, for example, might serve to raise not only money but also other, equally valuable resources.

While, by contrast, many offline intermediaries focus on one type of influence (bundlers and influence PACs, for instance, focus wholly on fundraising²³⁵), some offline intermediaries also cross influence boundaries. Labor unions, for instance, often raise significant funds from their members and deliver voters and volunteers to campaigns.²³⁶ Even in these cases, however, the Internet lends a new degree of connectedness to online intermediaries. Online intermediaries can build larger member bases across great geographic, cultural, and socioeconomic distances, coordinate these bases efficiently, and channel volunteers, voters, media, and dollars to campaigns in need.²³⁷ The shift toward online fundraising has the potential to consolidate the power of different kinds of intermediaries into fewer organizations that wield influence over virtually every resource that a candidate needs to win an election. This shift greatly enhances the power of online intermediaries.

235. See *supra* text accompanying notes 86–87, 95–103.

236. For example, the AFL-CIO, a labor union, spent about \$1.7 million during the 2008 elections. PACs: *AFL-CIO*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/lookup2.php?strID=C00003806&cycle=2008> (last visited Feb. 27, 2011). Union members also volunteered to urge union voters to get to the polls. Tula Connell, *A Toast: To Union Volunteers and the 2008 GOTV*, AFL-CIONOWBLOG: NEWS (Oct. 30, 2008), <http://blog.aflcio.org/2008/10/30/a-toast-to-union-volunteers-and-the-2008-gotv/>.

237. See, e.g., Malbin, *supra* note 25, at 13 (noting that the Internet allows intermediaries to develop networks of volunteers cheaply); Wilcox, *supra* note 224, at 1–2 (positing that Internet fundraising allows candidates to broaden the demographic and political range of potential donors).

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Second, having a large membership also enhances the influence of online intermediaries. Candidates seek donations, resources, and potential votes, and large memberships promise access to all three. Just as intermediaries aggregate the voices of their members, large memberships amplify the voices of the intermediaries themselves. Online fundraising intermediaries' effectiveness at opinion aggregation and debate shaping gives them immense influence because intermediaries have very large, active memberships and are particularly effective at mobilizing and directing those memberships.

Finally, the renewable nature of intermediaries' relationships with their members—so beneficial for member engagement—also greatly enhances their power to influence elections. Online fundraising intermediaries can go back to their contributors again and again, an assurance that gives online intermediaries a stream of continuous influence over candidates. While a candidate who receives a large contribution from an offline fundraising intermediary may not feel beholden to them, a candidate who is supported by an online fundraising intermediary likely realizes that he might be able to obtain more support from the intermediary in the days, weeks, and months to come.

Of course, the power of this continuous relationship is only as great as the willingness of the intermediaries to actually withdraw their support. Because most intermediaries are clearly partisan, their willingness to abandon a chosen candidate may not be so great—it is hard to imagine, for instance, that FreedomWorks might have thrown its support behind Barack Obama, regardless of what John McCain did.²³⁸ Nevertheless, the threat still holds some weight, especially during primary elections when candidates compete for their party's nomination.

Each of these factors enhances the ability of online fundraising intermediaries to influence candidates and elections. Whether this increased influence is reassuring or concerning, however, is a more complicated question. As with the debate-shaping discussion, determining whether online fundraising intermediaries are *too* powerful is in part a question of accountability. If online intermediaries are truly representative of their members' interests and the pressures of public debate, then ensuring their enhanced influence may not be a bad thing. Given our societal interest in democratic debate and deliberation and the importance of intermediaries as avenues for poorer and

238. See *supra* text accompanying notes 109–10 (explaining the conservative nature of FreedomWorks and its affiliation with the Tea Party).

weaker groups to take part, enhanced influence for democratically accountable intermediaries is certainly a good thing. Without proper accountability, a transition to online fundraising intermediaries simply trades one set of unaccountable special interests for another, potentially even more powerful one. Evaluating this question requires turning to the final goal of fundraising intermediaries.

E. Accountability

Given the enhanced power of online intermediaries to shape debate, capitalize on their membership, and influence elections, the question of accountability is a particularly serious one. If online intermediaries are more accountable to their membership and the public than their offline counterparts, then the transition toward online fundraising simply serves to empower their members' voices. If not, then online fundraising will enhance the power of intermediaries without enhancing—or while decreasing—their accountability. There are certainly aspects of the online environment that work to enhance the accountability of online fundraising intermediaries, but there are also some outstanding questions about how accountable online intermediaries really are.

First, the pressures of online fundraising provide members of online intermediaries with more influence than members of offline intermediaries. Members' renewable relationships with their online intermediaries yield power to the members. As no single contribution is likely to exhaust a member's ability to contribute or volunteer, they will continue to be valuable to intermediaries even after they have donated. Member threats to withhold continued support give them exactly the kind of voice that Professors Persily and Cain described.²³⁹

At the same time, member accountability is weakened by the increased membership sizes of online intermediaries. While a small group of wealthy donors might have some influence over a bundler, even one hundred MoveOn.org donors represent only an infinitesimal fraction of the organization's capital.²⁴⁰ To wield significant influence, a dissatisfied group from an online intermediary will need to be much larger, and this creates the additional risk that a majority of passive members will simply swamp the efforts of those seeking to hold the organization to account. Although this risk is real, two aspects of online fundraising that have already been discussed also mitigate it. For one, reduced transaction costs make it easier for

239. *See supra* text accompanying notes 160–63.

240. *See supra* text accompanying note 169.

discontented members to organize against their intermediary, just as they make it easier for the intermediary to help members organize in support of a candidate.²⁴¹ In addition, the increased frequency and detail of intermediary-member communications make it easier for members to identify intermediary transgressions quickly.²⁴²

Another threat to member accountability is the rise of microtargeting. Increasingly detailed member profiles, which include information about where members live, their age and interests, events they have attended, and even items they have purchased online, allow online intermediaries to tailor their messages to ever-smaller slices of their memberships.²⁴³ Although targeted mailings are not an invention of the Internet age,²⁴⁴ the ability of intermediaries to make fine-grained adjustments to each and every e-mail is unprecedented. Members might see different images and read different text, depending on their profiles. A member who is a banker and has extensive social connections on Wall Street might not learn of an intermediary's efforts to increase regulation of the finance industry. This individually targeted message shaping will influence members' perceptions of their intermediaries and the actions in which their intermediaries engage. As intermediaries become more sophisticated in their ability to shape member communications, the ability of members to identify and respond to actions by their intermediary that they might normally oppose is greatly reduced.

At the same time, the ability of intermediaries to tailor their messages goes only so far. Intermediaries still feel pressure to announce their causes publicly to draw sufficient resources, and members can still seek out intermediaries' public positions. Although offline member communications might not be tailored as precisely, offline intermediaries also experience less public scrutiny of their mass communications. A transition to online fundraising does not re-

241. *See supra* text accompanying notes 104–06.

242. *See supra* Part III.B.

243. *See generally* STEPHEN BAKER, *THE NUMERATI* 67–95 (2008) (describing microtargeting strategies used by Republican campaigns in 2004 and efforts by Democrats to respond in kind during 2008); David Paul Kuhn, *DNC Blunts GOP Microtargeting Lead*, POLITICO (May 23, 2008, 4:54 AM) <http://www.politico.com/news/stories/0508/10573.html> (explaining that the DNC and RNC both “boast one vast data coffer that merges traditional voter statistics on gender, geography, or party identification with consumer and census data”).

244. *See, e.g.*, Tim Taylor, *All Things to All People: The Republican Party's Use of Religious Messages in Direct Mail During the 2004 Presidential Election*, 13 *GEO. PUBLIC POL'Y REV.* 25 (2007) (detailing the use of targeted direct mailings during the 2004 presidential election).

lieve members of the responsibility to scrutinize their intermediaries, but it does offer them new resources to pursue this scrutiny.

The susceptibility of fundraising intermediaries to public scrutiny also changes significantly online. Offline intermediaries often operate at best semipublicly.²⁴⁵ While particularly unusual, high-profile, or extreme actions may draw some public attention, the vast majority of actions do not. By raising funds through direct mailings, an offline intermediary can gather thousands of contributions for a race without ever publicly endorsing a candidate. While FECA disclosure reports are meant to combat this problem, the reports are often delayed and dauntingly detailed;²⁴⁶ important transactions easily can be lost in their mountains of data. Many online fundraising intermediaries, by contrast, rely on the public sphere for their success. Decisions and actions taken by these groups are taken in full public view. Indeed, the need to attract new members means that online intermediaries must operate in the public sphere to survive. While intermediaries *can* operate privately online—a bundler, for instance, could use the Internet to solicit donations from his small group of friends—doing so means foregoing many of the benefits offered by the online public sphere, from large memberships, to rapid growth, to the opportunity for meteoric success. As a result, online intermediaries are strongly pressured to operate publicly, and every public move they take is open to scrutiny.

This enhanced publicity has two main effects. First, online intermediaries' "contributions" to candidates are public. As many online donations are small, intermediaries must aggregate many donations to support a candidate rather than contributing directly, and so they solicit their members in the most public way possible. When MoveOn.org and Daily Kos endorsed Barack Obama, for instance, it was through banner headlines on their respective front pages, each accompanied with a call to action directed at their readers.²⁴⁷ Such a clear public declaration directs scrutiny against the en-

245. Bundlers and influence PACs are two especially private intermediaries, but all offline intermediaries have an inconsistent relationship with public scrutiny. See *generally supra* Part II.B.

