

CASE WESTERN RESERVE LAW REVIEW

VOLUME 46

WINTER 1996

NUMBER 2

Political Contributions and Conduits After Charles
Keating and EMILY's List: An Incremental Approach
to Reforming Federal Campaign Finance

Geoffrey M. Wardle

POLITICAL CONTRIBUTIONS AND CONDUITS AFTER CHARLES KEATING AND EMILY'S LIST: AN INCREMENTAL APPROACH TO REFORMING FEDERAL CAMPAIGN FINANCE

I. INTRODUCTION

The rise of intermediaries who bundle campaign contributions for candidates has coincided with a period of political upheaval and cynicism in America. Circumvention of the law has been facilitated and promoted by a Congress driven by reelection motives. Bundling, brokering, and earmarking are terms used to describe fundraising activities that involve the arrangement of individual contributions by third parties for a candidate as a means of circumventing the statutory limits for contributions.¹ Since the mid-1980s, there has been growth in the utilization of this practice by political committees,² individuals, and political parties. Although Congress has attempted to enact comprehensive campaign reform, it has continually proposed exemptions that circumvent true reform.

This Note argues that comprehensive campaign reform is doomed to failure due to structural problems that prevent comprehensive reform from occurring. Despite a definite need for reform, the last significant amendment to the Federal Election Campaign Act occurred in 1979. Campaign reform must be conducted on a micro level, focusing on modifying the practice of bundling through incremental reforms. Greater openness in elections and increased participation by the electorate may result from reforms that seek full disclosure of contributors and contributions by politi-

1. To simplify the discussion, this Note advocates regulating bundling, which includes the related activities of brokering and earmarking.

2. "Political committee" includes any organization that engages in political fundraising including those that are not officially organized. The statutory definition of political committee is broad enough to include virtually any group that raises political funds whether it is formally established or not. See *infra* note 4.

cal committees to congressional candidates. To improve the system of campaign finance in the United States, all intermediaries, whether political committees or individuals, must be subject to the same regulations.

This Note is structured as follows. Section II discusses the treatment of contributions made through intermediaries or conduits. The history of bundling and the failure of past reforms are addressed. The history of campaign finance law since 1974 is analyzed in section III. Section IV discusses the fundamental reasons why comprehensive attempts by Congress to reform campaign finance have failed. The need for a theoretical framework in developing any reform is the subject of section V. In section VI the role of bundling in federal elections is analyzed. The need for addressing reform incrementally beginning with bundling reform is presented. Finally, a proposal for reform is made in section VII.

II. CURRENT CAMPAIGN FINANCE REQUIREMENTS

Before analyzing needed campaign finance reform, it is necessary to discuss the law as it currently regulates campaigns for federal office. All candidates and most political committees involved in federal elections are subject to strict reporting requirements and contribution limits; individual contributors are subject to contribution limits as well.³

Political committees⁴ are generally both contributors and recipients of contributions. In implementing the statute, the Federal Election Commission (FEC) has formulated regulations for the various types of political committees that exist, including principal

3. These requirements and limits are set forth in 2 U.S.C. §§ 431-451 (1994) and 11 C.F.R. §§ 100.1-116.10 (1995).

4. The term "political committee" is defined as follows:

(A) any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year; or
(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of \$5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of \$5,000 during a calendar year, or makes contributions aggregating in excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of \$1,000 during a calendar year.

2 U.S.C. § 431(4)(A)-(C) (1994).

campaign committees,⁵ multi-candidate committees,⁶ and party committees.⁷ The treasurer of every political committee is required to file regular reports of receipts and disbursements made by the committee.⁸ The frequency of required reports varies by committee type.⁹ However, all political organizations are subject to the same reporting and disclosure requirements. Committee reports must disclose the amount of cash held by the committee,¹⁰ the total amount of all receipts,¹¹ and total receipts distinguished by category.¹²

The identity of persons making aggregate contributions of more than \$200 within a calendar year to any political committee must be disclosed.¹³ However, committees may disclose the identity of all contributors if the committee chooses.¹⁴ Identification must be accompanied by the date and amount of any contributions reported under the statute.¹⁵ Individuals are to be identified by name, mailing address, occupation, and employer.¹⁶ Additionally, each committee that makes a contribution¹⁷ or transfer¹⁸ to the campaign in any amount must be included. Finally, a campaign is required to disclose any person¹⁹ who loans the campaign mon-

5. A "principal campaign committee" is defined as "a political committee designated and authorized by a candidate." 11 C.F.R. § 100.5(e)(1) (1994).

6. A "multi-candidate committee" is a political committee that

(i) has been registered with the Commission, Clerk of the House or Secretary of the Senate for at least 6 months;

(ii) has received contributions for Federal elections from more than 50 persons; and

(iii) (except for any State political party organization) has made contributions to 5 or more Federal candidates.

Id. § 100.5(e)(3)(i)-(iii).

7. A "party committee" is a "political committee which represents a political party and is part of the official party structure at the national, State, or local level." *Id.* § 100.5(e)(4).

8. 2 U.S.C. § 434(a)(1).

9. *See id.* § 434(a)(2)-(4), (10) (detailing the reporting requirements for congressional campaign committees, Presidential campaign committees, Vice-Presidential campaign committees, and all political committees not authorized by a candidate).

10. *Id.* § 434(b)(1).

11. *Id.* § 434(b)(2).

12. *Id.* § 434(b)(2)(A)-(K).

13. 2 U.S.C. § 434(b)(3)(A) (1994).

14. *Id.*

15. *Id.*

16. *Id.* § 434(b)(3)(A).

17. *Id.* § 434(b)(3)(B).

18. 2 U.S.C. § 434(b)(3)(C)-(D)(1994).

19. "Person" is defined as any "individual, partnership, committee, association, corpora-

ey,²⁰ as well as any person who provides a rebate, refund, offset,²¹ dividend, interest, or other receipt²² with an aggregate value of more than \$200 within a calendar year.

In addition to the reporting requirements, Congress has enacted specific limitations on contributions to candidates and political committees. An individual may not contribute more than \$1,000 to any candidate or the authorized committee of the candidate.²³ However, this is a per election limit.²⁴ In states where a congressional candidate is involved in the nominating convention, the party primary, and the general election, the candidate may receive three \$1,000 contributions per contributor.²⁵ Individuals are limited in the amount they may contribute each year to political committees that are not authorized political committees of a candidate. Individuals may contribute up to \$20,000 annually to political committees maintained by the national party.²⁶ Additionally, individuals are permitted to contribute up to \$5,000 annually to any other political committee.²⁷ Total contributions by an individual are limited to \$25,000 per year for all categories of contributions.²⁸

Multi-candidate political committees are also limited with respect to the size of the contributions they may make. Such committees may not contribute more than \$5,000 to a candidate in any election.²⁹ Like individual contributions, this is a per election limit, so committees may contribute to a candidate for the state nomi-

tion, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." *Id.* § 431(11).

20. *Id.* § 434(b)(3)(E).

21. *Id.* § 434(b)(3)(F).

22. *Id.* § 434(b)(3)(G).

23. 2 U.S.C. § 441a(a)(1)(A) (1994).

24. The term "election" has a very broad meaning under the code. It is defined as

(A) a general, special, primary, or runoff election;

(B) a convention or caucus of a political party which has authority to nominate a candidate;

(C) a primary election held for the selection of delegates to a national nominating convention of a political party; and

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

Id. § 431(1)(A)-(D).

25. *Id.*

26. *Id.* § 441a(a)(1)(B).

27. *Id.* § 441a(a)(1)(C).

28. 2 U.S.C. § 441a(a)(3) (1994).

29. *Id.* § 441a(a)(2)(A).

nating convention, party primary, and general election. The committees are limited to annual contributions of \$15,000 to national party committees,³⁰ and annual contributions to other political committees of \$5,000.³¹

Contribution limits are not modified simply because the contribution is made through a conduit. The statute provides that

all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the [Federal Election] Commission and to the intended recipient.³²

The statute does not address the issue of what happens when the conduit or intermediary exercises some control over the contribution.

The FEC enacted regulations defining and implementing limits and reporting requirements for contributions that are made under 2 U.S.C. § 441a(a)(8). The FEC defined "earmarked" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."³³ The earmarking of contributions has become an important issue as many conduits or intermediaries³⁴ have evaded reporting requirements through bundling contributions.³⁵

Reporting of earmarked contributions is virtually identical to any other contribution. The conduit or intermediary is required to report to the FEC and the recipient candidate³⁶ the name, mailing

30. *Id.* § 441a(a)(2)(B).

31. *Id.* § 441a(a)(2)(C).

32. *Id.* § 441a(a)(8).

33. 11 C.F.R. § 110.6(b)(1) (1995).

34. The FEC defines "conduit or intermediary" as "any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee," with some exceptions. *Id.* § 110.6(b)(2).

35. See *infra* notes 179, 220-21 and accompanying text (discussing individuals and organizations that admittedly use bundling).

36. 11 C.F.R. § 110.6(c)(1)(i).

address, occupation, and employer of any individual making a contribution in excess of \$200.³⁷ The recipient is then required to identify in its reports any conduit that provided one or more earmarked contributions that exceeded the \$200 threshold, the total amount of contributions that were made through the conduit, and the information required to identify individuals contributing more than \$200.³⁸

The regulations modify this structure if it is determined that the conduit exercised any "direction or control"³⁹ over the choice of the recipient candidate. If no such control is exercised, there is no effect on the conduit's or intermediary's contribution limits.⁴⁰ However, if "any" direction or control occurs over the individual's contribution, the contribution will be counted against the limits of *both* the individual and the conduit.⁴¹ Such contributions must be reported to the FEC and the recipient candidate as contributions by both the individual and the conduit with "the entire amount of the contribution . . . attributed to each."⁴²

The interpretation of "direction and control" and the structure of fundraising activities that results in bundling or earmarking of campaign contributions pose significant problems for any potential improvement in the structure of American campaign finance.

III. THE HISTORY OF CAMPAIGN FINANCE REGULATION

Although some campaign contributions have been subject to regulation since the beginning of the twentieth century,⁴³ comprehensive campaign finance regulation did not emerge until the 1970s.⁴⁴ The current system of campaign finance is a product of

37. *Id.* § 110.6(c)(1)(iv)(A).

38. *Id.* § 110.6(c)(2)(i)-(ii).

39. 11 C.F.R. § 110.6(d)(2) (1995).

40. *Id.* § 110.6(d)(1). The relevant portion of the rule addressing the direct or indirect control of a conduit states that "[a] conduit's or intermediary's contribution limits are not affected by the forwarding of an earmarked contribution except where the conduit or intermediary exercises any direction or control over the choice of the recipient candidate." *Id.*

41. *Id.* § 110.6(d)(2).

42. *Id.*

43. See *United States v. UAW-CIO*, 352 U.S. 567, 570-76 (1957) (discussing the history of American campaign finance reform).

44. See HERBERT E. ALEXANDER & MONICA BAUER, *FINANCING THE 1988 ELECTION* 110 (1991) (summarizing the development of campaign finance from the first Federal Election Campaign Act of 1971 through the subsequent amendments and modifications in 1974, 1976, and 1979).

Watergate and the 1974 amendments to the Federal Election Campaign Act (FECA).⁴⁵ The perception of corruption and the existence of contribution fraud led to the 1974 amendments to FECA, which were designed to improve grass root participation in federal elections. Congress sought to change "the shape and size of the contributing elite"⁴⁶ by increasing not only the number,⁴⁷ but also the importance of individuals making small contributions.⁴⁸

Congress addressed the issue of third party conduits in FECA, which prevented intermediaries from exercising control over the contributions of others.⁴⁹ The House of Representatives initially proposed this limit,⁵⁰ and the Senate approved both the House version of this provision and the House's legislative justification of the special treatment of contributions through conduits.⁵¹ The purpose of this provision, incorporated as § 441a(a)(8), is clear from

45. See David B. Magleby, *Prospects for Reform*, in MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 245, 256 (Margaret Latus Nugent & John R. Johannes eds., 1990) (arguing that comprehensive reform often requires such a deep commitment to change that a scandal may be necessary to create the perception that change is required).

46. Ruth S. Jones, *Contributing as Participation*, in MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 27, 39 (Margaret Latus Nugent & John R. Johannes eds., 1990).

47. *Id.*

48. FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 239 (1992) (asserting that Congress attempted to develop a system of campaign finance where individuals without a financial interest in a candidate and with limited resources would become the primary source of campaign contributions).

An inference can be drawn from the reporting provisions that small contributions are not seen as corrupting as larger ones. Because Congress exempted from identification contributors who donate less than \$200 to a candidate for Federal office, it is much easier administratively for campaigns to solicit such contributions. See 2 U.S.C. § 434(b)(3)(A) (1994).

49. *Id.* § 441a(a)(8) (1994); see also *supra* text accompanying note 32 (quoting the statute text).

50. The House Report states that

if a person exercises any direct or indirect control over the making of a contribution, then such contribution shall count toward the limitation imposed with respect to such person . . . but it will not count toward such a person's contribution limitation when it is demonstrated that such person exercised no direct or indirect control over the making of the contribution involved.

H.R. REP. NO. 93-1239, 93d Cong., 2d Sess. 16 (1974), reprinted in LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 650 (1977).

51. H.R. REP. NO. 93-1438, 93d Cong., 2d Sess. 51-52 (1974), reprinted in LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1974, at 995 (1977) (citing the portion of the House report regarding regulation of conduits and intermediaries).

its language and the legislative history,⁵² Congress intended for the FEC to regulate contributions controlled by an intermediary other than the candidate or the individual.

A. *Buckley v. Valeo: The Court and Campaign Finance Law*

The 1974 amendments to FECA were significantly modified by the ruling of the Supreme Court in *Buckley v. Valeo*.⁵³ The Court held that campaign finance regulations were justified when necessary to stem corruption or the appearance of corruption.⁵⁴ The Court was particularly concerned with the exchange of contributions for political favor.⁵⁵ As a result, the Court upheld limits on contributions to candidates but rejected limits on expenditures by candidates.⁵⁶

The ruling by the Court in *Buckley* fundamentally changed the campaign finance regime established by the 1974 Amendments. The emphasis placed on contribution limits did not increase the importance of small donors to campaigns. Instead, it created a system consisting of two classes of contributions—PAC contributions and individual contributions. Because PACs had higher contribution limits than individuals, PACs became the most desirable contributions to pursue.⁵⁷ Holding limits on expenditures unconstitutional, the Court inadvertently “spawned a money chase that requires constant fundraising and continued reliance on wealthy donors.”⁵⁸ Evidence shows that small contributions have declined significantly in importance since the Court’s decision in 1976.⁵⁹

52. *Id.*

53. 424 U.S. 1 (1976).

