I. INTRODUCTION

"Money, like water, will always find an outlet."\(^1\) Such is the cyclical nature of campaign finance law – when public outrage leads to laws that restrict one fundraising outlet, political professionals adapt to find another outlet.\(^2\) When the Watergate scandal spurred comprehensive campaign finance restrictions, politicians turned to "soft money."\(^3\) When the Bipartisan Campaign Reform Act of 2002 ("BCRA") banned "soft-money" and increased individual contribution limits,\(^4\) individual fundraisers became a

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\(^1\) McConnell v. Fed. Election Comm’n, 540 U.S. 93, 224 (2003) (the Supreme Court held that fundraising restrictions imposed by BCRA were constitutional, but noted that the restrictions on soft money would not solve all problems associated with “the ill affects of aggregated wealth on our political system”).


\(^4\) Bipartisan Campaign Reform Act, 2 U.S.C. §§ 434(f), 441(i) (2002).
popular outlet for campaign money. Meanwhile, the role of money in campaigns has steadily increased.

Today, “bundlers” (fundraisers who solicit checks from individual donors for a particular candidate) play a major role in the campaign finance system and often gain prominence and influence through their fundraising efforts. Though not a new practice, bundling experienced resurgence after Bush proved its powerful potential in the 2000 Presidential election. Meanwhile, public discomfort with the practice has grown, spurred by a series of high-profile scandals involving bundlers.


8 Id. at 159, n. 170.

9 The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act, 23 (Michael J. Malbin, ed. 2006) (noting that national parties modified existing fundraising networks to accommodate BCRA’s ban on soft money by converting existing fundraisers into bundlers; see also id. at 135 (“. . . the limit on contributions to the parties and the increase in individual hard money contribution limits have helped bundling organizations”).
deliver other people’s money rather than their own, however, their campaign finance activities often go totally undisclosed.  

Norman Hsu was once a poster boy for would-be bundlers. An entrepreneurial immigrant to the United States, Hsu became an elite democratic fundraiser by bundling millions of dollars for democratic candidates, including $850,000 for Hillary Clinton, who even made a live appearance at his birthday party via closed-circuit television. After federal officials discovered he was reimbursing contributors and fraudulently obtaining money from investors, however, he quickly became the poster boy for bundling abuse.

Such scandals highlight problems associated with bundling. For example, bundlers can circumvent existing contribution limits by reimbursing those from whom they bundle checks. Fundraising scandals also raise concerns about corruption

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14 See e.g. id.
because large bundlers enjoy access to politicians through bundling.\textsuperscript{15} Finally, bundling often has an appearance of corruption, which can undermine public confidence in the democratic process, even if actual corruption does not exist.\textsuperscript{16}

Until recently, most bundling was not a matter of public record.\textsuperscript{17} However, the newly enacted Honest Leadership and Open Government Act of 2007 ("HLOGA" or "the Act") requires congressional candidates to disclose lobbyist bundling. HLOGA's bundling provision ("the Provision") is a positive first step towards tackling the problems associated with bundling.\textsuperscript{18} While the Supreme Court has held that some disclosure requirements run afoul of the First Amendment, HLOGA's bundling measure is likely constitutional because it is justified by the government's interests of preventing corruption and the appearance of corruption, providing valuable information to voters and assisting in the enforcement of other campaign finance laws.\textsuperscript{19} HLOGA's bundling provision, however, does not go far enough. The law should be drafted to require

\textsuperscript{15} Brody Mullins, \textit{Donor Bundling Emerges As Major Ill in '08 Race}, \textit{Wall Street Journal}, Oct. 17, 2007, at A1 ("Campaigns encourage ambitious bundling by rewarding top fund-raisers with perks, including access to candidates").


\textsuperscript{17} Trevor Potter, \textit{Campaign Finance Disclosure Laws supra} note 6.


\textsuperscript{19} 424 U.S. 1, 66-68 (1976).
disclosure of all federal bundling activity by applying to all bundlers (whether lobbyist or otherwise) and all campaigns (whether congressional or presidential).

Part II for this note details the rise of bundling in campaigns, illuminating its associated problems. Part III examines HLOGA’s bundling disclosure provision, discusses its shortcomings, and concludes that it fails to remedy several serious problems associated with bundling. Part IV asserts that HLOGA does not violate the First Amendment and represents a constructive step towards much-needed bundling reform. Part V proposes that effective bundling law must go beyond HLOGA to include all federal bundling activity, discussing policy and constitutional justifications.

II. A BRIEF HISTORY OF BUNDLING

A. Pioneers of the Wild West – The Rise of Big Bundling

The 2002 Bipartisan Campaign Reform Act (“BCRA”) prohibited “soft money” contributions to national political parties. BCRA’s drafters probably “did not anticipate that the ban would simply divert the flow of big contributions into other channels.”

20 The FEC defines soft money as “funds raised and/or spent outside the limitations and prohibitions of the FECA . . . Soft money often includes corporate and/or labor treasury funds, and individual contributions in excess of the federal limit, which cannot legally be used in connection with federal elections, but can be used for other purposes.” Fed. Election Comm’n, Twenty Year Report, ch. 3, available at http://www.fec.gov/pages/20year.htm (1995).


22 Id.
perhaps BCRA was intended as a sort of “legislative triage,” that focused on “solving the most dangerous campaign finance problems facing America” at the time. In any case, as soft money evaporated and candidates abandoned underfunded public financing (and its associated spending limits), candidates embracing the practice of bundling “hard money.”


25 Bradley A. Smith, Bundling Ban Would Unravel Free Speech, Politico, Oct. 20, 2007, http://www.politico.com/news/stories/1007/6596.html (“So it is true that bundling existed long before [BCRA], but it is also true that the 2002 law — and before that, the Federal Election Campaign Act — made bundling ever more important to campaigns.”); but see David G. Vance, Bundling No Byproduct of McCain-Feingold, Politico, Oct. 20, 2007,
One commentary characterizes the current fundraising frenzy as a new “Wild West era.” Though bundling had been around for some time, President George W. Bush proved a pioneer of the “Wild West era,” when he revolutionized the practice of bundling during his 2000 presidential bid. A few years earlier, four of Bush’s longtime supporters developed a name and structure for an elite group of contributors, whose goal was to escape the restraints of a public financing system enacted to reduce the influence of money in elections. Their means to achieve this goal was to create a network of people who could find at least 100 family members, friends, associates and/or employees willing to contribute the maximum individual donation allowed by law to a presidential candidate: $1,000, at the time. Aptly named “Pioneers,” Bush’s cadre “evolved from an initial group of family, friends and associates willing to bet on putting another Bush in the White House into an extraordinarily organized and disciplined machine.”


26 Id.


29 Id.
By 2004, Bush’s fundraising machine included corporate CEOs, Wall Street financial leaders, Washington lobbyists and Republican officials. That campaign raised more than $76 million, or 29% of Bush’s primary budget, from bundling “Pioneers” – who raised at least $100,000 – and “Rangers” – who raised at least $200,000. John Kerry followed suit, accumulating almost $42 million, or around 17% of his primary campaign budget, from 298 “Co-Chairs” who raised at least $50,000 and 226 “Vice Chairs” who raised at least $100,000. In the end, the amount of money raised in the 2004 election broke nearly every campaign fundraising record. Despite the record-breaking funds raised, both candidates voluntarily disclosed extensive information about their bundlers.

