

LOBBYING, RENT-SEEKING, AND THE CONSTITUTION

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Politicians across the political spectrum, from Barack Obama to Sarah Palin and Rand Paul, routinely castigate lobbyists for engaging in supposedly corrupt activities or having unequal access to elected officials. Since attaining office President Obama has imposed unprecedented new lobbying regulations, and he is not alone: both Congress and state and local legislative bodies have done so in recent years. At the same time, federal courts, relying upon the Supreme Court's new campaign finance decision in Citizens United v. FEC, have begun striking down lobbying regulations, including important regulations that limit campaign finance activities of lobbyists and impose a waiting period before legislators or legislative staffers may work as lobbyists. Two courts have held such laws could not be sustained on anticorruption grounds, and they are unlikely to be sustained on political equality grounds either.

This Article advances an alternative rationale which could support some, though not all, of the recent wave of new lobbying regulations: the state's interest in promoting national economic welfare. Lobbyists threaten national economic welfare in two ways. First, lobbyists facilitate rent-seeking activities. Rent-seeking occurs when individuals or groups devote resources to capturing government transfers, rather than putting them to a productive use, and lobbyists are often the key actors securing such benefits. Second, lobbyists tend to lobby for legislation that is itself an inefficient use of government resources.

Part I of this Article provides an overview of the current state of lobbying regulation and lobbying jurisprudence. Part II proposes a new national economic welfare rationale for lobbying regulation. It begins by describing the political

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science literature on how lobbying works, as well as current statistics on the extent of lobbying on the federal level and the costs of lobbyist-driven rent-seeking on the national economy. Some of the new and proposed lobbying regulations, such as antibundling provisions and anti-revolving-door provisions, could decrease the total amount of interest group rent-seeking. The state's national economic welfare interest must be balanced against the First Amendment costs of lobbying regulation in infringing on the right to speak and petition the government. I defend this interest as an important (even potentially compelling) state interest that justifies at least some new lobbying regulations against constitutional challenge.

Part III turns to objections and extensions of the argument. I respond to objections on both ends and means. On ends, I consider the circumstances in which the promotion of national economic welfare can trump First Amendment rights. On means, I consider whether there is sufficient proof that lobbying regulations are sufficiently tailored to a reduction in rent-seeking and whether, because of the "hydraulic" nature of money in politics, attempts to regulate lobbying so as to decrease rent-seeking will be easy to evade. Under extensions, I consider whether the national economic welfare rationale could be used to justify the reenactment, as suggested by Justice Stevens, of the ban on spending corporate treasury funds in candidate elections, as well as the recent SEC "pay-to-play" rule for investment advisers.

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INTRODUCTION

President Barack Obama and former Alaska Governor Sarah Palin may not have a lot in common, but they share a common enemy: “Washington lobbyists.” As a presidential candidate, Obama declared that “[i]f you don’t think lobbyists have too much influence in Washington, then I believe you’ve probably been in Washington too long.”¹ He explained his refusal to take campaign contributions from federally registered lobbyists on the grounds that lobbyists can “drown out the views of the American people.”² As President, he criticized an “army of lobbyists” spending millions of dollars in an unsuccessful attempt to block passage of a bill reforming practices in the student loan industry.³

Sarah Palin has expressed similar views. When Fox News host Sean Hannity asked Palin if campaign contributions to then-Senator Obama and other members of Congress caused lax congressional oversight over mortgage giants Fannie Mae and Freddie Mac, Palin replied that “even more significant [than contributions] is the role that the lobbyists play in an issue like this.”⁴ She ex-

1. Perry Bacon Jr., *Edwards, Obama Press Lobby Issue*, WASH. POST 44 (Aug. 6, 2007, 6:01 PM), <http://voices.washingtonpost.com/44/2007/08/edwards-obama-keep-pressing-lo.html>.

2. *DNC Bans Lobbyist Money*, MSNBC (June 5, 2008, 2:03 PM), <http://www.msnbc.msn.com/id/24989468/from/toolbar>. Obama did accept contributions from state lobbyists and from law firm members whose partners were lobbyists. See Dan Morain, *An Asterisk to Obama's Policy on Donations*, L.A. TIMES, Apr. 22, 2007, at A1, available at <http://articles.latimes.com/2007/apr/22/nation/na-obama22>.

3. Damian Paletta, *Obama Takes Another Swipe at Banks*, WALL ST. J. WASH. WIRE (Mar. 30, 2010, 1:04 PM), <http://blogs.wsj.com/washwire/2010/03/30/obama-takes-another-swipe-at-banks>.

4. Ryan Powers, *Palin Blames Lobbyists Like Her Campaign Manager for the Failure of Fannie Mae and Freddie Mac*, THINKPROGRESS (Sept. 17, 2008, 10:10 PM), <http://thinkprogress.org/2008/09/17/palin-blames-davis> (providing embedded video and analysis of Palin’s interview with Hannity).

plained her views further in a Facebook post, in which she decried “crony capitalism” in negotiations over the financial reform bill: “Does anyone doubt that firms with the most lobbyists and the biggest campaign donations will be the ones who get seats in the lifeboat?”⁵ She explained that “the big players who can afford lobbyists work the regulations in their favor, while their smaller competitors are left out in the cold.”⁶

Newly elected U.S. Senator (and Tea Partier) from Kentucky, Rand Paul, went even further in his criticism of lobbyists. He declared that “[l]ast year, over 15,000 individuals worked for organizations whose sole goal was to rip you off. No, not the mafia or Goldman Sachs, but another distinctly criminal class—Washington lobbyists.”⁷ He called upon Congress to include in all government contracts worth at least \$1 million a clause barring the contractor from engaging in any lobbying activities or making campaign contributions.⁸

The focus by both the left and right on lobbyists and the supposed evils of lobbying is understandable. Every piece of major federal legislation has been influenced by (and sometimes portions even written by) lobbyists. Lobbyists are a key means by which interest groups pursue their goals in the political arena. In difficult times like these, when people are looking for someone to blame for a financial meltdown,⁹ a failing health care system,¹⁰ or a broken blowout preventer leading to a catastrophic oil spill,¹¹ lobbyists are a convenient target.

Despite the recent popular attacks on lobbying and lobbyists, lobbying regulation traditionally has been lax, and therefore lobbying law justifiably has received scant attention from legal scholars. Before the 1990s, lobbying disclosure laws were ineffective, thanks to the Supreme Court’s chary interpretation

5. Sarah Palin, *Institutionalizing Crony Capitalism*, FACEBOOK (Apr. 22, 2010, 7:28 PM), http://www.facebook.com/note.php?note_id=382303098434.

6. *Id.*

7. Rand Paul, *The Public Trough*, AM. CONSERVATIVE, Aug. 2009, at 35, 35, available at <http://web.archive.org/web/20100326125712/http://www.randpaul2010.com/issues/a-g/campaign-finance-reform>.

8. *Id.*; see also Sam Stein, *Rand Paul: Ban Federal Contractors from Lobbying*, HUFFINGTON POST (June 7, 2010, 2:18 PM), http://www.huffingtonpost.com/2010/06/07/rand-paul-ban-federal-con_n_603178.html.

9. For example, in February 2010, Elizabeth Warren stated her belief that lobbyists were responsible for the failure to pass a financial reform bill. *Real Time with Bill Maher* (HBO television broadcast Feb. 19, 2010), available at <http://www.movieweb.com/tv/TEjWgpoqWFxjnk/elizabeth-warren-chair-congressional-oversight-panel-on-tarp>.

10. For example, Robert Reich said that the Obama Administration gave up on additional regulation in its health care bill in return for “big pharma and big insurance” agreeing “not to oppose healthcare legislation with platoons of lobbyists and millions of dollars of TV ads.” Chris McGreal, *Revealed: Millions Spent by Lobby Firms Fighting Obama Health Reforms*, GUARDIAN (Oct. 1, 2009, 11:55 AM EDT), <http://www.guardian.co.uk/world/2009/oct/01/lobbyists-millions-obama-healthcare-reform>.

11. Member of Congress Dave Loebsack (D-Iowa) explained the cause of the Gulf oil spill as “nearly a decade [of] Big Oil lobbyists [being] in charge of our energy policy.” Alex Kline, *Grassley, Harkin, and Loebsack Weigh In on the Gulf Spill*, DAILY IOWAN (June 16, 2010, 7:30 AM), <http://dailyiowan.com/2010/06/16/Metro/17536.html>.

of the scope of the 1946 Federal Regulation of Lobbying Act in *United States v. Harriss*.¹² The main interesting legal issues arose over the meaning of the term “lobbying” at the intersection of lobbying law and tax law, because certain tax-exempt organizations face limitations on their ability to “lobby”¹³ and because of shifting treatment of the tax deductibility of lobbying expenses by businesses. In 1995 Congress passed a somewhat more effective lobbying disclosure law, the Lobbying Disclosure Act,¹⁴ and that new law prompted a small amount of academic writing about whether the revised disclosure rules were constitutional and whether they could be made more effective.¹⁵ Still, the concept of lobbying and the rationales for lobbying regulation remain undertheorized.

Two emerging conflicting forces are likely to move the question of lobbying regulation to the front burner, both for scholars and the courts. On the one hand, in the past few years, government actors have enacted unprecedented new lobbying regulations.¹⁶ For example, the Obama Administration banned lobbyists from orally communicating with the administration about certain economic legislation during the recent financial crisis and required any written lobbyist comments to be posted on government websites.¹⁷ States have imposed their own limits, such as laws barring lobbyists from contributing to candidates or soliciting campaign contributions for the elected officials they lobby. On the other hand, courts, relying in part upon the Supreme Court’s new deregulatory campaign finance jurisprudence culminating in *Citizens United v. FEC*,¹⁸ have begun striking down new lobbying regulations as violating the First Amendment. In *Green Party of Connecticut v. Garfield*,¹⁹ the United States Court of Appeals for the Second Circuit struck down a Connecticut law that barred campaign contributions to state candidates by lobbyists. It also

12. 347 U.S. 612 (1954). For a history of federal lobbying regulation, see William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in THE LOBBYING MANUAL 5 (William V. Luneburg et al. eds., 4th ed. 2009); and Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals Since 1955*, in THE LOBBYING MANUAL, *supra*, at 23.

13. For an excellent and accessible treatment of lobbying, see Lloyd Hitoshi Mayer, *What Is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL’Y REV. 485 (2008).

14. Lobbying Disclosure Act of 1995 (LDA), Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601-1614 (2006 & Supp. I 2007)).

15. See, e.g., William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32 (2006).

16. For thoughtful reflections on the rise in demand for lobbying regulation, written before he was chosen as President Obama’s White House Counsel, see Robert F. Bauer, Keynote Address to Inside Counsel’s Ninth Annual Conference (May 5, 2009) (transcript available at <http://www.moresoftmoneyhardlaw.com/news.html?AID=1451>).

17. Kenneth P. Vogel, *Obama Order Worries Speech Groups*, POLITICO (Mar. 28, 2009, 7:26 AM), <http://www.politico.com/news/stories/0309/20580.html>.

18. 130 S. Ct. 876 (2010).

19. 616 F.3d 189 (2d Cir. 2010).

struck down a law barring lobbyists from engaging in fundraising. In *Brinkman v. Budish*,²⁰ a federal district court in Ohio struck down a “revolving-door” statute that barred former state legislators and staffers from lobbying the legislature for twelve months after leaving service.

The conflict between these forces will require us to grapple more deeply with both the concept of lobbying and the rationales for lobbying regulation. The activity of lobbying—trying to influence the legislative and executive branches in a particular area²¹—squarely implicates both the Free Speech and Petition Clauses of the First Amendment. Speech aimed at influencing government action is core political speech, and it would certainly be both unconstitutional and poor public policy to bar individuals from lobbying to change government action.²² The right to petition promotes accountability of elected officials by ensuring that they are informed about constituents’ preferences and the likely effects of public policy choices.

But lobbying has been associated with a variety of social ills as well. One well-known problem is that of quid pro quo corruption. In the past few years, most notably in the Jack Abramoff scandal, lobbyists, elected officials, and staffers have been arrested and convicted for violating various lobbying, reporting, and ethics laws.²³ Most commonly, lobbyists gave misreported or unreported gifts to elected officials or staffers. Relatively few lobbyists have been involved in corrupt activities, but these highly salient events can color the public’s perception of the entire profession.

Lobbying is problematic even if we put aside corruption concerns and the overheated (and usually unwarranted) criticism of lobbyists. For example, lobbying appears to skew public policy in particular directions. The reason for the skewing is that those with resources and with narrow (as opposed to diffuse) interests in particular legislation can more easily overcome collective action problems and engage in political activity such as hiring lobbyists who—usually because of their past careers as elected officials or staffers or because of their extensive fundraising activities on behalf of elected officials—have easy access to elected officials and their staff.

20. 692 F. Supp. 2d 855 (S.D. Ohio 2010).

21. I will use this as a rough, working definition of lobbying, even though legal regulation of lobbying tends to be much narrower. One important narrowing is the extent to which “grassroots lobbying,” by which organizations seek to mobilize public support for or against legislation, is exempt from regulation.

22. See *Citizens United*, 130 S. Ct. at 915 (“[T]he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.”).

23. For a vivid account of Abramoff’s activities, placed in the context of Washington lobbying more broadly, see ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* (2009). Work from the *Washington Post*’s Pulitzer Prize-winning coverage of the Abramoff scandal appears at *Investigating Abramoff—Special Report*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited Jan. 14, 2012).

When lobbying laws were confined simply to disclosure rules, courts had an easy time engaging in the balancing of individual rights of free speech and petition against state interests. The Supreme Court and lower courts have ruled clearly and repeatedly that the state has sufficiently important anticorruption and information-based reasons to compel the disclosure of lobbying-related information. But the calculus has become more difficult as legislative and executive branch actors have enacted stricter lobbying laws, and as the courts, following the Supreme Court's lead, have become more skeptical of limits on the use of money to influence political outcomes. *Green Party* and *Brinkman* both relied upon *Citizens United* in concluding that parts of state laws regulating lobbyists interfered too much with political rights and could not be justified on anticorruption grounds. The conclusion is unsurprising (though not inevitable) given *Citizens United*'s dictum endorsing a very stingy definition of corruption.²⁴

The purpose of this Article is to advance an alternative rationale which could support some (though not all) of the recent wave of new and proposed lobbying regulations: the state's interest in promoting *national economic welfare*.

Lobbyists threaten national economic welfare in two ways. First, lobbyists facilitate activity which economists term *rent-seeking*.²⁵ One common form of rent-seeking occurs when individuals or groups devote resources to capturing government transfers, rather than putting them to a productive use, and lobbyists are often the key actors securing such benefits. Second, lobbyists tend to lobby for legislation that is itself an *inefficient use of government resources*, such as funding the building of a "bridge to nowhere."

Whether it is a plea to keep an obsolete weapons program or to secure a private tax benefit for a company (often in a provision buried deep in a thousand-page bill), lobbyists are masters at capturing economic benefits or "rents" for their clients, particularly on low-salience issues about which elected officials have little personal preference. Though Justice Stevens and a few scholars writing about the state's anticorruption interest in campaign spending limits have suggested taking rent-seeking into account in the constitutional analysis,²⁶ these scholars have neither considered in depth the costs and benefits of accepting a national economic welfare rationale as a compelling interest to justify government regulation nor considered the application of the rationale to lobbying regulation.

24. See *Citizens United*, 130 S. Ct. at 909-10 (limiting the definition of "corruption" to quid pro quo corruption and holding that influence over or access to elected officials cannot be the basis for a corruption claim). Following *Citizens United*, any argument based on egalitarian concerns almost certainly would fail as well.

25. For a more precise definition of "rent-seeking," see below Part II.B.1.a.

26. See *infra* Part III.B.1.

The national economic welfare rationale for lobbying regulation focuses on the systemic negative economic costs of lobbying activity, a rationale for lobbying regulation apart from the argument that elected officials act corruptly in doing favors for lobbyists. The latter approach not only unfairly impugns the reputation of all lobbyists and elected officials in Washington; it is simply inaccurate. Indeed, the best political and legal strategy going forward for those supporting lobbying regulation is to shift talk from anticorruption or political equality concerns to the social inefficiency of lobbying practices. The courts and public are quite aware of the current precarious economic condition of the United States, especially in relation to other countries, and if the \$3.6 billion per year lobbying industry is contributing to U.S. economic decline, reasonable regulation seems both necessary and important.

Courts which might reject anticorruption and equality rationales for some lobbying regulations nonetheless ought to view the promotion of national economic welfare as a sufficiently important, even compelling, government interest so as to justify many of the new lobbying regulations. When a group pays a lobbyist with easy access to elected officials to lobby on the group's behalf, the lobbyist may facilitate socially inefficient activity. Lobbying laws that make it more difficult for interest groups to purchase access—such as anti-revolving-door laws and laws that make it harder for lobbyists to ingratiate themselves with elected officials by engaging in fundraising activities on the officials' behalf—should lead to a decrease in the total amount of inefficient legislation, and for this reason such restrictions have a good chance of passing constitutional scrutiny under the national economic welfare rationale. In contrast, courts should be more willing to strike down laws that seriously interfere with free speech or petition rights but do little to promote efficiency. For example, courts should be skeptical of laws that ban (as opposed to limit) lobbyist campaign contributions. The hardest cases under the national economic welfare rationale are laws that both have the strong potential to limit the amount of inefficient activity but also impose real First Amendment costs, such as those that bar lobbyist fundraising for candidates; in such cases, courts need to engage in careful balancing.

If courts accept the national economic welfare rationale as a sufficiently important interest to justify some lobbying laws, the rationale could have much broader implications. Most importantly, following the *Citizens United* case, the rationale could justify reestablishing limits on corporate spending in candidate elections, or at least reestablishing such limits as to government contractors.

Part I of this Article provides an overview of the current state of lobbying regulation and lobbying jurisprudence. It begins by sketching current federal lobbying disclosure and tax regulations. It then describes new and proposed state and federal regulations, including the controversial Obama Administration initiatives. Part I then turns to existing lobbying jurisprudence. It explains that courts have upheld lobbying disclosure and tax regimes on anticorruption and informational grounds. It then recounts the Supreme Court's shift in the *Citi-*

zens United case, and uses two lower court cases relying on *Citizens United* to illustrate why certain lobbying regulations may not (or may no longer) pass constitutional muster under the anticorruption rationale.

Part II proposes a new national economic welfare rationale for lobbying regulation. It begins with a sketch of the political science literature on how lobbying works, as well as current statistics on the extent of lobbying on the federal level and the costs of lobbyist-driven rent-seeking on the national economy. Given what we know about lobbying, I argue that some of the new and proposed lobbying regulations, such as antibundling provisions, could decrease the inefficiency of lobbying activity. Anti-revolving-door provisions also solve related agency problems attendant when elected officials or staffers must make official decisions while still on the government payroll but with one eye on future lobbying-related employment.

I defend the promotion of national economic welfare as an important, even compelling, state interest. Though other scholars have proposed taking rent-seeking into account *indirectly* as a procedural rule applied when reviewing and interpreting statutes, I argue for a more *direct* use of an efficiency rationale to justify lobbying regulation. The state's interest in promoting national economic welfare must be balanced against the First Amendment costs of lobbying regulation. I conclude that courts ought to accept the rationale as justifying at least some lobbying regulations against constitutional challenge.

Part III turns to objections and extensions of the argument. I respond to objections on both ends and means. On ends, I consider the circumstances in which the promotion of national economic welfare can trump First Amendment rights. On means, I consider whether there is adequate proof that lobbying regulations are sufficiently tailored to the promotion of national economic welfare and whether, because of the "hydraulic" nature of money in politics, attempts to regulate lobbying so as to improve efficiency will be easy to evade. I also reject an argument for shrinking the size of the state as a more narrowly-tailored alternative than lobbying limits. Finally, under extensions, I consider whether the national economic welfare rationale could be used to justify the reenactment, as suggested by Justice Stevens, of the ban on spending corporate treasury funds in candidate elections, as well as the recent SEC "pay-to-play" rule for investment advisers. I conclude that the current Supreme Court is unlikely to accept the rationale to justify complete bans on spending money to affect political outcomes; but the rationale could well be found to justify less onerous regulations, such as the SEC regulations, and a future Supreme Court could accept the rationale to support broader regulation as well.

I. THE STATE OF LOBBYING REGULATION AND JURISPRUDENCE

The details of federal, state, and local lobbying disclosure and tax rules are byzantine and keep many lawyers in business. My purpose here is not to provide practical details for lobbying compliance.²⁷ Rather, I aim to give the reader enough detail to understand roughly both the nature of lobbying regulation (especially federal regulation) and the courts' responses to constitutional challenges to such regulation.