54. *Id.* at 26.

55. *See id.* The Court implemented a view of corruption that separated political contributions from political expenditures. As a result, “the Court established a dichotomy that has since governed campaign-finance regulation . . . [T]he Court understood the corruption risk solely in terms of the threat of quid pro quo corruption—dollars given in return for political favors. Large contributions heightened this risk while unrestrained expenditures did not.” Kenneth J. Levit, *Campaign Finance Reform and the Return of Buckley v. Valeo*, 103 YALE L.J. 469, 473 (1993) (footnote omitted). Levit notes that this distinction and formulation of corruption has been heavily criticized. *Id.* at 473 n.21.

56. *Buckley*, 424 U.S. at 58-59.

57. *See Levit, supra* note 55, at 472-75 (arguing that the result of *Buckley* was the opposite of what the Court had intended).

58. *Id.* at 473.

59. *See* LARRY J. SABATO, *PAYING FOR ELECTIONS* 61 (1989) (noting that between 1978 and 1984 the percentage of individual gifts of less than \$100 as a percentage of total campaign contributions has declined from 38% to 20%); *see also infra* note 154 (showing that a very small percentage of the population provided approximately three-

Additionally, total contributions by individuals have become less important sources of campaign contributions since *Buckley*.⁶⁰ The decline in the importance of individual contributors coincides with a period in which the political parties have neither the mass popularity nor the organizational ability to rally individual supporters.⁶¹ Many groups have filled the vacuum created by *Buckley* in the form of political action committees (PACs), single issue political interest organizations, and wealthy individuals who act as brokers. Although PACs existed prior to the 1974 amendments to FECA, the Act, as modified by *Buckley*, "ushered in a greatly enlarged PAC role."⁶² Additionally, loopholes in campaign finance laws appear to have been increasingly utilized by individuals, parties, and single issue political interest organizations during the last decade.⁶³

The importance of large contributions has resulted in a Congress captive to the post-*Buckley* system. Commentators argue that, after *Buckley*, congressional attempts to resolve campaign finance problems with additional reforms have failed because of partisan conflict.⁶⁴ The campaign finance laws have been utilized and manipulated by both parties in their attempts either to gain power from or to maintain power over the other.⁶⁵

quarters of the total amount of individual contributions for 1992 federal campaigns).

60. See SABATO, *supra* note 59, at 83 n.2 (stating that, as a proportion of money raised, individual contributions declined from 61% in 1978 to only 49% in 1984—four percentage points in each election cycle).

61. See SORAUF, *supra* note 48, at 241 (arguing that even though parties have the ability to raise significant amounts of money, today they cannot assume the role that they played in the early twentieth century because they lack the popular support they once had).

62. Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 219 n.33 (1989).

63. See Anne H. Bedlington, *Loopholes and Abuses*, in MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE 69, 69 (Margaret Latus Nugent & John R. Johannes eds., 1990) (arguing that, even though the evidence is incomplete and somewhat anecdotal, during the 1980s there was a gradual increase in abusive behavior with a sudden increase in the use of loopholes among wealthy individuals and large political interests).

64. See, e.g., ALEXANDER & BAUER, *supra* note 44, at 135 (arguing that the greatest impediment to campaign reform is Congress itself).

65. *Id.* at 135-38 (discussing congressional bad faith maneuvers between 1987 and 1990). Alexander and Bauer write,

Campaign finance is a politician's issue . . . [and] it is the lifeblood of most members of Congress. . . . [M]embers have come to view election reform attempts as partisan maneuvers designed to exploit their party's strengths and their rivals' weaknesses. . . . For rather than make the public interest the guid-

B. Conduits and Intermediaries After Buckley

In *Buckley*, the Court foresaw the potential use of intermediaries or conduits to circumvent the limits of FECA. In a footnote, the Court wrote that although the Act limits "the ability of all individuals and groups to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose the making of substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents."⁶⁶ The original language of the statute, which prevented control "either directly or indirectly," was incorporated into the regulations.⁶⁷ If any "direction or control" is exercised by an intermediary or a conduit, then the regulation states that the "contribution shall be considered a contribution by both the original contributor and the conduit or intermediary."⁶⁸

The FEC has liberalized the regulation in its Advisory Opinions interpreting the "direction or control" exercised by third parties. Prior to 1980, the Commission sought to restrict the influence of intermediaries or conduits. Initially, the FEC found control to exist when conduits requested that donors " earmark" contributions previously made⁶⁹ or a separate segregated fund (SSF) recommended or solicited a contribution from the private account of a participant in the fund.⁷⁰ This position was modified in 1980,

ing light behind reform legislation . . . legislative strategists chose instead to immunize their proposals from adoption by potential allies across the aisle.

Id. at 135-36.

66. *Buckley*, 424 U.S. at 29 n.31.

67. See *supra* text accompanying notes 39-42 (discussing the regulation).

68. 11 C.F.R. § 110.6(d)(2) (1995).

69. *Internal Transfers of Funds by Candidates or Committees* (AO 1975-10), 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5116 (Aug. 21, 1975) [hereinafter AO 1975-10]. The FEC ruled that such a request by a conduit constituted "some control." *Id.*

70. *Employee Group as Political Committee* (RE: AOR 1976-92), 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6951 (Nov. 10, 1976) [hereinafter AOR 1976-92]. The Commission held that Boeing's SSF would be exercising direction or control over private contributions from the campaign accounts under individual control of an employee if it solicited or recommended a particular candidate. *Id.* This opinion does not constitute a true Advisory Opinion however. It was provided in response to a request by Boeing Company's Civic Pledge Program based on proposed regulations. *Id.* Although the FEC applied the proposed language of 11 C.F.R. § 110.6, such application is improper. Ear-marking limits were not intended to apply to contributions made by SSFs because in the 1974 Amendments the House of Representatives intended to prevent SSFs from acting as conduits for earmarked contributions. See H.R. REP. NO. 1239, 93d Cong., 2d Sess. 15 (1974). This language was incorporated into the Conference Report and represented the position of both Houses. H.R. REP. NO. 1438, 93d Cong., 2d Sess. 52 (1974).

when the FEC concluded that the recommendation of a contribution to a specific candidate does not constitute "direction or control" if sent initially to the soliciting conduit.⁷¹ The Commission's rationale was that the individual controlled whether a contribution was made and the amount contributed.⁷² In spite of this definition, the FEC has reiterated in subsequent Advisory Opinions that "any direction or control" will result in double counting.⁷³

In 1986, the FEC recommended coordinating the language of the regulation with the original statute, replacing "direction or control" with the language contained in the earlier committee reports prohibiting "any direct or indirect control" over contributions by conduits.⁷⁴ In its discussion of the proposed rule change, the Commission admitted that "[c]urrently, § 110.6(d) does not provide criteria for determining whether a conduit exercised 'direction and control' or 'direct or indirect control' over an earmarked contribution."⁷⁵ Although the FEC implemented several other proposed rules, § 110.6(d) was not modified.

The lack of clarity in the meaning of the regulation became a significant issue as earmarking and bundling became more important in the late 1980s.⁷⁶ The lack of a concrete definition of what acts constituted "direction or control" frustrated consistent application of the regulation.⁷⁷ In fact, today the "direction or control"

71. *Soliciting Contributions to Be Forwarded to Candidate* (AO 1980-46), 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5508 (June 25, 1980). Responding to a request by the National Conservative Political Action Committee (NCPAC), the FEC concluded that contributions resulting from communications containing "a clear suggestion that the individual[s] receiving the communication[s] make a contribution to a specific candidate through NCPAC as an intermediary . . . would not be considered contributions by NCPAC. . . . Such contributions would only count against the contribution limitations of those persons making their contributions through NCPAC as an intermediary." *Id.*

72. *Id.*

73. See, e.g., *Transfer of Contributions from State PAC to Federal PAC* (AO 1981-21), 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5611 (June 4, 1981) (stating, however, that it did not reach the issue of whether the particular PAC exercised any direction or control over the choice of the recipient candidate). Double counting occurs when both the contributor and the PAC are required to count the individual's contribution against their limits due to the improper influence of the PAC over the contribution. See *supra* notes 39-42 and accompanying text.

74. *Comments Sought on Contribution Limitations*, [Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶ 9236, at 51,823 (July 23, 1986).

75. *Id.*

76. Bedlington, *supra* note 63, at 79-80.

77. In a concurring opinion to FEC AO 1991-29, Commissioner Thomas J. Josefiak attacked the Commission's inability and refusal to define the parameters for its consideration. He stated,

clause is now meaningless in the wake of the decision of the Court of Appeals for the D.C. Circuit in *Federal Election Commission v. National Republican Senatorial Committee*.⁷⁸

In 1986, the National Republican Senatorial Committee (NRSC) pre-selected candidates for whom it would solicit contributions.⁷⁹ It sent out letters requesting contributions, which would be divided equally among four unnamed candidates identified only by their state of residence.⁸⁰ The FEC originally refused to take action against the NRSC, so Common Cause sued, winning a judgment that compelled agency action.⁸¹ The Commission then brought an enforcement action against the NRSC. The Court of Appeals ruled for the NRSC, stating that "[t]o find direction or control on these facts would require a substantial shift in the Commission's construction of the language contained in § 110.6(d)."⁸² Thus, the FEC's and the courts' inconsistent application of the "direction or control" clause gives the clause virtually no effect.

IV. THE FAILURE OF COMPREHENSIVE REFORM

Effective campaign reform requires measures that do not seek partisan advantage. To accomplish this, Congress should abandon attempts at comprehensive reform and adopt an incremental approach. Incremental reform is appropriate when specific action is a necessary precursor to successful comprehensive reform. By addressing the practice of bundling and earmarking first, more aggressive reform can be undertaken without fear of circumvention of

It is long overdue for the FEC culture to shed its instinctive aversion to ordinary political fundraising. It is time to face up to describing a specific meaning for the "direction or control" standard under the earmarking regulations, instead of treating it as a chance to circumscribe PAC activity. Rather than constantly renege on the principle that "recommendation is not necessarily direction" in every case, the Commission should set out some relatively specific limits and guides for soliciting earmarked contributions under the "direction or control" standard of 11 CFR 110.6(d). The Commission missed a good opportunity to begin in Advisory Opinion 1991-29.

Collection of Contributions by PAC and Subsequent Earmarking (AO 1991-29), 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6036 (Dec. 4, 1991).

78. 966 F.2d 1471 (D.C. Cir. 1992).

79. *Id.* at 1473.

80. *Id.*

81. *Common Cause v. Federal Election Comm'n*, 729 F. Supp. 148, 152 (D.D.C. 1990) (holding that the FEC's partial dismissal of the complaint was arbitrary and capricious).

82. *National Republican Senatorial Comm.*, 966 F.2d at 1478.

later campaign regulations.

A. *Comprehensive Reform of Campaign Finance Laws Is Doomed*

To understand why an incremental approach is called for, it is necessary to first discuss the general flaws that exist in comprehensive reform proposals. Congressional attempts at a campaign finance overhaul have failed and will continue to fail because effective reform requires a fundamental motivation for change.⁸³ Several characteristics exist that destine any comprehensive reform to failure.

First, comprehensive reform generally has been neither well developed nor truly long-term. Participants in the electoral process thrive on finding ways around the law. Any new regulation immediately comes under attack by interested parties.⁸⁴ Political actors tend to think and operate in the short term, seeking to maximize any political advantage they may have.⁸⁵ By focusing on immediate benefits and quick resolutions to problems, legislators fail to anticipate the adaptations to new rules.⁸⁶ This is evidenced by the development of "[b]undling, soft money, personal PACs, and the political use of tax-exempt foundations"⁸⁷ to circumvent the current campaign laws. Effective campaign reform must not only preempt circumvention by political interests, but also survive judicial challenge.⁸⁸ After *Buckley*, Congress has adapted to such outcomes by relying on contingency plans⁸⁹ or severability clauses.⁹⁰ Thus,

83. Magleby, *supra* note 45, at 256 ("It is typically easier to build a legislative majority to change a few things than to revamp the entire system. Comprehensive reform requires a deeper commitment to change and a perception that something is seriously wrong.").

84. See John R. Johannes & Margaret Latus Nugent, *Conclusion: Reforms and Values*, in *MONEY, ELECTIONS, AND DEMOCRACY: REFORMING CONGRESSIONAL CAMPAIGN FINANCE* 263, 267 (John R. Johannes & Margaret Latus Nugent eds., 1990) (arguing that actors with a stake in reform will act to undermine any reform for their own benefit).

85. Bedlington, *supra* note 63, at 87 (noting that parties involved in campaign finance favor short-term tactical advantages regardless of the damage that such behavior may cause to the system in general).

86. See Magleby, *supra* note 45, at 248 (discussing the need to forecast potential negative adaptations to proposed reforms).

87. *Id.* at 248 (citing these as examples of the evolution that has occurred in campaign contributions as political actors adapted to the limits placed on them by the FECA).

88. *Id.* (noting that the judiciary often modifies part of an Act, resulting in distortion of the effects of the unmodified parts of the Act).

89. For example, the Senate's bill in the 103d Congress banned PAC contributions but contained language that would limit PACs to \$1,000 in contributions per election cycle, per candidate if the ban was not upheld by the courts. *Raising Money: Midyear Disclosure Reports Paint a Cloudy Future for Campaign Finance Reform Bills*, POL. FIN. &

attempts at comprehensive reform fail because they do not address political and judicial pressures that are foreseeable at the time of enactment.