246. For more information on FECA disclosure reports, see *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/fecfeca.shtml> (last updated Feb. 2011).

247. See, e.g., Press Release, MoveOn.org, MoveOn Endorsement Throws Progressive Weight Behind Barack Obama, (Feb. 1, 2008), <http://moveon.org/press/pr/obamaendorsementrelease.html> (endorsing Obama in the Democratic primary); kos, *Obama Gets the Blue Majority Endorsement*, DAILY KOS (Mar. 26, 2008, 4:14 PM), <http://www.dailykos.com/storyonly/2008/3/26/125659/086> (same).

dorsements of online intermediaries in a way that it may not be directed against offline intermediaries.

Second, online intermediaries must not only attract large memberships, they must maintain them.²⁴⁸ To do this, intermediaries must continually produce public content that keeps their members interested. In turn, this content can be evaluated, analyzed, and criticized by the general public. Such scrutiny can generate debate, elicit a response from the intermediary, and even compel the intermediary to shift its position. For instance, Markos Moulitsas, the founder of Daily Kos, was widely criticized when he implied that he did not care about the deaths of several mercenaries in Iraq.²⁴⁹ Several organizations even pulled their advertisements from the site.²⁵⁰ In response to the outcry, Moulitsas qualified his remarks.²⁵¹

Of course, the power of scrutiny and participation to constrain powerful online intermediaries should not be overestimated. Although Moulitsas did respond to public criticism, his response was hardly an unequivocal withdrawal.²⁵² Daily Kos, like many of the most successful online intermediaries, enjoys a significant first mover advantage—begun in 2002,²⁵³ it was one of the earliest political blogs. It has attained enough stature to present an imposing target to any blog that tries to unseat it.

Although the first mover advantage of established online intermediaries is significant, evaluating the accountability of online intermediaries is a comparative exercise. Whatever the institutional insulation of an intermediary like MoveOn.org against competitors, it

248. See generally *supra* Part III.A.

249. Matthew Klam, *Fear and Laptops on the Campaign Trail*, N.Y. TIMES, Sept. 26, 2004, at B10 (describing Moulitsas's original post and the resulting criticism).

250. *Id.*; see NohoMissives, *Support Kos*, DAILY KOS (Apr. 2, 2004, 9:55 PM), <http://www.dailykos.com/story/2004/4/2/194734/9122> (acknowledging that a blogger asked readers to complain to Kos advertisers about the mercenary comments).

251. kos, *Mercenaries, War, and My Childhood*, DAILY KOS (Apr. 2, 2004, 5:57 PM), <http://www.dailykos.com/story/2004/4/2/175739/8203>. These public conflicts also provide fresh opportunity for debate. In response to the criticism of Moulitsas, a number of Daily Kos readers mounted a campaign to signal support for the advertisers who chose to stay on the site through donations. NohoMissives, *supra* note 250 (encouraging readers to support Moulitsas, with several readers indicating in the comments that they did donate to advertisers who remained on the site).

252. kos, *supra* note 251 (“I was angry that five soldiers—the real heroes in my mind—were killed the same day and got far lower billing in the newscasts. I was angry that 51 American soldiers paid the ultimate price for Bush’s folly in Iraq in March alone. I was angry that these mercenaries make more in a day than our brave men and women in uniform make in an entire month.”).

253. *About Daily Kos*, DAILY KOS, <http://www.dailykos.com/special/about2#dk> (last visited Feb. 27, 2011).

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is surely less than the insulation of a century-old offline intermediary like the National Rifle Association²⁵⁴ or even a decades-old institution like EMILY's List.²⁵⁵ Offline, members must make phone calls, research alternatives, and wait for informational mailings if they would like to change intermediaries. On the Internet, members can explore alternatives with the click of a mouse. While offline membership often requires fees, membership online is commonly free.²⁵⁶ The low transaction costs leave little overhead for intermediaries to subsidize with memberships, and intermediaries want to amass the largest mailing list possible. Individuals can even be members of multiple intermediaries at the same time, allowing them to join a prospective alternative intermediary without leaving their original group. Thus, just as members of online intermediaries enjoy enhanced voice in their organizations, they also enjoy additional power to threaten exit, if necessary.²⁵⁷

One more criticism of online fundraising should be addressed. A critic could argue that the rise of microtargeting, faux-intimate communications with members, and similar Internet-powered communications techniques, allow online fundraising intermediaries to cloak themselves in the appearance of openness while in truth remaining as sheltered as ever. A recent article highlighted this concern when it reported that two secretive billionaires heavily fund many of the key organizations within the Tea Party movement,²⁵⁸ making critics question whether the Tea Party movement is the grassroots, decentralized force that it appears to be or whether it is just a front for moneyed interests. If the Internet does not compel openness from online intermediaries, how is it any better than traditional media?

Once again, comparing online and offline intermediaries offers a response. The rise of the Internet does not remove the need for members and the public sphere to scrutinize fundraising intermediaries, and it has not eliminated the ability of intermediaries to act duplicitously. It has, however, provided a range of resources that help police intermediaries. Leveraging these tools will ensure that online intermediaries are at least as accountable as their offline counter-

254. *A Brief History of the NRA*, NRA, <http://www.nra.org/Aboutus.aspx> (last visited Feb. 27, 2011).

255. *Our History*, EMILY's List, <http://emilyslist.org/who/history/> (last visited Feb. 27, 2011).

256. *E.g.*, *Join Our Online Community*, EMILY's List, <http://emilyslist.org/action/signup/> (last visited Feb. 27, 2011).

257. *See supra* text accompanying notes 160–63.

258. Jane Mayer, *Covert Operations: The Billionaire Brothers Who Are Waging War Against Obama*, *NEW YORKER*, Aug. 30, 2010, at 45.

parts—not perfectly accountable, but perhaps more accountable than the alternative.

F. Understanding the Differences Between Online and Offline Fundraising Intermediaries

The sheer range of distinctions raised by the previous Sections demonstrates the difficulties policymakers face as online fundraising expands in importance. Online fundraising combines the already-complex legal ecology of campaign finance law with a rapidly changing technology that promises to continue to transform fundraising, activism, and social interaction. The dangers of unforeseen consequences—policies intended to accomplish one thing that actually lead to something quite different—might scare policymakers into avoiding regulation altogether. Although the Internet is by no means mature today, there is enough data and history concerning its impact that useful guidance can be extracted from the distinctions identified above. This guidance can, in turn, help regulators respond effectively to the rise of online fundraising, reinforce its positive aspects, and combat the risks that it raises.

Table 2 provides a brief summary of the benefits and risks posed by online intermediaries. It divides these risks based on the five roles of fundraising intermediaries identified above. Benefits and risks that impact multiple roles are repeated.

Looking at the range of changes brought on by the rise of online intermediaries, a few things quickly become clear. Repeated benefits and risks are particularly important. The importance of the low transaction costs of online interaction, for instance, seems foundational to the value of online fundraising. Secondary characteristics that rely on low-cost interactions, such as the ability of intermediaries to manage large memberships, to interact frequently with their members, and to engage their members in multiple forms of activism, also appear repeatedly. Low transaction costs are an important factor in the ability of members to scrutinize and influence their intermediaries, as well.

As for the risks of online fundraising, two clear problems are the segmenting demographics of the American digital divide and the freedom from disclosure requirements that many online fundraising intermediaries enjoy.

In some cases, important factors also seem to operate at cross purposes. Large memberships, for instance, enhance engagement by bringing more citizens into the political process, but they also hamper the ability of online members to hold their intermediaries accountable. Similarly, the fact that online intermediaries engage in multiple

TABLE 2

Benefits and Risks of Online Fundraising Intermediaries

	Benefits	Risks
Enhance member engagement	Low transaction costs Large memberships Engages new members Continuous member-intermediary relationship Multiple forms of advocacy Frequent member-intermediary interactions	Digital divide Nationalizes public debate Enables anonymous donation Weak member commitment
Aggregate member voices	Low transaction costs Large memberships Engages new members Frequent member-intermediary interactions leads to more accurate aggregation.	Digital divide
Shape public debate	Low transaction costs Large memberships Multiple forms of advocacy Frequent member-intermediary interactions Multimedia communications Faux-intimate member-intermediary interactions	Potentially polarizing Blends reporting and advocacy Faux-intimate member-intermediary interactions
Influence elections	Large memberships Multiple forms of advocacy Renewable member-intermediary relationship Frequent member-intermediary interactions	Too influential?
Be accountable to members	Renewable member-intermediary relationship Low transaction costs	Large memberships Microtargeted messaging
Be accountable to the public	Public endorsements Public content production Continuous content production	First mover advantages Asymmetrical openness

forms of advocacy enhances member engagement, but it also gives these intermediaries expanded power to influence elections—power that, if not balanced by accountability, quickly becomes problematic.

The insights offered by looking at these distinctions can be very useful for regulators. First, they highlight key risks that, if left unchecked, could leave online fundraising as anything but a tool for enhanced democratic participation. These insights also demonstrate that the accountability of intermediaries continues to rely heavily on public scrutiny, suggesting that disclosure legislation that fails to capture online intermediaries should be carefully scrutinized and likely amended.