30 Id.
32 Public Citizen, The Importance of Bundlers to the Bush & Kerry Campaigns, supra note 29.
33 Small Donors, supra note 29.
34 Public Citizen, The Importance of Bundlers to the Bush & Kerry Campaigns, supra note 29.
Because fundraising prowess is increasingly viewed as a mark of candidate viability, the 2008 presidential race appears destined to raise more bundled money than ever before.\footnote{Small Donors supra note 29; see also Mullins, Donor Bundling Emerges As Major Ill, supra note 14 (estimating that bundled money represents 28.3% of all donations raised in the 2008 presidential election race and forecasting total fundraising to exceed $1 billion).} With more than a quarter of a billion dollars raised as of September 2007, the 2008 race was already the most costly in U.S. history.\footnote{John Solomon & Matthew Mosk, Past Clouds Candidates' Donor Lists, Washington Post, Sept. 20, 2007, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/09/19/AR2007091902508.html.} To prepare for the election and display their fundraising aptitude, all major presidential hopefuls tapped their bundling networks. Hillary Clinton depended on an army of “HillRaisers”.\footnote{Candidates Bungle with Bundlers, supra note 29.} Rudy Giuliani employed a roster of “Pitchers,” “Sluggers,” “Captains,” and ”All-American Team Captains,” the latter pledging to collect $1 million in bundled contributions.\footnote{Id.; Wildermuth, Campaign Finance Schemes Brought Too Much Light on Norman Hsu supra note 29.} Notably, although Hillary Clinton and Barack Obama have voluntarily agreed to disclose some of
their bundlers, none of the 2008 candidates has met the same voluntary disclosure standards of Bush and Kerry in 2004. 39

B. “Bundled Bundling” – When Bundling Goes Bad

“A gift that does nothing to enhance solidarity is a contradiction.” 40

While there is nothing inherently wrong with vigorous fundraising, a major concern is that bundling creates a climate ripe for corruption and influence buying, or at the very least, can carry an appearance of impropriety. 41 News stories exposing high-profile bundlers involved in illegal activities (both inside fundraising and outside of fundraising) has legitimized that concern. 42

Though the media have reported many cases of “bungled bundling,” 43 perhaps the most egregious is that of Norman Hsu, a leading Democratic fundraiser, who raised


41 Candidates Bungle with Bundlers, supra note 29; see also Mullins, Donor Bundling Emerges As Major Ill, supra note 14 (“Campaigns encourage ambitious bundling by rewarding top fund-raisers with perks, including access to candidates”).

42 See Candidates Bungle with Bundlers, supra note 29; Wildermuth, Campaign Finance Schemes Brought Too Much Light on Norman Hsu supra note 29.

43 See Candidates Bungle with Bundlers, supra note 29 (coining the term “bungled bundling”)
more than $800,000 for Hillary Clinton and contributed more than $600,000 to other federal, state and municipal candidates from 2004-07. In all, Mr. Hsu collected well over $1 million in small checks for candidates, making him one of the biggest fundraisers in the nation. Hsu turned out to also be a fugitive, after fleeing from a 15-year old conviction of felony grand theft for his role in a scheme to defraud investors. Before his fugitive status came to light, Hsu

44 Mike McIntire & Leslie Wayne, Democrats Turn from Big Donor Who’s Fugitive, N.Y. Times, Aug. 31, 2007, http://www.nytimes.com/2007/08/31/us/politics/31hsu.html; Ianthe Jeane Dugan & Brody Mullins, Leading Clinton Donor Stays Below the Radar, Wall Street Journal, Aug. 29, 2007, at A6. Other candidates have run into problematic bundlers. The Obama campaign gave $40,000 to charity that it collected from a fundraiser who was later indicted on corruption charges; the Edwards campaign returned the personal portion of $80,000 that a fundraiser collected from family and law-firm partners; one of Mitt Romney’s bundlers was indicted with multiple fraud and other charges. Likewise, George Bush’s “pioneers” included Enron CEO Kenneth Lay, who was convicted of fraud and conspiracy (vacated after his death), and lobbyist Jack Abramoff, who was sentenced to prison for fraud, tax evasion and bribery. See Candidates Bungle with Bundlers, supra note 29; Wildermuth, Campaign Finance Schemes Brought Too Much Light on Norman Hsu supra note 29.


was considered one of an elite group of investors capable of raising $1 million.\textsuperscript{47} This enabled him special perks, such as repeated access to candidates.\textsuperscript{48}

After the \textit{Wall Street Journal} broke a story about Hsu, he was arrested and charged Hsu with additional fraud and election-law violations. Federal prosecutors believe that Hsu ran a massive “Ponzi scheme”\textsuperscript{49} that cost investors more than $60 million.\textsuperscript{50} Further, Hsu used his status as a top political fundraiser to gain investors’

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\textsuperscript{48} Mullins, \textit{Donor Bundling Emerges As Major Ill}, supra note 14.
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\textsuperscript{49} A “Ponzi scheme” is a fraudulent investment operation that involves paying abnormally high returns to investors from money paid into the scheme by subsequent investors, rather than from net revenues generated by real business. U.S. Securities and Exchange Commission, http://www.sec.gov/answers/ponzi.htm (last visited Nov. 14, 2007).
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trust in his phony investments.\textsuperscript{51} One investor said, “I figured if Hillary trusted him, I could trust him.”\textsuperscript{52} Hsu also used his status as a high-yield investor to coerce business contacts into making donations to his candidates of choice.\textsuperscript{53} One Hsu donor who contributed to Hillary Clinton noted that he was a lifelong Republican who contributed because he feared being cut out of Hsu’s next lucrative deal; another angry investor demanded that the Clinton campaign to return his check saying, “I was a donor who had my arm twisted to make a contribution to Hillary Clinton’s campaign on behalf of Norman Hsu.”\textsuperscript{54}

In addition to fraud charges, the federal complaint filed against Hsu alleged that Hsu donated money to politicians under other people’s names and reimbursed donors for checks he solicited.\textsuperscript{55} In August 2007, the \textit{Wall Street Journal} reported that one of


\textsuperscript{52} Id.

\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} See Ianthe Jeanne Dugan, \textit{Hsu Is Accused of Ponzi Scheme}, \textit{Wall Street Journal}, Sept. 12, 2007, at A4; Mullins, \textit{Donor Bundling Emerges As Major Ill}, supra note 14. This article also discusses other bundlers who were caught reimbursing contributors from whom they collected checks. A Wisconsin developer, for example, pled guilty to repaying others for their donations; likewise, the former chairman of a Miami-based engineering firm pled guilty to crimes related to funneling $200,000 to $400,000 in illegal donations to congressional candidates from Florida to Alaska. \textit{Id}.
Clinton’s biggest sources of campaign donations was a tiny 1,280-square-foot green house in a working-class neighborhood near San Francisco International Airport. The owners of the home, the Paw family, were long-time Hsu associates who lived off a meager income from a gift shop and mail carrier salary. In addition to once listing the Paw home as his address, Hsu’s donations mirrored the Paw family’s donations in terms of timing, amounts and donees. Though the Paws deny that Hsu reimbursed them, federal prosecutors believe Hsu reimbursed the family for their donations.

Hsu’s story illustrates several problems associated with bundling, specifically, circumvention of existing campaign finance law and the appearance of corruption. While it is legal for individuals to ask friends, colleagues and family members to make donations to political candidates, it is illegal to coerce them into giving or to reimburse them. Reimbursing donors for contributions effectively circumvents existing contribution limits because it allows an individual to contribute more than the legal limit.