A. *The State of Lobbying Regulation*1. *Federal disclosure laws and other early federal laws*

Concerns about the role of lobbyists in influencing legislative bodies are not new. Georgia, for example, outlawed lobbying of state legislators in its 1877 constitution,²⁸ while in 1890 Massachusetts imposed a requirement that lobbyists register and disclose their expenses incurred in state lobbying activity.²⁹ Federal legislation took much longer to enact, and once enacted it was hardly effective.

Political activists, members of the public, and reform-minded elected officials raised concerns about federal lobbying activity and the growth of government beginning with the *Crédit Mobilier* scandal during the Ulysses S. Grant Administration.³⁰ Periodic congressional investigations revealed unsavory lobbying practices. For example, a 1913 investigation into the activities of the National Association of Manufacturers (NAM) concluded:

NAM controlled some committee appointments, paid the chief page of the House to report conversations by House Members on the floor and in the cloakroom, and enjoyed its own office in the Capitol. Less surprising, though still disturbing, were the large sums of money the lobbyists had at their disposal to influence legislation.³¹

A 1935 congressional investigation uncovered what we would now term an "astroturf" campaign,³² whereby utility companies paid for the sending of over

27. An excellent resource to get started with practical registration and other requirements is *THE LOBBYING MANUAL*, *supra* note 12. Another very useful source is TREVOR POTTER & JOSEPH M. BIRKENSTOCK, *POLITICAL ACTIVITY, LOBBYING LAWS AND GIFT RULES GUIDE* (3d ed. 2008).

28. *See* Eskridge, *supra* note 12, at 7 n.7 (noting that criminal prohibitions on lobbying survived under Georgia law until 1992). As Eskridge notes, such a requirement today would "very probably be held to violate the First Amendment's right to petition." *Id.* at 7.

29. *Id.* at 7 & n.8.

30. *Id.* at 6-9.

31. *Id.* at 8 (footnotes omitted).

32. "Astroturfing" is "[a]n artificially-manufactured political movement designed to give the appearance of grass roots activism." *Astroturfing*, TAEGEN GODDARD'S POL. DICTIONARY, <http://politicaldictionary.com/words/astroturf> (last visited Jan. 14, 2012).

250,000 telegrams to Washington, written by utility company employees, and often forging the signature of senders.³³

Despite periodic scandal, investigation, and legislative proposals, Congress passed no generally applicable federal lobbying bills until 1946, aside from a short-lived lobbyist registration requirement that lasted only as long as the 44th Congress.³⁴ In 1946, Congress passed the Federal Regulation of Lobbying Act³⁵ “almost by accident”³⁶ as part of a larger bill and without any legislative hearings.³⁷ The law imposed registration requirements for those who lobbied Congress, as well as a requirement of quarterly reports of money spent and received for lobbying activities. But the law lacked “a workable enforcement mechanism”³⁸ and it suffered from drafting problems that “resulted in a statute of remarkable opaqueness”³⁹ leading to “very uneven” compliance.⁴⁰

The statute’s drafting problems proved to be its downfall. Responding to a constitutional challenge to the statute (on the grounds that it was both fatally vague under the Due Process Clause and a violation of the First Amendment), the Supreme Court in *United States v. Harriss*⁴¹ significantly rewrote and narrowed the statute to avoid the vagueness problem, holding the rewritten statute acceptable under the First Amendment.⁴² In rewriting the statute, the Court “crippled an already frail statute”⁴³ through an interpretation which “all but ended” federal prosecutions under the statute.⁴⁴

Though it was clear by the mid-1950s that the 1946 Act was ineffective as a disclosure mechanism,⁴⁵ it took another forty years before Congress imposed new lobbying disclosure requirements. Although Congress passed the Lobbying Disclosure Act of 1995 (LDA)⁴⁶ on a unanimous vote of 421-0 in the House and 98-0 in the Senate,⁴⁷ the bill earlier faced serious Republican Party

33. See Eskridge, *supra* note 12, at 8.

34. *Id.* at 7.

35. 2 U.S.C. §§ 261-270 (1994) (repealed 1995).

36. Eskridge, *supra* note 12, at 9.

37. See *id.* at 10.

38. *Id.* at 11.

39. *Id.*

40. *Id.*

41. 347 U.S. 612 (1954).

42. Eskridge, *supra* note 12, at 12-14.

43. *Id.* at 14.

44. *Id.*

45. Susman and Luneburg identified five perceived weaknesses in the 1946 disclosure regime, as rewritten by the Supreme Court in *Harriss*. See Susman & Luneburg, *supra* note 12, at 24. The authors trace the history of lobbying reform proposals over the forty-year period from 1955-1995. See *id.*

46. Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601-1614 (2006 & Supp. I 2007)).

47. Adam Clymer, *Congress Passes Bill to Disclose Lobbyists’ Roles*, N.Y. TIMES, Nov. 30, 1995, at A1, available at <http://www.nytimes.com/1995/11/30/us/congress-passes-bill-to-disclose-lobbyists-roles.html>.

opposition.⁴⁸ It passed after, among other things, bill supporters affirmed that the bill did not require disclosure by those engaged in “grassroots lobbying.”⁴⁹

The LDA improved on the 1946 Act in a number of ways. It applies to lobbying of congressional staffs, and not just members of Congress; it covers executive branch lobbying;⁵⁰ and it expands the scope of who needs to register as a lobbyist and what information needs to be included in filed reports.⁵¹ The LDA’s complex registration requirement⁵² is keyed to new definitions of “lobbyist,”⁵³ “client,”⁵⁴ “lobbying contact,”⁵⁵ “lobbying activities,”⁵⁶ and “communication.”⁵⁷ Along with other federal laws,⁵⁸ it provides the current framework for federal lobbying regulation.

Though the LDA certainly required more disclosure than the 1946 Act, it was still a weak enforcement regime. “[T]he disclosures required by the Act are minimal and are made in a format that is neither easily accessible nor decipherable by average citizens.”⁵⁹ Furthermore, “lobbyists need only state generally that they contacted the House of Representatives or the Senate or a particular federal agency, such as the Department of Energy at large, rather than specify individual legislators, committees, or federal employees with whom they corresponded.”⁶⁰ Congress amended the LDA in 2007 to marginally strengthen

48. *See id.*; Adam Clymer, *G.O.P. Filibuster Deals a Setback to Lobbying Bill*, N.Y. TIMES, Oct. 7, 1994, at A1; Katharine Q. Seelye, *All-Out Strategy Hobbled Lobby Bill*, N.Y. TIMES, Oct. 7, 1994, at A22.

49. Susman & Luneburg, *supra* note 12, at 30-31.

50. More specifically, it applies to lobbying of a “covered executive branch official.” William V. Luneburg & A.L. (Lorry) Spitzer, *The Lobbying Disclosure Act of 1995: Scope of Coverage*, in THE LOBBYING MANUAL, *supra* note 12, at 43, 60-61.

51. For an overview of these LDA provisions, see *id.* at 48.

52. *See id.* at 45; *see also* William V. Luneburg & A.L. (Lorry) Spitzer, *Registration, Quarterly Reporting, and Related Requirements*, in THE LOBBYING MANUAL, *supra* note 12, at 105. As to what must be included in reports, see William V. Luneburg, *Semiannual Reports on Contributions and Disbursements by Registrants and Lobbyists*, in THE LOBBYING MANUAL, *supra* note 12, at 161.

53. *See* Luneburg & Spitzer, *supra* note 50, at 48-54.

54. *See id.* at 54-55.

55. *See id.* at 55-56.

56. *See id.* at 75-77.

57. *See id.* at 56-59.

58. Other significant federal lobbying laws include the Foreign Agents Registration Act, 22 U.S.C. §§ 611-621 (2006 & Supp. I 2007); *see infra* note 77, and the Byrd Amendment, 31 U.S.C. § 1352 (2006), which “prohibits the use of funds appropriated by Congress to lobby for any type of a federal award—a federal contract, grant, loan, or cooperative agreement.” Thomas M. Susman, *The Byrd Amendment*, in THE LOBBYING MANUAL, *supra* note 12, at 349.

59. Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 520 (2007).

60. *Id.* at 521.

disclosure requirements, penalties, and gift rules, and to make data accessible for online searching.⁶¹

2. *Federal tax laws*

Federal tax laws have long touched lobbying activities. From 1915 to 1962, the Treasury Department denied business income tax deductions for “lobbying expenses.”⁶² An amendment to the Internal Revenue Code allowed for the deduction beginning in 1962,⁶³ but in 1993, Congress repealed the deduction as to certain lobbying expenses, including for “influencing legislation.”⁶⁴

In addition, the Internal Revenue Code bars or limits certain § 501(c) organizations in their lobbying activities. Section 501(c)(3) organizations are very limited in the amount of lobbying they may do without jeopardizing their tax-exempt status.⁶⁵ An organization that engages in prohibited lobbying loses its tax exemption; moreover, donations to the organization are no longer deductible and the organization (and its managers) face additional excise taxes.⁶⁶ Social welfare groups organized as § 501(c)(4) entities may operate as “action” organizations and “may have, as a primary purpose, an aim that can be only accomplished by legislation, and they may lobby without limit to accomplish such a purpose.”⁶⁷ However, candidate-related activity may not become the “primary purpose” of the action organization,⁶⁸ and since the enactment of the LDA in 1995, § 501(c)(4) entities that engage in lobbying are ineligible for federal awards, grants, and loans.⁶⁹ Though § 501(c)(4) organizations are tax

61. *See infra* Part I.A.3.

62. Timothy W. Jenkins & A.L. (Lorry) Spitzer, *Internal Revenue Code Limitations on Deductibility of Lobbying Expenses by Businesses and Trade Associations*, in *THE LOBBYING MANUAL*, *supra* note 12, at 377, 377-78.

63. *Id.* at 378.

64. *Id.* at 377, 380-81. The Omnibus Budget Reconciliation Act of 1993 defined “influencing legislation” as “any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation.” Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13222(a), 107 Stat. 312, 478 (codified as amended at 26 U.S.C. § 162(e)(4)(A) (2006)).

65. Under § 501(c)(3) “no substantial part of the activities of [the organization may include] carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)).” 26 U.S.C. § 501(c)(3). Subsection (h), in turn, gives certain § 501(c)(3) organizations the option of using an “expenditure test” to allow the organization to make certain lobbying expenditures within dollar or formula limits. *See id.* § 501(h).

66. Timothy W. Jenkins & A.L. (Lorry) Spitzer, *Internal Revenue Code Limitations on Lobbying by Tax-Exempt Organizations*, in *THE LOBBYING MANUAL*, *supra* note 12, at 393, 393-94.

67. *Id.* at 397.

68. *See* Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 *ELECTION L.J.* 363, 382 (2011).

69. Jenkins & Spitzer, *supra* note 66, at 400 n.52.

exempt, contributions to such organizations are not deductible.⁷⁰ Section 501(c)(3) organizations often form § 501(c)(4) affiliates to engage in lobbying activities.⁷¹ Given these complex rules, tax scholars have devoted considerable attention to the question of what constitutes “lobbying” for purposes of tax laws.⁷²

3. *New federal laws and regulations (including Obama Administration initiatives)*

In 2007, Congress again revisited lobbying regulation, prompted in large part by the Jack Abramoff scandal.

Among other exploits, Abramoff arranged lavish trips to the United Kingdom and the South Pacific for [former House Majority Leader Tom] Delay; one such outing involved an outlay of \$70,000 to pay for Delay, his wife, and two aides to visit Scotland and play golf at the famous St. Andrews Links. He also allegedly enriched himself at the expense of various Native American tribes he represented; at one point he worked both for and against a tribe with regard to approval for a casino.⁷³

Abramoff eventually “pleaded guilty to charges of fraud, tax evasion, and conspiracy to bribe public officials.”⁷⁴ A “legislative stampede” followed.⁷⁵

In 2007, Congress passed the Honest Leadership and Open Government Act (HLOGA)⁷⁶ in the wake of the Jack Abramoff scandal. HLOGA strengthened the LDA through “expanded disclosure of lobbying coalitions; a new reporting system for lobbyist contributions and disbursements to or on behalf of legislative and executive branch officials and candidates for federal office;

70. David C. Vladeck, *Special Considerations for Lobbying by Nonprofit Corporations*, in *THE LOBBYING MANUAL*, *supra* note 12, at 401, 401-02.

71. “However, it is very important that the two entities be created and maintained as separate and that the Section 501(c)(3) organization not subsidize the Section 501(c)(4) organization’s lobbying activities.” Jenkins & Spitzer, *supra* note 66, at 397. For the limits on lobbying by other § 501(c) organizations, see *id.* at 397-98.

72. See, e.g., Mayer, *supra* note 13; Vladeck, *supra* note 70, at 406-11.

73. Susman & Luneburg, *supra* note 12, at 32. For a detailed and colorful look, see also KAISER, *supra* note 23, at 16-20.

74. Susman & Luneburg, *supra* note 12, at 34. Regarding Abramoff’s downfall, Potter and Birkenstock comment:

It is notable that despite the degree to which Abramoff and his associates are perceived to be emblematic of the worst kinds of abuses of the lobbying profession, neither he nor any other defendants from the private sector have even been charged with any violations of the LDA or the Congressional ethics rules.

POTTER & BIRKENSTOCK, *supra* note 27, at 13 n.2. A more recent scandal emerged over lobbying work connected to the late Democratic representative John Murtha. See Eric Lichtblau, *Lobbyist Charged with Hiding Political Donations*, N.Y. TIMES, Aug. 6, 2010, at A12, *available* at <http://www.nytimes.com/2010/08/06/us/politics/06indict.html>.

75. Susman & Luneburg, *supra* note 12, at 34-35.

76. Honest Leadership and Open Government Act of 2007 (HLOGA), Pub. L. No. 110-81, 121 Stat. 735 (codified in scattered sections of 2 and 18 U.S.C.).

[and] improved public access to information disclosed under the LDA and the Foreign Agents Registration Act.”⁷⁷ HLOGA made reporting more frequent and reports easier for the public to search, but it did not do anything to require more detailed information about the specific members of Congress, staff, or federal agency officials who were lobbied on particular bills or issues.⁷⁸

HLOGA also (1) extended the waiting period from one year to two years for senators (though not their staffers) to work as lobbyists;⁷⁹ (2) required reports on lobbyists’ “bundling” of campaign contributions for federal candidates;⁸⁰ and (3) banned gifts from lobbyists to members of Congress and staffers.⁸¹ The first requirement arguably caused Senator Trent Lott to retire from the Senate earlier than planned, so that he could begin a major lobbyist venture with former Senator John Breau under a one-year, rather than two-year, waiting period.⁸² Representative Van Hollen explained that the basis for the bundling disclosure provision was to guard against the use of bundling by a lobbyist to enhance the lobbyist’s stature and thereby “exert an undue influence over public policy.”⁸³

After taking office in 2009, President Obama rolled out a series of new lobbying regulations, which, among other things, provided that: (1) lobbyists

77. Susman & Luneburg, *supra* note 12, at 37. For more on the requirements of the Foreign Agents Registration Act, see Ronald I. Meltzer, *Foreign Agents Registration Act*, in THE LOBBYING MANUAL, *supra* note 12, at 307.

78. For an assessment of the limitations of the HLOGA disclosure requirements, see William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85 (2009).

79. See Robert G. Vaughn, *Post-Employment Restrictions and the Regulation of Lobbying by Former Employees*, in THE LOBBYING MANUAL, *supra* note 12, at 525, 540-43.

80. For the details of the reporting requirements, see Trevor Potter & Matthew T. Sanderson, *Lobbyist Bundling of Campaign Contributions*, in THE LOBBYING MANUAL, *supra* note 12, at 471. Lobbyists also face reporting requirements related to political action committees (PACs) under their control. See Joseph E. Sandler, *Lobbyists and Election Law: The New Challenge*, in THE LOBBYING MANUAL, *supra* note 12, at 751, 763.

81. Congress has steadily limited the gifts that members of Congress can receive, with somewhat different rules applying to House and Senate gifts. In HLOGA, both the House and Senate barred most gifts from lobbyists, lobbying firms, and entities that employ or retain lobbyists. For a history, see Robert F. Bauer & Rebecca H. Gordon, *Congressional Ethics: Gifts, Travel, Income, and Post-Employment Restrictions*, in THE LOBBYING MANUAL, *supra* note 12, at 477, 478-80. HLOGA also imposed new limitations on travel paid for by lobbyists, *see id.* at 494-98, and honoraria and related outside income, *see id.* at 498-504. For the limitations on gifts and outside compensation on executive branch officials, see Kathleen Clark & Beth Nolan, *Restrictions on Gifts and Outside Compensation for Executive Branch Employees*, in THE LOBBYING MANUAL, *supra* note 12, at 513. There are also ethical rules applying to lawyer lobbyists. See Thomas Ross, *Ethics Law and the Lawyer/Lobbyist*, in THE LOBBYING MANUAL, *supra* note 12, at 689.

82. Lott denied that this was why he left the Senate before the end of his term. See Adam Nossiter & David M. Herszenhorn, *Mississippi’s Lott to Leave Senate Seat Held Since ’88*, N.Y. TIMES, Nov. 27, 2007, at A20.

83. Luneburg, *supra* note 78, at 112 (quoting 153 CONG. REC. H9209 (daily ed. July 31, 2007)).

could not communicate orally with the administration regarding the economic stimulus package;⁸⁴ (2) absent a waiver, lobbyists could not serve as a presidential appointee;⁸⁵ (3) no one working for the Obama Administration could lobby the administration for the remainder of its term in office;⁸⁶ and (4) lobbyists could not be appointed to federal advisory panels.⁸⁷ These new rules provoked controversy among lobbyists and others in Washington.

Facing some criticism of these lobbying rules,⁸⁸ the administration changed some aspects of the presidential directive on communications over the stimulus package, applying it beyond registered lobbyists but narrowing the time frame to which it applied.⁸⁹ It defended its rules on presidential appointments by stating that the concern prompting the rule was “not about the few corrupt lobbyists or specific abuses by the profession, but rather . . . the system as a whole. For too long, lobbyists and those who can afford their services have held disproportionate influence over national policy making.”⁹⁰ The policies were geared to “level the playing field” so that “all Americans and not just

84. Memorandum on Ensuring Responsible Spending of Recovery Act Funds, 2009 DAILY COMP. PRES. DOC. 177 (Mar. 20, 2009).

85. Exec. Order No. 13,490, 3 C.F.R. 193 (2010), sets forth the rules, as well as the provisions for obtaining a waiver. See WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION 44 (2010 Supp.) (discussing Obama administration waivers); see also Richard W. Painter, *President Obama's Progress in Government Ethics*, 26 CONST. COMMENT. 195, 200 (2010) (discussing the difficulty of crafting a good waiver policy). The Office of Management and Budget (OMB) recently released for notice and comment a proposed final guidance to put this policy into place. See Proposed Guidance on Appointment of Lobbyists to Federal Boards and Commissions, 75 Fed. Reg. 67,397 (Nov. 2, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-27621.pdf>. Lobbyists reacted negatively to the OMB announcement. See Kevin Bogardus, *Lobbyists Group Denounces OMB Guidance to Ban K Street from Boards*, HILL ON MONEY (Nov. 24, 2010 3:04 PM), <http://thehill.com/blogs/on-the-money/personnel-notes/130683-lobbyists-group-blasts-omb-guidance-to-ban-k-street-from-advisory-boards>.

86. ESKRIDGE ET AL., *supra* note 85, at 45. For an overview of the Obama initiatives, see James A. Thurber, *Changing the Way Washington Works? Assessing President Obama's Battle with Lobbyists*, 41 PRESIDENTIAL STUD. Q. 358 (2011).

87. Memorandum on Lobbyists on Agency Boards and Commissions, 2010 DAILY COMP. PRES. DOC. 513 (June 18, 2010).

88. See Painter, *supra* note 85, at 201-03 (discussing lobbyists' dissatisfaction with the rules and with Norm Eisen, then the President's chief ethics counsel).

89. See Norm Eisen, *Update on Recovery Act Lobbying Rules: New Limits on Special Interest Influence*, WHITE HOUSE (May 29, 2009, 5:35 PM), <http://www.whitehouse.gov/blog/Update-on-Recovery-Act-Lobbying-Rules-New-Limits-on-Special-Interest-Influence>; Josh Gerstein, *WH Expands, Narrows Stimulus Lobbying Ban*, POLITICO (May 29, 2009, 11:31 PM), http://www.politico.com/blogs/joshgerstein/0509/WH_expands_narrows_stimulus_lobbying_ban.html.