Second, whenever a proposed regulation impacts the benefits listed in Table 2, policymakers should proceed with caution. Policymakers should be most concerned about regulation that might influence one of the repeated factors, especially the lowered transaction costs of online communication. New laws that reduce or eliminate these benefits could weaken the force behind online fundraising and the opportunities it offers. Even regulation targeted at one of the risks of online fundraising could have unintended negative consequences. Consider, for example, the risks posed by anonymous online contributions. There is no doubt that donors' ability to make anonymous donations raises serious risks of fraud. At the same time, requiring campaigns to identify and validate all small donors would increase the transaction costs of processing online donations. Such regulation would also discourage small donors who might otherwise choose to take part in the political process. If these added costs are not carefully considered, they could depress online fundraising to the point that its many positive impacts—the new contributors, increased engagement, increased accountability of intermediaries, etc.—would be lost.²⁵⁹ Thus, regulators should tune their policies carefully, with special consideration paid to the benefits and risks outlined above.

Before turning to the final Part of this Article, it is important to note the risk created by the rise of 501(c) IFGs, as well. One of the key conclusions of this Part has been that the accountability of fundraising intermediaries is a central factor in their ability to enhance democratic participation. Unaccountable intermediaries represent themselves rather than their members. Because 501(c) IFGs are not required to reveal their sources, they escape from an important form of accountability to the public.²⁶⁰ Further, because they focus on independent expenditures and can easily turn to corporations and other large donors for funding, they have little need for engaged memberships, greatly weakening their member accountability.²⁶¹

259. For more on addressing the problem of anonymous online donations, see *infra* Part IV.A.1.

260. See *supra* text accompanying note 72.

261. The rise of 501(c) IFGs and large corporate donors is a result of legal change, rather than technological innovation, and falls outside the scope of this Article. There has already been widespread discussion of the possible implications of *Citizens United* and a range of proposals to address its effects. See generally, e.g., Bebchuk & Jackson, *supra* note 76 (proposing changes in corporate law in response to *Citizens United*); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1676108> (outlining a narrow series of policy responses to *Citizens United*); Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 662 (2010) (arguing for disclosure and disclaimer regulations in the wake of *Citizens United*); see also H.R. 5175,

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IV. REGULATING INTERNET FUNDRAISING

This final Part builds on the framework developed in the last two Parts and makes specific proposals to enhance the benefits and mitigate the risks of online fundraising. In response to the explosion of online fundraising and campaigning in recent elections, academics, politicians, and policymakers have advanced numerous proposals to reform campaign finance law. They range from overhauls of public financing that encourage more small online donations,²⁶² to focused efforts to increase the regulation of online fundraising,²⁶³ to a range of legislation in response to *Citizens United*.²⁶⁴

This rash of proposals is a significant change from the status quo. In an effort to protect the developing Internet from undue burdens, policymakers in recent years have largely chosen to shield online entities from traditional legal burdens. For instance, little effort is made to collect sales taxes on interstate sales made online,²⁶⁵ and publishers are almost completely protected from liability for defamatory content

111th Cong. (2009–2010) (calling for additional disclosure requirements). Thus, this Article will not discuss the case's impact in detail. Nevertheless, the large donations and anonymous donations that it has made possible have both clear and troubling implications for democratic participation that will hopefully be addressed in future legislation.

262. CORRADO ET AL., *supra* note 25, at 40–41 (presenting a package of reforms to expand the role of small donors in politics, including multiple matching funds for small donors); Malbin, *supra* note 25, at 20 (arguing that the public financing system should be redesigned to encourage participation by small donors and discourage dependence on large donors).

263. See Daniel W. Butrymowicz, Note, *Loophole.com: How the FEC's Failure to Fully Regulate the Internet Undermines Campaign Finance Law*, 109 COLUM. L. REV. 1708, 1741–43 (2009) (arguing that including Internet communications that cost more than \$500 in the FEC's definition of "public communication" would reduce the exploitation of regulatory loopholes).

264. See Daniel Schuman, *Legislation Intended to Respond to Citizens United*, SUNLIGHT FOUND. BLOG (Jan. 27, 2010, 12:27 PM), <http://blog.sunlightfoundation.com/2010/01/27/legislation-intended-to-respond-to-citizens-united/> (describing and providing references to thirteen bills and amendments intended to respond in some way to *Citizens United*).

265. See generally *Quill Corp. v. North Dakota*, 504 U.S. 298, 315–19 (1992) (holding that states may only require retailers to collect state taxes if they have in-state offices or stores); Olga Kharif, *The Surge to Impose Online Sales Taxes*, BLOOMBERG BUS. WEEK (Apr. 26, 2009, 10:12 PM), http://www.businessweek.com/technology/content/apr2009/tc20090426_510375.htm (detailing recent debates over extending state sales taxes onto the Internet and noting the industry argument that preventing this tax extension will protect small businesses from being "strangled in their cribs").

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posted on their sites by third parties.²⁶⁶ The FEC thus far has been similarly reluctant to regulate online campaigning and fundraising.²⁶⁷

In 2004, in *Shays v. FEC*,²⁶⁸ the United States District Court for the District of Columbia directed the FEC to promulgate regulations to bring the Internet under the coverage of BCRA.²⁶⁹ Resisting expansive online regulation, the FEC updated its regulations to include only paid advertising online.²⁷⁰ Although paid-for advertising constitutes a large portion of political speech in other media—from television and print advertisements to banners and signs—it plays a relatively limited role on the Internet.²⁷¹ The rest of online communications, like the political conversation on blogs and discussion boards, were not considered “public communications” under the law and were left largely unregulated.

Despite concerns of burdening the Internet, there are two important reasons why policymakers should seriously consider expanding fundraising regulation to encompass online fundraising. For the past ten years, Internet fundraising has steadily expanded its role in American politics, with no end in sight. The important question for a regulator is not whether online fundraising should continue to expand, but how it should do so. Short of a possibly unconstitutional ban on fundraising over the Internet, it will only continue to grow. In the

266. See 47 U.S.C. § 230(c)(1) (2006) (protecting online providers from liability for information composed by third parties by requiring that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”).

267. For details on the FEC and Internet communications, see *Internet Communications and Activity*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/internetcomm.shtml> (last updated June 2007).

268. 337 F. Supp. 2d 28 (D.D.C. 2004).

269. See *id.* at 70 (“To permit an entire class of political communications to be completely unregulated irrespective of the level of coordination between the communication’s publisher and a political party or federal candidate, would permit an evasion of campaign finance laws . . .”).

270. Internet Communications, 71 Fed. Reg. 18,589, 18,589 (Apr. 12, 2006) (codified at 11 C.F.R. § 100.26 (2010)) (“The revised definition of ‘public communication’ includes paid advertising placed on another person’s website”); see also 11 C.F.R. § 100.26 (providing that “*general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site”). For more details on *Shays* and FEC regulation of online campaigning, see Butrymowicz, *supra* note 263.

271. The FEC acknowledged the limited role of paid political speech on the Internet in its notice of proposed rulemaking in response to *Shays v. FEC*. Internet Communications, 70 Fed. Reg. 16,967, 16,969 (Apr. 4, 2005) (codified at 11 C.F.R. § 100.26) (“[T]he Commission anticipates that the proposed definition would have an extremely limited impact, if any, on the use of the Internet by individuals as a means of communicating their political views, obtaining information regarding candidates and elections, and participating in political campaigns.”).

past decade, scholars have generated a large amount of literature arguing that there is something special about election law that requires “a different type of jurisprudence.”²⁷² Singling out political speech and political contributions for regulation is nothing new, and the proposals discussed in this Part are no different. Most of these proposals are not solely targeted at online fundraising—requiring intermediaries to disclose their identity when they earmark members’ donations, for instance, applies to offline bundlers just as much as it applies to online IFGs. Nevertheless, the proposals seek to address challenges that are brought to the fore by online fundraising itself.

Regulation of online fundraising can accomplish two important tasks: Regulation can help to mitigate or eliminate the risks raised by online fundraising, and regulation can help to expand online fundraising’s enhancement of democratic participation. Leaving online fundraising unregulated as it continues to expand, however, will only maintain an increasingly fragile status quo that is threatened by the risk of fraud and inequity.

The remainder of this Part proposes two specific policies to address some of the risks raised by online fundraising and a third policy to help draw in more small online donors and increase their value for campaigns.

A. *Regulating Risk*

Many of the dangers raised by online fundraising were outlined in Part III. Increasing emphasis on online fundraising by campaigns will only exacerbate these dangers. There are three risks in particular that, if left unchecked by regulation, will continue to expand: the gap in access created by the digital divide, anonymous donations and the risk of contribution fraud, and the fact that online fundraising intermediaries are not required to disclose their role in securing earmarked donations. The risk of the digital divide is by no means a uniquely political problem and has been discussed in detail elsewhere.²⁷³ Beyond identifying its importance and the importance of regulatory support to ensure that it is properly addressed, this Article

272. *E.g.*, Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 *IND. L. REV.* 7, 8 (2010).