Further, when bundlers are involved in illegal activities outside of fundraising, it raises

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57 Id.

58 Id.

59 Id.

60 Id.

61 See supra Leading Clinton Donor note 29.
serious suspicions that their bundled contributions may come from illegal sources such as foreign, hidden, coerced or reimbursed sources.62

C. Profile of a Bundler: Who They Are and Why They Matter

While some bundlers are lobbyists, most are not.63 A joint Campaign Finance Institute-Public Citizen study of over 2,000 individuals reported to be raising contributions for the 2008 presidential candidates found that 56 percent of the fundraisers came from three industries: lawyers and law firms, three finance industries, and real estate.64 Notably, lobbyists were only the sixth most common industry, representing just 61 (around 3%) of the 2017 reported fundraisers.65


63 Mullins, Donor Bundling Emerges As Major Ill, supra note 14 (estimating that only 3% of bundlers for the 2008 presidential campaign are bundlers); see also Thomas B. Edsall, Pioneers Fill War Chest, Then Capitalize, supra note 26 (noting that about one-fifth of Bush’s 2000 Pioneers were professional lobbyists).


65 Id.
Thus, law firms and businesses, whose profitability is directly affected by government regulatory and tax policies, make up a large. Others are individuals who are motivated by a broad range of interests such as political ideology, political aspirations or power. However, their purpose could be “more nefarious, such as Norman Hsu’s alleged scheme to acquire credibility among investors, or, worse yet, it could be used to obtain government contracts, tax breaks, earmarks or public policies.”

If big bundling buys bundlers nothing else, it buys them access to candidates. Such access raises corruption concerns, or at the very least, the appearance of corruption. “The fact that we have great numbers of these individuals raising larger and larger sums means there are going to be more individuals, postcampaign, making

66 Thomas B. Edsall, Pioneers Fill War Chest, Then Capitalize, supra note 26 (noting that half of Bush’s 2000 Pioneers were heads of companies whose profitability was affected by government regulatory and tax decisions).


68 Mullins, Donor Bundling Emerges As Major Ill, supra note 14 (“Campaigns encourage ambitious bundling by rewarding top fund-raisers with perks, including access to candidates”).
claims for policy preferences and ambassadorial posts.\(^6^9\) Candidates adamantly deny
that they give special preference to campaign contributors when making policy or
personnel decisions,\(^7^0\) but even if the candidates have good intentions, it is nearly
impossible to separate the money and the relationships that come with the money.\(^7^1\)
Election law experts argue whether money can actually be traced to politicians’

\(^6^9\) Thomas B. Edsall, **Pioneers Fill War Chest, Then Capitalize**, supra note 26 (quoting
Anthony Corrado, a visiting scholar at the Brookings Institution and a political scientist at
Colby College).

\(^7^0\) Opinion, **McCain Denies Impropriety**, **USA Today**, Jan. 1, 2000, at
http://www.usatoday.com/news/opinion/e955.htm (Senator John McCain denied that his
decision in favor of a major campaign benefactor by influenced by contributions);
Roberto Suro & Juliet Eilperin, **Loral Denies Benefits in Return for Donations**, **Washington Post**, May 19, 1998, at A03 (President Clinton’s administration denied that
the Chinese government sought to buy influence by coordinating a plan to illegally
funnel as much as $2 million into U.S. political campaigns).

\(^7^1\) Mullins, **Donor Bundling Emerges As Major Ill**, supra note 14. The article also
provides an example of contributions and favors. When Kenneth Lay, a 2000 Pioneer
and then-chairman of Enron, was a member of the Energy Department transition team,
he sent White House personnel director Clay Johnson III a list of eight persons he
recommended for appointment to the Federal Energy Regulatory Commission. Two
were named to the five-member commission. Id.
policies, but regardless of whether actual corruption takes place, the appearance of impropriety can undermine public confidence in the democratic process.

Further, as the amount of money required for successful campaigns steadily increases, so does bundlers’ importance to candidates. “The pressures of unlimited, arms-race spending has put the highest premium on presidential candidates finding bundlers who can raise huge amounts of money and the lowest premium on filtering out problematic bundlers.” Thus, it is unrealistic to expect campaigns to police themselves to identify problematic bundlers.

Fixing all problems associated with bundling requires a multi-pronged approached invoking various campaign finance tools. However, this article focuses on disclosure as a tool for reducing several serious problems associated with bundling. To begin, we must first understand current election law related to disclosure generally and bundling specifically.

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72 See generally Rodney A. Smith, Money, Power, and Elections (2006) (arguing that there is no evidence that money actually influences political decisions on a large-scale); but see generally Stacy B. Gordon, Campaign Contributions and Legislative Voting: A New Approach (2005) (arguing that contributions have a real affect on congressional voting on issues that are most important to large contributors).

73 Mullins, Donor Bundling Emerges As Major Ill, supra note 14 (interviewing Fred Wertheimer, the president of Democracy 21, a nonpartisan Washington-based group dedicated to reducing the influence of money in politics).
III. HONEST AND OPEN? BUNDLING LAW AND THE HONEST LEADERSHIP AND OPEN GOVERNMENT ACT

A. Of Intermediaries and Conduits – A First Attempt at Bundling Legislation

In Buckley, the Court anticipated the use of “intermediaries or conduits” to circumvent FECA’s contribution limits. Federal regulations\(^\text{74}\) appeared impose some direct disclosure legislation on bundling – requiring reporting and record keeping for contributions received and forwarded by a “conduit or intermediary” to authorized committees of Federal candidates.\(^\text{75}\) 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.\(^\text{76}\)

Under the statute, a “conduit or intermediary” must report to the FEC and the recipient candidate\(^\text{77}\) the name, mailing address, occupation, and employer of any individual who makes a contribution of more than $200.\(^\text{78}\) The recipient must then identify in its reports any conduit that provided one or more earmarked contributions above $200, the total amount of contributions made through that conduit, and

\(^{74}\) 2 U.S.C. 441(a)(8); 11 CFR 110.6.

\(^{75}\) NPRM at 4.


\(^{77}\) 11 C.F.R. § 110.6(c)(1)(i).

\(^{78}\) 11 C.F.R. § 110.6(c)(1)(iv)(A).
identifying information for individuals contributing more than $200. Thus, earmarked contribution disclosure is virtually identical to other contribution disclosure. The difference under 11 C.F.R. § 110.6 is that where a “conduit or intermediary” exercises “direction or control” over the choice of a recipient candidate, the “conduit or intermediary” must report this to the recipient candidate. The entire amount of the contribution is then credited to both the original contributor and the “conduit or intermediary.”

The description of contributions being directed through “conduits or intermediaries” appears to describe bundling – the “direction” being a bundler solicitation of funds and the “conduit or intermediary” being the bundler. However, these rules are widely misunderstood and largely dormant. When the FEC initially interpreted this law, it suggested that the law applied to some bundling activity. The

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79 11 C.F.R § 110.6(c)(2)(i)-(ii).


81 11 C.F.R S 110.6(d)(1).

82 11 C.F.R S 110.6(d)(2).