Next, comprehensive reform has proven to be a theoretical derelict due to the absence of clear and legitimate goals. Congress has not acted within a legitimate analytical framework in formulating campaign finance reforms. Action is driven by the desire to avoid future scandal⁹¹ and self-preservation,⁹² not by a desire to promote the accomplishment of specific altruistic goals.⁹³ This failure is not solely the fault of Congress. "Bad" reform and a lack of reform are also caused by the intransigent attitudes of public interest lobbyists—for example, Common Cause or Ralph Nader—demanding reforms.⁹⁴ It is impossible to develop support for campaign finance reform without compromise among interested parties. An "all or nothing" attitude undermines reform.⁹⁵ The original goal of FECA, to increase grass-roots participation,⁹⁶ failed to provide a strong theoretical base for reform after the

LOBBY REP., Aug. 26, 1994, at 1.

90. See Magleby, *supra* note 45, at 248.

91. See *id.* at 256 (stating that comprehensive reform is motivated by "a perception that something is seriously wrong" and "[s]candal has most often created this perception").

92. ALEXANDER & BAUER, *supra* note 44, at 109 (pointing out that the self-preservation instinct of politicians has led them to formulate laws that favor themselves).

93. See SORAUF, *supra* note 48, at 230 (noting that congressional action in the area of campaign finance has proven barren of goals or theoretical justification to enable it to be truly forward-looking and motivated by something other than "short-term projections based on recent personal experience").

94. See ALEXANDER & BAUER, *supra* note 44, at 138 (The "failure can be laid at the feet of the public interest lobby and editorial writers . . . who echoed the reformers. . . . Their 'all or nothing' stance . . . prevented any incremental improvements. . . ."). These groups reject any reform that does not follow their organizational reforms. See Curtis Gans, *Alive Again in Washington*, WASH. POST, Nov. 7, 1994, at A23 (noting that the bills emerging from the 103d Congress had no support other than "a handful of interest groups and journalists"). Additionally, those public interest lobbies that advocate the use of public financing in the name of greater equity are misled because the proposals offered would likely further alienate the public from true electoral participation as they would lose even the minimal financial tie that they have to candidates to whom they contribute. See David S. Broder, *Pox Populi; Why the New "Reform" Really Serves the Elites*, WASH. POST, Apr. 25, 1993, at C1 (arguing that the proposals offered by Common Cause and the League of Women Voters would likely increase the power of the social and economic elite that advocate them while likely decreasing the influence of the general public); see also Mickey Edwards, *Money—Still the Mother's Milk of Politics*, WALL ST. J., Nov. 8, 1994, at A22 (noting that the professional reformers seek to remove individual influence from campaigns, which the author argues is the essence of democracy).

95. See ALEXANDER & BAUER, *supra* note 44, at 138.

96. See *supra* notes 46-48 and accompanying text.

Supreme Court's decision in *Buckley*.⁹⁷

Although the current campaign system is administered by laws designed to promote a grass-roots model of participation, the changes occurring due to *Buckley* have ironically fostered the growth of large institutional contributors.⁹⁸ Power due to incumbency and the ability to raise money have transformed the role of the voters from the electors of candidates to ratifiers of the status quo.⁹⁹ The decline in importance of the voter and the perceived corresponding increase in importance of money has led to voter disinterest and abandonment of the process.¹⁰⁰ Change in the financing of federal elections is a prerequisite to increased voter interest. Unless all political interests modify their behavior and subscribe to reform, it is unlikely that voter detachment will reverse.¹⁰¹ Reform must truly have the goal of increasing individual participation. Most reform proposals have been highly partisan efforts motivated by a desire to distract the public while allowing advocates to benefit from the perception that they are attempting reform.¹⁰² Unless reform fundamentally changes campaigns, it is

97. See *supra* notes 53-63 and accompanying text (discussing the effect of the Supreme Court holding in *Buckley* invalidating statutory limits on campaign expenditures while upholding limits on campaign contributions). Justice White argues that the Supreme Court has destroyed campaign regulation in its various decisions on the matter. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 518 (1985) (White, J., dissenting). He states that "[b]y striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork." *Id.*

98. See SORAUF, *supra* note 48, at 241 (noting that organized giving dominates the current system of campaign finance).

99. See *id.* at 233-34 (arguing that voter choices are reduced due to the increasing power associated with the benefits of incumbency that accrue to members of Congress in federal elections).

100. Levit, *supra* note 55, at 495.

101. RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 155 (1992) (asserting that due to three decades of decline in voter participation, it is unlikely that Americans can be reconnected to the political system absent significant changes in the way that political interests contest elections). The decline in voter turnout and participation has occurred while party affiliation of the electorate eroded. See Broder, *supra* note 94, at C1 (noting that the decline in partisanship coincides with a decline in voter participation). "Liberation" from the parties may have resulted in the lack of attachment that voters feel to the process. *Id.* Many of the current proposals for comprehensive reform fail to effectively address the importance of voter identification and attachment to the system. Reforms that decrease the importance of individual contributors are likely to result in greater voter detachment from the process and the parties. See Edwards, *supra* note 94, at A22 (arguing that although reform is needed, the proposals that call for even less direct financial participation by individuals will limit public participation and debate, resulting in domination of government and elections by the elite).

102. See ALEXANDER & BAUER, *supra* note 44, at 135-36. The most recent attempts at

not likely that individual participation will increase.¹⁰³

In sum, the failure of reform is due to the lack of foresight of Congress, the lack of clear and legitimate goals to direct reform efforts, and the inability of reforms currently proposed to increase voter participation.

B. Congress Has Failed in Its Attempts at Comprehensive Reform

The motivations for reform differ between the two major political parties and between the houses of Congress.¹⁰⁴ In spite of being members of the same party, members of the House of Representatives and the Senate have different political interests due to the institutional differences between the bodies.¹⁰⁵ Four distinct congressional groups exist, each with distinct goals: House Democrats, House Republicans, Senate Democrats, and Senate Republicans.¹⁰⁶ As a result, any partisan reform proposal is not only unpalatable to the other party but also the members of the other chamber.

The treatment of proposals for campaign reform in the House during the year 1989 illustrates partisan barriers to reform.¹⁰⁷ Af-

reforming campaign finance were not popularly supported. Gans, *supra* note 94, at A23. Even though congressional leadership attempted to show wide support by the public and may have succeeded in molding public opinion, in reality, only a few interest groups and journalists supported the proposals of the 103d Congress. *Id.*

103. See TEIXEIRA, *supra* note 101, at 163-64 (noting that greater electoral competitiveness increases the importance of the role of the average citizen).

104. See Magleby, *supra* note 45, at 254-55 (noting that, traditionally, Senate Democrats tend to be the group most in favor of reform and the House Democrats least supportive of true reform). The fundamental change that has occurred in congressional politics, due to the 1994 Republican victory, renders much of this analysis meaningless if utilized prospectively to project what is likely to happen in the arena of campaign finance. The partisan conflict that has existed in Congress may be transformed if the Republicans can maintain a more cohesive ideological base in both houses of Congress than the Democrats did. The ability of the Republicans to bring conservative Democrats into their tent may overcome the partisan problems that have plagued past Congresses.

105. See ALEXANDER & BAUER, *supra* note 44, at 136-38 (discussing the failure of reform in 1990).

106. Magleby argues that three barriers to comprehensive reform differentiate the House Democrats, House Republicans, Senate Democrats, and Senate Republicans: self-interest, philosophy, and personality. Magleby, *supra* note 45, at 250-55. In the past, the House Democrats had the most to lose by any reform, while the Senate Democrats had the least to lose; the Republicans in both houses were somewhere in between. *Id.* Although this analysis must be viewed differently with Republican majorities in both houses, the true barriers are probably a reflection of structural factors and not partisan ones.

107. The resignations of Speaker Jim Wright and Congressman Tony Coelho marked the demise of two of the Democratic party's strongest members and fundraisers. See Magleby,

ter several failed attempts at campaign finance reform, the House attempted a bi-partisan approach to campaign finance reform, which, unfortunately, ended quickly.¹⁰⁸ The members of the House task force were unable to overcome "legitimate partisan differences"¹⁰⁹ on the issues important to each.

This period may have been the high point of campaign finance reform in the House. Subsequent attempts at campaign reform became even more partisan than previous proposals.¹¹⁰ Bills presented by each party protected the strengths and interests of the offeror.¹¹¹ Thus, the parties benefited by doing nothing while succeeding in maintaining the issue before the public, appearing aware of its own institutional shortcomings without modifying its position or compromising.¹¹²

Although the Senate is traditionally less partisan than the House,¹¹³ its attempts at comprehensive reform have failed as well. In 1988, Senators attempted to resolve partisan differences through negotiations conducted by four members of each party.¹¹⁴

supra note 45, at 252-53. Some speculated that they were the principle impediments to campaign finance reform due to their highly partisan conduct. *Id.* The failed 1989 bipartisan House task force on campaign finance may be evidence of that fact. SORAUF, *supra* note 48, at 195. For a comprehensive look at the power that Tony Coelho exercised as head of the Democratic Congressional Campaign Committee, see BROOKS JACKSON, HONEST GRAFT (1988), which details the activities of Coelho during the 1986 election cycle as he raised money and conducted the party's congressional campaign.

108. SORAUF, *supra* note 48, at 195 (noting that the task force appointed by the leaders of both parties agreed to ban leadership PACs and place tighter controls on bundling).

109. *Id.* (quoting Representative Al Swift, the Democratic co-chair of the bipartisan task force).

110. ALEXANDER & BAUER, *supra* note 44, at 126 ("[M]embers had largely ignored the issue of campaign finance since their own failure at bipartisanship in the fall of 1989. . . . [A]ction there was characterized by far less ambitious reform and a more determined pursuit of partisan interest.").

111. House Republicans tended to offer reform proposals that diminish the power of PACs, which tend to contribute in greater amounts to Democrats. *See* Magleby, *supra* note 45, at 251-52. The Democrats tried to limit the amounts that campaigns can spend, which makes it more difficult to defeat incumbents who were generally Democrats. *Id.*

112. *See* ALEXANDER & BAUER, *supra* note 44, at 135 (noting that congressional action in the area "might all be considered a waste of time were it not for the public relations value and political mileage that Congress was ultimately able to wring from the issue"); *see also* Campaign Reform Is Vital, CHI. SUN-TIMES, Jan. 22, 1995, at 31 (stating that attempts at campaign reform "have been politicized, insincere, ineffective and, for a change, bipartisan: Democrats and Republicans both have scuttled previous reform attempts").

113. *See* Magleby, *supra* note 45, at 249 (arguing that the greater partisan balance and more competitive elections in the Senate may be the reason for greater cooperation between parties in the Senate).

114. ALEXANDER & BAUER, *supra* note 44, at 114.

However, they failed to overcome the partisan obstacles that had prevented resolution in the House: namely, spending limits.¹¹⁵ Rather than forsake campaign reform, in 1990, the Senate looked beyond its chamber to a bipartisan committee of experts for assistance.¹¹⁶ However, party conflict quickly led to modification of the experts' proposals.¹¹⁷ Institutional conflict between Senate and House Democrats prevented any further reform.¹¹⁸

Even though the Clinton administration initially claimed that campaign reform was a priority of the administration,¹¹⁹ the President and the Congress failed to agree on reform and thus failed to effect any reform during the 103d Congress. Although the Democrats of the House and Senate agreed about the need for campaign finance reform, they quickly diverged in their approaches to reform. The Senate took an aggressive approach to PACs, banning them completely.¹²⁰ It initially prohibited any use of conduits, but as time passed, the Senate appeared willing to adopt the House's provision to facilitate compromise.¹²¹

The Senate has been the source of bi-partisan reform proposals,¹²² but its failure to produce reform is evidence of the structural bias against reform. The Senate's proposal, Senate Bill 3 (S. 3), in the 103d Congress¹²³ to eliminate PACs and ban bundling proved unacceptable to the House and thus unpassable.¹²⁴

115. *Id.* (quoting Senator Mitch McConnell as stating that "[i]t was the spending limits that broke down the process").

116. SORAUF, *supra* note 48, at 195. The "Gang of Six" produced a proposal that sought to balance the interests of both parties. *Id.* at 195-96. Its report offered a moderate approach to reform that proved unpalatable to either party. *Id.* Among the proposals of the committee, (1) an increase in the individual contribution limit, subsequently indexed for inflation, (2) voluntary expenditure limits that offered challengers realistic opportunities for election, (3) incentives to abide by the limits by offering reduced rates for advertising, postage, and tax-credits to in-state contributors, and (4) a ban on bundling by corporate and union PACs as well as lobbyists. ALEXANDER & BAUER, *supra* note 44, at 119-20.

117. ALEXANDER & BAUER, *supra* note 44, at 123 (noting that "Departures from the panel blueprint . . . began almost immediately").

118. *See supra* notes 104-06 and accompanying text.

119. *See* Tim Curran, *Leaders to Name Election Reform Conferees*, ROLL CALL, Apr. 18, 1994, at 3 (stating that "President Clinton is almost certain to sign any bill that passes Congress").

120. *Id.*

121. *Id.* (quoting a House aide who stated that the Senate had "been more accommodating" on exempting one conduit from the proposed bundling prohibition).

122. *See supra* notes 113-18 and accompanying text.

123. S. 3, 103d Cong., 1st Sess. § 401 (1993) [hereinafter S. 3].

124. *See* James A. Barnes, *Endgame for Campaign Reform*, NAT'L J., Apr. 23, 1994, at 969 (noting that although the Senate was willing to modify its bundling ban to appease

The Senate's ban on bundling failed to address a potential loophole with significant potential for future abuse. The law currently allows candidates to use commercial fundraiser proceeds retained by a candidate in campaigns.¹²⁵ The Senate's bill would not have changed the treatment of commercial fundraisers.¹²⁶ It is not improbable that a candidate could nominally hire the executive director of a political interest organization to bundle contributions in the role of a paid consultant. Although there is nothing inherently wrong with the hiring of professional fundraisers, some modification of the law would have been necessary to prevent such an abuse.