273. *See generally, e.g.*, AARON SMITH, PEW RESEARCH CTR., *HOME BROADBAND 2010*, at 2 (2010), available at <http://www.pewinternet.org/~media/Files/Reports/2010/Home%20broadband%202010.pdf> (detailing recent changes in Internet access that suggest a decreasing, but not disappearing, digital divide); U.S. DEP’T OF COMMERCE, NAT’L TELECOMMS. & INFO. ADMIN., *A NATION ONLINE: ENTERING THE BROADBAND AGE 13–15* (2004), available at <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf> (analyzing broadband usage and distribution in the United States); Anthony Sciarra, *Mu-*

will not address it in detail. The other two risks, however, have been greatly exacerbated by the rise of online fundraising in particular and deserve additional consideration.

1. *Anonymous Donations and Donor Fraud*

Donation fraud is a serious concern, both online and offline, but the sheer volume of small donations and the opportunity for anonymity that Internet fundraising offers make it a particular problem online. A public matching fund for general election donations, a central element to several recent policy proposals, would make donation fraud even more tempting.²⁷⁴ If small donations are matched by public money, they may double, triple, or quadruple in value. Increased value will create increased incentives for donors and campaigns to commit fraud.

At the same time, there are reasons to be cautious when considering regulation to prevent donation fraud, particularly online. First, constraints on online donations could increase the transaction costs for voters and campaigns, depressing the growth rate of Internet contributions and reducing the positive impact of online fundraising. Second, it is not clear how significant donor fraud truly is, and whether the increased transaction costs that may be necessary to combat it are worth the cost.²⁷⁵ Many of the potential solutions to these concerns impose significant burdens on campaigns, donors, or both. One could, for instance, require that all donors use credit cards, eliminating the use of anonymous gift cards. This would require that donors provide a valid, matched billing address and would ensure that any political donor satisfies a credit card company's fraud check. While this requirement would not be failsafe, it would likely prevent many attempts at fraud. Unfortunately, according to the Federal Reserve, some twenty-seven percent of American families do not have credit cards²⁷⁶ and thus would be excluded from online fundraising if this limitation were implemented.

Another possible solution would be to require that online donors provide positive identification, such as a social security number or driver's license number before contributing online. National legisla-

municipal Broadband: The Rush to Legislate, 17 ALB. L.J. SCI. & TECH. 233, 255-57 (2007) (presenting municipal broadband as a strategy to address inequity in Internet access).

274. See *infra* Part IV.B.1.

275. See *supra* text accompanying notes 195-201.

276. See Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, 95 FED. RES. BULL. A1, A46 (Feb. 2009), available at <http://www.federalreserve.gov/pubs/bulletin/2009/pdf/scf09.pdf>.

tion that required states to generate voter IDs along with their voter registration rolls could even generate a unique ID designed solely for the purpose of political contributions. Although this solution would be even more effective than requiring credit cards, it could greatly increase the transaction costs of online contributions. Donors might be unwilling to disclose such sensitive information to political campaigns over the Internet and might opt out of online donations altogether. Alternatively, donors might lose a rarely used identifier like a voter ID.²⁷⁷ The question of voter identification has become particularly controversial in recent years, with numerous authors warning that such a requirement could severely depress voter turnout.²⁷⁸ Campaigns would also become even more tempting targets for identity thieves. To verify the identity of donors, campaigns would need access to the appropriate government databases—a procedural and technological challenge that would further expose sensitive information to leaks, mishandling, and outright theft.

The risks posed by each of these solutions suggest that they should not be adopted without certainty of success, clear evidence of widespread contribution fraud, and a careful consideration of the consequences. In light of the lack of evidence to analyze from previous elections²⁷⁹ and the significant risks raised by each proposal, it makes sense to consider a compromise solution that could reduce the risk of online fraud while avoiding harmful unintended consequences.

Both of the policies discussed above center around a single mechanism: Contributors must provide identifying information that can be

277. One potential benefit of a voter ID requirement, however, is that it would limit the ability of noncitizens to donate, a problem that received significant attention in 2008. See generally *supra* text accompanying note 197.

278. See, e.g., Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 58-59 (2008) (arguing that requiring voter IDs is similar to the “Bull Connor” methods of the past, which thwarted African American political participation, when it bars eligible citizens from voting); Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1025 (2009) (arguing that “photo identification laws represent a continuation of the use of economic forces as a way to block people of lower economic status from participation in the electorate”); Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 788 (2008) (arguing that if legislatures wish to construct a constitutional photo identification requirement, they must take steps to ensure that every voter has access to such identification so that voter turnout is not affected, among other requirements). *But see* Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. ANN. SURV. AM. L. 613, 623-25 (2008) (arguing that survey results show that requiring voter identification will not exclude voters and is unlikely to discourage voter turnout).

279. See generally *supra* Part III.A.

linked to a verifiable address. This requirement does not prevent fraud altogether—an identity thief could still use someone else’s identification—but it does increase the barriers to fraudulent contributions.

A similar barrier can be achieved without requiring donors to provide credit cards or unique identifiers. Instead, donors could be required to provide valid physical and e-mail addresses for each donation. Further, fundraising groups could be required to verify the validity of these addresses upon donation, and store them after donation. Although this regulation presents a lower boundary than the previous proposals, it still provides a measure of deterrence and raises far fewer risks.

In addition, fundraising intermediaries could be required to log the Internet protocol (“IP”) address of the computer used to make an online donation.²⁸⁰ The IP address provides a digital address for the donor’s computer somewhat like, though less precise than, the information a physical address provides about a donor’s home.²⁸¹ An IP address log will not provide a definite donor identity because IP addresses change, can be masked by technically savvy users, and point to computers rather than individuals.²⁸² An IP log will, however, provide another point of verification that, in addition to donors’ physical and e-mail addresses, can be used to locate patterns that might indicate fraud. Software could monitor these patterns and flag suspicious contributions.

This limited solution will not prevent all fraud, but neither would either of the solutions discussed above. Instead, it will make online fraud more difficult and provide for enhanced recordkeeping that will allow researchers to determine how widespread a risk is really posed by donation fraud. Based on this additional evaluation, more severe measures could be adopted for future election cycles if deemed necessary. Just as importantly, this proposal places no additional burden on intermediaries or donors. Donors, in fact, will see no difference in the forms they must fill out to donate to most intermediaries—they will simply receive an error if they enter a nonexistent address. Intermediaries already gather this information to help them follow up

280. For more detail on how IP addresses function and how they could be used to track an Internet user, see Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 328 (2008).

281. *See id.*

282. *See id.*; Ned Snow, *Copytraps*, 84 IND. L.J. 285, 298 (2009) (explaining how online violators of copyright law might choose to mask their IP addresses); *see also, e.g., Tor: Overview*, TOR, <http://www.torproject.org/overview.html.en> (last visited Feb. 27, 2011) (describing Tor, a free service that masks the identity of its users online).

with their members, and there are numerous tools online that would allow intermediaries to validate physical addresses.²⁸³

This iterative approach avoids burdening the benefits of online fundraising listed in Table 2, provides some initial deterrence to would-be perpetrators of fraud, and allows regulators to gather more data and to refine future approaches.

2. *Requiring Disclosure of Earmarked Contributions*

Federal Election Campaign Act disclosure requirements currently fail to capture some of the most important information concerning online donations. Federal Election Campaign Act disclosure reports indicate the source of each donation, but because online fundraising intermediaries facilitate donations by their members, a crucial piece of data (who earmarks the data) is left out. Five thousand RedState readers who respond to the website's plea to donate to a particular candidate are indicating their own support, but they are also indicating RedState's influence.²⁸⁴ If there is no report of how these donations were delivered to candidates, a crucial piece of the pattern of political influence will go unreported. This problem, in fact, is identical to the disclosure problem posed by nonlobbyist bundlers; FECA does not require campaigns to report their earmarking.²⁸⁵

Campaigns almost certainly already know this information. Whenever a web surfer visits a page, most browsers provide a record of the last page the surfer visited, allowing campaigns to easily reconstruct from where their donors are coming.²⁸⁶ An even more certain method of reporting might require online intermediaries that drive

283. See, e.g., U.S. POSTAL SERV., ADDRESS INFORMATION SYSTEM PRODUCTS TECHNICAL GUIDE 89 (Oct. 2010), available at http://ribbs.usps.gov/addressing/documents/tech_guides/pubs/AIS.pdf (outlining various services provided free by USPS for online businesses, including address verification); CORRECTADDRESS, <http://www.correctaddress.com/> (last visited Feb. 27, 2011) (advertising an address verification software product); *Mastering the UPS Shipping API: Getting Started*, MARKSANBORN.NET (Sept. 19, 2008), <http://www.marksanborn.net/howto/mastering-the-ups-shipping-api-getting-started/> (detailing API services offered by UPS, including the UPS Address Validation Tool).