84 See Internal Transfers of Funds by Candidates or Committees (AO 1975-10), 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5116 (Aug. 21, 1975)(the FEC initially found “some
FEC later liberalized its interpretation, however, concluding that a party’s recommendation to contribute to a specific candidate does not constitute “direction or control” if the contribution is initially sent to the soliciting conduit. In 1992, the FEC’s inconsistent application of the “direction or control” clause rendered the law “meaningless.” The D.C. Court of Appeals declined to apply the “direction and control” disclosure requirements to a PAC that solicited contributions to be divided equally

control” existed when conduits requested that donors “earmark” previously made contributions); see also Employee Group as Political Committee (RE: AOR 1976-92), 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6951 (Nov. 10, 1976) (the FEC found control where a PAC recommended or solicited a contribution from a PAC participant’s private account).

See Soliciting Contributions to Be Forwarded to Candidate (AO 1980-46), 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5508 (June 25, 1980) (responding to 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.”).

among four unnamed candidates identified only by their state of residence. The court stated: “(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)”. Thus, the “direction and control” clause has “virtually no effect” on bundling today.

B. Laws That Give Bundling Structure and Limits

Several laws indirectly affect bundling by providing it with structure and limits. Contribution limits, for example, dictate the maximum amount bundlers can collect from each donor. Likewise, the Federal Election Campaign Act of 1971 (“FECA”) and Federal Election Commission (“FEC”) require a bundler who receives and forwards a contribution directly to a political committee to forward the contribution within 10 days and, if the contribution is more than $50, include the date of receipt and the name and address of the person making the contribution.


C. HLOGA’s Bundling Provision: Lobbyist Disclosure in Congressional Campaigns

Though they depend on bundling, some political leaders have echoed public discomfort with bundling. 2008 presidential candidate Senator Barack Obama, for example, pledged to reject contributions bundled by registered federal lobbyists and political action committees. In an opinion piece endorsing bundling disclosure entitled “The Problem with Bundled Money,” Obama said:

When it comes to reforming Washington and limiting the power of special interests, a man who died more than 60 years ago had exactly the right idea. Supreme Court Justice Louis Brandeis said, ‘Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.’ . . . Nearly a century later, we find Washington in need of a lot of sunlight and disinfectant.”

The Honest Leadership and Open Government Act of 2007 amends the Federal Election Campaign Act of 1971 (FECA) to provide more vigorous


93 2 U.S.C. 431 et seq.
requirements with respect to disclosure and enforcement of ethics and lobbying laws.\textsuperscript{94} HLOGA’s stated purpose is “[t]o provide greater transparency in the legislative process.”\textsuperscript{95} Initial versions of the Act did not include bundling reform,\textsuperscript{96} but Senators Feingold and Obama introduced the bundling provision, which eventually became section 204 “Disclosure of Bundled Contributions.”\textsuperscript{97}

HLOGA’s bundling provision requires candidates’ political committees (i.e., candidate committees, political action committees) to file reports every six months with the Federal Election Commission.\textsuperscript{98} The reports must include the name, address, and

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\item \textsuperscript{94} Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 204, 121 Stat. 735 (2007).
\item \textsuperscript{95} Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 204, 121 Stat. 735 (2007).
\item \textsuperscript{96} See 2007 CONG US S. 1, 110th CONGRESS, 1st Session, S. 1, (August 02, 2007 version) (containing § 204 bundling provision); but see 2007 CONG US S. 1, 110th CONGRESS, 1st Session, S. 1, (January 07, 2007 version) (did not contain §204 bundling provision).
\item \textsuperscript{97} Testimony of Sarah Dufendach, Mar. 1, 2007, House of Representatives, 110\textsuperscript{th} Congress, 1st Session, S.1, 2007 WL 614902.
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employer of each person who is reasonably known to have forwarded, or who is credited with raising, two or more bundled contributions totaling more than $15,000. The Act defines “person” as registered lobbyists or political action committees established or controlled by a lobbyist or lobbying organization. Accordingly, though the word “person” would appear to apply to all bundlers, the Act specifies that it only applies to lobbyist bundlers. Thus, as noted in the previous section, a majority of bundling activity would continue to be undisclosed because the vast majority of bundlers, at least in Presidential campaigns, are not bundlers. The Act also only

99 2 U.S.C. 434(i); New Rules, supra note 98.


applies to congressional campaigns, leaving the more expensive and potentially more problematic presidential campaigns completely unchecked.\textsuperscript{103}

In October 2007, the FEC released a Notice of Proposed Rulemaking ("NPRM") outlining several vague aspects of the Act.\textsuperscript{104} For example, the phrase “credited with raising” is problematic when multiple lobbyists are present at or co-host a single fundraiser.\textsuperscript{105} For example, it was unclear whether a lobbyist who co-hosts an event but plays no role in raising funds should be credited for funds raised.\textsuperscript{106} Similarly, should each co-host be credited with the full amount of the contributions raised at the event or should the total amount raised at the event be divided evenly among all co-hosts? These examples illustrate that under the law's current language the total amount reported from such an event might be misleading or inaccurate.\textsuperscript{107}

Another problem is that the Act does not specify whether mandatory reporting extends to fundraising by persons who are not lobbyists but raise funds as employees or agents of a lobbyist or lobbying organizations.\textsuperscript{108} A section-by-section analysis of the Act, indicates that it only covers contributions credited to registered lobbyists

\textsuperscript{103} Id.; NPRM at 1.

\textsuperscript{104} NPRM at 4.


\textsuperscript{107} NPRM at 14-15.

\textsuperscript{108} NPRM at 13; Bauer, Bundle of Issues, supra note 105.
themselves, and not to those collected by their employees or agents. During a discussion on the Senate floor, however, Senators Feingold and Obama indicated that a lobbyist’s employee who bundles a contribution would be subject to the disclosure requirements if the employee were acting as an agent of the lobbyist, even if the employee were not himself a registered lobbyist. Under this view, lobbyists would receive credit for funds collected by their employees or agents, which would prevent circumvention of HLOGA by closing a potential loophole by which lobbyists could avoid disclosure by using employees to bundle contributions. Because employees may act on behalf of lobbyists, their funds should be credited to their employer. This concept conforms with the application of other FECA requirements regarding agents, such as “soft money” fundraising restrictions, which apply to both federal candidates and their "agents." Applying the “agent” concept to the HLOGA would take bundling rules in a similar direction by requiring lobbyists to disclose employee bundling activity.

The FEC’s Notice of Proposed Rulemaking also illuminated HLOGA’s potential implications on contribution limits. “Under current FEC regulations, a bundler may be


\[111\] Bauer, Bundle of Issues, supra note 105.

\[112\] Id.

\[113\] Id.

\[114\] 2 U.S.C. § 441i (2002); Bauer, Bundle of Issues, supra note 105.

\[115\] NPRM at 13; Bauer, Bundle of Issues, supra note 105.
subjected to a charge against its contribution limit for the full amount raised and transmitted to a candidate.”

This rule would resurrect the "conduit or intermediary" rules discussed in the previous section and would apply when a bundler exercises "direction or control" over the contribution. “Not much has happened under these rules for years: [the rules] are largely dormant and certainly poorly understood.” However, as noted in the Notice for Proposed Rulemaking, the FEC is considering whether bundled contribution disclosures should "double count" by crediting such contributions to the original contributor as well as the bundler's own limit. Such “double count” rules apply in other campaign finance law, such as when a PAC collects and forwards contributions to a candidate, where the amount collected counts towards the PAC's limit as well as that of the original contributor. The “double count” interpretation would be a step toward “reinvigorating . . . limit-based bundling restrictions” from the “exercise and control” clause. These potential bundling contribution limits arguably have a far greater effect on bundling than HLOGA’s disclosure requirements.