The Senate's proposal also ignored potential abuses of brokering. Brokering occurs when an individual representing a significant political or personal interest arranges for wealthy and influential contributors to gather for a political event to benefit a candidate.¹²⁷ Senate candidates have traditionally relied on brokering to raise large contributions outside of the candidate's state.¹²⁸ Although this requires much more effort and time by both the candidate and the broker than simple bundling, it is more lucrative because these contributors make much larger contributions than do those who participate in bundling efforts.¹²⁹ S. 3 would

supporters of one conduit, EMILY's List, the unwillingness of the House to accept anything less than the current levels of PAC support would prevent House and Senate reconciliation of their bills, and would likely cause the Senate Democrats to lose the support of moderate Senate Republicans).

125. 11 C.F.R. § 110.6(b)(2)(i)(D) (1995) (excluding any "commercial fundraising firm retained by the candidate or the candidate's authorized committee to assist in fundraising" from the definition of conduit). The FEC has stated that "commercial fundraising firms retained by a candidate are not conduits, even if they receive and forward contributions." *Corporation as Contribution Broker* (AO 1991-32), 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6048 n.9 (Mar. 13, 1992).

126. See S. 3, *supra* note 123, § 401.

127. SORAUF, *supra* note 48, at 54 (In describing the typical brokered event, "[a] leading industrialist or environmentalist or feminist, or whoever, organizes the occasion, invites the 'guests,' provides the locale and refreshments, and discreetly suggests the size of the contribution.").

128. *Id.*

129. *Id.* (noting that brokering is a relatively easy and quick way to obtain a large number of \$1,000 individual contributions). But see Rick Pluta, *Finance Bill Spells Trouble for EMILY's*, HOUSTON CHRON., Nov. 1, 1993, at 1 (noting that EMILY's List claims raising over \$6 million for candidates with average contributions of \$93). Such fundraising is appealing to many candidates as they are able to obtain, through the broker's contacts, the support of influential donors the candidate would have otherwise been unable to obtain as well as additional media attention. Media personalities are often party to such events. Glen R. Simpson, ROLL CALL, Jan. 18, 1993, available in LEXIS, Cmpgn Library, Allnws File (discussing a study conducted as to the contribution patterns of influential

not have curtailed such brokering because it exempted an individual "hosting a fundraising event" at the individual's home from the definition of a "intermediary or conduit."¹³⁰ Thus, brokers would either host such events in their own homes or organize the event for another individual who could act as the intermediary.

In spite of the Senate's claim, the Senate bill did not ban PACs, but only their contributions to federal candidates.¹³¹ Under the new regime they could still make independent expenditures on behalf of a candidate, or raise funds for a candidate's benefit that can be routed through national, state, or local party committees.¹³² Additional means of circumventing the law would likely be developed by the PACs that could be more insidious than current practices and actually result in greater problems than currently exist.¹³³ The Senate's implicit acknowledgment of the unconstitutionality of the ban on PAC contributions¹³⁴ calls into question its motive for reform: true change, or acquisition of political capital.

The House's attempt at reform, House Bill 3 (H.R. 3),¹³⁵ was even more deficient than the Senate bill. The House passed a bill that would have limited total PAC contributions and established voluntary spending limits for candidates.¹³⁶ Although it limited

Hollywood figures); *The Briar Patch*, ROLL CALL, Feb. 15, 1993, available in LEXIS, Cmpgn Library, Allnws File (noting the contributions of a number of movie industry executives on a single day in 1991 to former Oklahoma Congressman Mike Synar). Additionally, some PACs even recruit entertainers to appear at fundraisers with congressional candidates. Margaret A. Latus, *Assessing Ideological PACs: From Outrage to Understanding*, in MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980s 142, 160 (Michael J. Malbin ed., 1984) (noting the tendency of the National Committee for an Effective Congress PAC to recruit entertainers).

130. See S. 3, *supra* note 123, § 401.

131. *The Big Stall: It's Mid-year and Reformers Are Starting to Get Nervous as the Clock Runs on Campaign Finance Bill*, POL. FIN. & LOBBY REP., June 22, 1994, at 1, 2 [hereinafter *The Big Stall*].

132. SORAUF, *supra* note 48, at 214.

133. *Id.* Sorauf foresees the possibility that PACs could actually begin to legally run the campaigns of candidates within the law as it currently exists or, worse, make large contributions to potential candidates prior to becoming official candidates to avoid contribution limits. *Id.* The loopholes retained under S. 3 would allow the institutionalization of PAC bundling in the campaigns of federal candidates and could result in the potential problems predicted by Sorauf.

134. See Magleby, *supra* note 45, at 248.

135. H.R. 3, 103d Cong., 1st Sess. § 501 (1993).

136. *Id.*; see also *The Big Stall*, *supra* note 131. In a speech on the House floor describing and extolling the virtues of H.R. 3, Representative Gejdenson, the sponsor of the bill, noted,

Section 501 amends section 315 of FECA to prohibit any person from acting

the extent to which some bundling could occur, the House exempted political committees that did not lobby from any bundling regulation.¹³⁷ That exemption was directed at preserving the ability of EMILY's List to raise money for Democrats.¹³⁸ Although the House claimed to limit bundling, the exemption to protect EMILY's List would have produced a new loophole that could have conceivably allowed all PACs to reorganize themselves to circumvent the bundling ban. Proponents claimed that organizations that did not lobby,¹³⁹ but only supported candidates, posed no threat to the electoral process.¹⁴⁰

as a conduit or intermediary for contributions to a candidate. "Conduit or intermediary" is defined as collecting and physically transmitting checks to a candidate, except that a "representative" of a candidate, defined as commercial fundraisers, volunteers holding house parties, and individuals who forward their spouses' contributions, and other individuals authorized and not acting on behalf of any prohibited class are not considered conduits or intermediaries. Representatives of a candidate may not include individuals acting on behalf of political committees with a connected organization, political parties, partnerships, sole proprietorships, or any organization which is prohibited from contributing to a candidate under the Federal Election Campaign Act, including corporations, labor unions, national banks, and trade associations.

139 CONG. REC. H10657 (daily ed. Nov. 22, 1993).

The impact of § 501 of H.R. 3 was noted in the floor debate prior to its passage. Representative Brown of Florida stated that "[i]t also prohibits bundling while allowing groups such as Emily's List to continue to assist women candidates for office." 139 CONG. REC. H10605 (daily ed. Nov. 21, 1993). The essential difference between the bundling reform proposed by the Senate and that offered by the House is in their treatment of political committees. The House only prohibited bundling by political committees with a connected organization, H.R. 3, *supra* note 135, § 501, while the Senate prohibited bundling by all political committees, not just those that had a connected organization. S. 3, *supra* note 123, § 401. The result of the House measure would have been to preserve a significant loophole for the continuance of bundling.

137. See Barnes, *supra* note 124, at 969 (discussing the attempt to resolve differences between House and Senate bills).

138. *Id.*; Richard E. Cohen, *For Heavy Lifting, They Call Gephardt*, NAT'L J., May 15, 1993, 1191 ("[M]any of the 35 Democratic women Members insisted on an exemption from proposed restrictions on political action committees to permit EMILY's List, a leading PAC for Democratic women, to continue 'bundling' contributions.").

139. EMILY's List sought an exemption for PACs that were not connected to a business, trade, or labor organization from limitations on bundling. The connected versus non-connected distinction has been justified on the grounds that non-connected PACs do not lobby members of Congress but instead promote only an electoral agenda and not a legislative one. See *infra* notes 226-41 and accompanying text (discussing the flaws in the lobbying versus non-lobbying distinction).

140. See *All Things Considered* (NPR radio broadcast, Apr. 8, 1993), available in LEXIS, Cmpgn Library, Allnws File. Ellen Malcolm of EMILY's List, supporting the exemption supported in Congress for her organization, distinguished it from a traditional PAC as follows: "I think the difference is that we support pro-choice Democratic women running in elections, but when the election's over, we don't get in a cab and run up to

H.R. 3 failed as legitimate reform due to its protectionist nature. First, the House proposal reinforced campaign finance as a means of exploiting the relative strengths of the majority and weaknesses of the minority parties.¹⁴¹ Second, the groups that would have been protected tend to promote a single issue or limited issue base.¹⁴² The plethora of groups advocating single issues or interests from all parts of the political spectrum may undermine the electoral process by making campaigns focus on the narrow interests of a few monied actors. Regardless, due to disagreement between the Houses and the filibuster of Republican Senators, the 103d Congress was unable to produce any campaign finance reform.¹⁴³

C. Reform After the 1994 Mid-Term Election

The victory by the Republicans in the 1994 mid-term elections may change the calculus of campaign finance.¹⁴⁴ However, campaign finance reform has yet to be addressed by the 104th Congress. Ironically, the election of Republican majorities to both the House and the Senate came in spite of an electoral system stacked against non-incumbents.¹⁴⁵ This political shift has changed the roles of Democrats. As a result, previous analyses focusing on the

Capitol Hill and tell them how they're supposed to vote on issues. And that's the distinction we think needs to be made. You need to separate the election process from the legislative process." *Id.* But see Vicki Kemper, *The Year of the Woman's Wallet*, COMMON CAUSE, Winter 1992, at 4, 11 ("EMILY's List officials insist that they are not a 'special interest' and do not lobby members of Congress on legislative issues, but 'when we send an envelope, they definitely know it's from EMILY's List,' says one. And with that knowledge comes the kind of access that members of Congress give 'special interests.'").

141. ALEXANDER & BAUER, *supra* note 44, at 135 (arguing that Members of Congress view election reform as a means of enhancing the strengths of one party at the expense of the other); see also Gans, *supra* note 94, at A23 (arguing that the House's measure was nothing more than an attempt to further institutionalize the power of the Democratic Party).

142. Ellen R. Malcolm, *Reining in Big Givers*, ST. PETERSBURG TIMES, Apr. 4, 1993, at 5D.

143. See J. Jennings Moss, *Senate Stops Lobbying Bill, Forces Changes; GOP Willing to Pass Gift Ban*, WASH. TIMES, Oct. 7, 1994, at A1 (noting that among other failed reforms, the 103d Congress failed to deliver any change in the structure of campaign finance).

144. Benjamin Sheffner, *Fundraising in "Star Trek Territory," Now in Majority, Republicans Are "Boldly Going Where We've Never Gone Before"*, ROLL CALL, Jan. 23, 1995, available in LEXIS, Cmpgn Library, Allnws File.

145. See *Politics and Money*, CHRISTIAN SCI. MONITOR, Oct. 6, 1992, at 20 (noting the institutionalized advantages that congressional incumbents have over challengers: free mail, name recognition, and free press coverage).

conflicting interests of House Democrats and Senate Democrats as the greatest impediments to reform are no longer applicable. Although there are Republican majorities in both houses, they are not likely to reorder the campaign finance universe because, as the majority party and as incumbents, it is automatically biased in their favor.¹⁴⁶ Furthermore, the Republicans had substantial fundraising success in 1994, so there is no impetus for reform.¹⁴⁷ The lack of "necessity" on the part of the Republicans to reform campaign finance unfortunately coincides with the first and best opportunity for true reform to occur since 1974.¹⁴⁸

In light of the 1994 mid-term elections, it is difficult to determine whether the past trends in Congress will continue. If the sources of the problems are structural, then there is little hope that Congress will succeed in reforming campaign finance. However, if past conflicts have been rooted in ideological conflict and partisan gamesmanship, there may be some hope for legislative change due to the massive political upheaval in Congress in the 1992 and 1994 elections.

D. FECA and the Interaction of the Courts and the FEC

Neither the FEC nor the courts have been able or willing to curtail the use of intermediaries or conduits to circumvent contribution limits. Overcoming institutional inertia has been left to the administrative and judicial branches, but the FEC and the federal courts have failed to rectify the problem. Congress ensured that the FEC would be a weak agency from the Agency's inception. By establishing a commission consisting of equal numbers of Republicans and Democrats, Congress guaranteed that partisan deadlock

146. See Greg D. Kubiak, *GOP Contract Omits One Major Reform: Campaign Reform*, ROLL CALL, Jan. 23, 1995, at A-5 (noting that Congress has been known to preserve the institutional advantages that incumbents have by killing campaign finance reform); Kevin Phillips, *Fat-Cat Revolutionaries; The Beginning of a Tax-cut Bidding War Cannot Disguise that GOP Policies Tilt Toward the Fortune 500*, L.A. TIMES, Dec. 18, 1994, at M1 (noting that the GOP leader on finance reform, Sen. Mitch McConnell, has pronounced reform unlikely). Interestingly, campaign finance reform was not included in the Republican's statement of intended legislative goals called its Contract With America. Sheffner, *supra* note 144.

147. See Charles R. Babcock, *Amway's 2.5 Million Gift to GOP the Largest Ever*, WASH. POST, Jan. 11, 1995, at A1 (noting that the GOP succeeded in out-raising the Democrats by nearly 4 to 1 in "soft money" in the closing days of the 1994 campaign); Sheffner, *supra* note 144 (discussing the capability the Republicans will have to increase their fundraising during the 104th Congress).

148. See *supra* notes 45-48 and accompanying text (discussing the 1974 reforms).

would occur.¹⁴⁹ Without a strong commission, there are significant incentives to knowingly violate FECA.¹⁵⁰

V. CREATING A THEORETICAL FRAMEWORK FOR REFORM

Absent in the discussions of and attempts at reform are clear parameters for change. Without clear goals and direction, reform will not succeed. I recommend three goals: (1) increase voter participation in elections; (2) increase voter access to information indicating the source of candidates' financial support; and (3) remain within the limits of the Constitution.

One clear goal of reform must be to increase voter participation in elections. However, until voters see that candidates and contributors are "more like us,"¹⁵¹ there is little hope that true participation, rooted in a feeling that the populace has a true stake in the process, will increase.¹⁵² Reform must facilitate greater individual participation and increase the number of individuals willing to invest in campaigns.¹⁵³

Two measures of participation exist: voter turnout and individuals contributing to candidates. Both measures are in decline.¹⁵⁴ Participation could be enhanced through means that do

149. JACKSON, *supra* note 107, at 308-09 (noting that in creating the FEC the Congress established a regulatory agency that had been captured by the subjects of its regulation from the beginning of its existence).

150. *Id.* at 309 (noting that "the benefits of taking money in violation of the rules far outweigh the slim risk of being caught and fined").