284. See *supra* text accompanying notes 112–16 (noting the role of partisan blogs in fundraising). R

285. See *supra* text accompanying notes 95–99. R

286. PHP, <http://www.php.net/manual/en/reserved.variables.server.php> (last updated Feb. 28, 2011) (defining “HTTP_REFERER” as “[t]he address of the page (if any) which referred the user agent to the current page”). By using this data, software developers can build a website that tracks the last site the viewer visited. Similar resources exist in a wide range of programming languages that are used to develop websites. For example, *HTTP_REFERER Test*, KARMAK.ORG, <http://karmak.org/2004/reftest/> (last visited Jan. 18, 2010), is a working sample of HTTP_REFERER; after clicking on the “Click here to test” link, the new page will display the URL of the page referring that page.

voters to candidate donation pages to embed a small identifying tag in the link that is selected by members.²⁸⁷ Candidate's websites could automatically decipher this identification tag and append it to any donation received.²⁸⁸ This proposal would require very little effort on the part of campaigns or fundraising intermediaries and is already widely used in online advertising, in which positive identification of surfers' origins is vital to companies' business models.²⁸⁹ It can be equally effective in the political context.

Finally, fundraising platforms like ActBlue gather earmarked donations themselves and remit periodic checks to campaigns that represent many aggregated donations.²⁹⁰ Intermediaries should be required to accompany these donations with transactional data that identifies each individual donation and links that donation to the intermediary. Campaigns, in turn, should be required to disclose this additional detail, including the earmarking intermediary and the donor for donations above the minimum disclosure threshold. Requiring intermediary information for all donations will ensure that all online fundraising intermediaries, whether they drive contributors to donate directly or aggregate and deliver their donations themselves, will have their earmarked contributions clearly identified and their potential influence made transparent through FECA disclosures.

This would not be a perfect system. For example, members who were convinced to donate by their intermediary, but who navigated to a candidate's page themselves rather than by clicking on a link from the intermediary's homepage, might be unidentifiable.²⁹¹ In addition, if one fundraising intermediary used another intermediary to deliver funds—for instance, Daily Kos might drive its members to contribute to a candidate via ActBlue—then only the final facilitating link would be recorded. Nevertheless, this simple recording system

287. See, e.g., Justin Cutroni, *Measure Online Advertising with Google Analytics*, THINK VITAMIN (Oct. 16, 2007), <http://thinkvitamin.com/uncategorized/measure-online-advertising-with-google-analytics/> (describing how tagging advertising links works and providing examples).

288. See *id.* ("Once Google Analytics knows which [link] the visitor responded to it stores the information in a cookie on the visitor's machine. From that point forward, as long as the cookie exists, Google Analytics can connect the visitor's actions with the originating [link].").

289. See *id.*

290. *ActBlue Frequently Asked Questions*, *supra* note 126 ("At least once a week we send checks to candidates aggregating all the donations they've received since the last time we sent them a check.").

291. See *generally* Cutroni, *supra* note 287 (describing "link tagging" and its use in tracking originating online activity).

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would capture vastly more earmarking data than is currently recorded.

One might also argue that reporting earmarking is unnecessary, because online intermediaries must publicly announce their donation drives to effectively raise funds. Any information provided in the announcement, however, will be in a mass of disconnected online press releases, formatted as the intermediaries choose and including only the data they choose to provide. Such information hardly offers a reliable resource for public scrutiny. Including earmarking in FEC disclosure reports would establish a single destination for easily comparable data on all intermediaries, an important step in exposing the breadth and depth of their influence.

In addition to their benefits, additional disclosure requirements pose three risks. First, additional requirements could burden campaigns—increasing the campaign-side transaction costs of online fundraising. The additional reporting will be very easy for campaigns to implement, however. Indeed, campaigns already gather much of the necessary data as part of their efforts to understand where their donors come from and how best to solicit continued support. Second, additional disclosure could increase the contributor-side transaction costs of online fundraising, discouraging donations from donors who are unwilling to reveal their identities. Donors' identities are already disclosed for donations of more than \$250,²⁹² and the new regulation should not change this. For donations below \$250, only the earmarking data for donations should be disclosed (for instance, the fact that MoveOn.org has facilitated a donation of \$50). If this limitation was maintained, the new policy would not further burden donors.

Finally, and perhaps most concerning, where donor identities are reported, attaching this information to their donation's earmarking intermediary will reveal not only the candidates whose donors choose to support but also the intermediaries with whom they choose to affiliate. A donor clicking a link to donate posted on Firedoglake.com or Teapartypatriots.org, for instance, will have his intermediary affiliation revealed in FEC disclosure reports. The Supreme Court has made very clear that the First Amendment right to affiliate with groups includes the right to do so anonymously for fear that members of controversial groups, such as the NAACP in the pre civil rights era South, might be intimidated into abandoning their affiliations.²⁹³

292. See *supra* text accompanying note 53.

293. See *NAACP v. Alabama*, 357 U.S. 449, 462–66 (1958) (holding that compelling disclosure of the membership roles of the Alabama NAACP would violate its members First Amendment right of association and that there is a “vital relationship between freedom to

To avoid this problem, intermediary earmarking data should not be linked to donor identities. Instead, earmarking data with no donor identifiers should be reported for all donations—no matter how small. Separately, individual transactions by donors aggregating over \$250 would be reported with donor identities.²⁹⁴ This would empower the public to scrutinize online fundraising intermediaries' influence and protect donors' privacy. There is a small risk that correlations could be identified based on donation amounts and dates for donations over \$250 made to local candidates, thus exposing the intermediary affiliations of large donors. If a particular candidate received a single \$250 donation on a given day, for instance, this could be linked to a separate disclosure that a \$250 donation was earmarked for that candidate by a particular fundraising intermediary. This would be a relatively rare occurrence. Further, the Supreme Court in *Buckley v. Valeo* concluded that the sufficient government interest in transparency warrants the disclosure of the personal details of large donors.²⁹⁵ Thus, one might conclude that this is a worthwhile risk. To be safe, however, earmarking disclosures could be made on a monthly, rather than a daily, basis—an intermediary would disclose that it earmarked one hundred \$250 donations and thirty \$50 donations during a one month period, for instance. This would greatly reduce any risk of unintended disclosure by data correlation and have little impact on the value of the disclosed data.

B. *Fostering Small Donors and Expanding Democratic Participation*

Increasing candidates' reliance on small donations increases the number of citizens who participate in elections and political debate.²⁹⁶ It privileges donors who give without a personal connection to the candidate and without any hope for direct influence.²⁹⁷ An increase in small donors also brings more donors into the political

associate and privacy in one's associations."); *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) ("[T]he invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations . . .").

294. See *supra* text accompanying note 53.

295. 424 U.S. at 66–68, 80–84.

296. See, e.g., Ellen L. Weintraub & Jason K. Levine, *Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up*, 24 ST. JOHN'S J.L. COMM. 461, 472–73 ("By the conclusion of the campaign, Obama claimed to have over 3 million individual donors who made a total of 6.5 million donations online. Six million of these contributions were for less than \$ 100 each." (footnote omitted)).

297. See *id.* at 472–74 ("Raising funds over the Internet substantially limits the opportunities for the kind of actual or apparent improper influence that can arise in direct face-to-face or telephone solicitations by candidates.").

process and leads to greater political engagement, because, once they have donated, small donors are more likely to volunteer and donate their time than large donors.²⁹⁸

The Internet has increased the number of small donors in American politics. There are reasons to believe, however, that the kind of massive mobilization managed by the Obama campaign in 2008²⁹⁹ will not become the norm without regulatory support. President Obama was a high-profile presidential candidate in a high-stakes election that generated enormous interest, perfectly placed to take advantage of widespread public demand for change and a young generation of motivated activists that were already comfortable online.³⁰⁰ Almost all other 2008 presidential candidates raised the majority of their funds from large contributions of \$1,000 or more.³⁰¹ In fact, all major candidates, including Obama, raised a much higher percentage of their early funds from large donors, turning to small donors only after the candidate achieved a sufficient level of notoriety and had become established as a serious contender.³⁰²

The numbers are even more telling in lower-profile campaigns. In 2008, Senate candidates raised only fourteen percent of their total take from individual donors who donated an aggregated total of \$200 or less.³⁰³ For House candidates, it was even lower: eight percent.³⁰⁴ The numbers drop further for incumbent candidates (nine percent in Senate races and six percent in House races).³⁰⁵ In fact, all candidates raised a smaller percentage of their funds from small donors in 2008 than in 2000.³⁰⁶

Although the Internet offers the promise of a rapid rise in the ability of candidates to rely on small-value donations, this promise has not yet been realized for the vast majority of elections. The more local and lower profile a race, the more its candidates turn to large do-

298. *See supra* note 174 and accompanying text.

299. *See supra* note 296.

300. *Cf. Weintraub & Levine, supra* note 296, at 474 (“While it is likely that a greater percentage of political fundraising will take place via the Internet in the years to come, the key question is whether Obama’s extraordinary fundraising success can be duplicated by other candidates. Was this ‘lightening in a bottle,’ a unique set of circumstances having more to do with a particular candidate at a particular time than with any structural innovations in his fundraising strategies?”).

301. CORRADO ET AL., *supra* note 25, at 15–16.

302. *See id.* at 18.

303. *Id.* at 20.

304. *Id.*

305. *Id.* at 21–22.

306. *Id.* In 2000, Senate candidates raised seventeen percent of their funds from donors aggregating to less than \$200, and House candidates raised fifteen percent. *Id.*

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nations. Even if the small donor revolution that helped lift Barack Obama to the presidency continued unabated for other presidential candidates—which is by no means guaranteed—it seems unlikely that it will penetrate to lower profile races without support.