90. Norm Eisen, *A Washington That Is More Reflective of All of America*, WHITE HOUSE BLOG (Nov. 9, 2009, 5:10 PM EDT), <http://www.whitehouse.gov/blog/2009/11?page=5>.

those with access to money or power” would have Washington address their concerns,⁹¹ and to “reduc[e] the undue influence of special interests.”⁹²

4. *The variety of state lobbying laws*

States vary widely in their approach to lobbying. Many states have long imposed limitations or bans on campaign contributions, at least during some time periods, by lobbyists to elected officials.⁹³ A few states bar lobbyists from serving in fundraising roles in campaigns.⁹⁴ Forty-three states ban contingent-fee lobbying, whereby lobbyists receive a percentage of any contracts a lobbyist helps procure for a client.⁹⁵ Many states also impose some kind of anti-revolving-door provision. These vary along three dimensions: the length of time for which they apply (typically one or two years following government service), the nature of the lobbying restriction (sometimes the restrictions are limited only to matters in which the elected official or staff member was involved while in government), and whether it applies only to lobbying for compensation.⁹⁶

5. *Proposals for additional lobbying regulations*

After a year of deliberations, a bipartisan task force of lawyers, lobbyists, academics, and representatives from public interest organizations, organized by the ABA Administrative Law Section, recommended changes in federal lobbying law.⁹⁷ Significantly, the task force recommended “that an individual lobbyist should be prohibited from conducting certain fundraising activity to support the campaign of any Member of Congress, or candidate for Congress, with

91. *Id.*

92. Memorandum on Lobbyists on Agency Boards and Commissions, *supra* note 87, at 1.

93. See Sandler, *supra* note 80, at 756-57.

94. See, e.g., ALASKA STAT. § 24.45.121(a)(8) (2011).

95. See *50 State Chart: Contingency Fees*, NAT’L CONF. ST. LEGISLATURES (Dec. 2010), <http://www.ncsl.org/default.aspx?tabid=15351>. On the complicated federal approach to contingent-fee lobbying, see Thomas M. Susman & Margaret H. Martin, *Contingent-Fee Lobbying*, in THE LOBBYING MANUAL, *supra* note 12, at 669. For an argument against the constitutionality of banning such lobbying, see Stacie L. Fatka & Jason Miles Levien, Note, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559 (1998).

96. For details, see Memorandum from Jason Campbell to author, Lobbying Regulations and the Constitution (Aug. 25, 2010) (on file with author).

97. See TASK FORCE ON FED. LOBBYING LAWS, ABA, LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS (2011) [hereinafter ABA TASK FORCE REPORT], available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/administrative_law/lobbying_task_force_report_010311.authcheckdam.pdf.

whom that lobbyist has made a 'lobbying contact' within the past two years."⁹⁸ Further, though lobbyists could continue to contribute to candidates, "a lobbyist's biennial aggregate contributions should be limited to half of the amounts allowed to other citizens by this statutory framework."⁹⁹ Apollonio et al. similarly advocate a ban on lobbyist fundraising.¹⁰⁰ They further advocate that the government provide public funding "for lobbyists that represent diffuse, non-corporate interests."¹⁰¹ Heather Gerken and Alex Tausanovitch have expanded on this idea, arguing for public subsidies of lobbying activities as a means of leveling up.¹⁰² Finally, Senator Rand Paul has proposed that Congress include in all government contracts worth at least \$1 million a clause barring the contractor from engaging in any lobbying activities or making campaign contributions.¹⁰³

98. *Id.* at 20. "[C]overed 'fundraising' activity would include hosting or organizing fundraising events, serving on a campaign fundraising committee, sending communications (phone, print, email) soliciting contributions for the Member's campaign, or participating in the 'bundling' of campaign contributions for the Member's campaign." *Id.*

99. *Id.* at 21. The report continues: "If a limitation on the size of lobbyists' donations to individual campaigns should prove necessary, as a practical matter, in order to implement these aggregate caps effectively, that step should also be considered." *Id.* The ABA Administrative Law Section voted to strip this provision from the recommendations sent on to the ABA House of Delegates. In the summer of 2011, the ABA House of Delegates voted to adopt a resolution based on the task force's recommendations. Among other things, the ABA advocated that Congress bar federally registered lobbyists from "engag[ing] in campaign fundraising for a member of Congress whom he or she has lobbied during the past two years." House of Delegates, *Resolution 104B: Urges Strengthening of Federal Lobby Laws*, ABANow (2011), <http://www.abanow.org/2011/07/2011am104b>.

100. See Dorie Apollonio et al., *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 48 (2008); see also KAISER, *supra* note 23, at 357 ("Congress could ban any registered lobbyist and any institution that hires a registered lobbyist from raising or soliciting contributions for federal candidates and officeholders."); *id.* at 358 (advocating lengthening anti-revolving-door provisions); RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE 257 (2009) ("It is, however, meaningless to criminalize buying a fifty-dollar lunch or cigarbox for a lawmaker, yet allow a lobbyist to raise \$50,000 in campaign contributions for the same lawmaker and invite clients to meet the lawmaker. Prohibiting the former may even be a smokescreen for ignoring the latter.").

101. Apollonio et al., *supra* note 100, at 48.

102. See, e.g., Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1165-67 (2011).

103. See Paul, *supra* note 7, at 35.

B. Constitutional Jurisprudence Concerning Lobbying Regulation

1. *The traditional approach of the courts*¹⁰⁴

The Supreme Court has rarely had to address issues related to lobbying. When it has, it has done so in the context of First Amendment free speech challenges to disclosure law or tax law.¹⁰⁵ Only lower courts have addressed the constitutionality of other lobbying regulations.

a. *Disclosure*

The Court has held that government-compelled *disclosure* of lobbying information is generally constitutional. In *United States v. Harriss*,¹⁰⁶ the Court, after narrowly construing the 1946 Lobbying Act,¹⁰⁷ held that the state's interest in providing information to legislators justified the disclosure requirements.¹⁰⁸ While *Harriss* relied on the state's interest in providing information

104. This Subpart draws upon the history of lobbying regulation recounted in Ellen P. Aprill & Richard L. Hasen, *Lobbypalooza*, AM. INT., Jan.-Feb. 2011, at 62, available at <http://www.the-american-interest.com/article-bd.cfm?piece=911>.

105. There has been considerable academic commentary on the meaning and reach of the Petition Clause in the First Amendment. See Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993); Steven A. Browne, Note, *The Constitutionality of Lobbying Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL RTS. J. 717 (1995); Fatka & Levien, *supra* note 95. The Supreme Court thus far has not viewed the Petition Clause as providing any greater or different protection than the Free Speech Clause of the First Amendment. See *McDonald v. Smith*, 472 U.S. 479 (1985). However, the Court recently clarified that point:

This Court's opinion in *McDonald v. Smith* has sometimes been interpreted to mean that the right to petition can extend no further than the right to speak; but *McDonald* held only that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition. . . . There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.

Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2495 (2011) (citation omitted). On claims that the Petition Clause requires greater constitutional protection for lobbying activities, see, for example, Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149 (1993). See also Jan Witold Baran, *Can I Lobby You? Don't Let One Bad Abramoff Spoil the Whole Bunch*, WASH. POST, Jan. 8, 2006, at B1.

106. 347 U.S. 612 (1954).

107. See *supra* text accompanying notes 41-44.

108. The Court stated:

to lawmakers about lobbying activities as a rationale for disclosure law, today that rationale “is at best a secondary consideration.”¹⁰⁹ Indeed, the LDA “findings” do not mention this interest,¹¹⁰ focusing instead on public awareness of lobbyist activities and public confidence.¹¹¹ Congress found that “effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.”¹¹² Practically speaking, challenges to lobbying disclosure laws today are unlikely to rely on the *Harriss* discussion (with its endorsement of an equality rationale no doubt undermined by *Citizens United*) and are more likely to be decided under campaign finance law jurisprudence about disclosure.¹¹³ Garrett et al. conclude that the disclosure provisions of the LDA are likely constitutional under the anticorruption, appearance of corruption, and information interests recognized in the campaign finance disclosure cases.¹¹⁴

Recently, the Supreme Court in *Citizens United* cited approvingly to *Harriss*'s upholding of lobbying disclosure rules.¹¹⁵ In addition, the United States Court of Appeals for the District of Columbia Circuit rejected a challenge the National Association of Manufacturers brought to a disclosure provision of HLOGA.¹¹⁶ That provision requires disclosure by any organization that contri-

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.

Harriss, 347 U.S. at 625. The Court further rejected hypothetical claims that the Act would deter individuals from engaging in lobbying. *Id.* at 626.

109. Elizabeth Garrett et al., *Constitutional Issues Raised by the Lobbying Disclosure Act*, in THE LOBBYING MANUAL, *supra* note 12, at 197, 198.

110. *See id.*

111. *See* 2 U.S.C. § 1601 (2006).

112. *Id.*

113. *See* Garrett et al., *supra* note 109, at 198.

114. *Id.* at 201. They suggest that had the LDA or HLOGA extended to grassroots lobbying, it would have presented a closer constitutional question. *Id.* at 205. Further, they believe that groups facing harassment for their lobbying activities might be entitled to an “as-applied” exemption from disclosure provisions, analogous to the exemption recognized in campaign finance law. *See id.* at 206-08; *see also* Doe v. Reed, 130 S. Ct. 2811, 2821 (2010); *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010). Ironically, an attack on the disclosure rules would most likely succeed by focusing on the *ineffectiveness* of the lobbying rules. *See* Garrett et al., *supra* note 109, at 207-08.

115. *Citizens United*, 130 S. Ct. at 915 (“[T]he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.”); *see also* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 356 n.20 (1995) (“The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption.”).

116. Nat’l Ass’n of Mfrs. v. Taylor, 582 F.3d 1 (D.C. Cir. 2009).

butes more than \$5000 and actively participates in another organization's lobbying efforts.¹¹⁷ The appeals court held that the government had a compelling interest in revealing to the public those who were behind the funding of lobbying activities.¹¹⁸ Following well-trodden campaign finance law, the court held that a group could be entitled to an as-applied exemption from disclosure requirements if it could demonstrate that it would be subject to government or other harassment for revealing its lobbying activities.¹¹⁹

b. *Tax laws*

The Supreme Court has issued three major opinions at the intersection of tax law and lobbying law. In *Textile Mills Securities Corp. v. Commissioner*,¹²⁰ the Court upheld a Treasury Department regulation barring the deduction of lobbying costs as a business expense. It found that the regulation did not "contravene[] any Congressional policy. Contracts to spread such insidious influences through legislative halls have long been condemned."¹²¹ Eighteen years later, in *Cammarano v. United States*,¹²² the Court rejected, among other arguments, a First Amendment challenge to nondeductibility rules for business lobbying expenses. "Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets"¹²³ The Court explained that the tax treatment was valid based upon Congress's determination that "since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."¹²⁴

In *Regan v. Taxation with Representation of Washington*,¹²⁵ a nonprofit ideological group that wished to engage in lobbying activities but keep its § 501(c)(3) tax-exempt status argued that the lobbying prohibition on such groups violated its First Amendment rights. Explaining that both tax exemptions and tax deductions are a form of government subsidy, the Supreme Court held that there was no First Amendment violation. Relying on its earlier opinion in *Cammarano*, the Court held that Congress's failure to subsidize lobbying through its tax laws did not amount to a First Amendment violation:

117. 2 U.S.C. § 1603(b)(3) (2006 & Supp. I 2007).

118. *Taylor*, 582 F.3d at 16.

119. *Id.* at 20-21.

120. 314 U.S. 326 (1941).

121. *Id.* at 338 (footnote omitted).

122. 358 U.S. 498 (1959).

123. *Id.* at 513.

124. *Id.*

125. 461 U.S. 540 (1983).

It appears that Congress was concerned that exempt organizations might use tax-deductible contributions to lobby to promote the private interests of their members. It is not irrational for Congress to decide that tax-exempt charities . . . should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying.¹²⁶

Lloyd Mayer believes that “all of the federal laws governing lobbying and lobbyists appear now to share a common purpose: to limit both the actual and perceived influence of interest groups on government actions.”¹²⁷ Mayer further explains that the government’s interest in “ensuring a level playing field for all those seeking to influence government action by any branch, a purpose that has been cited in the past with respect to at least the tax rules[,] . . . appears to have been supplanted by interest group influence concerns, particularly in recent years.”¹²⁸

c. *Other lobbying laws*

Though the Supreme Court has not considered the constitutionality of other types of lobbying laws, lower courts have ruled upon a number of challenges. In the past, most courts have tended to uphold lobbying regulations. Courts have upheld bans on lobbyist contributions to legislators,¹²⁹ bans on lobbyist contingency fees,¹³⁰ anti-revolving-door statutes,¹³¹ and restrictions on lob-

126. *Id.* at 550 (citations omitted). Justice Blackmun, for himself and Justices Brennan and Marshall, stated his belief that lobbying is an activity protected by the First Amendment, and that the only reason the tax provision did not impose an unconstitutional condition upon § 501(c)(3) organizations is the ease with which they could create a § 501(c)(4) affiliate. *Id.* at 551-53 (Blackmun, J., concurring).

127. Mayer, *supra* note 13, at 507-08.

128. *Id.* at 508.

129. *See, e.g.*, N.C. Right to Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999) (applying strict scrutiny, and upholding North Carolina ban on lobbyist contributions to legislators during legislative sessions); Preston v. Leake, 743 F. Supp. 2d 501 (E.D.N.C. 2010) (applying closely drawn scrutiny, and upholding ban on lobbyist contributions to state legislators), *aff’d*, 660 F.3d 726 (4th Cir. 2011); Inst. of Governmental Advocates v. Fair Political Practices Comm’n, 164 F. Supp. 2d 1183 (E.D. Cal. 2001) (applying closely drawn scrutiny, and upholding ban on lobbyist contributions to candidates for offices the lobbyist is registered to lobby); State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999) (applying closely drawn scrutiny, and upholding ban on lobbyist contributions to members of assembly except allowing contributions to candidates in lobbyist’s home district); Kimbell v. Hooper, 665 A.2d 44 (Vt. 1995) (applying closely drawn scrutiny, and upholding Vermont ban on contributions to assembly members during legislative session). *But see* Fair Political Practices Comm’n v. Superior Court, 599 P.2d 46 (Cal. 1979) (applying closely drawn scrutiny, and holding a broad ban on lobbyist contributions to all state elected officials unconstitutional).

130. *See, e.g.*, Fla. League of Prof’l Lobbyists v. Meggs, 87 F.3d 457, 462 (11th Cir. 1996); Associated Indus. of Ky. v. Commonwealth, 912 S.W.2d 947, 951 (Ky. 1995). *But see* Mont. Auto. Ass’n v. Greely 632 P.2d 300, 308 (Mont. 1981) (striking down Montana anti-contingency-fee law on First Amendment grounds).

131. *See* United States v. Nasser, 476 F.2d 1111, 1115 (7th Cir. 1973).

byists serving on campaign committees¹³² or bundling campaign contributions.¹³³

2. *The changing tide: constitutional jurisprudence concerning lobbying regulation in a post-Citizens United world*

The Court's shifting interpretation of First Amendment speech rights, and in particular its campaign finance jurisprudence, are beginning to have an effect on how lower courts have considered challenges to lobbying restrictions. Though it is early in the development of this jurisprudence, there are signs that many new and proposed lobbying regulations going beyond disclosure could fail to survive constitutional scrutiny under the traditional anticorruption justification.

This is not the place to canvass the details of the seismic shift in the Supreme Court's campaign finance jurisprudence.¹³⁴ It is enough here to note that in a series of recent cases, the Supreme Court has expressed deep skepticism about the constitutionality of limits on the use of money to influence political outcomes. Of these cases, the most important one is *Citizens United v. FEC*,¹³⁵ in which the Court endorsed in dicta a very stingy definition of corruption that excludes ingratiation and the sale of access, and rejected the idea that political equality could justify regulations limiting political speech.¹³⁶ Both of these conclusions endanger lobbying regulations that reach beyond disclosure rules (or tax law), as two recent lower court cases show.

In *Green Party of Connecticut v. Garfield*,¹³⁷ the United States Court of Appeals for the Second Circuit struck down two provisions of Connecticut law related to lobbyists. First, the court, applying closely drawn scrutiny, struck down as a First Amendment violation a ban on campaign contributions to state-elected officials imposed on state-registered lobbyists and their families.¹³⁸ Contrasting the state's extensive evidence of corruption related to government contractors, which the court said justified the state's ban on contributions by contractors and their families, the court held the evidence of actual corruption

132. See *Md. Right to Life State Political Action Comm. v. Weathersbee*, 975 F. Supp. 791, 797 (D. Md. 1997) (applying strict scrutiny, and upholding law barring lobbyists from serving on political fundraising committees).

133. See *Preston*, 743 F. Supp. 2d at 503, 508-09 (applying closely drawn scrutiny, and upholding North Carolina state law that banned both lobbyist contributions to state candidates as well as lobbyist bundling activities). On appeal, the Fourth Circuit upheld the law banning lobbyist contributions but did not address the ban on lobbyist bundling contained in the law. See *Preston*, 660 F.3d 726.

134. For my most recent distillation, see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

135. 130 S. Ct. 876 (2010).

136. See *id.* at 910, 913; see also *id.* at 919-24 (Roberts, C.J., concurring).

137. 616 F.3d 189 (2d Cir. 2010).

138. *Id.* at 205-07.

insufficient as to lobbyists. Relying on *Citizens United*, the court rejected evidence suggesting that the public “generally distrust[s] lobbyists and the ‘special attention’ they are believed to receive from elected officials.”¹³⁹ Further, “[i]nfluence and access . . . are not sinister in nature.”¹⁴⁰ The court concluded that a limit, rather than ban, on lobbyist contributions would “adequately address” anticorruption concerns.¹⁴¹

The court similarly rejected a law banning lobbyists from collecting campaign contributions for elected officials. Again relying on recent Supreme Court campaign finance cases, the court held that this was a ban on speech, subject to strict scrutiny.¹⁴² The court then held that under *Citizens United* the anticorruption interest was not a compelling interest which could justify limitations on spending.¹⁴³ Further, and again relying on *Citizens United*, the court rejected the idea that “an individual might secure a political favor by recommending that another person make a campaign contribution.”¹⁴⁴

After noting that the district court had upheld the antisolicitation provision on the grounds that a lobbyist or contractor might “organize a large fundraising event in exchange for a candidate’s assistance in securing a lucrative state contract,”¹⁴⁵ the court noted that there were “good reasons to think that the threat of bundling does not provide a compelling justification for the solicitation bans, especially with regard to lobbyists.”¹⁴⁶ It held that in any case the law was not narrowly tailored because it prohibited not just organized bundling activities but also “small-scale solicitation efforts” including a lobbyist recommending to his mother to make a contribution to a state candidate.¹⁴⁷ Further, if the problem with bundled lobbyist contributions was the danger of solicitation from clients, the law could have more narrowly addressed only those solicitations.¹⁴⁸

In *Brinkman v. Budish*,¹⁴⁹ a federal district court, applying strict scrutiny, struck down on First Amendment grounds a law barring former members of the state assembly and their staff from lobbying the state assembly. Relying on *Citizens United*, the court held that, as applied to lobbying for compensation, the anti-revolving-door statute could potentially be justified on anticorruption

139. *Id.* at 206.

140. *Id.* at 207.

141. *Id.*

142. *Id.* (“Whatever may be said about whether money is speech, *speech* is speech, even if it is speech about money.” (citation omitted)).

143. *Id.* at 208-09. On this point, it appears that the court misread *Citizens United*. The Supreme Court held that independent spending could not corrupt or create the appearance of corruption, not that corruption was an insufficient interest to justify such limits. See Hasen, *supra* note 134, at 596.

144. *Green Party*, 616 F.3d at 208.

145. *Id.* at 209.