116 Bauer, Bundle of Issues, supra note 105.
117 11 C.F.R. 110.6(d)(2).
118 NPRM at 20-23; Bauer, Bundle of Issues, supra note 105.
120 11 C.F.R. 114.2(f)(4).
121 NPRM at 21.
122 NPRM at 21.
IV. HLOGA’s BUNDLING PROVISION IS LIKELY CONSTITUTIONAL

After interpreting what the Provision means, the next step is to analyze whether it is constitutional. This is necessary because the Provision impacts the First Amendment rights of speech and association. Part A discusses the constitutional framework for disclosure law and its historical context. The framework provides a method for analyzing the Provision, while the historical framework traces the cyclical nature of campaign finance reform and adaptation by political professionals. Part B analyzes the Provision under the constitutional framework, concluding that it is likely constitutional.

A. Disclosure Law: Historical Context & Constitutional Framework

More than 120 years ago in Ex parte Yarborough, the Supreme Court held that congressional power to regulate elections included the authority to protect elections against two great natural and historical enemies of all republics, “open violence and insidious corruption.” The Court described the source of corruption as the “free use of money in elections . . . .” Fifty years later, the Court endorsed disclosure as a means of combating corruption in campaigns. In Burroughs v. United States, the Court deferred to the Congress’ conclusion that public disclosure of contributions would

\[\text{Id. (quoting Ex parte Yarborough, 110 U.S. 651, 658 (1884) (emphasis added).)}\]

\[\text{Yarborough, 110 U.S. at 658.}\]

\[\text{Burroughs v. United States, 290 U.S. 534 (1934).}\]

discourage the corrupt influence of money in elections.\textsuperscript{127} The Court reasoned that Congress’s power to protect the election of the President and Vice President implicitly included discretion to select the means of achieving that end.\textsuperscript{128}

In 1974, “[u]pon signing the most systematic restrictions on campaign finance in American history, President Gerald Ford declared, ‘the times demand this legislation.’”\textsuperscript{129} The times he referred were the Watergate times and the systemic campaign finance restrictions were the 1974 amendments to the Federal Election Campaign Act (“FECA”).\textsuperscript{130}

The Watergate scandal enflamed public concerns about corruption in the government, illuminating the potential for corruption inherent in campaign financing.\textsuperscript{131} While commonly associated with presidential abuse of power, Watergate also involved campaign finance abuse.\textsuperscript{132} For example, Nixon’s Committee for Reelection of the President used money derived from campaign contributions\textsuperscript{133} to hire burglars to break

\begin{footnotesize}
\textsuperscript{127} Burroughs 290 U.S. at 548.
\textsuperscript{128} Id. at 547-48.
\textsuperscript{129} John Curtis Samples, supra note 3 at 211 (2006).
\textsuperscript{130} Id. at 211-212.
\textsuperscript{131} Araiza, supra note 115, at 1310; Jason B. Frasco, Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States, 92 Cornell L. Rev. 733, 737 (2007).
\textsuperscript{132} John Curtis Samples, supra note 3 at 212-215.
\textsuperscript{133} Id.
\end{footnotesize}
into the Democratic National Committee headquarters.\textsuperscript{134} Nixon’s campaign committees also violated an array of campaign finance laws, including raising more than $500,000 from illegal sources to finance “dirty tricks” against Nixon’s enemies and to cover-up the DNC burglary.\textsuperscript{135} Further, links between Nixon’s campaign contributions and his policy decisions and ambassador suggested impropriety.\textsuperscript{136} Finally, the Watergate crisis and Nixon’s subsequent resignation caused widespread public outcry and distrust of the government, creating “a political climate where congressional majorities could pass virtually any restrictions on campaign finance.”\textsuperscript{137}

Reacting to public concerns and disillusionment, Congress passed amendments to the Federal Election Campaign Act (“FECA”).\textsuperscript{138} The amendments regulated several aspects of campaign finance including disclosure of donations, public funding for presidential campaigns, and creation of the Federal Election Commission.\textsuperscript{139}

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\textsuperscript{134} Michael J. Malbin, A Public Funding System in Jeopardy, \textit{in} The Election After Reform: Money Politics, and the Bipartisan Campaign Reform Act 220 (Michael J. Malbin, ed. 2006).

\textsuperscript{135} Samples, The Fallacy of Campaign Finance Reform, supra note 127 at 212-216.

\textsuperscript{136} Id.

\textsuperscript{137} Id.


\textsuperscript{139} Erwin Chemerinsky, Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections, 74 \textit{Chi.-Kent. L. Rev.} 133, 136 (1998); see also NC for second part.
lodestar campaign finance decision *Buckley v. Valeo*, the Supreme Court upheld a FECA disclosure provision that required individuals and groups who expressly advocated for or against a federal candidate to disclose their related contributions and expenditures. The Court applied “intermediate scrutiny,” stating that to be upheld, a disclosure provision must be justified by an *important public interest* and have a *relevant correlation* or *substantial relation* to the public interest being served. In rejecting a First Amendment challenge, the Court held that FECA’s disclosure requirements furthered three “sufficiently important” interests: (1) deterring actual and apparent corruption; (2) providing information to voters, and (3) aiding in the enforcement of other campaign finance law.

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142 424 U.S. 1, 74 (1976).


144 *Buckley*, 424 U.S. at 66-68; see also Hasen, supra note 131 at 251-52.
In the 1970’s and 1980’s, the Court “frequently upheld FECA’s disclosure framework.”145 In the 1990’s, however, the Court’s disclosure opinions became more unpredictable.146 Twenty years after Buckley in McIntyre v Ohio Elections Commission,147 the Supreme Court “seemed to draw back from [the] relatively relaxed standards applied to the review of mandated disclosures.”148 In McIntyre, the Court appeared to employ a strict scrutiny standard of review and conduct a searching overbreadth analysis, requiring narrow tailoring of a compelling government interest.149

The law at issue required ballot initiatives materials to disclose on their face the name of the entity providing the literature.150 An elderly pamphleteer challenged a fine imposed on her for distributing anonymous leaflets opposing a proposed school tax


150 McIntyre, 514 U.S. at 334, 338, n.3 (providing the Ohio disclosure statute); Hasen, supra note 131 at 252.
levy. Citing historical protection of anonymous First Amendment rights, the Court struck down the Ohio statute. The Court noted that the First Amendment affords “the broadest protection” to core political expression, to ensure an unfettered exchange of ideas to bring “political and social changes desired by the people.” The Court concluded that ballot measures did not carry the threat of corruption and circumvention that would trigger Buckley’s three justifications. Scalia offered the lone dissent, nothing that the Court was ignoring its primary justification of informational interest in Buckley.

In Buckley v. American Constitutional Law Foundation Inc. (“ACLF”), the Court again addressed disclosures related to “core political speech.” AFL addressed two compelled disclosure requirements in the context of ballot initiative petitions. The first required petition circulators to wear a name badge while soliciting initiative signatures;  

151 McIntyre, 514 U.S. at 334. CHECK THIS.

152 McIntyre, 514 U.S. at 346-47 (“[D]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution”); id. at 342 (citing historically significant anonymous works such as the Federalist Papers).