151. See TEIXEIRA, *supra* note 101, at 162 (quotation is paraphrase of Teixeira's discussion).

152. See *id.* at 155 (arguing that until Americans feel psychologically involved in the political process it will not be easy to reconnect them and increase their participation). But see Kubiak, *supra* note 146 (arguing that the first step to reconnecting the voters to the process is the elimination of all special interest money).

153. See Jones, *supra* note 46, at 41 (stating that "perhaps when the system is 'improved,' more citizens will be willing to contribute").

154. American voters have exhibited a steady decline in their turnout to vote in Presidential elections since 1960. Kenneth M. Dolbear, *The Decay of American Democracy*, in *POLITICAL ISSUES IN AMERICA: THE 1990s*, 89, 90-91 (Philip J. Davies & Fredric A. Waldstein eds., 1991). Turnout has generally been even worse for off-year elections. *Id.* The percentage of small contributors giving to congressional candidates has also declined. See SABATO, *supra* note 59, at 61. The percentage of individual contributors has declined as well. Between 1978 and 1984, individual contributions to House and Senate candidates declined from 61% of all contributors to just 49%. *Id.* at 83 n.2. More importantly, however, has been the reliance on a small number of large individual contributors for support in elections. In 1992, less than one percent of the nation's population made contributions of more than \$200 dollars to candidates for federal office. However, that 1% accounted for 77% of all individual contributions to federal campaigns. Jamin Raskin & John

not relate to the financing of campaigns.¹⁵⁵ However, they are not likely to connect the populace to the political process.¹⁵⁶ Greater voter participation in the funding of campaigns may translate into greater voter turnout because of increased voter motivation.¹⁵⁷ Voter turnout is directly related to socioeconomic status, suggesting a belief that only the wealthy can affect the political process;¹⁵⁸ participation may increase if the middle and lower classes feel more connected to this process. Currently, the view that candidates are more interested in courting wealthy special interest groups rather than obtaining popular support inhibits voter turnout.¹⁵⁹ Campaign finance reform must encourage candidates to rely on small to medium sized individual contributions and reduce the incentive for candidates to simply pursue wealthy contributors or those with connections providing access to such contributions. Voters will turn out to vote only if they feel needed in the electoral process.¹⁶⁰

Another clear goal of campaign finance reform is to increase access to information that enables voters to openly discuss and evaluate candidates and issues. True evaluation of a candidate requires that the validity of the candidate's platform be verified. Voters should be able to identify and assess not only what the candidate says, but also who else supports the candidate.¹⁶¹ This is important, as many candidates refuse to accept PAC contributions, labeling them as "special interest" money, while at the same

Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1177 (1994) (noting that the average contribution of this group to congressional campaigns was \$536.76).

155. Measures utilized in other countries have been proposed to increase American voter turnout. These include compulsory voting, direct payments or other incentives to vote, abolishing the bicameral legislature, adopting proportional representation, and elimination of the electoral college. TEIXEIRA, *supra* note 101, at 151-52.

156. *Id.* at 154 (noting that these solutions are all virtually impossible, would require constitutional amendment to enact, or are contrary to traditional American values).

157. *Id.* at 156.

158. See Raskin & Bonifaz, *supra* note 154, at 1181-82. The authors note that voting is an "affirmation of belonging" and reflects the attachment of voters to politics and government. *Id.* at 1182. The appearance that government is responsive solely to wealth may serve to create the detachment felt by voters. *Id.*

159. See *id.* at 1182 (noting that evidence suggests that people are more likely to vote when the influence of wealthy contributors is reduced).

160. See TEIXEIRA, *supra* note 101, at 161-62 (noting that greater influence of the ordinary citizen, whether real or perceived, may enhance the responsiveness of government and encourage greater turnout).

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

time, accept bundled contributions from individuals affiliated with those interests.¹⁶² Political debate is enhanced when voters know who supports a candidate and what the candidate truly believes.

The final goal of any campaign reform must be to withstand constitutional challenge. It has been insincere for Congress to offer reforms that will clearly be found unconstitutional.¹⁶³ True reform can only occur when Congress offers a system that retains regulatory cohesiveness after judicial scrutiny.¹⁶⁴

VI. THE ROLE OF BUNDLING IN FEDERAL CAMPAIGNS

Because it is unlikely that Congress will pass any comprehensive reform in the near future, the best approach for legislative campaign finance reform is incremental reform. Incremental reform is more desirable than comprehensive reform because the former is more workable,¹⁶⁵ more realistic,¹⁶⁶ and can serve as the basis for truly comprehensive change later.¹⁶⁷ An incremental approach would allow the modification of a known system rather than the creation of an unknown one.¹⁶⁸ The faults and weaknesses of our current system become more evident with each election. An incremental approach resolves identifiable problems while hopefully preserving the predictability of the outcome of such reforms.¹⁶⁹ The first major campaign finance practice that needs to be addressed in any incremental reform proposal is bundling.

Past reform has not addressed the problems posed by bun-

162. See *infra* note 179, 220 and accompanying text (giving examples of such candidates).

163. The fact that the Senate in the 103d Congress passed a bill that openly acknowledged its potential unconstitutionality by providing for an alternative to the outright ban on PACs if found to be unconstitutional may simply be an attempt by the Senate to aggressively approach reform. See *supra* notes 88-90 and accompanying text. However, it is more likely that Congress is using campaign finance reform as a means of appearing to act progressively while actually preserving the status quo. See *supra* notes 112, 163 & 134 and accompanying text (noting the political capital Congressmen gain by appearing to seek campaign finance reform).

164. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 518 (1985) (White, J. dissenting).

165. See Johannes & Nugent, *supra* note 84, at 269 (noting that "reforms must be reasonable and workable if they are to succeed").

166. *Id.*

167. Magleby, *supra* note 45, at 257-58 (arguing that incremental reforms often lead to later consideration of more comprehensive reform).

168. See SORAUF, *supra* note 48, at 209 (noting that refurbishing the status quo is much less demanding and less speculative than redesigning it).

169. *Id.*

dling. Even though the practice was recognized as early as 1976,¹⁷⁰ neither the 1976 nor 1979 Amendments to FECA addressed it. In spite of the recognition that a significant loophole existed, Congress failed to act.¹⁷¹

For effective reform to occur, Congress must create a system where compliance with the law places all on an equal footing. Before such reform can occur, all avenues of circumvention must be foreclosed. The most significant means of circumventing FECA is through bundling. Bundling undermines the legitimacy of elections by enabling political committees and wealthy or well-connected individuals to exercise significant influence over elections with-

170. See *supra* text accompanying note 66 (discussing the Supreme Court's recognition in *Buckley* of the possibility of circumvention of contribution limits through the use of conduits or intermediaries).

171. For a discussion of the reasons reform attempts failed, see *supra* notes 83-103 and accompanying text. The following exchange between Senators Dick Clark (D-IA) and Bennett Johnston (D-LA), in debating an amendment that would have allowed the national and congressional party committees to contribute up to \$20,000 to its candidates, serves as an example of how the bundling problem is shrugged off during reform attempts.

Mr. CLARK. If we are going to allow \$20,000 to go to a candidate, that means we really open up and invite the possibility of earmarking. At least, we make it extremely difficult to enforce the law against earmarking because then we have a way to pass at least \$20,000 out of an individual and into the hands of a House or Senate Member.

Mr. JOHNSTON. The Senator is aware that there is a specific law which prohibits the earmarking?

Mr. CLARK. Yes.

Mr. JOHNSTON. If someone, expressly or by implication, earmarks, then it is the duty of the committee to so note that earmarking and it is the duty of the candidate to report that as if it were a direct contribution from the original donor and the final donee

Mr. CLARK. . . . But we have to be very concerned in the process of passing this legislation that we do not invite difficulties in the enforcement of this law. I think this would do so.

Mr. JOHNSTON. The Senator is not suggesting that the chairmen or the committees of this Congress would be party to circumventing that law, either expressly or impliedly?

Mr. CLARK. No.

122 CONG. REC. S3805 (daily ed. Mar. 18, 1976).

Although the \$20,000 limit was not adopted, the NRSC's successful circumvention of a similar limit by bundling direct contributions to Senate candidates' committees in 1986 was the basis for *Federal Election Comm'n v. National Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992). See *supra* notes 78-82 and accompanying text.

out any notice of such influence to the electorate.¹⁷² The success of bundling forces other political interests to engage in it or be left behind.¹⁷³

A. The Problems with Bundling

Earmarking, bundling, brokering, and other types of third party fundraising have become significant sources of campaign funds. In light of *Federal Election Commission v. National Republican Senatorial Committee*,¹⁷⁴ statutory limits on bundling contributions have been rendered meaningless.¹⁷⁵ Political interest organizations that support federal candidates through bundled contributions have proliferated recently.¹⁷⁶ Brokered contributions (contributions bundled by conduits) have been called the "last frontier . . . in the regime of campaign finance."¹⁷⁷ Political committees, wealthy individuals, and parties have become experts at circumventing contribution limits and "stretching the boundaries of the FECA limits."¹⁷⁸ Many candidates eschew taking PAC or "special interest" money, but accept contributions bundled by these entities.¹⁷⁹

172. Bedlington, *supra* note 63, at 81.

173. *Id.*

174. 966 F.2d 1471 (D.C. Cir. 1992).

175. See *supra* notes 78-82 and accompanying text (discussing the D.C. Circuit Court of Appeals' failure to require any substance to the regulatory language "direction or control").

176. Rick Pluta, *Raising Dough; Candidates Have a Bundle to Lose*, CHI. TRIB., Oct. 17, 1993, Womanews, at 1.

177. SORAUF, *supra* note 48, at 126-27.

178. Bedlington, *supra* note 63, at 77.

179. Two former members of Congress serve as examples of the willingness of members to be strong advocates of reform yet accept money that has been "sanitized" from bundling. Former Representative Mike Synar and Senator David Boren, both of Oklahoma, advocated the elimination or significant diminution of PAC contributions in federal elections. Synar was embarrassed by a \$2,000 fine levied by the FEC for the failure of his campaign to amend its disclosure reports and provide information about contributors. *Color Rep. Mike Synar 'Embarrassed,' House Champion of Campaign Reform Pays \$2,000 Fine for Disclosure Violation*, POL. FIN. & LOBBY REP., June 11, 1993, available in LEXIS, Cmpgn Library, Allnws File (discussing the penalty levied against Synar by the FEC); Ed Zuckerman, *In Rep. Mike Synar's 'No PACs Allowed' Campaign, Special Interest Money Still Flows into Coffers*, PACs & LOBBIES, June 3, 1992, available in LEXIS, Cmpgn Library, Allnws File (analyzing the campaign contributions of Rep. Synar for 1991). Additionally, Senator Boren refused PAC contributions but accepted over \$250,000 in 1983-84 from executives and employees of the banking and energy industries. SABATO, *supra* note 59, at 21 (discussing the hypocrisy of refusing PAC contributions while taking contributions from individuals affiliated with the same interests and industries as the PACs). For a discussion of the difficulty in identifying bundled contributions, see *infra* notes 188-95 and accompanying text.

Political committees, individuals, and parties rely on bundling to increase their collective power in expressing their interests. The motivation of each is similar: bundling allows larger contributions to candidates than would otherwise be allowed under the law.¹⁸⁰ There is at least anecdotal evidence that PAC-sponsored bundling has occurred within the Executive Branch to gain favor of a new administration.¹⁸¹ This behavior is not new. Traditional PACs sponsored by corporations or labor unions bundle contributions to increase the amount that they can provide to a candidate once they have reached their statutory limit.¹⁸² Wealthy or influential individuals are also important sources of bundled contributions through the practice known as brokering.¹⁸³

Bundling is a means of enhancing individual participation in the political process while increasing the accountability of the organization acting as conduit for its members.¹⁸⁴ However, bun-

180. See David Dahl, *Changing the Rules of Campaign Finance*, ST. PETERSBURG TIMES, June 23, 1993, at 1A (identifying a political supporter who through bundling and soft money effectively exceeded the \$25,000 limit on contributions by an individual to candidates for federal office by \$375,000); Elizabeth Drew, *Watch 'Em Squirm*, N.Y. TIMES, Mar. 14, 1993, § 6, at 33 (noting that bundling has enabled interests to raise larger amounts for candidates than they could have as a PAC and enabled candidates to "forsake" PAC money); Michael Ross, *Senate Ends Filibuster on Election Reform*, L.A. TIMES, June 17, 1993, at A1 (noting that reform legislation was needed to prevent the circumvention of campaign contribution limits through the use of bundling).

181. Alan C. Miller, *USDA Staffers Were Targets of '92 Clinton Fund Raising*, L.A. TIMES, Nov. 19, 1994, at A1 (reporting that then Representative Mike Espy and Grant B. Buntrock, later appointed to be Secretary of Agriculture and the head of the Agricultural Stabilization and Conservation Service, respectively, bundled contributions from upper-management employees of USDA, by funneling them through the Farmers & Ranchers '92 PAC—many participants in this fundraising scheme were promoted after Clinton's victory).

182. SORAUF, *supra* note 48, at 55 ("If the PAC . . . has reached its statutory limit on contributions to candidate Spendmore . . . it may collect the checks of individuals made out to Spendmore, bundle them, and forward them to the candidate, ostentatiously taking credit.").

183. See *supra* notes 127-29 and accompanying text. Sorauf argues that the 1974 Amendments left brokers virtually untouched because they were neither the origin nor the final destination of contributions. SORAUF, *supra* note 48, at 54. The brokers of yesterday often acted in official party roles. *Id.* Due to the decline of political parties, the principal brokers are no longer party leaders but today are individuals protecting their own interests. *Id.* Brokers are seen as the traditional conduits for the "fat cat" contributors; bundlers gather other people's money for a candidate and claim credit for the contributions. *Id.* Sorauf distinguishes between traditional brokering and modern bundling, finding that "the Charles Keatings may well bundle without being called bundlers." *Id.* at 54-55. For the purposes of this Note, brokering and bundling are treated similarly because they function in a similar manner: the use of a third party conduit to arrange campaign contributions who benefits personally from affiliating with both the contributor and candidate to circumvent campaign reporting and contribution regulations.