146. *Id.*

147. *Id.*

148. *Id.*

149. 692 F. Supp. 2d 855 (S.D. Ohio 2010).

grounds. But uncompensated lobbying could not be justified on anticorruption grounds or on the alternative grounds of “level[ing] the playing field,” a justification tantamount to an equality argument which has been rejected by the Supreme Court.¹⁵⁰ As to compensated lobbying, the court held the Ohio law was not narrowly tailored to the prevention of corruption. First, the court held the state did not present sufficient evidence to demonstrate the basis for a twelve-month limitation. “Defendants have not established that the danger of *quid pro quo* corruption or the appearance of corruption is significantly lessened if the former legislator is permitted to lobby the General Assembly one year and one day after leaving the legislature.”¹⁵¹ Second, the statute was too broad in covering matters regardless of whether the former official or staff member had personally participated in formulating policy on the issue and “had the opportunity to gain ‘inside’ information.”¹⁵² Further, the law applied to both compensated and uncompensated lobbying,¹⁵³ and it was underinclusive in not restricting “other behaviors or activities . . . that might give rise to actual or perceived corruption, such as the acceptance of gifts or offers for employment unrelated to lobbying.”¹⁵⁴

These two cases show the difficulty of relying upon the traditional anticorruption interest to justify lobbying regulations that go beyond disclosure or special tax treatment for lobbying. To be sure, not all courts will follow *Green Party* and *Brinkman*. Certainly there are ways courts could write reasonable opinions upholding various lobbying regulations on anticorruption grounds.¹⁵⁵ In addition, the Second Circuit in *Green Party* suggested that more narrowly tailored bundling laws possibly could pass muster, and that laws passed with additional evidence of actual corruption facilitated by lobbyists could justify laws banning lobbyist contributions. But these first two post-*Citizens United* cases should be viewed like canaries in a coal mine, signaling that lobbying laws that were once seen as easily passing constitutional muster now face a potentially difficult path.

150. *Id.* at 862-63.

151. *Id.* at 864.

152. *Id.* at 865.

153. *Id.*

154. *Id.* The State of Ohio did not appeal this ruling. See Jim Siegel, *State Won't Appeal Ruling Tossing Out Lobbying Law*, COLUMBUS DISPATCH, May 4, 2010, at 8B, available at http://www.dispatch.com/live/content/local_news/stories/2010/05/04/state-wont-appeal-lobbying-law-ruling.html. Writing before *Citizens United*, the Supreme Court of Oregon struck down a ban on lobbyists offering gifts to elected officials under the state constitution's freedom of expression protections. *Vannatta v. Or. Gov't Ethics Comm'n*, 222 P.3d 1077 (Or. 2009). However, the court upheld a ban on elected officials receiving gifts from lobbyists. *Id.*

155. See, e.g., *Preston v. Leake*, 660 F.3d 726, 734-35 (4th Cir. 2011) (citing *Green Party* while upholding the statute at issue), *aff'g* 743 F. Supp. 2d 501, 507-08 (E.D.N.C. 2010) (same).

Equality arguments to justify lobbying regulations are likely to fare even worse in the post-*Citizens United* world, even though some of the earlier Supreme Court tax cases seemed to recognize an equality interest in lobbying regulation.¹⁵⁶ For all the talk from Obama and his former ethics czar Norm Eisen about lobbying laws being justified by a desire to “level the playing field,”¹⁵⁷ and for all of Sarah Palin’s complaints about the “smaller competitors left out in the cold” by the lobbying of the “big players,”¹⁵⁸ it seems unlikely that new lobbying regulations could now pass muster under a political equality (or anti-distortion) rationale. Indeed, to the extent courts care about government *intent* in passing lobbying regulation,¹⁵⁹ equality talk justifying lobbying regulations *decreases* the chances that such laws would be upheld.

II. THE NATIONAL ECONOMIC WELFARE RATIONALE FOR LOBBYING REGULATION

A. *How Lobbying Works: Lessons from Political Science*

The national economic welfare rationale for lobbying regulation depends upon a clear understanding of how lobbying works and its effects on the economy. An understanding of lobbying is a prerequisite to a fair evaluation of potential state interests to justify regulation, as well as to an evaluation of the tailoring of such regulation to the government’s interests.

Politicians on the left and right both have excoriated lobbyists as “corrupt” or as gaining unfair advantage in the political marketplace. Yet these politicians usually leave unsaid how lobbyists gain their Svengali-like influence. The unstated model of the “black box” is that of an ideal and distorted legislative process. The ideal model imagines a typical civic republican view of the political process.¹⁶⁰ Legislators come into a legislative debate with a set of preferences about ideal public policy. They are influenced, but not overly so, by the views of their constituents. Exercising independent judgment in line with the common good, legislators deliberate about the best public policy. Legislative outputs accurately reflect the outcome of reasoned debate, and promote the

156. Cf. Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105, 113 (2008) (writing before the *Citizens United* case that compared to the campaign finance arena, “[p]olitical equality plays a far smaller role in lobbying regulation”); *id.* at 114 (explaining that the equality concerns in the lobbying arena are less about the “political equality of individuals *per se*” and more about “fair competition among contending interest groups”).

157. See *supra* notes 90-92 and accompanying text.

158. See *supra* notes 4-6 and accompanying text.

159. On why courts should not, see Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843.

160. For a summary of civic republican ideas, see the sources cited in Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 11 n.37 (1996).

common good. A variation of this ideal views legislative preferences as driven less by reasoned deliberation and preexisting preferences and more by a politician's desire to be reelected through pleasing the median voter. This changes the model so that ideal legislative outputs come closer to representing the median voter's view of idealized public policy rather than the legislators' own preferences.

In the model of the legislative process distorted by lobbyists, again legislators come into the legislative debate with a set of preferences about ideal public policy, and they take voter preferences into account in considering their position on legislation. Alternatively, legislators are faithful agents of the median voter in their jurisdictions. Lobbyists then somehow, magically, skew the political process. The result is that legislative outputs no longer reflect the outcome of reasoned debate, promoting the common good, or the preferences of the median voters. Instead, public policy reflects the preferences of lobbyists' clients.

The "corruption" variant of lobbyist influence views lobbyists as bribing politicians to change their position, through either personal or political gifts. Among the important political gifts are campaign contributions. This popular view is reflected not only in the words of politicians referring to lobbyists as a "criminal class,"¹⁶¹ but also in typical formalized public choice models of the legislative process. Such models assume that politicians seeking to maximize their chances of reelection will alter their legislative actions (such as votes, committee hearings, and drafting of legislative language) in response to the receipt of campaign contributions, often from lobbyists, which are used to help insure reelection.¹⁶²

The "equality/distortion" version of lobbyist influence is less clear in its causal methodology. Under Sarah Palin's explanation, the wealthy can more easily afford lobbyists, who "work the regulations" in their favor and ply influence through large campaign contributions.¹⁶³ Similarly, the Obama Administration defended its new lobbying regulations as "leveling the playing field" based upon a similar view of the lobbyist skew.¹⁶⁴ The equality/distortion rationale, while overlapping somewhat with the corruption explanation, does not

161. See *supra* note 7 and accompanying text.

162. See, e.g., Ivan Pastine & Tuvana Pastine, *Politician Preferences, Law-Abiding Lobbyists and Caps on Political Contributions*, 145 *PUB. CHOICE* 81, 84-85 (2010) (concluding that a cap on lobbyist contributions induces a politician to be more likely to enact the policy he would have enacted in the absence of lobbying, because there would be fewer contributions which would be large enough to sway the politician from his sincerely held position); see also Lucian A. Bebehuk & Zvika Neeman, *Investor Protection and Interest Group Politics*, 23 *REV. FIN. STUD.* 1089, 1098-99 (2010) (using a formal model of lobbyist influence, and noting that in addition to campaign contributions, "[l]obbying groups can provide positions or business opportunities to associates, family members, or friends of the politician, give charitable contributions to causes favored by or helpful to the politician by supporting positions the politician seeks to advance, and so forth").

163. See *supra* notes 4-6 and accompanying text.

164. See *supra* notes 90-92 and accompanying text.

depend upon elected officials (or executive agency personnel) being *corruptly* influenced by personal or political gifts, that is, by making a conscious decision to vote against the politician's views of ideal public policy because of a gift. Instead, the implicit assumption of this model seems to be that these officials respond to *the sheer amount of lobbyist contact*, perhaps as a proxy for the public intensity of preference on particular issues, and the more contact from lobbyists on a political point, the more likely the officials are to adopt the lobbyist position. Because the wealthy can afford more lobbyists, the wealthy get more public policy in their favor through buying more lobbyist stimuli.

Lobbyists, of course, tend to deny the existence of a skew caused by corruption or inequality. They argue that lobbyists influence the political process merely by the provision of *specialized information* which assists legislative deliberation, so that legislators make more informed policy decisions consistent with the public good.¹⁶⁵

Political scientists have been studying the lobbying process for many decades, and the nuanced picture that emerges bears only a slight resemblance to all of these popular depictions. To begin with, political scientists studying current politics have uncovered very little evidence of actual lobbyist quid pro quo *corruption*, where dollars from lobbyists are expressly bartered for political favors from elected officials or staffers.¹⁶⁶ To be sure, some celebrated instances of lobbyist corruption remain, whereby a lobbyist actually bribes elected officials to take legislative action (in the form of votes or other legislative influence) to favor the interests of the lobbyist's client. The Abramoff case is only the most prominent recent case of actual (but rare) lobbyist corruption. Despite popular rhetoric, nothing indicates that lobbyist corruption is rampant, or even commonplace, and so long as law enforcement officials adequately enforce existing antibribery laws, laws barring conduit contributions (whereby one person passes money to another to contribute to a candidate), and disclosure laws, lobbyist corruption is likely to remain uncommon. It has become difficult for lobbyists to bribe elected officials and staffers without violating another law whose violation is more easily detected, thanks to campaign finance laws and the tightening of the gift and travel bans in HLOGA.¹⁶⁷

Beyond instances of corruption, political scientists have studied how lobbyists work and how much influence they have. Though there is some longstanding disagreement among scholars over the strength of lobbyist influence over legislative outcomes,¹⁶⁸ the following is a thumbnail sketch of the

165. On the information theory, see below note 171 and accompanying text.

166. In the past, actual corruption was much more common. See *supra* notes 30-33 and accompanying text.

167. See *supra* note 81.

168. Two classic works examining the role of lobbyists both involve issues of foreign trade. E.E. Schattschneider paints a picture of lobbyists as able to skew public policy on trade in significant ways. See E.E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF* (1935). Raymond Bauer et al. are more skeptical about lobbyists' effectiveness in pursuing

collective political science wisdom on *how* lobbyists achieve influence. Then, in Part II.B, I address the extent and direction of any lobbyist *skew* of public policy.

1. *How lobbyists achieve influence*

Clients employ lobbyists to try to influence public policy on a particular issue in a certain direction. Lobbyists use a variety of tools to achieve such influence, including mobilizing individual citizens to contact legislators (grassroots lobbying), testifying at hearings, submitting written comments to an agency or committee, press releases, and other activities.¹⁶⁹ But lobbyists' most important tool is personal contact with legislators and staff members.¹⁷⁰ A lobbyist with access to a legislator is in the best position to influence public policy. Once a lobbyist secures access, she influences policy primarily by providing credible information to a legislator or staffer to argue for a particular legislative action.

Lobbyists have a number of incentives to provide credible information. Lobbyists are involved in iterated play with elected officials and staffers. A lobbyist who is not credible will not be listened to in the future. Thus, even if clients wish for lobbyists to provide information that is not credible to elected officials and staffers, it is in the lobbyist's own long-term interest in securing future clients to maintain good relationships with elected officials and staffers by providing credible information. In this instance, the principal-agent dispute between lobbyist and client makes it more likely that lobbyists provide credible information.¹⁷¹

their clients' aims. See RAYMOND A. BAUER ET AL., *AMERICAN BUSINESS AND PUBLIC POLICY* (1963).

169. See FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 151 tbl.8.1 (2009) (summarizing various methods by which federal lobbyists worked to achieve their policy goals); see also ANTHONY J. NOWNES, *TOTAL LOBBYING: WHAT LOBBYISTS WANT (AND HOW THEY TRY TO GET IT)* 18 (2006) (discussing a study of thirty-four lobbyists on the federal, state, and local level); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 148 (1986) (representing an earlier study discussing lobbying tactics used to influence Congress).

170. See BAUMGARTNER ET AL., *supra* note 169, at 152 ("Most notable is the wide range of tactics used and the high frequency with which advocates on all sides work with congressional staff, members, and legislative allies in general."); *id.* at 151 tbl.8.1 (indicating that 80.6% of lobbyists in the study reported engaging in "[p]ersonal contact with rank-and-file members of Congress or staff"); NOWNES, *supra* note 169, at 200 ("[M]ost lobbyists tend to come back to the 'old favorites': meeting personally with legislators and their aides and with bureaucrats."); *id.* at 213-15 (discussing lobbyists' reliance on personal meetings). Citizens report using similar tools when engaging in local lobbying. See BRIAN E. ADAMS, *CITIZEN LOBBYISTS: LOCAL EFFORTS TO INFLUENCE PUBLIC POLICY* 134 tbl.7.1 (2007) (showing that 100% of citizen lobbyists surveyed list "[s]peak with an elected official" among political activities they have engaged in to influence local government action).

171. Cf. BAUMGARTNER ET AL., *supra* note 169, at 135-36 (explaining that for lobbyists, "credibility comes first"); Scott Ainsworth, *The Logic and Rationale of Lobbying Regulations*, 23 *CONGRESS & PRESIDENCY* 1, 7 (1996). For a general discussion of principal-agent

Though a common (mis)understanding of lobbying is that lobbyists *change legislators' positions* on a particular legislative issue through favors or threats, such change appears relatively rare. Instead, the lobbyist's usual role is to provide support and useful information for a position a legislator already holds.¹⁷² At other times, the issue of interest to the lobbyist (and her client) is one about which the legislator has no firm position, or even knowledge, and one about which the public is not paying any attention. In such circumstances the legislator is often willing to help a friendly lobbyist achieve her client's interests, especially when the client is a constituent or has business affecting the legislator's district.¹⁷³

Lobbyists rarely can sway resistant legislators on high-salience issues about which the public appears to be paying a great deal of attention. Birnbaum and Murray, for example, describe in painstaking detail how even the most highly paid professional lobbyists were unable to derail a large corporate tax increase which became part of the politically popular Tax Reform Act of 1986, a major tax bill passed during the Reagan Administration with bipartisan support.¹⁷⁴ And though Baumgartner et al. used the example of the student loan program as one in which the public interest appeared to have been scuttled by lobbyists for the banking industry,¹⁷⁵ when the issue of student loan reform became a priority for the Obama Administration, industry lobbyists eventually were unable to stop fundamental change to the program.¹⁷⁶

Rather than working primarily to change legislative minds on issues of high public salience, lobbyists, like mushrooms, thrive in areas of low light.¹⁷⁷ As Birnbaum and Murray show, once it became apparent that the 1986 tax bill was going to pass, lobbyists were much more successful in working to get fa-

problems between clients and lobbyists, see Matthew C. Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. ON LEGIS. 1 (2010).

172. For a careful exploration of this role, see Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69 (2006).

173. See John M. de Figueiredo & Brian S. Silverman, *Academic Earmarks and the Returns to Lobbying*, 49 J.L. & ECON. 597 (2006) (finding universities in districts with a representative on the House or Senate appropriations committees were more successful at obtaining government earmarks than those not represented, and that lobbying committee members in favor of other universities had only limited benefits).

174. JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987).

175. BAUMGARTNER ET AL., *supra* note 169, at 239-40; see also Eric Lichtblau, *Industry Lobbying Imperils Obama Overhaul of Student Loans*, N.Y. TIMES, Feb. 5, 2010, at A1.

176. Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES, Mar. 31, 2010, at A14, available at <http://www.nytimes.com/2010/03/31/us/politics/31obama.html> ("Mr. Obama portrayed the overhaul of the student loan program as a triumph over an 'army of lobbyists,' singling out Sallie Mae, the nation's largest student lender, which he said spent \$3 million on lobbying to stop the changes.")

177. See BAUMGARTNER ET AL., *supra* note 169, at 120-21 (discussing the relationship of issue salience to lobbyist success).

vorable treatment for their clients in the details of the bill and its implementation.¹⁷⁸ A similar phenomenon occurred with the recent passage of the financial reform bill. Though opponents of the bill just barely failed in getting the bill scuttled,¹⁷⁹ they worked fervently with legislative and executive agency staffers to seek advantage as staffers hashed out the details of the bill's implementation and its accompanying regulations.¹⁸⁰

The more general lesson appears to be that lobbyists are most likely to be successful when (1) they have direct access to legislative officials and their staff, (2) they are working on issues of lower salience, and (3) the legislators being lobbied are either already in agreement with the position of the lobbyist or are indifferent about the policy proposals of the lobbyists.

2. *Securing access*

Lobbyists gain access through the cultivation of relationships with legislators and staffers using a variety of tools permissible under the law,¹⁸¹ especially the raising of campaign contributions for legislators. Campaign contributions are a key part of a culture of reciprocity.¹⁸² Feelings of reciprocity are formed easily and without the outlay of considerable resources,¹⁸³ but those who help out the most are likely to get the greatest access. It is a natural instinct to help someone who has helped you. In this context, why *shouldn't* a legislator help a lobbyist supporter by favoring her client's interests on an issue about which the legislator has no personal preference?¹⁸⁴

178. BIRNBAUM & MURRAY, *supra* note 174, at 236-37 ("With tax reform clearly on its way to passage, the most savvy lobbyists decided it was time to jump on board. . . . The most virulent opponents of the effort became born-again reformers. . . . The high-sounding rhetoric masked the real reason for supporting the bill—it was the lobbyists' last chance to save themselves and at least some of their favorite tax breaks.").

179. Edward Wyatt & Eric Lichtblau, *A Finance Overhaul Fight Draws a Lobbying Swarm*, N.Y. TIMES, Apr. 20, 2010, at A1.

180. Binyamin Appelbaum, *On Finance Bill, Lobbying Shifts to Regulations*, N.Y. TIMES, June 27, 2010, at A1, available at <http://www.nytimes.com/2010/06/27/business/27regulate.html>.

181. NOWNES, *supra* note 169, at 17-19.

182. See GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS 11 (2001) (describing the use of campaign contributions to secure access to elected officials).

183. See Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STAN. L. & POL'Y REV. 10, 15-17 (2008) (describing experiments in which experimenters created feelings of reciprocity through the provision of a soft drink); see also Mayer, *supra* note 13, at 524 (citing means by which interest groups and lobbyists secure access and influence).

184. See KAISER, *supra* note 23, at 297 (explaining that according to lobbyist Gerry Cassidy, money is given to "reinforce established connections" and "because of long-term relationships and friendships"); Larry Makinson, *What Money Buys*, in SHADES OF GRAY: PERSPECTIVES ON CAMPAIGN ETHICS 171, 181 (Candice J. Nelson et al. eds., 2002) (discussing relationship building among candidates, lobbyists, and PACs). The ABA TASK FORCE

Lobbyists typically do not raise campaign contributions for any and all legislators.¹⁸⁵ Republican lobbyists raise funds for Republicans and Democratic lobbyists raise funds for Democrats—though often such lobbyists are in the same firm as a means of hedging against future political change and having the ability to work both sides of the aisle in Congress.¹⁸⁶ Lobbying and fundraising patterns follow the fortunes of the parties in Congress. Following the “K Street Project” period in which the House Republican leadership built close relationships with lobbyists who engaged in major fundraising for the party,¹⁸⁷ many Republican lobbyists lost their jobs in 2006 and 2008 as Democrats took control of the House, Senate, and executive branch and Democratic lobbyists had greater career opportunities.¹⁸⁸ When it became clear in 2010 that Republicans were poised to retake control of the House, Republican lobbyists again grew in demand.¹⁸⁹

Lobbyists often do much more than simply contribute money themselves to pivotal legislators; they have become prolific fundraisers and bundlers of campaign contributions for key legislators and party leaders.¹⁹⁰ For example, dur-

REPORT, *supra* note 97, at 20, refers to “a self-reinforcing cycle of mutual financial dependency.”

185. See Hall & Deardorff, *supra* note 172, at 80 (“Money buys access only to one’s allies, and the behavioral consequence is greater legislative effort on behalf of a shared objective, not a disingenuous vote.”).

186. Eric Lichtblau, *Anticipating Power Shift, and Hiring Republicans*, N.Y. TIMES, Sept. 10, 2010, at B1.

187. See KAISER, *supra* note 23, at 4, 272.

188. David Kirkpatrick, *For Lobbyists, No Downturn, Just a Turnover*, N.Y. TIMES, Nov. 25, 2008, at A1, available at <http://www.nytimes.com/2008/11/25/washington/25lobby.html>.