154 Id. at 348-49. – CHECK THIS CITE

155 Bauer, supra note 32, at 42 (citing McIntyre, 514 U.S. at 384)(Scalia, J. dissenting)).

the other required disclosure of the names and addresses of all paid circulators.\textsuperscript{157} A unanimous Court struck down the name badge requirement, citing concerns that the requirement would chill speech and indicating that the provision lacked a sufficient state interest.\textsuperscript{158} A majority also struck down the circulator reporting provisions.\textsuperscript{159} The Court reasoned that ballot initiatives did not involve the risk of “\textit{quid pro quo} corruption present when money is paid to, or for, candidates”\textsuperscript{160} and noted that the statute’s other disclosure provisions sufficiently promoted the state’s antifraud and informational interests.\textsuperscript{161}

The Court’s exacting scrutiny melted away in \textit{McConnell v. FEC},\textsuperscript{162} however, where the Court applied a more deferential standard to uphold key portions of BCRA, “the most important piece of federal campaign finance legislation in a generation,” against a facial constitutional challenge.\textsuperscript{163} Likely because \textit{McConnell} invoked \textit{contribution} disclosures instead of \textit{core political speech} disclosures, the majority opinion paid little attention to the apparent tension created by \textit{McIntyre}, relegating it to a

\begin{itemize}
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. (emphasis added).
\item \textsuperscript{161} Id.
\item \textsuperscript{162} McConnell v. FEC, 540 U.S. 93 (2003).
\item \textsuperscript{163} Richard L. Hasen, \textit{Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns}, \textit{78 S. Cal. L. Rev.} 885, 891 (2005).
\end{itemize}
mere footnote. The Court held that BCRA’s extension of contribution disclosure rules furthered the same three interests promulgated in Buckley: deterring corruption, providing information to voters, and aiding in the enforcement of other campaign finance law. However, the Court largely ignored constitutional questions. Thus, the McConnell decision “overall displays unprecedented deference to congressional judgments and appears to apply only cursory attention to First Amendment interests that might be balanced in evaluating any campaign finance regime.”

B. Cloudy Transparency: HLOGA is Likely Constitutional But Could Be Better

Many of the critiques discussed in section III(C) (“What HLOGA Does and Why It Falls Short”) are relevant to the inquiry of whether HLOGA is constitutional. For example, the critique that HLOGA fails to apply to all bundlers is relevant in the constitutional analysis when balancing the government interests (i.e. deterring corruption) against the infringement on constitutional rights. Thus, several of the critiques discussed above are applied here under a constitutional analysis.

164 See Bauer, supra note 32, at 42 (referencing McConnell, 540 U.S. at 207, n. 88, McConnell’s lone reference to McIntyre).
165 McConnell, 540 U.S. at (Sc Ct. 690). NC.
166 Hasen, supra note 29 at 252-56.
The Supreme Court cases discussed above provide a constitutional framework to evaluate HLOGA’s bundling disclosure provision. The Court’s history regarding disclosures has been mixed, with the Court paying less deference to laws restricting core political speech and more deference to laws requiring contribution disclosures. The preliminary question, then, is whether HLOGA’s bundling provision involves core political speech, contribution disclosures or something in between. After settling on the appropriate level of scrutiny, the next step is to identify the government’s interests and weigh them against any constitutional infringement. In the past, the Court has continuously cited reducing corruption and the appearance of corruption as a compelling government interest that justifies disclosures. Likewise, the Court has held that disclosures provide useful information to voters and assist in enforcement of other campaign finance law.

1. **Level of Scrutiny**

The preliminary question is whether HLOGA’s bundling provision involves core political speech, contribution disclosures or something in between. HLOGA’s bundling provision regulates activity of lobbyists who collect or solicit contributions from individuals. This involves disclosure of contributions, but also invokes freedom of association because bundlers function by soliciting checks from others. Accordingly, HLOGA’s bundling provision is not a straightforward Buckley contribution disclosure because it targets bundler’s solicitation or collection of others’ contributions rather than the contributions themselves. The Provision is “contribution-like,” however,
because it involves individual contributions and can carry a *quid pro quo* potential similar to that of large contributions.168

The Court should not classify the Provision as impacting core political speech like the anonymous leaflets from *McIntyre* or the ballot measure initiatives from *ALCF*. Though arguably bundling individuals, like the elderly woman distributing anonymous pamphlets in *McIntyre*, have a right to anonymous political speech169 and contribute to the marketplace of ideas by associating with like-minded political individuals when soliciting money for their preferred candidate, bundling falls short of core political speech.170 Bundling does not involve the “marketplace of ideas” for bringing about the political and social changes desired by the people, but rather, more closely mirrors the contribution and expenditure disclosures upheld in *Buckley*, which required individuals and groups advocating for the election or defeat of a candidate for federal office to file

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168 *Buckley*, 424 U.S. at 26-27.

169 Daniel Hays Lowenstein & Richard L Hasen, *Election Law: Cases and Materials* 1016 (3d ed. 2004). The secrecy of the voting booth has been associated with preventing corruption of voters; likewise, some argue that a secret “donation booth” could better prevent corruption of candidates and elected officials, without infringing on first amendment speech and association rights. Going even further, some argue that donor anonymity should be *mandatory*. See generally Bruce Ackerman & Ian Ayers, *Voting with Dollars: A New Paradigm for Campaign Finance* (2002) (endorsing a combination of mandatory donation anonymity and campaign finance vouchers).

Similarly, full bundling disclosure requires campaigns to file reports detailing the name, mailing address, employer, occupation, amount of bundled money and other relevant information. Thus, the Court should apply intermediate scrutiny, requiring HLOGA’s disclosure provision to be justified by an important public interest and have a relevant correlation or substantial relation to the public interest being served.172

2. Deterring Corruption and the Appearance of Corruption

After settling on the appropriate level of scrutiny, the next step is to identify the government’s interests and weigh them against any constitutional infringement. In Buckley, the Supreme Court justified restrictions on campaign contributions as follows: “[T]he primary interest served by these limitations . . . is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”173 While this language applies to contribution limits instead of disclosures, it articulates the Court’s reasoning regarding the appearance of corruption, suggesting that the Court considers the appearance of corruption to be a serious problem. This simplifies the constitutional analysis by eliminating the inquiry of whether apparent corruption is real or imagined.174

171 Buckley, 424 U.S. at 74.
172 Id. at 16.
173 Id. at 25.
174 See generally Rodney A. Smith, supra note 72 (arguing that evidence fails to establish a compelling connection between political decision-making and campaign contributions); but see Stacy B. Gordon, supra note 72 (demonstrating that campaign
HLOGA’s bundling provision serves the government’s interest of preventing corruption or the appearance of corruption because disclosures act as a check on lobbyists and the candidates receiving their money by exposing them to public scrutiny. Section II cites several examples of illegal fundraising through bundling and the appointment of bundlers in administrations. These stories, at the very least, create an impression of impropriety. The documentation of bundling problems and the Court’s longstanding approval the government’s anticorruption interest, suggests the Court should find that HLOGA is served by the important government interest of deterring corruption and the appearance of corruption.

The next step under the constitutional analysis is to scrutinize the means-end relationship between the law and its asserted purposes. The Court should apply an intermediate scrutiny, requiring that HLOGA have a relevant or substantial relation to the government’s interest of preventing corruption and the appearance of corruption.175 The Provision applies only to lobbyist bundlers and may carry an unintended effect of actually strengthening bundling, which weakens the means-end relationship.

As discussed extensively elsewhere, several studies estimate that only three percent of known bundlers in the 2008 presidential campaign are lobbyists.176 While this percentage reflects lobbyists in presidential campaigns as opposed to all bundlers, it powerfully illustrates that lobbyist bundlers do not dominate the world of big bundling.