Careful regulation can provide this support, as fundraising patterns from state elections illustrate. In 2006, state candidates from Maryland, the state representing the median distribution of candidate fundraising, raised only nine percent of their funds from donations of \$100 or less and only fourteen percent from donations of \$250 or less.³⁰⁷ While most states presented fundraising statistics that were similarly skewed to large donors,³⁰⁸ candidates from several states raised significantly higher percentages from small donations. State candidates from Minnesota, for instance, raised forty-five percent of their funds from donations of less than \$100.³⁰⁹ Similarly, state candidates from Vermont raised twenty-six percent of their funds from small donors.³¹⁰ Both states, as well as other states that showed increased candidate reliance on small donations, had government programs that created incentives for candidates to focus on small donations.³¹¹ Minnesota offered partial public funding to its candidates, employed low contribution limits, and offered a state rebate for small donations.³¹² Vermont required candidates to raise significant funds from small donations to qualify for public financing.³¹³ In each case, regulation seems to have successfully refocused campaign fundraising on small donations. This is especially true for low profile candidates whose counterparts in other states without such regulation relied mainly on large donors.

1. *Public Matching Funds for Small Donations*

Although a federal public matching program currently exists, it only matches small donations during primaries, is available only to presidential candidates, and does not provide sufficient incentives to

307. *Id.* at 24–25.

308. In Alabama, for example, state candidates raised only two percent of funds from donations of \$100 or less, but twenty-one percent came from donations of \$1000 or more. *Id.* at 24.

309. *Id.*

310. *Id.*

311. *Id.* at 23.

312. *Id.*

313. DEBORAH L. MARKOWITZ, GUIDE TO VERMONT'S CAMPAIGN FINANCE LAW 12 (2008), available at <http://vermont-elections.org/elections1/2009-10CFGuideRev5.25.10.pdf> (explaining that a candidate for governor must collect contributions amounting to no less than \$35,000 collected from no fewer than 1,500 qualified individuals contributing no more than \$50 each).

focus candidates on small donors.³¹⁴ To increase the incidence of small online donors, this program should be reconceived and expanded. Although it would be primarily aimed at the rising number of small donations that have been made online, such a program could match offline donations as well. Small offline donations, though perhaps more challenging to raise and coordinate, are at least as valuable as acts of democratic participation as online donations.

In light of the relevant case law, designing a matching fund would require careful planning. *Buckley*, for instance, held that restricting “the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”³¹⁵ *Citizens United* reinforced and expanded this sentiment by holding that the Government cannot “impose restrictions on certain disfavored speakers.”³¹⁶ While both of these statements concerned expenditures,³¹⁷ not contributions—and *Buckley* drew important distinctions between the two³¹⁸—the tone of *Citizens United* suggests that an expansion of these principles to contributions is far from out of the question. Thus, any matching fund should be especially cautious if it explicitly restricts larger contributions in favor of smaller ones, lest it be interpreted as a restriction “distinguishing among different speakers” or “taking the right to speak from some and giving it to others.”³¹⁹

Currently, primary candidates who meet certain qualifications can receive public matching funds on a dollar-for-dollar basis for the first \$250 contributed by each donor, while general election candidates may request a flat grant of some \$84,000,000.³²⁰ In return for such funding, candidates commit to use only public funds during the general election and “are subject to limits on the amount they may spend in the primary and general election campaigns.”³²¹

In order for a voluntary matching program to be effective, candidates must opt in. In other words, the benefits of the program must

314. See generally Malbin, *supra* note 25 (discussing public financing); *Public Funding of Presidential Elections*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/pubfund.shtml> (last updated Feb. 2011) (same).

315. 424 U.S. 1, 48–49 (1976).

316. 130 S. Ct. 876, 899 (2010).

317. *Id.*; *Buckley*, 424 U.S. at 47–48.

318. *Buckley*, 424 U.S. 19–23.

319. *Citizens United*, 130 S. Ct. at 898–99.

320. *Public Funding of Presidential Elections*, *supra* note 314 (detailing necessary qualifications and available primary and general election public funding for qualifying candidates). The above amount for the general election reflects the cost-of-living adjustment for 2008. *Id.*

321. CORRADO ET AL., *supra* note 25, at 37.

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outweigh the cost of taking part. In 2008, Barack Obama chose not to seek public funding.³²² Without it, he raised more than \$640,000,000.³²³ John McCain, who did seek public funding, was limited to \$84,000,000, leaving him seriously outmatched in campaign spending.³²⁴ With these events so etched into the recent memory of candidates, one goal of a restructured public matching program must be to ensure that all candidates take part, or at least that a single candidate's choice to opt out will not cripple his competitors. Thus, a new public matching program should avoid limiting the campaign spending of candidates who take part. These guidelines will also help ensure the constitutionality of a public matching program, should the Supreme Court, which has been increasingly suspicious of expenditure limits in any form,³²⁵ be called upon to evaluate the legislation.

More broadly, the matching program should have one clear goal: to increase the percentage of candidates' funds that come from small donations.³²⁶ If successful, the program will increase the number of small donors that are active in American politics, resulting in an overall increase in democratic participation. To accomplish this goal, public matching funds should be available for all federal races, not merely for presidential candidates. As the data outlined above demonstrates, matching programs may in fact be most crucial for lower profile races where candidates have less public notoriety. These candidates are currently the most reliant on large donations. Evidence from states with matching programs in place, however, indicates that this reliance can be shifted.³²⁷

A matching fund program could also address another concern raised by online fundraising: the nationalization of elections. By matching only in-state donations, a public matching fund could significantly increase the relative value of donations from within a candidate's potential constituency.³²⁸ This limit would not prevent candidates from seeking outside support, but it would ensure that can-

322. Kenneth P. Vogel, *Obama, McCain Skip Public-Funding Chat*, POLITICO (Nov. 17, 2008, 1:52 PM), <http://www.politico.com/news/stories/1108/15718.html>.

323. *Id.*

324. *Id.*

325. Weintraub & Levine, *supra* note 296, at 476 (noting that “the Supreme Court views the concept of ‘leveling the playing field’ as ‘wholly foreign to the First Amendment’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976))).

326. *See, e.g.*, Malbin, *supra* note 25, at 20–21 (noting that the purpose of proposed congressional campaign financing legislation is “promoting small donor participation”).

327. *See supra* text accompanying notes 307–13.

328. *See, e.g.*, Fair Elections Now Act, H.R. 6116, 111th Cong. § 503(a) (2010) (“The Commission shall pay to each participating candidate an amount equal to 400 percent of the amount of qualified small dollar contributions received by the candidate from individ-

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didates remained primarily focused on the voters and donors within their own districts.

To increase the degree to which candidates rely on small donors, the matching program should increase the value of small donations relative to large donations. A program that provided a four-to-one match for all donations of \$200 or less, for instance, would quadruple the value of these small donations.³²⁹ The remainder of this Section will use this example—a four-to-one match of donations of \$200 or less—to discuss possible public matching programs. It is not the intent of this Article to suggest that this is the only, or optimal, dollar level for such a program.³³⁰ Nevertheless, a four-to-one match of donations of \$200 or less provides a good starting point for discussion. The exact levels of any program that is implemented should be the result of additional analysis into the size donations regulators feel candidates should focus on and the value increase necessary to attract candidates away from larger donations. The smaller the maximum matched donation, the larger the multiple matching funds offered by public funding would likely need to be.

Increasing the relative value of small donations cannot simply rely on increasing the size of all donations. If the same matching funds that increase small donations also increase large donations, then the program will achieve little realignment. Candidates will continue to focus on large donations, pocketing public matching funds along the way.³³¹

A four-to-one matching program might solve this problem in three ways. First, the program could reduce maximum contributions for all candidates who opt into the program while using matching funds to increase the value of small donations.³³² At least one current

uals who are residents of the State in which such participating candidate is seeking election.”).

329. See, e.g., Fred Wertheimer, *The \$200 Campaign Finance Fix*, WASH. POST, Nov. 13, 2008, at A23 (exploring campaign financing, the role small donations of \$200 or less played in the 2008 election, and proposing the four-to-one ratio for matching funds). Currently a \$200 donation is worth one-twelfth of the maximum donation of \$2,400. A four-to-one matching program would make a \$200 donation worth \$800, one-third of the maximum \$2,400 donation. *Id.*

330. For instance, a public matching program currently running in New York City matches the first \$175 of any private donation to a city candidate by a factor of six-to-one. CORRADO ET AL., *supra* note 25, at 40.

331. *Id.* at 40–41 (noting how this risk played out in the existing public financing system: “Al Gore and Bill Bradley, the leading contenders for the Democratic Party’s presidential nomination in 2000, both accepted matching funds, but each focused on \$1,000 donors and raised more than 60 percent of their funds from this source”).