189. Lichtblau, *supra* note 186; Kevin Bogardus & Silla Brush, *Democratic Aides May Get Cold Shoulder from K Street After Midterms*, HILL (Sept. 13, 2010, 9:35 PM), <http://thehill.com/business-a-lobbying/118495-democratic-party-aides-see-value-drop-on-k-street>. Lobbyists also target legislators who are key on committees which control policy areas of interest to their clients. See BIRNBAUM & MURRAY, *supra* note 174, at 177-78 (describing the lobbying role of two former aides to House Ways and Means Chair Dan Rostenkowski in the 1986 tax reform negotiations).

190. See KAISER, *supra* note 23, at 80 (discussing lobbyist Gerry Cassidy’s role in running a PAC for his client, the Ocean Spray cranberry cooperative, and “help[ing] decide who got its money”); see also *id.* at 272 (noting that during the 1990s, “[m]any members of Congress, both Republicans and Democrats, asked lobbyists to be their finance chairmen”); *id.* at 291 (“[L]obbyists often told the PACs where to give their money [L]obbyists had become indispensable to politicians. They served as advisors, fundraisers, even finance chairmen of their campaigns.”); *id.* at 105-06 (describing how Cassidy and his associates organized a fundraiser to help a member of Congress with key power to block or approve an earmark request of Cassidy’s client); *id.* at 185 (discussing how fourteen members of Cassidy’s firm gave contributions to a member of Congress while business was pending before that congressman’s committee, and how Cassidy’s client flew another congressman and his wife “to Hawaii for a week for a ‘seminar’ sponsored by [the client]” and paid him a \$2000 honorarium for making the trip). Senator Chuck Hagel described how both Democrats and Republicans looking to raise \$20 million to \$25 million for House and Senate campaign

ing the 2010 period when Republicans appeared poised to retake control of the House, House Minority Leader Boehner provided special access to lobbyists who contributed the maximum \$37,800 contribution to various committees supporting him or who raised at least \$100,000 from other contributors.¹⁹¹

Another key means of securing legislative access is for clients to hire former legislators and staffers as lobbyists (through the so-called “revolving door”). Many prominent former senators and members of Congress have become lobbyists, and dozens of former staffers of sitting senators and members of Congress have done so as well.¹⁹² Indeed, half the senators who left office between 1998 and 2004 became lobbyists.¹⁹³ These revolving-door lobbyists have preexisting reciprocal relationships with current legislators and staffers, which they can then use to gain access for their clients. Though it is no longer permissible for a former senator to use the Senate gym as a place for lobbying,¹⁹⁴ and there is a waiting period for senators after leaving the Senate to engage in certain lobbying activities,¹⁹⁵ there is no question that a former senator or major House staffer who is lobbying for a client is likely to get a phone call

committees “go to a committee of twenty-five lobbyists, a steering committee. And you say, Okay, you guys each have to come up with a million dollars.” *Id.* at 291.

191. Jonathan Martin, *The Cash-for-Speaker Program*, POLITICO (July 29, 2010, 4:26 AM), <http://www.politico.com/news/stories/0710/40380.html> (reporting that Boehner “convened a meeting of top Republican lobbyists . . . to enlist them in the cause” and promised donors and fundraisers “VIP access to all events, including roundtables, briefings, breakout discussions and interactive panel discussions”); see also Eric Lipton, *G.O.P. Leader Tightly Bound to Lobbyists*, N.Y. TIMES, Sept. 12, 2010, at A1 (“[Lobbyists and former aides] have contributed hundreds of thousands of dollars to [Boehner’s] campaigns, provided him with rides on their corporate jets, socialized with him at luxury golf resorts and waterfront bashes and are now leading fund-raising efforts for his Boehner for Speaker campaign, which is soliciting checks of up to \$37,800 each, the maximum allowed. Some of the lobbyists readily acknowledge routinely seeking his office’s help—calling the congressman and his aides as often as several times a week—to advance their agenda in Washington. And in many cases, Mr. Boehner has helped them out.”).

192. The Center for Responsive Politics offers an online database to track this revolving door. See Ctr. for Responsive Politics, *Revolving Door*, OPENSECRETS.ORG, <http://www.opensecrets.org/revolving> (last visited Jan. 14, 2012).

193. George Packer, *The Empty Chamber: Just How Broken Is the Senate?*, NEW YORKER, Aug. 9, 2010, at 38, available at http://www.newyorker.com/reporting/2010/08/09/100809fa_fact_packer; see also Christopher Lee, *Daschle Moving to K Street: Dole Played a Key Role in Recruiting Former Senator*, WASH. POST, Mar. 14, 2005, at A17, available at <http://www.washingtonpost.com/wp-dyn/articles/A32604-2005Mar13.html> (“[Public Citizen legislative representative Craig] Holman said that in the 1970s only about 3 percent of retiring members of Congress wound up in K Street law and lobbying firms. These days, the figure is more like 32 percent, he said, in part fueled by the dramatic increase in pay for such positions.”).

194. STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, R. XXIII, at 18 (2007) (as amended by the Honest Leadership and Open Government Act of 2007 (HLOGA), Pub. L. No. 110-81, § 533, 121 Stat. 735, 765-66).

195. 18 U.S.C. § 207(e)(1)(A) (Supp. I 2007).

returned and a chance to make the case for the lobbyist's clients.¹⁹⁶ In fact, as evidence that who you know is more important than what you know, Bertrand et al. found that revolving-door lobbyists tend to follow their former legislative bosses from committee to committee, switching from lobbying on an issue such as health care to one such as defense.¹⁹⁷ Expertise is secondary to personal contacts.

A study of health care lobbying before the passage of the Obama health care law by the *Chicago Tribune*, Northwestern University, and the Center for Responsive Politics found:

At least 166 former aides from the nine congressional leadership offices and five committees involved in shaping health overhaul legislation—along with at least 13 former lawmakers—registered to represent at least 338 health care clients since the beginning of last year

Their health care clients spent \$635 million on lobbying over the past two years

The total of insider lobbyists jumps to 278 when non-health-care firms that reported lobbying on health issues are added in¹⁹⁸

The article describes how a former congressional staffer who became a lobbyist for a medical device trade association successfully lobbied to change a \$40 billion proposed tax on the industry to a \$20 billion tax in the bill, saving his clients \$20 billion.¹⁹⁹

Moving from legislator or staffer to lobbyist can be quite lucrative. Former staffers can expect their salaries to increase significantly,²⁰⁰ and former sena-

196. See, e.g., Susan Crabtree, *PMA's Fallout Shines Spotlight on Revolving Door of Lobbyists*, HILL (June 22, 2009, 3:29 PM), <http://thehill.com/homenews/news/47250-pmas-fallout-shines-spotlight-on-revolving-door-of-lobbyists> (discussing lobbying of Representative John Murtha and others by his former staffers); Manu Raju & John Bresnahan, *Sen. Richard Shelby Steers Cash to Ex-Aides*, POLITICO (July 29, 2010, 4:25 AM EDT), <http://www.politico.com/news/stories/0710/40388.html> (“Since 2008, Alabama Sen. Richard Shelby has steered more than \$250 million in earmarks to beneficiaries whose lobbyists used to work in his Senate office—including millions for Alabama universities represented by a former top staffer.”).

197. See Marianne Bertrand et al., *Is It Whom You Know or What You Know? An Empirical Assessment of the Lobbying Process 18-20* (Feb. 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1748024>.

198. Andrew Zajac, *Congressional Staffers Turn Lobbyists: Health Care Lobby Drafts Army of Insiders to Help Fight Overhaul*, CHI. TRIB. (Dec. 20, 2009), http://articles.chicagotribune.com/2009-12-20/news/0912190289_1_health-care-lobbyists-insiders.

199. *Id.*

200. Bogardus & Brush, *supra* note 189 (“Lobbying salaries offered to Democratic staffers leaving Congress for K Street about a year ago [in 2009] ranged from \$250,000 to \$500,000.”); Kelley Beaucar Vlahos, *Premium Placed on Lobbyists Who Served in Congress*, FOX NEWS (Mar. 20, 2006), <http://www.foxnews.com/story/0,2933,188563,00.html> (“While rank and file House and Senate members make around \$165,000 a year, the average high-level Washington lobbyist makes at least \$300,000 a year, with many former members making much more than that, according to reports.”). For average staffer salaries, see Daniel Schuman, *What's the Average Salary of House Staff?*, OPEN HOUSE PROJECT (Dec. 2, 2009), <http://www.theopenhouseproject.com/2009/12/02/whats-the-average-salary-of-house-staff>.

tors and members of Congress can earn seven-figure salaries.²⁰¹ One prominent example is former Congressman Billy Tauzin, who went from his congressional salary to a salary exceeding \$2 million per year working for the pharmaceutical industry.²⁰² Vidal et al. find that lobbyists with past work experience in the office of a United States senator suffer on average a twenty-four percent drop in revenue when that senator leaves office.²⁰³ That is, once the main connection to the elected official disappears, the revolving-door lobbyist's value on the market drops.

3. *After the access*

Once lobbyists gain access to elected officials, lobbyists solidify relationships of trust and influence by providing credible information (on both policy and politics) to elected officials and staffers in order to help the legislative office make informed policy choices and succeed in achieving legislative goals.²⁰⁴ Today is an era of information overload; the best lobbyists recognize that their long-term reputations depend upon credibility and the usefulness of the information they provide.²⁰⁵

Access certainly does not guarantee lobbyist success. Indeed, lobbyists often have a difficult time getting elected officials to take action on their proposed policy changes.²⁰⁶ Moreover, it is easier for lobbyists to react to a changing policy environment than to facilitate major legislative change.²⁰⁷ It is more accurate to think of access as a necessary but insufficient condition for a lobbyist to achieve a client's goals.²⁰⁸

With the black box of lobbying regulation now pried open, we can turn to the question of skew: how does lobbying affect public policy?

201. Lee, *supra* note 193; Vlahos, *supra* note 200.

202. Paul Blumenthal, *The Legacy of Billy Tauzin: The White House-PhRMA Deal*, SUNLIGHT FOUND., (Feb. 12, 2010, 12:51 PM), <http://blog.sunlightfoundation.com/2010/02/12/the-legacy-of-billy-tauzin-the-white-house-phrma-deal>.

203. Jordi Blanes i Vidal et al., *Revolving Door Lobbyists* (July 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1641217>.

204. GROSSMAN & HELPMAN, *supra* note 182, at 5-6 (describing the information role played by lobbyists for special interest groups); see also Kevin M. Esterling, *Buying Expertise: Campaign Contributions and Attention to Policy Analysis in Congressional Committees*, 101 AM. POL. SCI. REV. 93, 93 (2007).

205. See BAUMGARTNER ET AL., *supra* note 169, at 124; Hall & Deardorff, *supra* note 172.

206. See BAUMGARTNER ET AL., *supra* note 169, at 88 (describing lobbyists' difficulties in capturing the attention of legislators).

207. *Id.* at 110-11.

208. Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 126 (2003).

B. *The National Economic Welfare Rationale for Lobbying Regulation*

1. *Lobbying skew, equality, and inefficiency*

The *skew* question—how lobbying affects public policy—is a key to understanding the national economic welfare rationale for lobbying regulation. Preliminarily, it is worth noting a problem with measuring skew: one of the most important ways that lobbyists may skew legislative outcomes is by *preserving the status quo* when the public or legislators otherwise would prefer legislative change.²⁰⁹ That is, lobbyists can often achieve their goals by blocking the enactment of new laws or amendment of existing laws. Our federal system for the passage of bills contains multiple points to block legislative action (“vetogates”).²¹⁰ Lobbyists often can block change, even change supported by a majority in Congress or the country, simply by successfully lobbying a committee chair or other legislator or member of the executive branch who controls a key aspect of the legislative agenda. Thus, skew may be difficult to detect if lobbyists have acted by preventing change that otherwise would have happened. It is hard to attribute causation in the face of legislative inertia.

Political science studies of lobbying do not support the Obama view that lobbyists’ actions generally “drown out the views of the American people”²¹¹ as to issues about which the public has a view and is paying attention. However, as to less salient issues—the vast majority of issues taken up by Congress—lobbying does appear to skew public policy in certain directions.

First, lobbying skews public policy away from the interests of the poor.²¹² The reason for this skewing is the logic of collective action²¹³: those with resources and with narrow (as opposed to diffuse) interests in particular legislation can more easily overcome collective action problems and engage in political activity such as hiring lobbyists who have easy access to elected officials and their staffs. There can be more subtle influence as well. “The cumulative

209. See BAUMGARTNER ET AL., *supra* note 169, at 7 (“The most common single goal [of lobbyists in the study] is, not surprisingly, to protect the status quo from a proposed change.”).

210. On “vetogates,” see WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 66-68 (4th ed. 2007).

211. See *supra* notes 1-3 and accompanying text.

212. See BAUMGARTNER ET AL., *supra* note 169, at 255-57 (discussing how neither citizens groups nor organized labor has lobbied much in favor of issues that matter most to low income Americans, and noting that many citizen groups lobby on issues such as environmental and consumer issues).

213. The classic text is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). See also SCHLOZMAN & TIERNEY, *supra* note 169, at 123-24 (discussing the collective action problem in the formation of interest groups, and the greater ability of narrow interests to overcome collective action problems); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

effects of spending most of one's spare time in the company of wealthy people and their particular view of the world, and corresponding expectations among the wealthy that they have special claims, likewise do little for the quality of representative democracy."²¹⁴ The poor are the least likely to overcome these problems and organize. Even if they try to organize, the poor face an uphill battle; a status quo bias favors wealthy interests, who have already won in the past.²¹⁵

Despite the collective action advantages to narrow groups, such groups do not win all battles. The student loan bill is the latest high-profile example of a failed lobbying effort to stop policy that has the support of key policymakers, including the President, and strong public support. But lobbying can skew public policy over the vast majority of issues about which the public is not paying attention. As to those issues, lobbying tends to skew public policy toward narrow groups that can overcome collective action problems and pursue their policy goals at the expense of the general public.²¹⁶

As the study by Baumgartner et al. shows, citizen groups that engage in lobbying have fewer resources than business groups and "are often spread thin."²¹⁷

And when [citizen groups] do get involved in, say, an issue relating to consumer credit practices by banks, or an environmental dispute related to coal-mining practices, or automobile emissions standards, they often find themselves in a David and Goliath position, with a few staff members on their side facing sometimes hundreds of industry lobbyists or researchers who work on nothing but that one particular issue year-in and year-out.²¹⁸

214. MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY* 71-72 (2005); see also Hall & Deardorff, *supra* note 172, at 81 ("Groups that are better able to pay the costs of information-gathering, policy analysis, and lobbying will be advantaged in addition to whatever advantages they might accrue from better grass roots organization and more contributions to congressional campaigns.").

215. BAUMGARTNER ET AL., *supra* note 169, at 19-20.

216. This is not a new observation. See E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 30-37 (1960); SCHLOZMAN & TIERNEY, *supra* note 169, at 87 ("[T]he number of organizations in the Washington pressure community is tilted heavily in favor of the advantaged, especially business, at the expense of the representation of broad publics and the disadvantaged.").

217. BAUMGARTNER ET AL., *supra* note 169, at 11.

218. *Id.* at 11-12. The authors give this example:

The American Petroleum Institute, for example, has about 270 staff and an annual budget of \$42 million. All these people are not lobbyists, of course, and the budget goes for many things, to be sure, but the Institute deals only with petroleum issues. When the issue shifts to nuclear energy, the Nuclear Energy Institute, with 125 staff members and a budget of \$34 million, may get involved. Electrical generation in general? The Edison Electric Institute will be there, with its 200 staff and \$50 million annual budget.

Id. at 12; see also NOWNES, *supra* note 169, at 208-12 (discussing how business firms dominate lobbying in the United States, and considering whether this is a sign of strength or weakness of business groups).

Citizen groups use resources besides finances, such as mobilizing voters, to attempt to fight business lobbying interests,²¹⁹ but it is often a losing battle.²²⁰ As the authors explain it:

[Lobbyist-led political mobilization is] skewed not just toward the wealthy, but more generally toward professional communities of corporations, professionals, and institutions and therefore away from average citizens. One need not adopt a class-based approach to the study of lobbying in the United States to recognize that K Street is full of well-paid representatives of corporate America. The airlines are more likely to be present in the lobbying community than the diffuse group of people who often suffer through terrible service as airline customers. The bias is not just a corporate one; this is an oversimplification. More accurately, it is a bias toward professions and occupations. Many Americans may share an opinion, an ideology, or a feeling. But they are dramatically less likely to mobilize and join an interest group with a powerful Washington presence on the basis of these shared interests than they are to be a member of a professional association or labor union or be employed by a company or an institution that has substantial representation in Washington.²²¹

Business groups, thanks to their greater material resources (such as political action committee (PAC) contributions and the lobbyists they can afford to hire), have another significant advantage when it comes to lobbying:

Businesses are more likely to have a friend in a high place than are other types of groups. . . . [U]nions and citizen groups are quite successful in working with the rank and file but rarely get to take advantage of the highest level of government support. Businesses enjoy much greater access and cooperation at this level, more than twice the level of the citizen groups.²²²

a. *Rent-seeking, social inefficiencies, and social costs*

Economists have a term for the policy goals often pursued by narrow groups through their Washington lobbyists: rent-seeking.²²³ Classic rent-seeking “occurs when resources are used in order to capture a monopoly right instead of being put to a productive use.”²²⁴ Broadly speaking, “[r]ent seeking is the socially costly pursuit of wealth transfers.”²²⁵ As will be clear below,

219. See BAUMGARTNER ET AL., *supra* note 169, at 12.

220. On the other hand, “[m]aterial resources can sometimes be trumped by sheer numbers—organizations with many members may be heeded just as rapidly as organizations able to make large campaign contributions.” *Id.* at 194.

221. *Id.* at 28.

222. *Id.* at 202; see also *id.* at 209 (discussing the importance of high-level allies of lobbyists willing to push for an issue as a correlate to lobbyist success).

223. Gordon Tullock was the first to write about the concept, though the term originates with Ann O. Krueger. See Gordon Tullock, *Rent Seeking*, in *THE WORLD OF ECONOMICS* 604, 604 (John Eatwell et al. eds., 1991).

224. Hasen, *supra* note 160, at 9; see also Tullock, *supra* note 223, at 604-09.

225. Robert D. Tollison, *Rent Seeking*, in *PERSPECTIVES ON PUBLIC CHOICE* 506, 506 (Dennis C. Mueller ed., 1997). A narrower definition of rent-seeking would focus more

lobbyist inefficiencies result from more than just rent-seeking; we must also consider the inefficiency of the lobbyist-produced legislation itself.

Tullock explains the core efficiency loss caused by fighting over transfers:

Suppose that ten different lobbyists go to Washington representing ten different associations, and each spends one million dollars over the course of a couple of years in the hope of influencing Congress to provide them with a monopoly. Only one of the lobbyists is successful and the monopoly turns out to have a present discounted value of ten million dollars. There is a substantial redistribution of resources from the unsuccessful lobbyists to the successful.

This substantial redistribution has occurred simultaneously with a considerable waste of resources in general, both because these highly intelligent people could otherwise be doing something of higher productivity and because the economy's use of resources has been further distorted by the creation of the monopoly.²²⁶

Despite the mathematical cleanliness of Tullock's example, there is no reason to believe that total lobbying costs typically will equal the government benefit sought. Indeed, returns on lobbying tend to be quite high for the winners, raising the question why lobbying expenditures are not even greater. One promising possibility is that given finite quantities of elected officials' and staff's time, there is a declining marginal utility of lobbying: adding a twentieth industry lobbyist may not do much to further the client's cause.

The social ill of rent-seeking is that it causes a decline in overall social wealth (in economic parlance, it is Kaldor-Hicks inefficient²²⁷) as resources are devoted to capturing and keeping government benefits, rather than being put to productive use. "Assume that A puts in \$50 for lobbying to get \$100 from B and B puts in \$50 lobbying against that. Regardless of the outcome, one part [sic] will gain \$50 from his lobbying. Society has lost \$100."²²⁸

closely on government-conferred "barriers to entry, such as restrictive licensing or permit regimes." MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 49 (2009).

226. Tullock, *supra* note 223, at 606. Other scholars have explored the parallel question of why bribes are so low and campaign contributions and spending so low in a democracy, given what is at stake. *See, e.g.,* Eric Rasmusen & J. Mark Ramseyer, *Cheap Bribes and the Corruption Ban: A Coordination Game Among Rational Legislators*, 78 *PUB. CHOICE* 305, 305-06 (1994); *see also* Ansolabehere et al., *supra* note 208, at 105.