175 Buckley, 424 U.S. at 64.
176 Mullins, Donor Bundling Emerges As Major Ill, supra note 14.
Because lobbyist bundlers represent a fraction of all bundlers, the Provision leaves a large majority of bundling activity completely undisclosed. Further, the Provision applies only to congressional bundling, which leaves presidential bundling completely undisclosed.

Further, the “light of publicity” might actually enable corruptive influences. 177 “This will be a boon for reporters in search of stories, but it won't diminish the power of Washington's top lobbyists. Such federal disclosure . . . provides ‘free advertising’ for [lobbyists] . . . to woo special interests craving influence and lawmakers in need of campaign cash.”178 One lobbyist noted that before the Act, lobbyist bundling was the stuff of tall tales spun with fellow lobbyists over drinks, debating who brought in the biggest bundle. 179 After the Act, the lobbyist said he enjoys “full disclosure with a congressional blessing.”180 Some believe this “free advertising” might actually spur

177 Buckley v. Valeo, 424 U.S. at 67, 96 (1975)(“Disclosure laws deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”).


179 Id.

180 Id.
lobbyists to compete harder to raise money, which could undermine the Act’s effectiveness in curbing corruption and the appearance of corruption.\textsuperscript{181}

These problems weaken the means-end relationship between HLOGA’s purpose of preventing corruption and the appearance of corruption and what it actually achieves. However, while the Provision could carry the unintended negative consequence of providing increased credibility to bundlers with which they can seek greater influence, such publicity could also make politicians more careful when considering granting a favor or appointment. Because the Court should employ intermediate scrutiny, the Court would only inquire whether the law had a relevant or substantial relation to the asserted government interest.\textsuperscript{182} Accordingly, the Court should find that requiring disclosure of lobbyist bundlers has a substantial relation to reducing corruption or the appearance of corruption by exposing lobbyist bundlers and the candidates who accept their money to “the light of publicity.”\textsuperscript{183}

3. Providing Information to Voters

Under Buckley’s second justification – providing information to voters – the Provision is likely justified. The Court has repeatedly endorsed the informational interest of disclosures. HLOGA’s information about lobbyist bundlers allows voters to make better-informed decisions by disclosing which lobbyists are bundling for congressional candidates. The transparency associated with disclosure allows the


\textsuperscript{182} Buckley, 424 U.S. at 64.

\textsuperscript{183} Id. at 65.
public to track contribution trends and speak with their vote by punishing candidates who are corrupt or appear corrupt. The improvement may be slight, however, given the number of bundlers who are not lobbyists, and HLOGA’s application only to congressional elections. Further, as noted, the Provision currently suffers from vague language that could hamper meaningful reporting if interpreted unfavorably.

While generally favoring disclosure as a means of providing information to voters, the McIntyre Court concluded that a voter’s informational interest of identifying a leaflet’s writer did not justify the disclosure requirements in the statute.\textsuperscript{184} Information provided by HLOGA’s bundling provision might not be overwhelming, given the limited information the Provision provides (especially when compared to what it could have provided). However, under an intermediate scrutiny, HLOGA’s disclosure requirement has a substantial relation to increasing transparency and thereby providing information to voters. By allowing the public and the media to access information about candidates and their bundlers, the public has the capacity to make better decisions about who they choose in an election.\textsuperscript{185} Thus, while the information provided by the Act is under-

\textsuperscript{184} McIntyre, 514 U.S. at 348-49; Hasen, supra note 29 at 252.

\textsuperscript{185} See, for example, non-governmental websites that track contributions to candidates by analyzing public documents, which are created from mandatory campaign finance reporting. See generally http://www.whitehouseforsale.org and http://www.opensecrets.org. Currently, non-governmental agencies and non-profits primarily track bundling via voluntary disclosures. The Provision enables such websites to track and report lobbyist bundling activities using primary sources, namely FEC reports. The FEC also recently released its own online campaign finance tracking tool
inclusive, it is nevertheless constitutionally justified because it provides useful information to the public.

4. **Aiding in the Enforcement of Other Campaign Finance Law**

HLOGA fulfills Buckley’s final justification – assisting in the enforcement of other campaign finance laws – in several ways. A significant problem associated with bundling is that fundraisers can use it to circumvent campaign contribution limits. Related to this problem is that bundlers can coerce donors into contributing, which in addition to violating campaign finance law, also inhibits the contributors’ first amendment rights.¹⁸⁶

HLOGA’s main impact on the enforcement of existing campaign finance law is its transparency. Because HLOGA requires disclosure of lobbyist bundlers, the FEC (or the “watchdog” media) can identify bundling that violates existing campaign finance laws.¹⁸⁷ For example, the Wall Street Journal relied on publicly available FEC

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¹⁸⁷ See note 185 for a discussion of how the public might access such information.
contribution reports to break the Hsu story by tracking Hsu’s contributions to the Paws, which eventually led to Hsu’s indictment for campaign finance violations. Disclosure of lobbyist bundlers would allow the public, the media and the FEC to review bundling disclosures for these “red flags” – potential circumvention of existing campaign laws – and take legal or political action.

Under an intermediate scrutiny, the means-end relationship is likely sufficient. Arguably, lobbyists are more familiar with campaign finance laws (because bundling is part of their job) and are accordingly accustomed to following them. Thus, exposing seasoned lobbyists to scrutiny but leaving the vast majority of bundlers in the shadows perhaps does little to aid in the enforcement of other campaign finance laws overall.

After all, under the Provision, Hsu’s contributions but not bundling activities would have been a matter of public record because he was not a lobbyist. However, even if this is true, lobbyist bundlers could conceivably violate existing campaign finance laws while bundling. Thus, under the intermediate scrutiny standard HLOGA is substantially related to assisting in the enforcement of other campaign finance laws because it allows the public and government to review lobbyists bundling for campaign finance violations.

V. IN THE INTEREST OF FULL DISCLOSURE: EFFECTIVE BUNDLING LAW MUST GO BEYOND HLOGA

The modern debate over campaign finance laws is driven by two fundamentally different attitudes about the relationship between money and campaigns. One side

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189 Malbin, The Day After Reform, supra note 2 at 1.
rests upon the idea that human beings are not angels, so legislation is needed to prevent money from corrupting politicians and harming democracy by robbing voters of power. At the opposite end of the spectrum are those who view restrictions on political money as weakening democracy because they limit freedom of speech and naturally favor incumbents. Despite these seemingly polar opposite views, both philosophies favor disclosure. “Disclosure is the basic foundation on which all other [campaign finance] regulation must rest.” Thus, building an effective foundation for campaign finance reform is important.