184. Bedlington, *supra* note 63, at 81 (discussing the claim that earmarking or bundling

dling by political committees or other interest groups creates significant problems.

Institution-initiated bundling gives campaign contributors and watchdogs a false sense of democratic participation. When an organization directs individuals to earmark their contributions or bundles for a particular candidate, an appearance of greater individual participation is created than actually exists.¹⁸⁵ The contributor may or may not recognize that the organization or broker receives the political credit for the contributions.¹⁸⁶ Additionally, on reports filed with the FEC,¹⁸⁷ the candidate can point to a large number of individual contributions as evidence of popular support when, in reality, they may represent a limited or institutional interest. If a candidate is supported by groups that bundle a very large number of small contributions, and if these contributors belong or adhere to relatively minor and isolated interests, an illusion of widespread support may be created absent disclosure of the real entity behind the support.

This illusion is enhanced by the difficulty in identifying bundling organizations through the disclosure documents candidates file with the FEC.¹⁸⁸ Due to improper and inadequate disclosure of contributors, bundled contributions may go unidentified.¹⁸⁹ Bun-

actually increases individual campaign participation by encouraging greater participation with the sponsoring organization—this, in turn, increases the members' oversight of the organization, which increases accountability); *see also infra* notes 208-13 and accompanying text.

185. *See* ANN B. MATASAR, CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS 53 (1986) (noting that bundling or earmarking enables PACs to provide its members a means to "participate" in a campaign and enhances the appearance of democracy).

186. *See* SORAUF, *supra* note 48, at 55 (pointing out that PACs get all the benefits of direct contributions to a candidate simply by bundling individual contributions); Glenn F. Bunting, *The Washington Connection/Glenn F. Bunting: Feinstein, Boxer Seek Loophole for Emily*, L.A. TIMES, June 4, 1993, at A3 (noting that, by bundling, "EMILY's List collects the political credit for providing far more money to candidates than it would otherwise get").

187. *See generally* 2 U.S.C. § 434 (1994) (providing guidelines for such reports).

188. SABATO, *supra* note 59, at 21 (As an example, the author quotes Democratic Congressional Campaign Committee's former director, Martin D. Franks, "'instead of getting one check from Lockheed corporation's PAC we'll get five \$1,000 checks from housewives . . . with no mention that their spouses are executives with Lockheed.'").

189. Candidates are required to disclose the name, address, and employer of contributors who make contributions of more than \$200. *See supra* text accompanying notes 13-16. However, most campaigns fail to comply with this requirement, allowing industries that bundle to go unnoticed. *See* Mark Stencel, "Bundling" Skirts Campaign Gift Curbs; Corporate Contributions Outlawed, But Executives Raise Large Amounts, WASH. POST, Apr. 20, 1992, at A1 (noting that many corporate executives who participated in bundling

dling is characterized by a large number of related or identical contributions occurring on the same day.¹⁹⁰ For example, bundling is evidenced when employees or executives of a single firm or industry simultaneously make large contributions to a single candidate,¹⁹¹ or when a significant number of large contributions from concentrated areas outside of the candidate's home region occur at the same time.¹⁹² Another indicator of bundling is when an individual who makes a contribution lists employment as a homemaker or retired. Even if the information is accurate, the use of such designations may disguise the contributor's affiliation to another entity through a spouse or former employer.¹⁹³ Additionally, when contributions come directly from individuals employed in industries or corporations that sponsor PACs, and the individual contribution is in addition to any contributions by such affiliated PACs, bundling may be occurring.¹⁹⁴ Thus, identification of bundling operations requires access to a list of individuals who are members of or affiliated with the organization that is bundling contributions and the FEC reports of the recipient.¹⁹⁵

As an example of one such identification process, the Product Liability Coordinating Committee succeeded in comparing the FEC contribution reports of Pennsylvania Senator Harris Wofford with the membership list of the Association of Trial Lawyers of America (ATLA) prior to the November 1994 election.¹⁹⁶ Their study disclosed that, with five months to go before the election, bundling

drives for candidates in the 1992 election were not easily identifiable due to non-disclosure by the candidates). The failure of campaigns to fully identify their contributors is a significant problem. Between January 1, 1991 and March 31, 1992, congressional incumbents failed to fully disclose the identities of contributors of over \$8 million. Glenn R. Simpson, *Hill Incumbents Fail to Disclose Correctly Contributors Who Gave Total of \$8 Million*, ROLL CALL, July 2, 1992, available in LEXIS, Cmpgn Library, Allnws File.

190. Mark Krewatch & Glenn R. Simpson, *The Generous Lindner Circle; Cincinnati Financier, Mentor to Charles Keating, Gives \$1.5 Million to Candidates with His Circle of Donors; Favored Recipients Include Dole, McEwen, McConnell*, ROLL CALL, June 17, 1991, available in LEXIS, CMPGN File, ALLNWS Library.

191. SABATO, *supra* note 59, at 21.

192. Zuckerman, *supra* note 179.

193. *Id.*

194. SABATO, *supra* note 59, at 21.

195. See Stencel, *supra* note 189 (noting that often the only means of identifying contributors who have bundled contributions is by comparing FEC lists of contributions with lists of corporate executives and firm partners).

196. *Review & Outlook: Tommy's List*, WALL ST. J., Nov. 8, 1994, at A22 [hereinafter *Review & Outlook*] (noting that ATLA contributions were identified by comparing the membership of the organization with contributors to federal campaigns).

by ATLA had generated over \$150,000 in contributions for the Senator.¹⁹⁷

Although bundling as a means of influence peddling is obviously a problem, several other concerns arise from individuals brokering contributions. First, the conduit and not the individual generally receives credit for the contribution that is conveyed.¹⁹⁸ Even though the conduit's contribution can legally be no larger than that of the other contributors, the candidate's gratitude and attention will be directed toward the organizing intermediary.¹⁹⁹ Additionally, the interests of the conduit and those of the contributors he organizes do not necessarily coincide.²⁰⁰ The individual contributor with a true interest in supporting the candidate may unintentionally further and perpetuate the power and interests of the conduit.²⁰¹ Finally, contributions that are bundled by individuals differ from PAC contributions only in that the true organizational or ideological interest of the contribution goes unreported.²⁰²

The political parties themselves are also important sources of bundled contributions. Although fundraising conducted jointly by a candidate for Congress and one of the congressional campaign committees is allowed by law,²⁰³ the party committees have turned to bundling as a means of quickly raising large amounts of money.²⁰⁴ Bundling enables the national party committees, as well

197. *Id.*

198. SORAUF, *supra* note 48, at 54 (arguing that the conduit, and not the individual contributor, reaps the benefit of the candidate's gratitude for the contributions).

199. *Id.* at 54, 126.

200. *Id.* at 125 (observing that in brokered contributions, the goals of the conduit, the candidate, and the contributor may or may not coincide—however, the goals of the conduit will always drive the transaction); *see also* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 513-14 (1985) (White, J., dissenting) (arguing that it "can safely be assumed that each contributor does not fully support" all the actions of the conduit through which he contributes).

201. *See* SORAUF, *supra* note 48, at 126 (arguing that the conduit or intermediary is always benefited in brokering contributions and becomes more powerful with each election due to the conduit's ability to raise large contributions quickly).

202. *Id.* at 90 (noting that contributions that are bundled by out-of-state or out-of-district interests "have most of the characteristics of PAC contributions").

203. *See* 11 C.F.R. § 102.17 (1995).

204. FEC, *Rejecting Legal Staff's Advice, Dismisses Complaints Against GOP Fundraising for 1990 Senate Races*, PACs & LOBBIES, Nov. 8, 1991, available in LEXIS, Cmpgn Library, Allnws File (discussing allegations made by the Democratic Senatorial Campaign Committee and Common Cause that the Republican Senatorial Inner Circle 1990 had engaged in "an improper contribution 'bundling' scheme"); *see also* Bedlington, *supra* note 63, at 80 (noting that due to the success of the National Republican Senatorial Committee (NRSC) in 1984 and 1986 raising funds by acting as a conduit, the National

as the congressional campaign committees, to arrange contributions that would otherwise violate FECA limits to federal candidates once they have reached the statutory limits for direct party contributions.²⁰⁵

Bundling by party committees, as distinguished from non-party political committees or individuals, creates additional issues for consideration. First, the FEC has yet to differentiate between bundling by party committees where the party exercises direction or control over the contribution, which violates the regulations, and when the party and the candidate conduct joint fundraising, which does not violate the regulations.²⁰⁶ Next, the practice of party bundling, in essence, makes access to the nation's most important decision-makers subject to a requisite contribution to the party's candidates,²⁰⁷ which is not in the country's best interests.

Republican Congressional Committee began its own bundling program in 1988).

205. Bedlington, *supra* note 63, at 80 (noting that the national committees, especially the Republicans, have engaged in bundling in situations when the committees have made the maximum contribution possible to candidates engaged in competitive races). Bedlington notes that in spite of the fact that parties traditionally abstained from bundling due to the administrative difficulties of bundling, the NRSC and National Republican Committee have utilized the practice to circumvent contribution limits. *Id.*

206. *Id.* at 80-81 (noting that the FEC has failed to resolve crucial questions relating to joint fundraising and bundling). In the wake of the problems that emerged from the NRSC's activities in 1986, it appears that there is tacit acceptance by the party committees of what constitutes joint fundraising versus bundling. *FEC, Rejecting Legal Staff's Advice, Dismisses Complaints Against GOP Fundraising for 1990 Senate Races*, *supra* note 204. By a 5-0 vote, the Commission refused to act against the NRSC's 1990 fundraising activities, noting that

the joint fundraising notice sent by the respondents clearly stated (1) the names of all participating committees; (2) the allocation formula for all funds received; (3) that contributors could designate their contributions to a particular participant or participants; (4) that the allocation would change if a contribution would violate the permissible contribution limits; and, (5) that contributions from sources which are prohibited from contributing under the Act would be allocated to a non-federal account of the NRSC.

Id. A cynic may observe that joint fundraising is only bundling that complies with those provisions of the FECA that have been previously enforced by the Commission.

207. JACKSON, *supra* note 107, at 99. Jackson writes,

The GOP had been marketing contacts with its own most powerful policy-makers since capturing the White House and the Senate in 1980. . . . The limit-skirting "bundling party" . . . at which PAC managers posed for pictures with the President after donating \$20,000 to GOP House candidates, was only a variation of this access-peddling game.

Id.

B. Asserted Justifications for Bundling

Two justifications have been offered in support of the need to continue bundling: support of disadvantaged candidates and increased individual participation in the electoral process. Neither is persuasive.

Bundling has been advocated as a means of facilitating participation by groups long ignored by the political process.²⁰⁸ Specific quasi-PACs have emerged to fill such roles. For example, AMERICA'S Fund was launched in 1993 to support minority candidates for office.²⁰⁹ A fund for Democratic women candidates, EMILY's List, has been in existence since 1985²¹⁰ and was an important contributor to candidates for both state and federal offices in 1992.²¹¹ The success of EMILY's List has fostered the growth of similar organizations that focus on state and local women candidates.²¹² Other political interests have begun to utilize

208. See, e.g., Adam Clymer, *Senate Approves Brady Legislation and Trade Accord*, N.Y. TIMES, Nov. 20, 1993, at A1 (quoting Rep. Barney Frank of Massachusetts stated that "'women and blacks'" argue that "they depend on 'cooperative fund-raising'"). Ellen Malcolm, the founder and president of EMILY's List, has stated that: "'I find myself in the ludicrous position of defending EMILY's List, which I think is the most effective electoral reform we've seen in 10 years . . .'" Helen Dewar, *EMILY's List Falls Prey to PAC Hunt: Group Thrived in Loophole that Campaign Finance Bill Could Close*, WASH. POST, Mar. 7, 1993, at A14.

209. AMERICA'S Fund (Achieving More Equitable Representation In the Congress And States) supports black, Hispanic, and Asian candidates who support issues that are important to racial or ethnic groups. It functions by recruiting members who join by paying \$100 and agreeing to make two similar contributions during each federal election cycle to candidates endorsed by the fund. Joyce Jones, *The Color of Money*, BLACK ENTERPRISE, Feb. 1994, at 28, 28.

210. *Id.*

211. AMERICA'S Fund modeled itself after EMILY's List (Early Money Is Like Yeast). The only difference between their fundraising structures is that EMILY's List requires aggregate contributions of \$200 to candidates it endorses, while members of AMERICA'S List are required to make two \$100 contributions. *Id.* EMILY's List refers to its method of fundraising as "networking" rather than bundling, but the process is the same. See Peggy Reynolds, *Mercer Islander Is Key to Getting Women Elected*, SEATTLE TIMES, May 10, 1993, at C3.

212. There has been an emergence of committees supporting women candidates that are not only pro-Democratic but also pro-Republican. Many of these groups focus on abortion rights: e.g., Kentucky's Emma's List; Maryland's Harriet's List; and Utahns For Choice. See Kentucky: "Women Gear Up for Belated Political Gains", AM. POL. NETWORK ABORTION REP., Oct. 15, 1993 available in LEXIS, Cmpgn Library, Allnws File (discussing Emma's List's desire to "steer its members' individual contributions to candidates it endorses" to circumvent the state's \$500 limit on PAC contributions); Maryland: *Harriet's List Focuses on Pro-Choice Women*, AM. POL. NETWORK ABORTION REP., Jan. 7, 1994, available in LEXIS, Cmpgn Library, Allnws File (discussing the Harriet's List's intention

bundling in an attempt to increase their ability to influence elections and increase their power.²¹³

Although groups like EMILY's List are promoted as a means of enabling candidates from traditionally under-represented groups to compete politically, the large number of failed challenges to incumbents by women indicates that bundling has not enabled women to overcome the inherent systemic bias toward incumbents.²¹⁴ Some women political activists reject the notion that bundling can create a level playing field for elections and call for the elimination of all loopholes that promote incumbency.²¹⁵ The attempt to exempt some bundling may be a covert way to support incumbents.²¹⁶

The claim that bundling promotes participation also appears flawed. True participation requires the individual to do something more than financially support a political cause. The exemption for non-connected PACs has been justified as an effective way to enhance participation.²¹⁷ However, the true motive may be to increase the power of those political committees who are able to raise the most money.²¹⁸ The benefits of the contribution truly

to support non-incumbent women running for state legislature and other statewide campaigns through bundled contributions); *Utah: Pro-Choicers to Increase Involvement in Elections*, AM. POL. NETWORK ABORTION REP., Sept. 1, 1993, available in LEXIS, Cmpgn Library, Allnws File (discussing the Utahns For Choice's intention to take a greater role in statewide elections and help candidates supporting abortion rights regardless of gender).