332. If the maximum donation were reduced to \$1,000, for instance, a four-to-one matched \$200 donation would be worth four-fifths of the maximum donation.

proposal takes this approach, requiring that all candidates seeking public funding agree to a contribution limit that would be “significantly lower than the amount that may be accepted by a candidate who does not accept public funds, but . . . not . . . so low that the level and administrative burden gives candidates a reason to opt out.”³³³ Although this program greatly increases the relative value of small donations, it carries significant risks. To take part, candidates must agree to forego the large donations that have been their most reliable source of funding in the past.³³⁴ Unwilling to shoulder this risk, candidates might choose not to take advantage of the program at all. In addition, a matching program like the one proposed could well run afoul of *Citizen United*’s distrust of restrictions on political money, as it clearly limits the ability of wealthy donors to contribute to candidates who opt in to the program.³³⁵

Second, the matching program could match *only* donations from donors who donated no more than \$200. Candidates would be free to also seek \$2,400 donations, but their first \$200 would not be matched.³³⁶ This would eliminate the risk of candidates choosing to opt out of the program because of a reduced contribution limit. Matching only small donations, however, would impose a strange perverse incentive on campaigns. For a four-to-one match of \$200 donations, for instance, any donation between \$200 and \$800 would actually cost the campaign money in lost matching funds.³³⁷ Campaigns would also incur administrative costs because they would be required to identify donors whose contributions aggregated above the maximum matched donation and to return the appropriate matching funds. This would burden campaigns, risk errors, and expose the system to fraud.³³⁸ It would hamper the cardinal benefit of online fundraising that has been highlighted in this Article—namely, its low transaction costs. It could also result in campaigns dissuading further donations by impassioned supporters who had reached the matching limit, but who the campaign did not anticipate would donate enough to surpass the value of their maximum matched donation. Not only

333. CORRADO ET AL., *supra* note 25, at 43.

334. See Malbin, *supra* note 25, at 12–13 (purporting that “all of the candidates [in the 2008 presidential election] started off by relying more on large donors than small”).

335. See *supra* text accompanying notes 68–71.

336. In this case, a four-to-one matched \$200 donation would be worth one-third of the maximum donation.

337. Since a \$200 donation would be worth \$800, a \$300 donation, for instance, would cost the campaign \$500.

338. See, e.g., CORRADO ET AL., *supra* note 25, at 41 (citing the above risks to justify proposing a match of the first \$200 of any donation).

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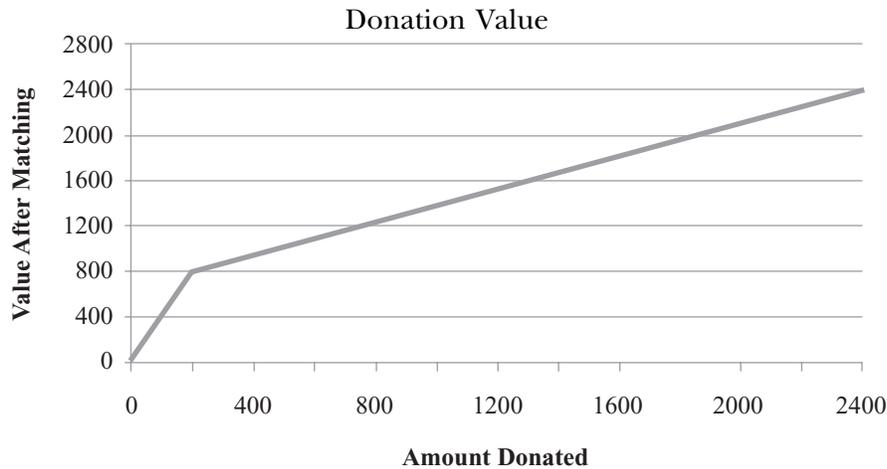
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would this solution impose administrative costs and strange incentives on campaigns, but potential contributors who sought to participate could well be turned away by the campaign—hardly a desirable outcome.

A third solution would take a different approach. It would not impose contribution or spending limits on candidates, and it would avoid placing any perverse incentives on campaigns by matching the first \$200 of any donation, regardless of size. Instead, every dollar over the matching limit would be discounted so that the campaign actually received slightly less than the donation’s full value. If properly calibrated, this proposal would keep the maximum donation constant while greatly increasing the relative value of small donations. Table 3 shows how such a program might be built around a four-to-one match of the first \$200 of any donation, maintaining the current contribution limit of \$2,400.³³⁹

TABLE 3

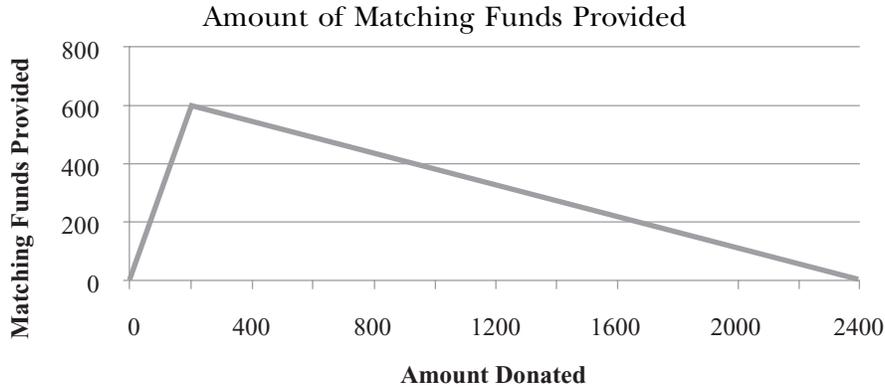


Each dollar over \$200 would actually be worth slightly less than one dollar for the campaign. Although it might not seem reasonable to “discount” donation dollars, it would in fact be quite simple. Small donations are matched with government funds. Until donations reach the \$200 threshold, the matching amount increases at the same pace as the donation—a donation of \$200 would garner a campaign twice as many matched dollars as a donation of only \$100. Above \$200, however, the amount of matched funds would actually decrease.

339. *Id.* at 35.

Instead of each dollar being worth five dollars, each dollar would be worth less and less until, for a maximum donation, no matching funds would be received at all. Table 4 demonstrates how this program might be structured.

TABLE 4



With a four-to-one match of \$200 donations and a \$2,400 maximum donation, for instance, each dollar over \$200 would be worth about seventy-three cents to campaigns. About twenty-seven cents would be withheld from the campaign’s matching funds for each dollar donated above \$200.³⁴⁰ This proposal would allow campaigns to seek large donations—thus limiting the risk of candidates opting out of public funding and reducing the likelihood that the program would be considered a restriction on speech—but would still refocus fundraising efforts on small donations.³⁴¹

Although this solution addresses the shortcomings of the previous solutions, it nevertheless raises a problem of its own. The calculations used to determine appropriate matching amounts are complex, and the program itself will require considerable oversight and management. Perhaps the most complex scenario would arise when a do-

340. These numbers are only examples. If a different maximum matched donation, maximum contribution, or matching percentage were desired, these could easily be recalibrated. To determine the proper discount percentage for a different maximum matched donation, matching percentage, or maximum donation, plug the relevant values into the following equation: $\text{discount_percent} = (\text{max_donation} - (\text{match_threshold} * \text{match_percent})) / (\text{max_donation} - \text{match_threshold})$.

341. Although the example presented here is a simple linear discount of all donations above the maximum matched amount, further analysis might demonstrate that a more progressive discount might be more effective at increasing campaigns’ emphasis on smaller donations. The exact nuances of how this program might best be structured are beyond the scope of this Article.

nor made multiple small donations, eventually surpassing the maximum matched donation. At this point, his subsequent donations should be discounted in value, but the campaign already would have been awarded matching funds on his earlier donations. If not carefully designed, this situation could force campaigns to constantly return small amounts of matched funds to the FEC. Requiring campaigns to conduct this calculation would impose a significant burden and likely dissuade campaigns from opting into the program just as strongly as any contribution limit. Further, its complexity would leave the program open to miscalculation and fraud.

There is a technological solution, however, that will limit the increased transaction costs for campaigns, enhance transparency in fundraising, and still allow matching funds to focus candidate attention on small donations. By developing a software package to administer the assignment of matching funds, much of the transactional work of public funding, and, indeed, much of the work of campaign disclosure discussed above, can be accomplished automatically by a federal agency, such as the FEC, or a designated third party.

2. *A Digital Monitor for Campaign Finance Management*

To administer effective campaign finance disclosure and public funding programs, data from campaign databases must be monitored, collated, and processed accurately and quickly. Certain actions—disclosure of information about individual donors and issuing of matching funds—must be taken based on information extracted from campaign data. Except in rare cases, these actions are largely mechanical steps that easily could be predicted beforehand. For instance, donor information for every donation of over \$250 or for every donor who aggregates above this threshold through multiple donations must be disclosed. This process is difficult not because the reasoning is highly complex, but simply because it requires the high-speed processing of vast quantities of data. These challenges are exactly what modern database systems were designed to address.³⁴² A software system that could gather data remotely and securely from campaign databases to determine matching fund amounts, disclose donor information where appropriate, and monitor for potential fraud would vastly reduce transaction costs on all sides while simulta-

342. See, e.g., *Nonprofit Performance Management*, BLACKBAUD, http://www.blackbaud.com/services/pm/pm_overview.aspx (last visited Feb. 27, 2011) (touting the ability of its software to quickly analyze “huge volumes of information” and to “integrat[e] . . . data from multiple systems, applications, and data sources”).

neously increasing the quality of election data and the speed at which it was made publicly available.