190 The Federalist No. 51 (James Madison).
191 Malbin, The Day After Reform, supra note 2 at 1.
192 Malbin, The Day After Reform, supra note 2 at 2; see also Rodney A. Smith, supra note 71 at 61 (“placing arbitrary limits on the availability and flow of money in politics weakens rather than strengthens the democratic electoral process because it limits freedom of speech”).
193 See Rodney A. Smith, supra note 72 at 95 (arguing that full, complete and timely financial disclosure alone is the constitutionally correct approach for dealing with “the vexing problem of the perception of money in politics.”); cf. Malbin, The Day After Reform, supra note 2 at 30 (advocating comprehensive campaign finance reforms but noting that disclosure must be the foundation of such reform).
194 Malbin, The Day After Reform, supra note 2 at 1. 30 (1998).
195 The importance of building a stable foundation on a house, for example, was recognized in ancient texts. See Matthew 7:24-25 (King James) (“a wise man, which built his house on a rock. And the rain descended, and the floods came, and the winds
To approach effective bundling reform, all federal candidates must disclose all big bundlers (those raising more than $15,000 in a 6-month period). The reason Congress chose to single out lobbyists is unclear, but it may be because the Act was regarded mainly as lobbyist and ethics legislation and because the provision was only added after the bill went to the Senate. During congressional testimony regarding the bundling provision, however, an election law expert testified:

[M]uch of the money raised for federal campaigns (in particular, for presidential campaigns) is not raised by lobbyists but by friends of a candidate or by senior corporate executives who do not meet the definition of 'lobbyist.' The bundling rules only apply to contributions collected or arranged by those defined as lobbyists. If Congress is interested in a more complete disclosure provision, it would have to apply to all

blew, and beat upon that house; and it fell not: for it was founded upon a rock”); Luke 6:48 (“a man . . . who digged deep, and laid the foundation on a rock: and when the flood arose, the stream brake against that house, and could not shake it: because it was well buildeed”).


197 See 2007 Congress US S.1, 110th CONGRESS, 1st Session, S. 1, (Aug. 2, 2007 version) (containing § 204 bundling provision); but see 2007 Congress US S.1, 110th CONGRESS, 1st Session, S. 1, (Jan. 7, 2007 version) (did not contain §204 bundling provision).
**individuals, not just lobbyists.** Consequently, the bundling provision as written . . . is vague and open to misapplication.198

Arguably, laws targeting lobbyists affect those who are in the business of affecting legislation are more strongly justified under Buckley’s prong of preventing corruption and the appearance of corruption. However, lawyers, business leaders and individuals may also seek to influence legislation, even if they are not directly paid to do so. Business leaders and lawyers also have a high stake in influencing legislation because their financial profitability is directly connected to the legislation.199 Individuals also might bundle in hopes of obtaining personal favors or appointments.200 Accordingly,


199 In 2006-07, the average lobbyist made $92,827 per year (http://swz.salary.com/salarywizard), whereas the average CEO of a Standard & Poor’s 500 company made $14.78 million in total compensation per year (2007 Executive Pay Watch, http://www.aflcio.org/corporatewatch/paywatch/). Though lobbyists get paid to influence legislation, CEO’s have a huge stake in influencing legislation, both for their own bottom line and that of their companies.

contributions from law firms, businesses and individuals also have a potential for
corruption or for the appearance of corruption. Thus, the distinction between lobbyists
and other bundlers cannot be justified. To single out lobbyists simply because their
official “job” is to influence legislation, largely misses the point as well as an opportunity
to enact effective bundling disclosure.

Disclosures provide minimal infringement upon free speech, as compared with
more stringent forms of bundling legislation, such as direct restrictions on bundling or a
bundling ban. Accordingly, full bundling disclosure represents a relatively
unrestrictive means of achieving the three important public interests from Buckley. Full
disclosure would more powerfully deter corruption and avoid the appearance of
corruption by exposing all large bundlers to the “light of publicity.” Likewise, the
informational benefit to voters would be greater than HLOGA’s current provision
because the public would have a more complete understanding of where candidates

201 Lillian R. BeVier, Campaign Finance “Reform” Proposals: First Amendment Analysis,
Cato Policy Analysis No. 282, Sept. 4, 1997, at http://www.cato.org/pubs/pas/pa-282.html (arguing that ban on bundling is a clumsy solution that raises a host of
Constitutional issues and could be held to infringe on First Amendment rights because it
directly burdens the association rights of individual contributors); Bradley A. Smith,
Bundling Ban Would Unravel Free Speech, Politico, Oct. 29, 2007,
http://www.politico.com/news/stories/1007/6596 (Former FEC chairman arguing that a
ban on bundling would kill would “kill some of our political speech rights and entrench
incumbents.”)

202 Id. at 202 (quoting Buckley v. Valeo, 424 U.S. 1, 67 (1976)).
receive their money. Finally, full bundling disclosure would assist in the enforcement of other campaign laws because all bundlers would be subject to public and FEC scrutiny. Because such disclosures would include all bundlers and apply to all federal elections, the disclosures would be substantially related to important governmental interests of deterring corruption, providing information to voters, and aiding in enforcement of other campaign finance laws, thus satisfying “intermediate scrutiny.”

Creating full transparency in the bundling process would not solve all problems associated with bundling. “No campaign finance reform, however attractive, can ever work like a magic bullet.”204 Any disclosure requirement implicitly depends upon: (1) candidates and political organizations accurately reporting most of the activities and relationships of importance to voters, (2) timely and user-friendly reports, (3) interested, knowledgeable people who read, interpret and provide useful information to voters, and (4) voters who are able and willing to use the information as a basis for making an election decision.205 If any of these steps fails, the chain breaks. For example, if reporting requirements are easily sidestepped (step 1) or not consistently applied (see discussion of intermediaries in Section III), disclosure laws become powerless. Likewise, if voters care more about other issues than they care about campaign funding (step 4), they will not act upon what they learn from disclosure, which undermines the idea that disclosure will hold campaigns accountable.

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203 _Id._ at 202.

204 _Malbin, The Day After Reform, supra_ note 2 at 5.

205 _Id._ at 36.
Likewise, bundling disclosure does little to tackle broader campaign finance problems. “Changing an election system requires something more than just rewriting a statute.” Effective campaign finance reform requires a multi-pronged approach that includes disclosure, contribution limits, spending limits, and public financing. For example, the fact that candidates turn to bundlers and lobbyists to raise money at all is arguably problematic. Momentum is growing for reform to public financing legislation that would make the system for viable for candidates, thus reducing the pressure to raise cash from individuals. Public finance reform would serve to generally remove the influence of money in elections, which would have a powerful affect on bundling. While this article cannot fully discuss public financing, it references public financing to illustrate that no single approach to bundling reform is a “silver bullet.”

However, while no “silver bullet,” bundling disclosure gives voters the capacity to “connect the dots” between the flow of money and political favors and allows the FEC to identify problematic bundling activities. Further, it is exceedingly simple to implement and is a relatively unrestrictive means of bringing greater transparency to the bundling

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206 Michael J. Malbin, The Day After Reform, supra note 2 at 5.

207 Id.

process. Bundling disclosure, then, is something that can be accomplished “right here, right now” to improve bundling and the perhaps improve the public perception of the influence of money in campaigns. Thus, complete disclosure of all bundling activities should be adopted.

VI. CONCLUSION

Bundling is a powerful and useful tool for candidates. However, it also poses serious problems related to the appearance of corruption and circumvention of existing campaign finance laws. Under the Open Government and Honest Leadership Act, Congress cast light upon lobbyist bundlers. However, it left non-lobbyist bundlers, like Norman Hsu, in the safety of the shadows. Unfortunately, there are likely many, many more Norman Hsus out there. HLOGA’s bundling provision represents a positive, yet flawed first step towards tackling problems associated with bundling. Under the Buckley framework, the Act is likely constitutional, but must be expanded to be more effective. To seriously address problems associated with bundling, the bundling provision must apply to all persons (instead of the Act’s lobbyist-only “persons”) and to all federal elections (instead of the Act’s application only to congressional campaigns). Complete bundling disclosure is closely related to the government’s interests of deterring corruption and the appearance of corruption, providing information to voters, and aiding

in enforcement of other campaign finance laws. Only through complete disclosure will bundling approach a meaningful transparency.\textsuperscript{210}

\textsuperscript{210} Id.