213. For example, the League of Conservation Voters initiated a bundling program, EarthList, for the 1994 elections. Due to its success, the League hopes to triple the amount that it raised in 1994 by bundling for the 1995-1996 election cycle. A. Martin Willis, *Environmental Lobbies Aren't Alarmed by Prospects of a GOP-Held Congress*, POLITICAL FIN. & LOBBY REP., Nov. 23, 1994, available in LEXIS, Cmpgn Library, Allnws File. Conservative groups have begun bundling programs. Madison Project was founded in an attempt to funnel small contributions to candidates supported by the group. Robert O'Harrow Jr. & Kent Jenkins Jr., *Virginia Notebook*, WASH. POST, Mar. 3, 1993, at V03.

214. Elizabeth Schwinn, *Lobby Laws: Women May Win an Exemption*, TIMES-PICAYUNE (La.), Oct. 31, 1993, at A10 (noting that in 1992, despite large contributions provided by bundling, 38 of 40 women facing incumbents lost).

215. *Id.* (noting the opinion of Margery Tabankin, the leader of the Hollywood Women's Political Committee).

216. *Id.*

217. See *EMILY's List in Michigan: 'Scent of a Woman' or 'Indecent Proposal'?*, POL. FIN. & LOBBY REP., Aug. 25, 1993, at 1, 5. Judith Corley, a former attorney at the FEC, described EMILY's List as "an administrative convenience to its membership. . . . [I]nstead of having to mail contributions to up to eight candidates, a contributor needs to mail only to EMILY's List." *Id.*; see also Bunting, *supra* note 186, at A3.

218. Bunting, *supra* note 186, at A3.

accrue to the entity bundling rather than to the contributor.²¹⁹ In fact, individuals who contribute through intermediaries may unwittingly support political causes that are not their own. EMILY's List acknowledges that the organization would not be as successful if it relied on its members to send contributions directly to each woman candidate they wished to support.²²⁰ Thus, bundling may only give the perception of participation.²²¹ Moreover, pseudo-participation, where an organized interest benefits from the contributions of individuals, cannot be legitimately called an advancement for participatory democracy.

Two arguments have been raised justifying the related practice of brokering. First is the claim that brokering allows individuals with common political interests to organize themselves in an ad hoc manner to participate in the political process without formally organizing as a PAC or interest group.²²² The intermediary will organize a fundraising event, bring together individuals with specific interests, and forward their contributions to the candidate "guest."²²³ The second justification for individuals bundling or brokering contributions is pure influence peddling.²²⁴ By arranging for a significant number of associates and acquaintances to make large contributions to a candidate, an individual may manipulate the candidate's legislative agenda to favor the interests of the individual.²²⁵

The contention that certain groups should be exempted from

219. See *supra* notes 186, 198-99 and accompanying text.

220. Bunting, *supra* note 186, at A3 (citing the additional paperwork required of contributors to send checks and disclosure forms directly to candidates supported by the PAC).

221. See MATASAR, *supra* note 185, at 55.

222. See SORAUF, *supra* note 48, at 89-90 (noting that often Senatorial candidates will venture to raise funds outside their state at informal "receptions" that are organized around a common bond between the candidate and contributors like religion, ethnicity, profession, or policy interest).

223. *Id.* at 90-91.

224. See Miller, *supra* note 181 (noting the link between contributions by USDA employees and their subsequent advancement as well as appointment of the conduits to important positions at USDA). Charles Keating is a prime example of an individual brokering large contributions for federal candidates simply to enhance his own position. ALEXANDER & BAUER, *supra* note 44, at 79-80. Charles Keating himself is the best spokesman for this justification for bundling. He once stated, "One question, among many, has had to do with whether my financial support in any way influenced several political figures to take up my cause. I want to say in the most forceful way I can: I certainly hope so." *Id.* at 80.

225. ALEXANDER & BAUER, *supra* note 44, at 79.

the bundling prohibition because they do not "lobby"²²⁶ artificially distinguishes structure from purpose. This view seems to advocate the theory that lobbying only occurs when influence is applied to guarantee a specific legislative outcome. However, these advocates of the lobbying and non-lobbying distinction ignore the fact that support of candidates who meet the group's litmus test is a means of guaranteeing specific legislative outcomes in multiple situations. The definition of lobbying is difficult to establish. The process of lobbying cannot be separated from the results of lobbying. If direct lobbying of a candidate produces the same result as indirect pressure, exerted by the need for contributions for the next election, then the two are indistinguishable. If campaign contributions affect the way that a candidate decides a legislative issue, then such action must be classified as lobbying.

Furthermore, the basis for allowing only some PACs to bundle rests on the claim that non-connected committees²²⁷ have less interest in the legislative process than do affiliated ones. Advocates of this claim assert that non-connected committees are benign, as they do not seek to affect legislative outcomes through lobbying activities. This view is based upon the assumption that the connected PACs dominate the field of lobbying and campaign donations. While corporate, labor, and trade association PACs represent the largest category of PACs, the largest growth in PACs between 1977 and 1994 occurred in non-connected PACs.²²⁸ The relative strength of the connected committees would likely decline if Congress were to exempt non-connected PACs from any prohibition of bundling.

The distinction between connected PACs or separate segregated funds (SSFs) sponsored by corporations or unions and non-connected PACs is artificial when their fundraising activities and contribution practices are similar. When an SSF decides to support

226. See *supra* notes 139-40 and accompanying text.

227. The FEC has interpreted 11 C.F.R. § 106.6A as dealing with non-connected PACs to "include[] any committee which conducts activity in connection with an election but which is not a party committee, an authorized committee, or a separate segregated fund." *Reallocation of Federal and State Expenses* (AO 1993-3), Fed. Election Camp. Fin. Guide (CCH) ¶ 6083 n.2 (Apr. 2, 1993) (citation omitted).

228. From 1977 to 1994, the number of non-connected PACs increased from 110 to 980 or by 791%. PAC Count, FEC Recent Release (Dec. 31, 1994), available in LEXIS, Cmpgn Library, Fedrel File. During the same period, the three combined categories of corporate, labor, and trade association PACs increased from 1,222 to 2,785, or by 128%. *Id.* (showing a slight decline in the number of PACs for 1994 in both the corporate, labor, and trade association category and non-connected category).

a candidate and solicits contributions on the candidate's behalf, the SSF engages in conduct that the FEC interprets as direction or control and is subject to the double counting provision of FECA.²²⁹ The standard procedure followed by organizations that bundle is to obligate members to contribute a designated amount to candidates chosen by the PAC during each election cycle.²³⁰ The FEC has not held this type of action to constitute "direction or control" over contributions.²³¹ The affiliation of a PAC to a corporation, union, or bank as opposed to an ideological or political entity should not be the basis for regulation when the activities of the two groups are the same. While legitimate concern exists for the improper use of SSFs of the parent entity, no logical basis exists for creating and maintaining separate reporting and contribution regulations for ideological or political PAC's when the two act in an identical manner.

Administratively, it would be difficult to distinguish PACs that do not lobby from those that do.²³² It is impossible to justify, in the name of reform, regulations that protect a single interest to the detriment of similar interests.²³³ The 1994 House proposal for campaign finance reform, H.R. 3,²³⁴ would have required the FEC to "divide PACs into 'good' and bad."²³⁵ Allowing only non-connected PACs or other political interests to bundle would lead to judicial challenges,²³⁶ reorganization of affiliated PACs as uncon-

229. See AOR 1976-92, *supra* note 70 (In the actions of Boeing Corporation's SSF, the Commission held that when the SSF makes a determination to support a specific candidate and then solicits contributions from the campaign accounts of its managers, the PAC must count such contributions as contributions by both the PAC and the individuals in accordance with the regulations); see also *supra* notes 32-42 and accompanying text.

230. See *supra* notes 209-11 and accompanying text.

231. See *supra* note 71 and accompanying text.

232. The House proposal would have allowed virtually any non-business, labor, or trade organization PAC to continue bundling. See Dewar, *supra* note 208. Whether a PAC is truly independent or non-connected is really a matter of organization and semantics. Any group can sponsor a PAC or other political committee that complies with the bundling exemption and still effectively lobby or represent institutional legislative concerns through another separate entity. Ellen S. Miller & Thomas Asher, *Campaign Finance: Closing a Loophole*, WASH. POST, May 19, 1993, at A19 (discussing the impossibility of effectively creating an exemption favoring a limited number of political committees).

233. Pluta, *supra* note 176, at 1 (arguing that "[y]ou can't write a set of rules that applies only to a particular PAC . . . that represents only the good guys").

234. See H.R. 3, *supra* note 135, § 501.

235. *Emily's Lesson*, WASH. POST, Apr. 12, 1993, at A18.

236. For a bundling exception to be found constitutional, Congress would have to allow virtually every organization that wishes to continue or begin bundling; it is impossible to protect a single group or interest. See Miller & Asher, *supra* note 232. "To avoid uncon-

nected ones,²³⁷ or direct circumvention by excluded PACs and interests.²³⁸ Non-connected PACs are no better than affiliated PACs in their manipulation of candidates and elections.²³⁹ Due to the lack of institutional control and oversight over non-connected PACs, they may be worse for the electoral process than affiliated PACs.²⁴⁰ Allowing some PACs to bundle at the exclusion of others may encourage greater utilization of bundling as candidates pressure PACs for increased contributions to offset new statutory limits.²⁴¹

Although the evils of bundling have been discussed, it is important to note that political committees play an important electoral role. Organizations engaged in bundling have traditionally been organized as PACs. An argument can be made that political committees have a legitimate role in the political process.²⁴² As a surrogate for political parties,²⁴³ they offer contributors an ideologi-

stitutionality, the door must be open to other voluntary PACs—Phyllis Schlafly's List, the Toxic Waste Industry's List and the mega-bundlers of Hollywood and Wall Street. Loopholes simply do not discriminate on the basis of viewpoint, and one person's 'good cause' is another's anathema." *Id.* The courts will not support any reform that limits the ability of truly independent groups to attempt to influence campaigns and the right of individuals to maximize their point of view through the collective use of resources. Gans, *supra* note 94, at 23.

237. See *Emily's Lesson*, *supra* note 235, at A18; see also Miller & Asher, *supra* note 232, at A19 (noting that PACs will simply find a means of complying with the exception through modification of their organization).

238. See Jeffrey Denny, *Staking a Claim, Washington's Influence Industry Invests in Change*, COMMON CAUSE, Oct.-Dec. 1992, available in LEXIS, Cmpgn Library, Allnws File (noting that "[t]o allow EMILY's List to bundle is to allow (Wall Street firm) Goldman, Sachs to bundle").

239. See Latus, *supra* note 129, 151-61 (discussing the activities of 10 ideological PACs and comparing them to their corporate and labor counterparts).

240. JOHN M. THIELMANN & AL WILHITE, DISCRIMINATION AND CONGRESSIONAL CAMPAIGN CONTRIBUTIONS 51 (1991) (Because non-connected organizations have no "parent" to oversee the PAC, "the nonconnected PACs are more likely . . . to test the bounds of the FECA.").

241. See JACKSON, *supra* note 107, at 306 (discussing the adverse impact to some PACs that an earlier proposal to reform campaign contributions would have); see also *Review & Outlook*, *supra* note 196, at A22 (analyzing the link between contributions by the Association of Trial Lawyers of America (ATLA) and Senatorial actions favorable to the association).

242. This is not to say that PACs do not exhibit significant problems. Before the 1994 congressional election, PACs alienated many Republicans by their exclusive support of Democratic candidates, who may or may not hold the same ideological views. *Two Cheers for PACs*, ROLL CALL, May 10, 1993, available in LEXIS, CMPGN library, ALLNWS file [hereinafter *Two Cheers*]. Additionally, many PACs donate to both candidates, indicating that their sole purpose in contributing is to purchase influence. *Id.*

243. PACs offer interest groups outside the parties the opportunity to influence policy.

cally cohesive organization that is supported by the contributions of "members" who collectively express their interests.²⁴⁴ As the popularity and importance of political parties have declined,²⁴⁵ political committees and other interest organizations have become surrogates for the strong precinct or voting district party organization; non-party political and interest organizations often fulfill the role of organizing and motivating the electorate. Today, the political "precinct" is not a geographical one but rather an economic, ideological, labor, or business precinct.²⁴⁶ These party surrogates represent collective interests that enable those with similar ideas, goals, or issues to collectively advocate their position.²⁴⁷ Within a regulated context, these surrogates may represent the essence of republican pluralism.

In a system where parties no longer maintain the cohesiveness that they once did, interest groups have effectively utilized PACs to express their narrow legislative and political interests. See John W. Hays, *PACS in Kentucky: Regulating the Permanent Committees*, 76 KY. L.J. 1011, 1016 (1988) (concluding that "the increasing political pluralism of the United States during the 1970s and 1980s made PACs valuable political tools for groups not affiliated with traditional sources of political power").

244. See *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986) (stating that "individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction").

245. See Broder, *supra* note 94, at C1 (noting that since World War II, the decline in voter turnout has largely been a reflection of the decline of the parties' power and their ability to mobilize the electorate).

246. *Id.* Comparing the role that PACs play in modern elections with that played by the precinct organizer, one finds that both serve to energize their constituents, encourage their support for a specific result, and contribute the time or money necessary to support a successful campaign. *Id.*

247. See *Two Cheers*, *supra* note 242; see also Edwards, *supra* note 94, at A22 (noting that by pooling resources, PACs legitimately protect the legislative interest that they have by attempting to influence the outcome of elections). The Supreme Court has held that PACs are protected by the First Amendment freedom of association. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) (citing *Buckley v. Valeo*, 424 U.S. at 22). Nothing in their organization or purpose justifies diminishing their constitutional protection, because PACs are "mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplify' the voice of their adherents." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. at 22).