An application programming interface (“API”) is a structured framework that allows multiple pieces of software to easily communicate.³⁴³ Many online services today boast APIs that allow third-party engineers to tap into and process their data directly. Google Maps, Twitter, and Facebook, for instance, all have APIs.³⁴⁴ Application programming interfaces often securely transmit sensitive data, allowing access only to properly credentialed users.³⁴⁵ If campaign databases all provided consistent API access, a third-party software package could accomplish virtually all the monitoring and processing necessary to provide fast, reliable disclosure of campaign donations, distribute matching funds, and recall them when necessary.

Third-party trusted data processing services are nothing new on the Internet. Paypal and other financial services have long provided trusted third-party processing for monetary transactions.³⁴⁶ In this case, the third-party processor could be a unit within the FEC, a separate government entity, or a private, contracted agency. Allowing its program secured API access to campaign databases would enable the generation of continuous, instantaneous disclosure reports and automatically calculate matching funds for candidates. This kind of software package would be well suited to administering the public matching program outlined in the previous Section. It could use a similar technique to provide campaigns with access to software that would validate donor data to help reduce incidences of contribution fraud. Campaigns could be required to conduct the checks described above without being burdened with developing the necessary system

343. David Orenstein, *QuickStudy: Application Programming Interface (API)*, COMPUTERWORLD (Jan. 10, 2010, 12:00 PM), http://www.computerworld.com/s/article/43487/Application_Programming_Interface.

344. See *Google Maps API Family*, GOOGLE CODE, <http://code.google.com/apis/maps/> (last visited Feb. 27, 2011); *Graph API*, FACEBOOK DEVELOPERS, <http://developers.facebook.com/docs/api> (last visited Feb. 27, 2011); *Twitter API Wiki*, TWITTER, <http://apiwiki.twitter.com/> (last visited Feb. 27, 2011).

345. Many e-commerce websites, for instance, use third-party credit card processing packages with which they communicate using a secure API. See, e.g., *Choose an API*, AUTHORIZE.NET, <http://developer.authorize.net/api/> (last visited Feb. 27, 2011) (detailing several API options for e-commerce developers using Authorize.net, an industry leading credit card processing service).

346. See *How Does PayPal Work?*, PAYPAL, https://personal.paypal.com/cgi-bin/marketingweb?cmd=_Render-content&content_ID=marketing_us/Sign_Up_for_PayPal (last visited Feb. 27, 2011) (explaining how PayPal helps customers and services transact for goods on the Internet).

themselves.³⁴⁷ Rather than forcing intermediaries to remit small portions of matching funds to compensate donations that aggregated above the matched limit, a software package could simply discount matching funds that the campaign was due to receive from subsequent donations. If one donor aggregated donations over the maximum matched donation, the next set of matching funds that the intermediary received for some future donation would be debited to offset the necessary discount. Although administering this program would be virtually impossible for a human accountant, it would be fairly straightforward for a well-designed computer management system.³⁴⁸ A properly designed third-party service with API access to intermediary data could even keep low-value donors anonymous until they aggregated above the \$250 disclosure threshold, at which point their identities would immediately be disclosed to the FEC.

Direct access would bring other benefits, as well. Generating real-time disclosure reports would not merely enhance electoral transparency, it would drastically reduce the burden on campaigns and the FEC to generate and process the cumbersome periodic filings that are now the norm. Further, monitoring software could track data patterns that might indicate donor fraud, helping to provide a clearer picture of the risks that fraud poses, and stop perpetrators.

Such a system would not be without its risks. Primarily, the security of the system would be paramount. While the system would not need to transfer personal information that was not due for public disclosure (the system would likely need only amounts, rather than actual account numbers, to process donations), a wealth of personally identifying information would flow across it. Regardless of what third party was selected to run the system, careful regulatory and technological security walls would need to be included to prevent the export and reuse of voters' data. For a government agency, sharing of such data with other agencies would need to be prevented. For a private contractor, strict limitations on the sale or marketing of the data would need to be imposed. These concerns could be mitigated to some degree by carefully limiting the system's access to voter information to only that information necessary to fulfill federal disclosure,

347. Housing the system with a third party could also shield campaigns from liability for fraud that slipped through the screen. Campaigns worried about liability might choose to discontinue online donations altogether—hardly a positive solution.

348. See, e.g., *Our Product*, MINT.COM, <http://www.mint.com/product/> (last visited Feb. 27, 2011) (describing the product's collection and analysis of personal financial data and the provision of key alerts regarding recent financial activity).

public matching, and fraud monitoring requirements, but protections would still need to be put into place.

Although fears of the risk of data misuse should be carefully addressed, the system proposed here would not gather any data that is not already being gathered, processed, and aggregated in national databases. Both the Democratic and Republican parties already have massive national voter databases that aggregate contribution information (among other things).³⁴⁹ Developing a government mandated system would provide several opportunities. The empowering regulation could dictate what data would be gathered and what data would be left out. As the system grew, it would create strong incentives for intermediaries to enroll. Even if it were not mandatory, shifting monitoring to a third party would greatly decrease intermediaries' regulatory burden. It would provide a single, reliable data store that scholars could use to analyze the questions of data fraud and online engagement that are currently difficult to answer because of the lack of reliable, neutrally verified data.

A second risk the system would need to surmount would be fear of unreliability. The system would need to be highly reliable and incorporate fail-safes to ensure continuous functionality. Whatever the exact contours of the enabling legislation, the third-party provider would need to be provided with resources and/or incentives to ensure the quality of the system's development and deadlines to ensure it was developed properly. Once ready, the system would need to be tested extensively and phased in over time to ensure that there were no failures in service. One benefit of an API-style solution would be that it would only minimally change intermediaries' data gathering, meaning that if a flaw were discovered in the third-party system, it could be temporarily shut down, allowing developers to correct the problem while intermediaries continue operations without interruption. Once corrected, the system could be brought back online and could quickly catch up by processing all donations made since it was shut down.

Finally, such a system could not entirely automate campaign finance monitoring and processing. Operators would need to continually monitor the system for accuracy and potentially intervene if inconsistencies became apparent. Added personnel costs, however, would likely be offset by the elimination of the need to process cumbersome disclosure reports.

349. See Kuhn, *supra* note 243 (describing the "vast" archived data stores of the Democratic National Committee and the Republican National Committee that "merge[] traditional voter statistics on gender, geography, or party identification with consumer and census data").

For all the technical challenges that such a system poses, there are already global computer systems, such as stock exchanges, that process data that is every bit as complex and sensitive every day.³⁵⁰ By following in their digital footsteps, regulators can enhance campaign finance transparency, reduce its transaction costs, increase accuracy by reducing the risk of human error, and expand the national capacity for new solutions to the challenges of campaign fundraising.

Each of the proposals outlined in this Section is designed to keep in mind the factors, benefits, and risks discussed in Part III. Each proposal minimizes additional transaction costs. An expanded public matching fund program would draw in more small donors, who have been shown to engage more extensively and frequently with fundraising intermediaries. It would also increase membership sizes, as more citizens would have incentives to get involved. The disclosure of donor earmarking would enhance intermediary accountability, helping to ensure that online fundraising intermediaries do not become too powerful.

The policies do not eliminate all the risks of online fundraising and, in some places, must balance between benefit and risk. Setting the low transaction costs of easy donation against the risks of anonymous election fraud is a perfect example of this balancing act. Using the factors identified in Part III as a guide will help policymakers understand the online fundraising ecology and the benefits and risks their legislation must navigate. By identifying policies that enhance the benefits and mitigate the risks of online fundraising, policymakers can be more certain of the impact they will have. Although this alone is not enough to ensure that the policies will be successful, it will enhance their effectiveness and reduce the risk of unintended consequences that has been so prevalent in campaign finance regulation in recent decades.

V. CONCLUSION

The website that Trevor Lyman used for his original moneybomb, ThisNovember5th.com, is still in existence. Lyman, whose fundraising efforts on behalf of Ron Paul are the classic expression of the rise of a populist Internet, is himself a fundraising intermediary. Like FreedomWorks, MoveOn.org, and Daily Kos, he intermediates be-

350. See, e.g., Andrew Ross Sorkin, *U.S. Exchanges Tout Speed After Tokyo Upgrade*, N.Y. TIMES DEALBOOK (Jan. 6, 2010, 5:58 AM), <http://dealbook.blogs.nytimes.com/2010/01/06/us-exchanges-tout-speed-after-tokyo-upgrade/#more-161575> (detailing the speed and reliability of stock exchanges in Tokyo and New York City).

tween voters and candidates, channeling information to contributors and support to candidates. The fact that he is an intermediary, however, should not detract from his positive impact on democratic participation—from the tens of thousands of new participants that his website brought into the political process to the transparent, public way that it generated funds.

The Internet has contributed to the rise of new fundraising intermediaries that, like Lyman, wield enormous power but operate very differently than their offline counterparts. The Internet is no more a guarantor of openness than it is a guarantor of direct, candidate-contributor communications. Examining the ways in which online fundraising intermediaries operate, however, reveals a range of important factors that help encourage increased democratic participation online and provide tools to hold intermediaries accountable. The 2008 election provided a preview of the Internet's political potential. Its impact will only increase as new media penetration and the potential of online fundraising continue to grow. Policymakers now face increasing calls for the regulation of online fundraising. Careful regulation will help to mitigate the risks of online fundraising and expand its benefits. With the right regulation, online fundraising intermediaries can enhance transparency, empower democratic participation, and engage millions of new voters in American elections.