227. Kaldor-Hicks efficiency is the typical normative measure used in law and economics analysis, focusing on overall social wealth regardless of its distribution. *See* Hasen, *supra* note 160, at 8. In less technical parlance, it is a normative criterion aimed at increasing the size of the pie, rather than deciding how to divide up pie slices.

228. Tullock, *supra* note 223, at 606. In an important supplement to Tullock's analysis of rent-seeking, Fred McChesney models the lobbyist-elected official behavior as one in which elected officials extort (or "extract") payments from lobbyists and interest groups under threat of passing legislation which will hurt the groups' economic interests. *See* FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997) [hereinafter MCCHESENEY, *MONEY FOR NOTHING*]; *see also* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. LEGAL STUD.* 101, 101-02 (1987) [hereinafter McChesney, *Rent Extraction*]. Though it is

Noneconomists sometimes find this rent-seeking analysis nonintuitive: after all, how is a business's decision to spend money on lobbying any less efficient than an individual's decision to spend money on a consumer good, an action which can actually help the economy? Stearns and Zywicki note this problem in teaching the concept of rent-seeking to law students.²²⁹ They explain that "rent seeking is purely redistributive in nature and thus the real cost of rent seeking is the diversion of human and other capital away from productive activity (such as lawyers drafting contracts) to purely redistributive activity (lobbying)."²³⁰

This argument against rent-seeking therefore is similar to the efficiency arguments Richard McAdams and I have made justifying laws against theft: inefficiency occurs not because of the transfer itself, but thanks to the indirect costs of a legalized theft market, such as the defensive measures which individuals would take to deter theft and the countermeasures taken by thieves to overcome the defenses, which direct resources away from more productive social uses.²³¹ Similarly, substantial lobbying costs go to defensive measures to protect against the rent-seeking activity of others and related countermeasures.²³²

unclear how much lobbyist-related behavior should be labeled as rent-seeking rather than part of an elected official's acts of rent extraction, for my purposes the distinction does not matter because rent extraction also is Kaldor-Hicks inefficient. Rent extraction creates social losses in at least three ways. "First, the possibility that government may reduce returns to their capital unless paid off naturally reduces firms' incentives to invest in the first place." MCCHESENEY, *MONEY FOR NOTHING*, *supra*, at 33. Second, "[t]he value of existing capital is also diminished by the possibility that it will be extracted." *Id.* at 34. "Third, one must include in the total social cost of rent extraction the transaction (including bargaining) costs incurred in the extraction process—just as private blackmail and extortion are undesirable for similar reasons." *Id.* In addition, there are the "costs of operating the legislative process" and "the deadweight costs of hiding resources so as to avoid their being subject to extraction in the first place, and the effects of that concealment on bargaining costs." *Id.* For an argument for campaign finance limits building on McChesney's concern about legislator extortion, see David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1380-81 (1994).

229. See MAXWELL L. STEARNS & TODD J. ZYWICKI, *TEACHER'S MANUAL TO PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 24* (2010) ("Students often have trouble grasping why expenditures on activities like political lobbying are costs to the economy rather than just a subset of welfare-enhancing mutually beneficial exchange of services.").

230. *Id.*

231. See Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT'L REV. L. & ECON. 367 (1997).

232. On occasion, lobbying activities to defeat earlier-imposed rent-seeking legislation could in isolation be efficient. For example, a lobbyist may successfully get the government to remove a protective tariff. Overall, however, a culture of fighting over transfers is likely to be inefficient, akin to the usual inefficiencies of arms races. See Charles Anderton, *Teaching Arms-Race Concepts in Intermediate Microeconomics*, 21 J. ECON. EDUC. 148, 158-59 (1990).

b. *Inefficiency beyond rent-seeking*

Aside from rent-seeking costs, political economists have noted that the *content* of lobbyist-influenced legislation is likely to be inefficient as well.²³³ Lobbying can cause the government to spend money on duplicative or inefficient programs—think of the “bridge to nowhere”²³⁴—and to pass protective legislation that discourages competition or private innovation. In both situations, the rent-seeking activity distorts the economic market and discourages economic productivity.²³⁵ A bridge to *somewhere* would have facilitated commerce. Only *reasonable* patent protection will spur innovation without discouraging new market entrants and innovation.

Though the government is obviously capable of passing duplicative, inefficient, and protective legislation in the absence of lobbying, lobbying makes the passage of inefficient legislation much more likely. Rational politicians seeking to maximize their chances of reelection ordinarily would have an incentive to avoid waste and duplication, and to create the conditions for economic growth, but for the rent-seeking lobbying activity.²³⁶

Though it is hard to quantify how much rent-seeking legislation costs the U.S. economy indirectly in the form of distorted government decisions, as explained below there is every reason to believe that the overall effect is likely great—producing inefficiencies at rates many times the few billion dollars each year spent directly on lobbying expenditures. Indeed, considering the direct and indirect costs of rent-seeking legislation together, rent-seeking legislation could be undermining the health of the overall U.S. economy, threatening the economic position of the United States compared to other world powers. As Mancur Olson has explained, societies with rampant rent-seeking may be at a com-

233. See, e.g., Peltzman, *supra* note 213; Stigler, *supra* note 213; see also McChesney, *Rent Extraction*, *supra* note 228 (noting government-produced inefficiencies created by politicians’ desire to extract rents).

234. See Ed Hornick, *Stevens’ Senate Career Hurt by “Bridge to Nowhere,”* CNN (July 29, 2008), http://articles.cnn.com/2008-07-29/politics/stevens.history_1_senate-financial-disclosure-bridge-democrat-from-west-virginia?_s=PM:POLITICS (“In 2005, legislation backed by Stevens to build a so-called ‘bridge to nowhere’ became a lightning rod for those critics. The proposal called for construction of a \$223 million bridge to connect Alaska’s Gravina Island—population 50—to the mainland.”).

235. In this way, the wasted competition between lobbyists over government transfers costs the economy much more than competition between Coke and Pepsi for each other’s customers. (Coke reported spending \$2.6 billion worldwide in 2006 on advertising-related expenditures. *FAQs—Advertising*, COCA-COLA, <http://www.thecoca-colacompany.com/contactus/faq/advertising.html> (last visited Jan. 14, 2012).) That is, lobbying expenditures (but not soft-drink advertising expenditures) cause the government to make inefficient decisions that hurt the overall national economy.

236. They may have incentives to seek benefits for their own states or districts, however (like the “bridge to nowhere”), which can still create inefficiency on a national scale. The desire to bring “pork” back to each district raises its own version of the collective action problem for legislators.

petitive disadvantage compared to other countries and may eventually decline as a result.²³⁷

Minimizing rent-seeking therefore may be a necessary component of an effort to improve U.S. economic productivity and decrease the deficit. Unchecked rent-seeking may retard long-term economic growth. In their look back at the Gilded Age in the United States, Glaeser et al. suggest that an earlier round of regulation to curb rent-seeking was necessary to sustain U.S. economic growth.²³⁸ Similarly, a study by Murphy et al. finds that national economic growth is negatively correlated with the number of lawyers in a country and positively correlated with the number of engineers—suggesting that the national economy benefits from production and suffers from fights over transfers.²³⁹ I have not seen a similar study looking at lobbyists, though I suspect we would see a similar effect.

c. *The efficiency costs of lobbying*

While the earlier example using a \$100 lobbying cost is obviously unrealistic, the actual scope of federal lobbying is quite large. Figure 1 shows that lobbying costs have risen steadily each year, from \$1.44 billion per year in 1998 to just under \$3.5 billion per year in 2009.

The \$3.6 billion-plus annual cost of lobbying may seem large, though it is relatively small compared to the size of the national economy. The greater economic concern is the inefficient *content* of lobbying-influenced legislation. The return on lobbying is often positive but difficult to measure, in part because of how little data federal law requires lobbyists to disclose. Obviously business groups, labor unions, citizen groups, local groups, and others must be seeing some results to be investing billions of dollars in the activity each year.²⁴⁰ One recent important study has overcome methodological impediments to measuring returns to lobbying. Alexander et al. looked at lobbying for a one-time special tax rule (a tax “holiday” on “repatriated” foreign earnings) passed as part of the American Jobs Creation Act of 2004 (AJCA).²⁴¹ The authors counted

237. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982); see also STEARNS & ZYWICKI, *supra* note 225, at 60-63 (exploring Olson’s insights, and arguing that the radical reform necessary to curb rent-seeking could be socially destabilizing).

238. See Edward Glaeser et al., *The Injustice of Inequality*, 50 J. MONETARY ECON. 199 (2003). As the authors note, “if political and regulatory institutions can be moved by wealth or influence, they will favor the established, not the efficient.” *Id.* at 200.

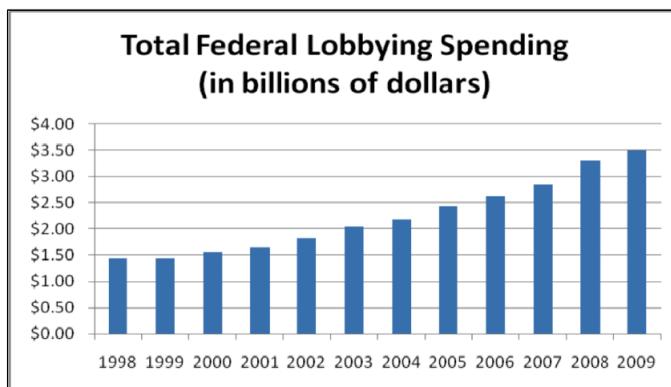
239. See Kevin M. Murphy et al., *The Allocation of Talent: Implications for Growth*, 106 Q.J. ECON. 503 (1991).

240. See Ansolabehere et al., *supra* note 208, at 126 (contrasting the relatively low amounts spent on campaign contributions with the larger amounts spent on lobbying).

241. See Raquel Alexander et al., *Measuring Rates of Return on Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401 (2009).

ninety-three companies that lobbied for the passage of the AJCA (either individually, or as part of a coalition), spending a total of \$282.7 million on lobbying, averaging \$3 million per firm.²⁴² The overall repatriated amount for the companies taking advantage of the repatriation holiday was over \$298 billion, with a tax savings of approximately \$88 billion, meaning that the overall return rate on lobbying was over 30,000%.²⁴³ Though there certainly were free riders who did not lobby but took advantage of the repatriation holiday, returns were higher for coalition participants.²⁴⁴ Examining a more limited sample of companies that apparently spent more than \$1 million each lobbying for the AJCA, the return was about \$243 for each dollar spent lobbying.²⁴⁵

FIGURE 1
Federal Lobbying Spending over Time²⁴⁶



Another new study connects lobbying by financial institutions to the financial crisis. Igan et al. found that lobbying by financial institutions such as Ameriquest “was associated with more risk taking during 2000-07 and worse outcomes in 2008.”²⁴⁷ “In particular, lenders lobbying more intensively on issues related to mortgage lending and securitization (i) originated mortgages with higher loan-to-income ratios, (ii) securitized a faster growing proportion of

242. *Id.* at 404. General Electric (GE) spent the most on lobbying as an individual company, \$24.7 million. *Id.* at 426.

243. *Id.* at 427.

244. *Id.*

245. *Id.* at 429.

246. Ctr. for Responsive Politics, *Lobbying Database*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby> (last visited Jan. 14, 2012).

247. Deniz Igan et al., *A Fistful of Dollars: Lobbying and the Financial Crisis 1* (Apr. 16, 2010) (unpublished manuscript), available at <http://www.wcfia.harvard.edu/sites/default/files/mishra.pdf>.

their loans, and (iii) had faster growing loan portfolios.”²⁴⁸ In addition, they faced higher delinquency rates on their loans in 2008 and experienced negative abnormal stock returns during key events in the financial crisis.²⁴⁹ They seemed to benefit more than nonlobbying lenders from the government bailout of financial institutions.²⁵⁰ The study lends further support for the idea that rent-seeking activity can have a significantly negative economic effect on the U.S. economy.²⁵¹ It is no surprise that the Financial Crisis Inquiry Commission’s report credited an “army of lobbyists” for Fannie Mae and Freddie Mac’s ability to resist reform despite signs of serious financial problems.²⁵²

2. *The promotion of national economic welfare as a sufficiently important government interest to be balanced against First Amendment interests*

Though critics of lobbying typically mention corruption or inequality concerns,²⁵³ efficiency issues crop up too. Eskridge ties the rise in citizen concern about lobbying in the nineteenth century to the growth of the federal government: “Citizens concerned with lobbying abuses became increasingly vocal, and increasingly well-organized, in the last third of the 19th century. During that period, *federal government expenditures increased substantially*, stimulating ferocious competition for government largesse as well as heightened public concern about the means of political competition.”²⁵⁴

Efficiency concerns have been voiced ever since. Then-Senator (and later Supreme Court Justice) Hugo Black declared in 1935 that “our Government has lost hundreds of millions of dollars which it should not have lost and which it would not have lost if there had been proper publicity given to the activities of lobbyists.”²⁵⁵ Richard Painter, a professor and former ethics counsel for President Bush, reviewed the beginning of the Obama Administration’s approach to

248. *Id.*

249. *Id.*

250. *Id.*

251. The authors of the study hedge on whether the results of their study show industry rent-seeking or whether lenders were simply specialized in certain risks and overoptimistic in their assessment of their performance. *See id.* at 27-28.

252. *See* FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT 38 (2011) (discussing the “whole army of lobbyists” for Fannie Mae and Freddie Mac), *available at* <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>; *see also* Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1684-87 (2011) (discussing Fannie and Freddie campaign contributions to lawmakers).

253. *See* Krishnakumar, *supra* note 59, at 522 (“The public perceives two main categories of problems with the lobbying process: quid pro quos and unequal access.”).

254. Eskridge, *supra* note 12, at 6 (emphasis added).

255. *Registration and Regulation of Lobbyists: Hearing on S. 2512 Before a Subcomm. of the S. Comm. on the Judiciary*, 74th Cong. 12 (1935) (statement of Sen. Black).

ethics and lobbying issues and identified the rent-seeking problem as intractable given the tremendous size of the federal government and budget: “Neither this President nor any other can avoid the fact that the more money flows through government, the larger will be the already sizeable industry that seeks to direct that money to particular ends.”²⁵⁶ Popular disapproval of the “ear-marking” process—whereby federal bills direct sums of money to particular institutions for particular purposes—is further evidence of popular concern about the inefficiencies of government facilitated by lobbying.²⁵⁷

These statements recognize the public’s strong interest in limiting government inefficiencies. Especially at a time of record budget deficits and financial instability, promoting national economic welfare may be a rare government interest that could attract support from both the left and the right. The concern here is more than simply keeping costs (or taxes) down; as the works of Olson and others show, the question could be one of the national economic security of the United States.

Despite longstanding public and scholarly concern about rent-seeking, I am aware of no court that has ever considered whether national economic welfare could be considered a sufficiently important (even compelling) government interest that could justify lobbying (or other) laws. The term “rent-seeking” has appeared only twice in Supreme Court opinions. First, Justice Breyer, dissenting from dismissal of a petition for writ of certiorari in a patent case, quoted from a book by Landes and Posner discussing the rent-seeking potential of a rule that would allow for the patentability of basic scientific and technological principles.²⁵⁸ Second, as discussed in Part III.B.1 below, Justice Stevens in his dissent in *Citizens United* mentioned the potential for rent-seeking by corporations as part of his discussion of the antidistortion rationale for corporate spending limits in candidate campaigns.²⁵⁹

Legal scholars too have been well aware of rent-seeking, though no one has focused on the role of lobbying regulation in curbing the practice. Jonathan Macey, for example, famously called upon courts to construe ambiguous statutes in a public-regarding way, rather than to enforce private rent-seeking

256. Painter, *supra* note 85, at 206.

257. The size of earmarks is quite small relative to the federal budget, and therefore the public’s focus on eliminating earmarks in order to significantly decrease government rent-seeking may be misplaced. See Walter Alarcon, *Self-Imposed Republican Moratorium Leads to Drop in 2011 Earmark Spending*, HILL ON MONEY (Aug. 1, 2010, 3:18 PM), <http://thehill.com/blogs/on-the-money/appropriations/112059-gop-moratorium-leads-to-drop-in-2011-earmark-spending>; Jeanne Sahadi, *Earmarks: Myth and Reality*, CNNMONEY (Mar. 11, 2009, 11:54 AM), http://money.cnn.com/2009/03/11/news/economy/earmark_primer/index.htm.

258. *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 127 (2006) (Breyer, J., dissenting) (quoting WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 305 (2003)).

259. See *infra* Part III.B.1.

deals.²⁶⁰ Farber and Frickey were skeptical of Macey's approach that would have courts strike down rent-seeking laws that conflict with public values because of the difficulty of determining what counts as rent-seeking.²⁶¹ Lobbying for the AJCA is a good example, where lobbyists promoted the legislation as a job creation measure.²⁶² Courts would have to determine whether these claims were pretextual. Farber and Frickey also wondered whether courts could pick out and strike down special interest provisions in laws that otherwise promote public values.²⁶³

Farber and Frickey instead advocated a different proceduralist solution to the problem of rent-seeking: judicial remands to Congress when the Supreme Court is convinced that there has been insufficient deliberation over legislation.²⁶⁴ Only Robert Sitkoff (later picked up by Justice Stevens) has tied rent-seeking to a substantive law change; Sitkoff argued that corporations may be especially adept at engaging in rent-seeking, and accordingly, limitations on corporate contributions and expenditures might be justified.²⁶⁵ But no one has offered a detailed defense of the broader national economic welfare rationale, or applied it to lobbying regulation.

C. *Balancing the State's Interest in Promoting National Economic Welfare with First Amendment Speech and Petition Rights in the Lobbying Context*

Determining that the state has an interest in promoting national economic welfare begins, but does not end, the constitutional analysis. On the other side of the scales are the First Amendment speech, association, and petition rights, which protect lobbying activities. As Eskridge puts it: "One of the goals of the right to petition is to encourage and foster a 'pressure' system of politics, in which interest groups are expected to influence representatives through a wide array of techniques, with very few out-of-bounds, in a continuing game of struggle and domination."²⁶⁶ The question is how to achieve the right constitutional balance.

260. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

261. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 69-70 (1991).

262. In fact, the law failed to create a large number of jobs. See Alexander et al., *supra* note 241, at 419 n.88.

263. FARBER & FRICKEY, *supra* note 261, at 70.

264. *Id.* at 118-31 (discussing due process of lawmaking). They also suggest (in their book predating *Citizens United*) that Congress limit contributions and expenditures from business and labor political action committees. *Id.* at 132-34.

265. Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1112-13, 1124-25 (2002).

266. Eskridge, *supra* note 12, at 5.

We can start with some easy cases. Congress seems to have ample power to prevent legislator and staff receipt of gifts from lobbyists. Though a gift ban is justified on anticorruption grounds, it is also justifiable on efficiency grounds. Voters are principals who elect legislators as agents to pursue the public interest and guard against economic inefficiencies in government. Gifts can cause legislators and staffers to be more willing to give in to lobbyist recommendations for legislative action (or inaction), and lobbyists will often recommend socially inefficient legislative actions. By banning lobbyists' gifts, legislators (and staffers) are more likely to pursue legislation in the public interest.²⁶⁷

At the other end of the spectrum of constitutionality are laws that would actually ban lobbying. The Supreme Court in *Citizens United* recently remarked in dicta that laws banning lobbying would be unconstitutional,²⁶⁸ and the matter seems scarcely in doubt. A somewhat more difficult question is whether Congress could condition a private entity's entry into government contracts on forfeiting the right to lobby, as suggested by Senator Paul.²⁶⁹ At first glance, this appears to be an unconstitutional condition, though some of the tax cases might lend support for such a tradeoff.²⁷⁰ Such a lobbying ban would likely encompass most major U.S. and foreign companies, and it seems unlikely to pass muster before the current Supreme Court. Senator Paul's proposal also would give a lobbying advantage to those corporations without government contracts (who could well lobby for government contracts and then be bought by existing corporations after contracting) and encourage lobbying through trade associations rather than the contracting companies themselves.

More interesting are constitutional questions about lobbying regulations that are less severe than bans but would break the strong bond of reciprocity encouraging legislators and staffers to grant lobbyists special access and favors. The best way to limit reciprocity is to follow the recommendation made by the ABA Task Force and others to take lobbyists (and those who retain and direct lobbyists) out of the business of fundraising for candidates.²⁷¹ Lobbyists still could make smaller, individual personal donations, but they would not be allowed to solicit clients, coworkers, or associates to make contributions to candidates, parties, or committees, and they could not engage in any bundling activities.