VII. PROPOSAL FOR REFORM

A. Bundling Reform as a First Step

Political organizations and individuals may facilitate greater debate and participation in the political process if they deal openly with contributions and candidates. The information available to the public regarding political committees is much greater than that about individuals or organizations that legally evade reporting requirements.²⁴⁸ The reporting of contributions made through or by a political committee to a congressional candidate may evidence the candidate's ideological tendencies or, at the least, his legislative agenda. As stated by Justice O'Connor in *Massachusetts Citizens For Life*, full disclosure of contributions and expenditures "serves the important governmental interest of 'shed[ding] the light of publicity' on campaign financing, thereby helping voters to evaluate the constituencies of those who seek federal office."²⁴⁹ Permitting bundling without full disclosure allows intermediaries to circumvent the law and hide those who support them from public view.²⁵⁰

Thus, a first step to reform must address the practice of bundling. With the popularity of bundling increasing over the last ten years, any reform that is not coupled with significant modification of bundling will not succeed because the reform can be immediately circumvented.²⁵¹ Any elimination of or reduction in the ability

248. See *supra* notes 4-18 and accompanying text (discussing the disclosure requirements for political committees).

249. *Massachusetts Citizens For Life*, 479 U.S. 238, 265 (1986) (alteration in original) (O'Connor, J., concurring) (quoting *Buckley v. Valeo*, 424 U.S. at 81). In *Massachusetts Citizens For Life*, the Supreme Court addressed the concern that allowing MCFL to conduct independent expenditures with its corporate resources would open the door to "massive undisclosed . . . spending by similar entities, and to their use as conduits for undisclosed spending." *Id.* at 262. The Court stated that, due to the regulation of independent expenditures under FECA, this concern is unfounded because any expenditure greater than \$250 would trigger the disclosure requirements of 2 U.S.C. § 434(c), which requires disclosure of any contributor who provides more than \$200 per year to the committee. *Id.* These requirements are circumvented by some political organizations and individuals who bundle. They avoid disclosing the names of contributors because they are either not organized officially as PACs or the contributors' aggregate contributions are less than \$200. See *infra* note 274.

250. See *infra* note 278 (noting the Supreme Court's inference in *Buckley* that an informed public is the best prevention against politicians catering to hidden supporters).

251. See Johannes & Nugent, *supra* note 84, at 275-76 (arguing that if bundling is not prohibited, other proposed campaign reforms may result in even greater use of conduits or intermediaries to circumvent the limits on contributions).

of political committees, especially PACs, to contribute to congressional candidates would require control of bundling.²⁵² Contrary to their claims,²⁵³ political committees that act as conduits for campaign contributions do influence the legislative agenda of candidates.²⁵⁴ By coordinating contributions, political committees exert great pressure on a candidate.²⁵⁵ Congress has been lulled into the mistaken notion that bundled contributions are more democratic than money from PACs, even though money raised by bundling has essentially the same characteristics as PAC contributions.²⁵⁶

252. SABATO, *supra* note 59, at 20-21 (discussing the modification of PAC money into bundled contributions or soft money if PACs were to be subject to further limitations).

253. See Malcolm, *supra* note 142, at 5D (arguing that "donor networks [that bundle] such as EMILY's list . . . exact no quid pro quo for campaign donations").

254. An excellent example of this influence is seen in the case of Senators Boxer and Feinstein of California. The two benefited a great deal from the efforts of EMILY's List in their 1992 campaigns. During the 103d Congress, they led the fight in the Senate to maintain the group's ability to bundle contributions for Democratic women. Bunting, *supra* note 186, at A3. The fallacy in the argument put forward by supporters of EMILY's List is illustrated by Ellen Miller, the director of the Center for Responsive Politics, who states, "The reality is EMILY's List chooses candidates who agree with them and lobby (the candidates) by the very fact that they hold a carrot out. . . . The carrot is the money." *Id.*

The issue should not be whether a group lobbies, but whether a group is corrupting the candidate. The Supreme Court's definition of corruption in *National Conservative Political Action Committee* describes the practice of bundling; the Court wrote that "[c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." 470 U.S. 480, 497. Clearly, where a candidate modifies his or her position in order to obtain or maintain financial support for his or her campaign, the possibility of corruption exists. The view of corruption as simply a quid pro quo for the candidate's personal benefit is too limited an assessment of the problem. Justice White in his dissent in *National Conservative Political Action Committee* noted that the process by which many groups decide which candidates they will support publicly and financially requires candidates to complete questionnaires showing their political alignment with the group. Justice White quoted one Senator as follows:

"[The] current system of financing congressional elections . . . virtually forces Members of Congress to go around hat in hand, begging for money from Washington-based special interest groups, political action committees whose sole purpose for existing is to seek a quid pro quo. . . . We see the degrading spectacle of elected representatives completing detailed questionnaires on their positions on special interest issues, knowing that the monetary reward of PAC support depends on the correct answers."

Id. at 517 (citation omitted)(quoting Sen. Eagleton)(White, J., dissenting).

255. See Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 398 (1992) (noting that when contributors with similar legislative goals coordinate their contributions to a candidate, the influence of their aggregate contribution is often greater than the sum of their individual contributions).

256. SORAUF, *supra* note 48, at 199 (noting that, even if candidates reject PAC contri-

The perception that political committees or individuals drive a candidate's political agenda through their control over contributions is detrimental to voter participation.²⁵⁷ Reform that is focused on increasing participation must reduce the financial influence of political committees and wealthy individuals.

B. Outline for Reform

In light of the problems comprehensive reform poses, an incremental reform of eliminating bundling is the best approach; it would eliminate the most significant loophole in campaign finance that currently exists. The benefits from curtailing the practice outweigh the benefits from allowing conduits and intermediaries to continue such conduct.²⁵⁸ However, it would be impossible to completely prevent individuals or organizations from raising funds to support a candidate. Moreover, complete elimination of bundling would be unconstitutional.²⁵⁹

Incremental reform, however, may make effective regulation of bundling possible. Several steps can be taken to modify the current practice of bundling without requiring significant modification of the current structure for funding campaigns. First, the phrase "direction or control" must be defined. Second, current regulations must be enforced to ensure candidates and committees are complying with them. Finally, new reporting requirements must be adopted.

1. Clarify Definition of "Direction or Control"

A clear definition of "direction or control" would resolve many of the problems that exist in the current system.²⁶⁰ The language of the regulation prohibits any direction or control from being exerted over the contribution by a conduit or intermediary.

butions, they will often take contributions from individuals with ties to corporations, trade organizations, or other actors that have PACs, so that the true interest represented by the contribution is the same whether or not the contribution check is from an individual account or the account for the PAC).

257. See TEIXEIRA, *supra* note 101, at 162 (arguing that in the current system, voter detachment may be due to the perception that candidates and contributors are not "like us"); see also text accompanying notes 151-60.

258. See Bedlington, *supra* note 63, at 81 (stating that bundling "provides few benefits in exchange for its costs").

259. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (allowing independent expenditures by political action committees, striking down aggregate expenditure limits as applied to spending by political committees).

260. See *supra* notes 50-52 and accompanying text.

The FEC should return to the position it originally put forward in AO 1975-10²⁶¹ as a starting point for defining the phrase. The Commission ruled that a conduit's request that a contributor earmark a contribution for a specific candidate constituted "some control," thus counting it as a contribution by, and against the limits of, both the contributor and the conduit.²⁶² If the Commissioners are unwilling to rely on these early interpretations as precedent, then they must overcome the partisan conflict that has prevented consensus and develop a new definition of "direction or control." The failure of the agency to clearly define this phrase was noted by the court in *Federal Election Commission v. National Republican Senatorial Committee*.²⁶³ It is difficult to understand why the Commission has not clearly defined such an important term in the twenty years since the statute was adopted.²⁶⁴ Once the phrase "direction or control" is defined, the courts will have some guidance.

The opinion offered by the FEC in AO 1981-57²⁶⁵ provides additional precedent for improving the control over earmarked or bundled contributions. The FEC determined that SSFs must report earmarked contributions of participants to both the FEC and the candidate.²⁶⁶ Earmarking and bundling are theoretically the same: a third party encourages contributions by its affiliates to a specific candidate or cause, the affiliates then forward their contributions to the third party who collects the contributions and forwards them to the candidate. AO 1981-57 offers an administrative approach to regulating the contributions to candidates through conduits. Its application should not be limited to SSFs but rather expanded to include all entities that engage in earmarking or bundling. It is important to note, however, that in AO 1981-57, the FEC did not reach the issue of whether urging contributors to make contribu-

261. AO 1975-10, *supra* note 69; see also *supra* notes 69-75 (discussing the treatment by the Commission of the "direction or control" requirement of 11 C.F.R. § 110.6(d)).

262. AO 1975-10, *supra* note 69.

263. 966 F.2d 1471, 1478 (D.C. Cir 1992) ("It is enough to say that the Commission has not . . . adopted such a construction.").

264. *Id.* at 1477 ("The Commission's precedents and statements, both preceding and following the 1986 election, do not clearly establish what 'direction or control,' means. . . . [T]he lack of precision is troubling.").

265. *Earmarked Contributions via Payroll Deduction Plan* (AO 1981-57), Fed. Election Camp. Fin. Guide (CCH) ¶ 5636 (Jan. 25, 1982).

266. *Id.*

tions to a candidate constitutes direction or control.²⁶⁷ This does not pose a problem in the application of the regulation if the focus of regulation shifts from determining whether "direction or control" over contributions has occurred to all fundraising by third party conduits.

2. Better Enforcement of Current Regulations

As another step towards reform, we need better enforcement of existing disclosure requirements for both the conduits and candidates. In *Buckley*, the Supreme Court upheld disclosure requirements as constitutional.²⁶⁸ The law currently requires political committees to report all earmarked contributions that are greater than \$200 to both the FEC and the candidate.²⁶⁹ By requiring political committees engaged in bundling to comply with the reporting provisions, we can more closely track contributions and the conduits who generate them.²⁷⁰ In addition, as previously noted,²⁷¹ some members of Congress have been at least negligent in failing to disclose information about contributors. Effective enforcement of candidates' disclosures would improve the lack of openness that exists in the identification of those who truly support a candidate. If enforcement of disclosure requirements was quicker and violators were swiftly sanctioned, then candidates would take the initiative to ensure disclosure occurred. Prompt enforcement would encourage compliance by candidates to prevent even the appearance of scandal or impropriety that could be raised by opponents.

3. New Reporting Requirements

As the final step towards reform, the requirements for identification²⁷² should be modified to include additional information about contributors. Also, there should be a lower threshold that triggers the identification requirement.

267. *Id.*

268. In *Buckley*, the Court stated that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above. The disclosure requirements, as a general matter, directly serve substantial governmental interests." *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976).

269. See *supra* notes 36-38 and accompanying text.

270. See *supra* notes 13-22.

271. See *supra* note 189.

272. See *supra* note 16 and accompanying text.

The identity of the conduit or intermediary transmitting the individual's contribution to the candidate should be reported along with the individual's occupation and employer. This information would result in open disclosure of who and what groups support a candidate. Also, if a contribution is made in connection with attendance at a political fundraiser of any kind, the date and sponsor of the event should also be disclosed. These two measures would ensure that virtually all bundled contributions would be identified as such whether the conduit was Charles Keating, the NRSC, or EMILY's List. The burden would be placed not only on the bundler to fully disclose their influence but also on the candidate to disclose the identity of the candidate's support.

The threshold requiring identification of individual contributors should be lowered. The current threshold of \$200²⁷³ is high enough to capture the large contributors but too high to require disclosure by many groups who engage in massive bundling drives to support candidates.²⁷⁴ The trigger for identification of contributors by intermediaries or conduits should be eliminated completely; all contributions that have been bundled or earmarked should be disclosed as such. This would not impose a significant burden on intermediaries who bundle. As they are currently required to report any individual who contributes more than \$200, the process already exists for the disclosure of these individuals.²⁷⁵ Additionally, such a regulation would just change the current rule that allows disclosure²⁷⁶ to one that requires disclosure.

Stronger FEC guidance on who must disclose, improved disclosure requirements, and stricter enforcement of disclosure requirements are the best choices for reform of campaign finances. First, they do not pose a significant disincentive to individuals to contribute and participate in elections.²⁷⁷ Next, enhanced disclosure im-

273. 2 U.S.C. § 434(b)(3)(A) (1994).

274. The fact that both EMILY's List and AMERICA'S List only require \$200 a year in aggregate contributions, *see supra* notes 209, 211, can be explained in two ways. Although the groups may simply be trying to attract small contributors (by requiring a relatively small commitment) who otherwise would not contribute to a candidate, the more likely reason is that the groups can avoid reporting individual contributors to both the FEC and the recipient candidate because such reporting is not required until the aggregate annual contribution exceeds \$200. *See supra* text accompanying notes 36-38.

275. *See* 2 U.S.C. § 434(b)(3)(A) (1994).

276. *Id.*

277. *Buckley*, 424 U.S. at 68 (acknowledging that although disclosure is intrusive and may discourage some contributors from contributing, it does not place an excessive burden on individuals).

proves the evaluation of candidates and their supporters by opening the fundraising process to public scrutiny, and deterring corruption or the appearance of corruption.²⁷⁸ Finally, disclosure is clearly constitutional and "the least restrictive means of curbing the evils of campaign ignorance and corruption."²⁷⁹

VIII. CONCLUSION

As the "last frontier," bundling has proven to be a lucrative means of circumventing federal election law. Significant improvements in the way we conduct elections can be obtained by focusing initially on improved regulation of conduits and intermediaries that make large contributions to candidates through bundling other people's money. The inability of Congress to effectively regulate its own elections provides an incentive to abandon further attempts at comprehensive reform. An incremental approach to reform would produce immediate benefits and avoid many of the problems inherent in attempts at comprehensive reform.

GEOFFREY M. WARDLE

278. The Supreme Court stated in *Buckley* that "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 67. Additionally, the Court stated in a footnote that "[w]e have said elsewhere that 'informed public opinion is the most potent of all restraints upon misgovernment.'" *Id.* at 67 n.79 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)).

279. *Id.* at 68.