267. Another easy constitutional case is a ban on contingent-fee lobbying. Contingent-fee lobbying may result in an increase in costs to the taxpayer, as the lobbyist inflates the amount requested in an earmark to cover the expected commission. Susman & Martin, *supra* note 95, at 670.

268. See *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010).

269. See *supra* note 8 and accompanying text.

270. Cf. Theodore P. Seto, *Keeping Tax-Subsidized Corporate Money out of Politics*, 127 TAX NOTES 1476, 1477 (2010).

271. See ABA TASK FORCE REPORT, *supra* note 97, at vii.

This impetus to break the reciprocity relationship may have been behind the 2007 bundling disclosure provisions of HLOGA. As Representative Van Hollen explained, “[W]hen the bundling of contributions is done by someone who lobbies on behalf of a particular interest, this practice enables the lobbyist to enhance his or her stature with an official. This enhancement increases their opportunity to advance the cause of a special interest.”²⁷² Unfortunately, lobbyist bundling *disclosure* might have had the perverse effect of increasing the stature of the lobbyist with an elected official, by documenting how hard a lobbyist is working for an elected official or her party.²⁷³ It is only a *ban* on such fundraising activities that can help break the cycle of special access and favors.²⁷⁴

The other way to break the reciprocity relationship is to impose longer revolving-door restrictions on elected officials and staffers. For example, a five-year anti-revolving-door provision on compensated lobbying would make it harder for former elected officials and staffers to be able to use personal connections. Ex-officials and staffers five years out will be less in demand as lobbyists, because they will be less valuable to clients as points of access. They would also minimize the major principal-agent problems arising as staffers or legislators reach the end of their government careers, when they might take particular official actions to support future lobbyist employers or clients in an effort to secure postgovernment service employment.

Limiting fundraising and contributions, and a lengthened transition from government to lobbying, would not end the practice of lobbying or otherwise limit the ability of lobbyists to communicate with elected officials and staffers. But these steps could affect the nature of how lobbying would work by decreasing the number of favors done that are not preferred by either voters or legislators. “As money becomes less influential, the value of information will increase.”²⁷⁵ In other words, if we could break the monetary connection between lobbyists and elected officials, lobbyists’ primary role would be an information function, and competition among lobbyists would help to ensure that elected officials and staffers received accurate and helpful information.²⁷⁶ The information-driven market would lead toward greater government efficiencies and less rent-seeking.

272. 153 CONG. REC. H9209 (daily ed. Jan. 4, 2007) (statement of Rep. Van Hollen).

273. This appears to be the role of voluntary bundling disclosure in presidential elections. See Richard L. Hasen, *The Transformation of the Campaign Finance Regime for U.S. Presidential Elections* 17 (Nov. 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1505527> (discussing donor motivations for bundling).

274. See Ainsworth, *supra* note 171, at 6-7 (arguing that controlling access is one means of checking the influence of lobbyists).

275. Susman, *supra* note 183, at 18.

276. See Nick Allard, *We Need More Lobbyists*, NEWSWEEK, Feb. 22, 2010, at 13, available at <http://www.newsweek.com/2010/02/11/we-need-more-lobbyists.html>.

Importantly, reforms would not require us to figure out which lobbying activities count as rent-seeking, a key critique Farber and Frickey raised to other proposals aimed at rent-seeking.²⁷⁷ By breaking the ties between money or personal connections and legislative outcomes, lobbying reform aims at a merit-based system in which the most useful information rises to the top.

The constitutional question raised by such laws would require courts to balance the efficiency benefits of these laws with lobbyists' First Amendment rights. The *Green Party* and *Brinkman* cases hold that solicitation provisions and revolving-door statutes should be subject to strict scrutiny, because they are bans on political speech.²⁷⁸ Contribution bans are subject to lower scrutiny, but still must survive a close look from the courts. Both *Green Party* and *Brinkman* held that the anticorruption interest could not justify the particular laws at issue in those cases. But those cases did not consider the national economic welfare interest, and both courts indicated that more narrowly tailored lobbying laws might pass constitutional muster.²⁷⁹

Antibundling provisions, contribution limitations, and longer anti-revolving-door provisions are much less draconian than some of the Obama Administration rules, which limit actual communications from lobbyists and bar lobbyists from serving in the administration (a reverse revolving door). In addition, it is not clear how these rules would promote economic efficiency. For example, the rule barring oral communications about certain government contracts connected with the economic stimulus plan (which was eventually extended beyond lobbyists to everyone communicating with the administration) would seemingly bar the provision of private strategic advice which could be useful to an elected official without a likely reduction in rent-seeking.

The rule barring registered lobbyists from serving on advisory commissions seems to limit the information available in groups whose very goal is to bring together people of diverse interests to advise the government.²⁸⁰ Participation on these advisory commissions is not tantamount to giving an individual lobbyist access to legislative or executive branch officials. Similarly, the reverse revolving-door rule (barring lobbyists coming *into* the government) has

277. See FARBER & FRICKEY, *supra* note 261, at 69-70; see also *supra* text accompanying note 261.

278. See *supra* Part I.B.2.

279. In *Brinkman*, the anti-revolving-door law applied to uncompensated lobbying as well. I agree with the *Brinkman* court that a ban on uncompensated lobbying is harder to justify, though it may be difficult in practice to know when lobbying is truly uncompensated. In any case, my proposal considers only compensated lobbying.

280. See Letter from William V. Luneburg, Chair, Section of Admin. Law and Regulatory Practice, ABA, to Norman Eisen, Special Counsel for Ethics and Gov't Reform, White House (Mar. 9, 2010), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/10/Letter-to-Norman-Eisen-on-FACA-March-9.pdf> (criticizing these rules).

the social cost of excluding a class of public interest lobbyists who are potentially less likely to be involved in rent-seeking activity.²⁸¹

The administration defended the latter rule on grounds that it did not want to be seen as favoring its friends in determining which lobbyists could work for the administration.²⁸² But the administration already imposed a rule barring former administration employees from lobbying the administration for the remainder of the Obama presidency. It is not clear how the rule would do any more to promote efficiency. Instead, it seems to be more about the appearance of not being influenced by (former) lobbyists than anything else.

In sum, in close cases courts would have to engage in delicate balancing to determine whether the government's interest in promoting national economic welfare justifies various lobbying regulations when weighed against First Amendment costs.

III. OBJECTIONS AND EXTENSIONS

A. *Objections*

1. *Ends-based objections*

Challengers to lobbying restrictions may argue that the government's interest in promoting national economic welfare is not sufficiently compelling or is outweighed by the First Amendment costs of restrictions on political activity. This objection raises the vexing question of how to determine when a governmental end is important enough, and in some circumstances "compelling," so that a challenged regulation can survive judicial scrutiny.

Compelling interests are judicially created and usually not based in the text of the Constitution.²⁸³ Whether a government interest should be recognized as

281. See Peter Baker, *Groups to Push for Exceptions to Lobby Rule*, N.Y. TIMES, Apr. 21, 2009, at A1; Jacob Weisberg, *A Tale of Two Lobbyists: What's Wrong with Obama's Order Barring Lobbyists from His Administration?*, SLATE (Apr. 18, 2009, 7:24 AM), <http://www.slate.com/id/2216433>.

282. See Daniel Newhauser, *Obama's Ethics Counsel Faces Tough Crowd at ABA Conference*, BLT: BLOG LEGAL TIMES (Oct. 23, 2009, 10:11 AM), <http://legaltimes.typepad.com/blt/2009/10/obamas-ethics-counsel-faces-tough-crowd-at-aba-conference.html> ("Thomas Susman . . . questioned Eisen as to why, if indeed these regulations are intended for the public interest, no distinction is made between corporate lobbyists and those who lobby for public interest causes. Eisen responded by saying that the administration did consider parsing types of lobbying, but in the end, 'felt that as a matter of principle, we needed to be consistent in that regulation to have credibility.'"); see also Kevin Bogardus, *Eisen Lays Out Case for Limiting Lobbyists' Role*, HILL (Oct. 23, 2009, 6:00 AM), <http://thehill.com/business-a-lobbying/64423-eisen-lays-out-case-for-lobbying-limits>.

283. See Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 919 (1988) ("[A]t no point does the Constitution mandate or define compelling interests, or establish their weight

“compelling” is inevitably a value judgment determined by a court.²⁸⁴ In fact, the Supreme Court routinely accepts governmental interests, such as preventing fraud,²⁸⁵ without either explaining the derivation of the compelling interest or why the interest is compelling.²⁸⁶ Critics have charged that the Court simply knows a compelling interest when it sees one,²⁸⁷ and David Strauss’s canvass of compelling interests accepted by the Supreme Court seems to bear out that criticism,²⁸⁸ given Court recognition of compelling interests ranging from “maintaining a judiciary fully capable of performing the demanding tasks that judges must perform,” to “protecting . . . citizens from abusive practices in the solicitation of funds,” to avoiding the appearance of a “corrupt arrangement,” to “preventing fraud by an applicant for medical care.”²⁸⁹

The government’s interest in promoting national economic welfare seems to be at least as strong as these other government interests. Especially if we give credence to Olson’s concerns about the international competitive disadvantage of countries with high amounts of rent-seeking, the national economic welfare interest seems to be a variant of the government’s indisputably compelling interest in maintaining our national security.²⁹⁰ The national economic welfare rationale is much more than simply an interest in “administrative convenience,” which the Supreme Court has repeatedly rejected as insufficient to justify serious infringements on constitutional rights.²⁹¹ Administrative convenience is primarily about saving the government (or taxpayers) from relative-

or supremacy.”). The national economic welfare rationale arguably does have a textual basis in the Constitution, in its preamble providing for the establishment of the Constitution to promote the “general Welfare,” U.S. CONST. pmbl., and in Congress’s power to “provide for the . . . general Welfare,” *id.* art. I, § 8, cl. 1. However, the Supreme Court has not recognized these clauses as giving any independent power to Congress to enact legislation. *See* Gottlieb, *supra*, at 960-61.

284. *See* Erwin Chemerinsky, *Constitutional Scholarship in the 1990s*, 45 HASTINGS L.J. 1105, 1114-15 (1994) (book review).

285. *See* *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972) (“[T]he prevention of . . . fraud is a legitimate and compelling government goal.”).

286. *See* Gottlieb, *supra* note 283, at 932-38 (canvassing the Supreme Court’s discussion of compelling interests).

287. *Id.* at 937.

288. *See* David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 29 n.78.

289. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991); *Larson v. Valente*, 456 U.S. 228, 248 (1982); *Brown v. Hartlage*, 456 U.S. 45, 58 (1982); *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 268 (1974)).

290. *Cf.* *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“This Court has recognized the Government’s ‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.”).

291. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

ly minor expenses;²⁹² national economic welfare is about limiting large-scale inefficient activity threatening the country's financial health.

Recognizing the strength of the government's interest in promoting economic efficiency would not guarantee the constitutionality of certain lobbying regulations. There is also the question of balancing and fit. Despite (what I view as) the compelling governmental interest in promoting national economic welfare, the interest likely would not justify draconian regulations, such as a ban on lobbying activities. Such a ban would be analogous to a ban on campaign spending, which the Supreme Court has repeatedly held unconstitutional.

The difficult question is whether less severe but still significant lobbying regulations, such as antisolicitation provisions, lower contribution limits for lobbyists, and longer anti-revolving-door rules, could survive judicial scrutiny, especially if a court determines that strict scrutiny should apply to such laws.²⁹³ Courts applying strict scrutiny might accept the constitutionality of strong lobbying regulations in principle, while holding that the laws need to be more narrowly tailored, such as through higher contribution limits, shorter revolving-door rules, or more limited antisolicitation rules targeted at particular types of solicitations, such as solicitations of business associates but not family members.

The more compelling the courts view the national economic welfare rationale to be, the more likely they are to give the government leeway in crafting lobbying regulations. Thus, the Supreme Court has consistently applied a lower "exacting scrutiny" standard in reviewing campaign contribution limitations, and has accepted the government's compelling interest in such regulations, to prevent corruption and the appearance of corruption, even though many contributions above the contribution limits have very little corruption potential.²⁹⁴ The reason is the government's exceedingly strong interest in deterring corruption of public officials and preserving public confidence in the democratic process. Similarly, even though not all lobbying regulation would promote national economic welfare, the Court could accept lobbying regulations that would tend to minimize inefficiencies.

In other contexts, too, the Supreme Court has rejected First Amendment challenges to laws aimed at promoting efficient government and protecting the public from economic loss. Most importantly, in the Hatch Act cases, the Court upheld severe limits on government employees exercising most of their political rights, such as working for political campaigns in their spare time. In *United Public Workers v. Mitchell*, the Court concluded that the Hatch Act was justi-

292. It also may serve an information-forcing function, for example, by weeding out government claimants with weak claims who fail to file a form or pay a fee.

293. As discussed in Part II.C, in *Green Party* and *Brinkman* the courts judged the anti-revolving-door and solicitation provisions under strict scrutiny, but the ban on lobbyist contributions under a lower level of scrutiny. Other courts may disagree with the proper level of scrutiny.

294. See Hasen, *supra* note 134, at 586.

fied by Congress's "desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not overactive politically."²⁹⁵ Further, it was enough that Congress thought employee political activities would "interfere with the efficiency of the public service."²⁹⁶ As the Court reiterated in a follow-up case, *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, Congress was within its power to conclude that partisan political activities of government employees "must be limited if the Government is to operate effectively and fairly."²⁹⁷

Similarly, in the commercial speech context, the Supreme Court has recognized that, despite disagreements about other aspects of the commercial speech doctrine, the government has a strong interest in protecting consumers by barring false or misleading advertising despite First Amendment objections to regulation.²⁹⁸ These examples demonstrate the Court's recognition of reasonable limitations on First Amendment rights when the government has offered an important interest and reasonable means to attain it.

Finally, there is the question of how much evidence would be necessary to convince the Supreme Court that reasonable lobbying regulations actually can promote (or be narrowly tailored to the promotion of) national economic welfare. While the evidence I have offered in this Article might not satisfy some social scientists as to the scope of inefficiencies caused by lobbying, the Court has accepted much less evidence to justify laws in similar contexts, such as when the Court recognized the constitutionality of campaign contribution limits based on virtually no evidence that such limits prevent the "appearance of cor-

295. 330 U.S. 75, 100 (1947).

296. *Id.* at 101.

297. 413 U.S. 548, 564 (1973); see also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.8.3, at 1116 (3d ed. 2006) (calling the constitutional issue "enormously difficult" given First Amendment costs to government speech, but acknowledging practical experience with patronage practices which "risks distorting the political process, impairing efficient government operations, and undermining the freedoms of government workers").

298. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." (citations omitted)). In contrast, "[i]f the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed." *Id.* at 564; see also CHERMERINSKY, *supra* note 297, § 11.3.7.5, at 1095 ("It also is clearly established that false and deceptive advertisements are unprotected by the First Amendment."). But sometimes the rub is figuring out whether speech is "false" or "misleading." See Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 *LOY. L.A. L. REV.* 227, 227-28 (2007).

ruption” and a decline in public confidence in the democratic process.²⁹⁹ There is a much stronger efficiency case here to justify some lobbying regulations.

2. *Means-based objections*

Many conservatives agree that rent-seeking is a major problem facing the United States today, and it is at least partially responsible for the tremendous size of the federal government. However, these conservatives are skeptical that any attempt to regulate political activity would be effective in curbing rent-seeking. Instead, the only solution they see is to shrink the size of government. Thus, McChesney remarks that “[t]he one unambiguous solution for reducing rent extraction is reducing the size of the state itself and its power to threaten, expropriate, and transfer.”³⁰⁰ Senator Paul is even more emphatic:

While it is important to cut down on the demand for lobbyists, the supply side is even more important. Washington, D.C. has a supply of money and power that it can dole out to the highest bidder. As long as this golden goose exists, people will find ways to take advantage of it. The problem is not the abuse of power, but rather the power to abuse.

The only answer to that problem is for Congress to reduce severely the size and scope of the federal government, so that the market is allowed to operate according to the free forces of a laissez-faire economy.³⁰¹

The solution to shrink the size of government seems a quixotic one. In the first place, the very forces that make lobbying so powerful make it exceedingly difficult to enact major spending cuts. Even more importantly, even if the United States budget were cut in *half*, the annual federal budget would still be almost \$2 trillion.³⁰² There is plenty of room for rent-seeking in such an enormous budget.

Consider one example, from national defense, of rent-seeking activity over a single engine to a single plane which would still occur in a shrunken government. National defense is an appropriate example because many conservatives recognize it as a public good which must be supplied even by a smaller government. The F-35 Joint Strike Fighter is a military plane slated to replace a

299. See Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing That Wouldn’t Leave,”* 17 CONST. COMMENT. 483, 484 (2000).

300. MCCHESENEY, MONEY FOR NOTHING, *supra* note 228, at 170. McChesney is pessimistic about regulation. “Attempts to make that world a better place by imposing this or that constraint on the system, to mitigate or end only one aspect of the problem, can only exacerbate some other problem.” *Id.*

301. Paul, *supra* note 7, at 35.

302. See U.S. GOV’T ACCOUNTABILITY OFFICE, A CITIZEN’S GUIDE TO THE 2009 FINANCIAL REPORT OF THE U.S. GOVERNMENT, at xiii (2009), available at <http://www.gao.gov/financial/fy2009/09guide.pdf> (reporting the 2009 budget to be more than \$3.7 trillion).

host of aging military jets currently in use.³⁰³ The Pentagon plans to purchase over 2400 of the Lockheed Martin fighters, at a cost of about \$382 billion.³⁰⁴ The main engine for the F-35 is manufactured by Pratt & Whitney, while an alternative is being jointly developed by General Electric (GE) and Rolls-Royce.³⁰⁵

Since the 1990s the military has planned to develop two engines for the F-35 and to hold yearly competitions between the two manufacturers. In 2006, however, the Pentagon announced that it no longer believed the alternative engine was necessary, setting the stage for the current fight.³⁰⁶ President Obama and Defense Secretary Gates oppose an alternative engine, with Gates saying that it would be a “serious mistake.”³⁰⁷ In 2009, the Senate voted to remove fiscal year 2010’s funding for the engine, but the House version including funding prevailed.³⁰⁸ The House again inserted funding for the alternative engine in the 2011 budget, while a Senate panel again recommended against funding.³⁰⁹

Competition between the two manufacturers, proponents argue, will force suppliers to lower prices, thereby saving taxpayers an estimated \$20 billion. Opponents, including Obama and Gates, argue that the additional cost to develop the alternative—potentially \$450 million in fiscal year 2011 alone, and \$4.2 billion overall—is wasteful and better spent elsewhere. The total cost of the engine is expected to reach \$100 billion.

The lobbying on both sides has been fierce. “[T]here are 75 lobbyists working on defense issues at the firms engaged in the second engine showdown, of whom at least 56—or 75 percent—are former congressional staffers or executive branch officials. Of those, at least 33 are registered to work on the engine issue specifically.”³¹⁰ Rolls-Royce’s lobbying efforts did not begin in

303. Matthew Potter, *Some Rough Sledding Ahead for JSF Program*, DEF. PROCUREMENT NEWS (Sept. 17, 2010), <http://www.defenseprocurementnews.com/2010/09/17/some-rough-sledding-ahead-for-jsf-program>.

304. Nathan Hodge, *Lockheed Braces for Cost Cuts at the Pentagon*, WALL ST. J. (June 17, 2010), <http://online.wsj.com/article/SB10001424052748703650604575313053091066716.html>.

305. Potter, *supra* note 303.

306. Megan Scully, *New Analysis Fuels Debate over Alternative F-35 Engine*, GOVEXEC.COM (Feb. 26, 2010), <http://www.govexec.com/dailyfed/0210/022610cdam2.htm>.

307. John Reed, *Gates: Funding F136 Would Be “Serious Mistake,”* DEF. NEWS (June 16, 2010, 3:51 PM), <http://www.defensenews.com/story.php?i=4672964>.

308. Craig Whitlock & Dana Hedgpeth, *Congress Pursues F-35 Engine That Defense Secretary Robert Gates Doesn’t Want*, WASH. POST (May 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/27/AR2010052705614.html>.

309. Reed, *supra* note 307. The latest congressional deal kept the engine funded through at least March 2011. Jonathan Riskind, *Engine Issue Joins Brown, Boehner*, COLUMBUS DISPATCH (Jan. 2, 2011, 6:08 AM), <http://www.dispatch.com/content/stories/editorials/2011/01/02/engine-issue-joins-brown-boehner.html>.

310. Nick Schwellenbach, *Lobbyists Stage Capitol Hill Dogfight over Joint Strike Fighter Engine*, IWATCH NEWS (June 7, 2010, 11:00 AM), <http://www.iwatchnews.org/2010/06/>

earnest until 2007.³¹¹ In 2006, the company spent only \$40,000 on lobbying. In 2007, that figure skyrocketed to \$826,000, and to over \$1.3 million in 2008 and 2009. Rolls-Royce has two principal in-house lobbyists: Anne McInerney, a former aide to Senator Jon Kyl and the Senate Appropriations Committee, and former Congressman Ed Pease. In the 2006, 2008, and 2010 election cycles, McInerney and Pease contributed \$6300 and \$9300, respectively, to political candidates and PACs. Since 2007, the company has used the Livingston Group and Robison International as principal outside lobbying firms, paying each \$60,000 in 2010. At Livingston, former Congressman Bob Livingston, his former chief of staff, and another lobbyist working on this issue have given political contributions in the amounts of \$42,100, \$32,400, and \$2000, respectively, since 2006. In the same period at Robison, the four lobbyists working on Rolls-Royce's business (including a former aide to Senator James Inhofe and the former Comptroller of the U.S. Marine Corps) have made political donations of \$5000, \$11,750, \$2000, and \$129,900.

Because of the size of GE's lobbying operation, it is difficult to discern specific figures for the amounts spent on the F-35 issue. In 2007, GE spent over \$17 million on lobbying, reaching \$25.5 million in 2009. GE's in-house and external lobbyists count among their ranks former Senators Trent Lott, John Breaux, and Don Nickles; former House Majority Leader Dick Gephardt; and Thurgood Marshall, Jr. Since the 2006 cycle, Breaux has given \$162,000 in direct contributions, Gephardt has given \$161,000, and Marshall has given \$32,000.

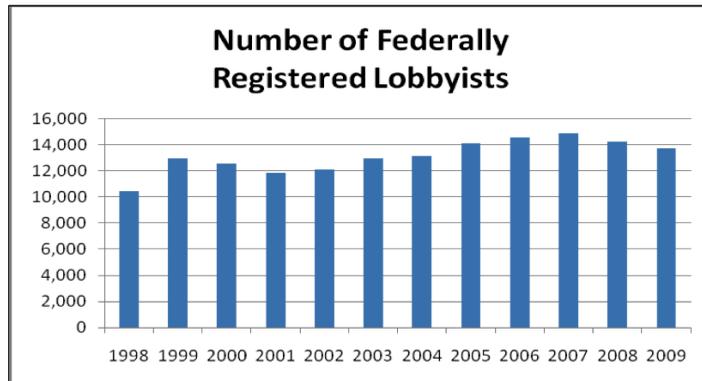
Pratt & Whitney is a subsidiary of United Technologies (UT). Data on lobbying expenses for the subsidiary is unavailable. United Technologies, however, spends considerable amounts on lobbying. In 2009, for example, UT spent \$8.1 million on lobbying. UT's lobbyists include Tony Podesta of the Podesta Group, Park Strategies principal and former Senator D'Amato, and Cindy Jimenez, a former aide to Speaker Pelosi. Podesta's direct contributions since the 2006 cycle top \$300,000.

This single example of lobbying over the F-35 engine demonstrates not only the stakes, but also the difficulty of using a "shrink the size of the state" solution to the problem of rent-seeking. Lobbying regulation seems more likely to minimize rent-seeking than calls to shrink the federal government.

07/2661/lobbyists-stage-capitol-hill-dogfight-over-joint-strike-fighter-engine; *see also* Whitlock & Hedgpeth, *supra* note 308.

311. The figures in the next few paragraphs come from searches performed by a research assistant on the Center for Responsive Politics website in September 2010. The lobbying database can be accessed at Ctr. for Responsive Politics, *supra* note 246.

FIGURE 2
Number of Federally Registered Lobbyists³¹²



Though shrinking the government cannot be a full answer to ending rent-seeking, there are also reasons to question whether lobbying regulation can make a serious dent in rent-seeking. The question is whether lobbyists will find ways to gain extra access to elected officials and staffers even with new rules put in place. Recent experience demonstrates the validity of this “hydraulic” critique.³¹³ Once the Obama Administration started releasing logs disclosing all White House visitors, White House officials began taking some meetings with lobbyists and others at the Caribou Coffee across the street from the White House.³¹⁴ The meetings continued; only the venue changed. Similarly, despite the huge growth in the amount of lobbying,³¹⁵ the number of lobbyists has not increased,³¹⁶ suggesting either that existing lobbyists are doing more work, or that nonregistered lobbyists are doing the work of lobbyists. The latter possibility appears to be a big part of the story. The Obama Administration’s lobbying restrictions have led to a “demand for formal methods of de-registering as a lobbyist.”³¹⁷ Lobbyists were deregistering in record numbers in 2008 after

312. Ctr. for Responsive Politics, *supra* note 246.

313. *See* *McCannell v. FEC*, 540 U.S. 93, 224 (2003) (“Money, like water, will always find an outlet.”); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *TEX. L. REV.* 1705, 1708 (1999).

314. Eric Lichtblau, *Across Street from the White House, Coffee and a Chat with Lobbyists*, *N.Y. TIMES*, June 25, 2010, at A18.

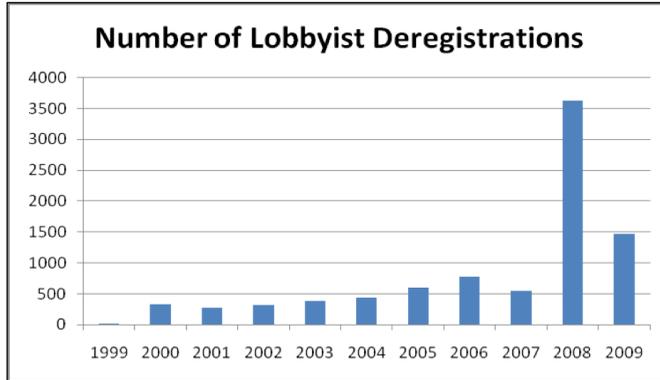
315. *See supra* Figure 1.

316. *See supra* Figure 2.

317. *ESKRIDGE ET AL.*, *supra* note 85, at 45.

HLOGA took effect, and more deregistered in 2009, perhaps in part because of the new Obama Administration rules.³¹⁸

FIGURE 3
Number of Lobbyist Deregistrations³¹⁹



In addition, many former elected officials took steps to ensure that their activities did not trigger lobbying registrations, such as by devoting less than twenty percent of their time to lobbying activities as defined by federal statutes. One prominent example is former Senate Majority Leader Tom Daschle. He is not a registered lobbyist, but instead is a “high-paid policy advisor.”³²⁰ “Although he never registered, Daschle, in fact, made millions of dollars after he left government doing stuff that looks, smells and tastes a lot like lobbying”³²¹ Daschle and other “nonfederal registered lobbyists[] have had easy access to the White House in the first two years of the Obama administration, as shown on the White House log of visitors.”³²²

The current experience with hydraulics has led to calls (some from lobbyists, who don’t like the competition) to change the lobbying rules to capture

318. CTR. FOR RESPONSIVE POLITICS, *THE DEREGISTRATION DILEMMA: ARE LOBBYISTS QUITTING THE BUSINESS AS FEDERAL DISCLOSURE RULES TIGHTEN?* 4-5 (2010), available at <http://www.opensecrets.org/news/Deregistrationreport.pdf>; see also *infra* Figure 3.

319. CTR. FOR RESPONSIVE POLITICS, *supra* note 318, at 5.

320. Michael Scherer, *Daschle’s Problems: When Is a Lobbyist Not a Lobbyist?*, TIME (Feb. 3, 2009), <http://www.time.com/time/politics/article/0,8599,1876550,00.html> (internal quotation marks omitted).

321. *Id.*; see also Lee, *supra* note 193 (“[Daschle] and his new employer say they don’t expect him to do much traditional lobbying anyway. ‘It will be more meeting with clients and providing broad strategic advice as to how to deal with matters both domestically here in Washington as well as internationally,’ said Frank M. Conner, the partner in charge of Alston & Bird’s Washington office.”).

322. Thurber, *supra* note 86, at 364.

strategists and others who provide lobbying support.³²³ The lesson for anyone who would implement the national economic welfare lobbying regulations that I propose in this Article is to draft the regulations with care so as to minimize the potential for evasion. As with campaign finance regulation, a kind of whack-a-mole dynamic could emerge, raising the possibility that effective lobbying regulation will require periodic adjustment to deal with attempts to circumvent the rules.

B. *Extensions*

1. *Reenacting, or partially reenacting, corporate spending limits*

In Part II, I argued that the government's interest in promoting national economic welfare could justify a number of lobbying regulations. Here, I consider whether that government interest could justify other, related laws. I leave to others the expansion of the rationale to different areas of the law, such as affirmative action programs or other laws which have run into constitutional controversy.

In his *Citizens United* dissent, Justice Stevens referred to the rent-seeking activities of corporations in arguing in favor of the antidistortion rationale for corporate spending limits:

When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation." Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is "far more destructive" than what noncorporations are capable of.³²⁴

Though Justice Stevens made his rent-seeking argument as part of a muddled defense of the antidistortion interest put forward in *Austin v. Michigan State Chamber of Commerce*,³²⁵ Robert Sitkoff, cited by Justice Stevens, brief-

323. See Bara Vaida, *K Street Paradox*, NAT'L J., Mar. 13, 2010, at 22, 29 (inset interview with Norm Eisen).

324. *Citizens United v. FEC*, 130 S. Ct. 876, 975 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting Sitkoff, *supra* note 265, at 1113); see also *id.* at 977 ("A rule that privileges the use of PACs thus does more than facilitate the political speech of like-minded shareholders; it also curbs the rent seeking behavior of executives and respects the views of dissenters.").

325. 494 U.S. 652 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010). On Justice Stevens' defense of *Austin*'s antidistortion interest, see Richard L. Hasen, Citi-

ly advanced a more direct anti-rent-seeking rationale for corporate spending limits. He focused on the deadweight loss of corporations fighting over government transfers, and corporations' supposed comparative advantage in engaging in such rent-seeking activity.³²⁶

The idea that Congress should restore the corporate PAC requirement and attempt to overturn *Citizens United* on anti-rent-seeking grounds has gained currency. E.J. Dionne, echoing McChesney's rent-extraction concerns, declared that "[f]iscal conservatives should be as worried as anyone about corporations using their newfound power to extract expensive benefits from the government."³²⁷ Marvin Ammori, though phrasing his concern in terms of a "corruption economy," argues that *Citizens United* "threatens the U.S. economy" because of corporate rent-seeking.³²⁸ Similarly, Samuel Issacharoff, writing in the Supreme Court issue of the *Harvard Law Review* about *Citizens United* and also using "corruption" terminology, suggests that a subset of corporations—those with government contracts—could be barred from spending money on election campaigns.³²⁹ He argues that doing so would "try to insulate politics from the demands of those who would use public power for nonpublic-regarding aims."³³⁰

It is not at all clear that the Supreme Court, which decided *Citizens United* heralding the value of unfettered speech and spending in elections, would be willing to reconsider the matter under the anti-rent-seeking interest or the broader concern about promoting national economic welfare. In *Citizens United*, the Court held that the anticorruption interest could not justify corporate spending limits, because it held as a matter of fact that independent spending cannot corrupt or create the appearance of corruption.³³¹

Perhaps the Justices would be more willing to entertain evidence that corporate spending limits would cause a decline in corporate rent-seeking. Even if they did accept the promotion of national economic welfare as a compelling interest, however, it is not clear how the Court would balance this interest with the First Amendment rights of corporations, particularly if it could be shown that other entities, such as labor unions, also engage in rent-seeking activities

zens United and the Orphaned Antidistortion Rationale, 27 GA. ST. U. L. REV. 989, 997-98 (2011).

326. Sitkoff, *supra* note 265, at 1112-13, 1124-25. Sitkoff did not discuss whether labor unions and other organizations may have a similar advantage in organizing for such activities.

327. E.J. Dionne Jr., *The Price of Independence: Repairing Citizens United Becomes a Test for Three GOP Senators*, WASH. POST, Sept. 13, 2010, at A15.

328. Marvin Ammori, *Corruption Economy*, BOS. REV. (Sept. 9, 2010), <http://bostonreview.net/BR35.5/ammori.php>.

329. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121-130, 139-42 (2010). Interestingly, Issacharoff never uses the "rent-seeking" terminology in making his argument, and focuses instead on concerns about "clientelism." *See id.* at 127.

330. *Id.* at 140.

331. *See Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010).

but would not be targeted by a new corporate (or government-contractor) spending ban. In addition, very large corporations appear to be the ones engaging in the most rent-seeking activity, and so arguably only a law aimed at large corporations would be properly tailored.³³² The Court in *Citizens United* expressed concern that corporate spending limits could hurt small and nonprofit corporations the most, because large corporations can lobby the government in private and are more apt to get their way.³³³ Finally, the Court could decide that the First Amendment costs of a corporate spending ban are so high that even a compelling interest in curbing rent-seeking cannot justify an absolute ban on spending from corporate treasury funds.³³⁴

2. *SEC pay-to-play rule for investment advisers*

In 2010, the Securities and Exchange Commission adopted a rule³³⁵ to limit the campaign activities of investment advisers.³³⁶ Under the rule: (1) an investment adviser may not provide investment advisory services for compensation to a government entity within two years after making a contribution to an official of the government entity it seeks to advise;³³⁷ (2) investment advisers may not pay third parties, known as placement agents, to solicit government entities for business on the adviser's behalf unless the placement agent is also subject to these restrictions;³³⁸ (3) investment advisers may not solicit or coor-

332. *See id.* at 907 (noting that many small corporations are affected by the statute, which the Court said belied the government's argument that the corporate ban was necessary to deal with the "distorting effects of immense aggregations of wealth" (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990))).

333. *Id.*

334. The *Citizens United* majority implicitly rejected the argument that a PAC alternative for corporations adequately protected the corporations' free speech rights. *See id.* at 930 (Stevens, J., concurring in part and dissenting in part) (noting that the Court majority "does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC"). All of this, of course, depends upon the composition of the Court at the time it would consider these issues. *Citizens United* was a 5-4 decision, and a change in personnel could lead the Supreme Court to accept the national economic welfare interest (or some other interest) to justify corporate spending limits.

335. *See* Political Contributions by Certain Investment Advisers, 17 C.F.R. § 275.206(4)-5 (2011). The rule is modeled on similar rules promulgated by the Municipal Securities Rulemaking Board. *See* MUN. SEC. RULEMAKING BD. R. G-37, G-38 (2011), *available at* msrb.org/rules-and-interpretations/msrb-rules.aspx.

336. The SEC proposed similar rules in 1999, but did not enact them. *See* Political Contributions by Certain Investment Advisers, Investment Advisers Act Release No. 1812, 70 SEC Docket 611 (Aug. 4, 1999).

337. 17 C.F.R. § 275.206(4)-5(a)(1) (2011). A "contribution" includes a "gift, subscription, loan, advance, or deposit of money or anything of value made for: (i) The purpose of influencing any election for Federal, State or local office; (ii) Payment of debt incurred in connection with any such election; or (iii) Transition or inaugural expenses of the successful candidate for State or local office." *Id.* § 275.206(4)-5(f)(1).

338. *Id.* § 275.206(4)-5(a)(2)(i).

dinate contributions to the government entity the adviser is seeking to provide services to, or payments to political parties of the state or locality in which the adviser seeks to or provides services;³³⁹ and (4) investment advisers may not circumvent the rule by doing anything indirectly which, if done directly, would result in a violation of the rule.³⁴⁰ Finally, probably in an effort to assuage First Amendment concerns,³⁴¹ the rule allows covered investment advisers to contribute up to \$350 per election to officials for whom the adviser is entitled to vote, or up to \$150 to officials for whom the adviser is not entitled to vote.³⁴²

The impetus for the current rule appears to have been earlier “pay-to-play” scandals.³⁴³ In 1999, Connecticut’s state treasurer pled guilty to racketeering charges. He later admitted in court to collecting campaign contributions in exchange for “placing \$500 million in state pension investments with certain equity funds.”³⁴⁴ In New York, a two-year investigation by Attorney General Andrew Cuomo resulted in charges against former aides and fundraisers for former State Controller Alan Hevesi.³⁴⁵

Though the SEC sought to justify its rules on anticorruption grounds, there is also an efficiency rationale for the regulation. As the SEC release explained, if elected officials allow political contributions to affect their management of the funds, the retirees who rely on the funds can be harmed economically.³⁴⁶ The SEC regulations should pass constitutional muster if challenged, either on

339. *Id.* § 275.206(4)-5(a)(2)(ii).

340. *Id.* § 275.206(4)-5(d). California recently adopted a similar rule. See Laura Mahoney, *Schwarzenegger Signs Law to Make Placement Agents Register as Lobbyists*, BNA MONEY & POL. REP. (Oct. 6, 2010), http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=17877265&vname=mpebulallissues&fn=17877265&jd=a0c4j7f0r4&split=0.

341. The SEC paid close attention to the First Amendment concerns posed by contributions limits, and dedicated a section of its announcement to addressing these concerns. See *Political Contributions by Certain Investment Advisers*, Investment Advisers Act Release No. 3043, 75 Fed. Reg. 41,018, 41,023-24 (July 14, 2010) (codified at 17 C.F.R. pt. 275).

342. 17 C.F.R. § 275.206(4)-5(b)(1) (2011).

343. The SEC referred to these and other scandals in its release announcing the new rules. See *Political Contributions by Certain Investment Advisers*, *supra* note 341, at 41,019-20.

344. Mike Allen, *Ex-Treasurer in Connecticut Pleads Guilty*, N.Y. TIMES, Sept. 24, 1999, at B1.

345. Kenneth Lovett & Melissa Grace, *Consultant Hank Morris, Hevesi Aide David Loglisci Get Corruption Charges in \$35M Pension Scheme*, N.Y. DAILY NEWS (Mar. 19, 2009), <http://www.nydailynews.com/news/consultant-hank-morris-hevesi-aide-david-loglisci-corruption-charges-35m-pension-scheme-article-1.363560>.

346. According to the release:

The most qualified adviser may not be selected or retained, potentially leading to inferior management or performance. The pension plan may pay higher fees because advisers must recoup the contributions, or because contract negotiations may not occur on an arm’s-length basis. The absence of arm’s-length negotiations may enable advisers to obtain greater ancillary benefits, such as “soft dollars,” from the advisory relationship, which might be used for the benefit of the adviser, potentially at the expense of the pension plan, thereby using the pension plan’s assets for the adviser’s own purposes.

Political Contributions by Certain Investment Advisers, *supra* note 341, at 41,022.

anticorruption or national economic welfare grounds. As with the proposed lobbyist antisolicitation rules, the SEC rules allow investment advisers to make contributions, thereby allowing for the symbolic act of identifying with a candidate.³⁴⁷ But they seek to break the relationship of reciprocity which could lead elected officials to make decisions that allow for rent-seeking as opposed to representing the public interest.

CONCLUSION

Given the economic costs of the rent-seeking facilitated by lobbying activities, it is surprising that there has been so little focus on whether lobbying regulation might improve the U.S.'s financial situation. The post-*Citizens United* jurisprudential world and the current financial crisis create an opportunity to rethink our approach to federal lobbying regulation.

The existing framework of lobbying regulation, which severely restricts lobbyist gifts and personal benefits conferred on legislators, should remain a necessary component of federal lobbying regulation. Disclosure laws should remain in place as well. These restrictions are amply justified on anticorruption grounds. But further regulation, most notably antisolicitation rules, antibundling rules, and longer revolving-door prohibitions, may require new justifications after *Citizens United*. The national economic welfare rationale refocuses our attention on the social inefficiencies of lobbyist-driven rent-seeking, and on the connections of reciprocity between lobbyists and elected officials and staffers fueled by the use of money to forge and maintain relationships. In this story, lobbyists are no longer villains who routinely bribe elected officials to take legislative actions against their better judgment. Instead, the social ill is a systemic one. It requires an answer that goes beyond platitudes about "undue influence" and recognizes that the future of our country's national economic welfare could well depend upon meaningful political reform.

347. The idea of allowing for a lower contribution limit makes sense (as opposed to an outright ban), as it does in the lobbying context as well. Congress should consider lower individual and aggregate contribution limits for lobbyists and those who provide lobbyist support.

